

# Customer H and Powershop – Decision and Reasons

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

5 December 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 Essential Services Commission (the commission) of a complaint by Customer H.
2. The complaint is about the application of section 40B of the Electricity Industry Act 2000 (Vic) (the Act) to a disconnection by Powershop Australia Pty Ltd (Powershop) of Customer H's electricity supply at *[address redacted]* (the premises). The electricity supply to the premises was disconnected from 1:03pm on 27 June 2017 to 4:38pm on 3 July 2017 (a period of 6 days, 3 hours and 35 minutes).

## Issues for decision

1. The issue for decision by the commission on the complaint is whether or not Powershop has breached a condition of its electricity retail licence regarding an obligation to make a prescribed payment to Customer H in circumstances where:
  - (a) Powershop disconnected the supply of electricity to the premises of Customer H; and
  - (b) Powershop 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(1) of the Act, Powershop was obliged to make the prescribed payment to Customer H as soon as practicable after the supply of electricity was reconnected to Customer H's premises.
2. This requires the commission to make findings and reach conclusions regarding the following matters:
  - (a) Whether Powershop disconnected the supply of electricity to the premises of Customer H, and if so, when (see paragraph 17 below);
  - (b) Whether the supply of electricity to Customer H's premises was reconnected, and if so, when (see paragraph 19 below);
  - (c) If Powershop did disconnect the supply of electricity to Customer H's premises, the period of time for which supply to the premises was disconnected (see paragraph 20 below);
  - (d) What was the contract between Powershop and Customer H? (see paragraphs 22(c) and 32 below);
  - (e) What were the terms or conditions of that contract which specified the circumstances in which Powershop may disconnect the supply of electricity to Customer H's premises? (see paragraph 22(c) below);
  - (f) Whether Powershop failed to comply with those terms and conditions (see paragraphs 26 and 41 below);
  - (g) Whether Customer H was entitled to receive payment of a prescribed amount because of any wrongful disconnection by Powershop under section 40B of the Act (see paragraphs 29 and 42 below);
  - (h) If so, when was Powershop obliged to make the payment of the prescribed amount? (not applicable as, in this instance, no such obligation arises);

- (i) Whether Powershop has made the payment to Customer H 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 Powershop has not made the payment, what are the consequences? (not applicable as, in this instance, no such obligation arises).
3. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman acknowledged that Powershop had demonstrated compliance with clauses 109 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 Powershop had complied with clause 110(2) of the code. The ombudsman considered that because Powershop's disconnection warning notice did not clearly inform Customer H of the actions he needed to take to avoid disconnection and the period of time during which Customer H could take those actions, it was unclear if Powershop had complied with its obligations under clause 110(2)(c)(i) and (ii). In reaching this decision, the ombudsman referred to the commission's guidance on the content of disconnection warning notices in its decision on the disconnection dispute of AGL Sales and Customer R (8 March 2017).
4. Powershop was invited to provide any information and documents it considered the commission should have regard to in making its decision. Powershop was also invited to make submissions on the complaint for the commission to consider. Powershop made submissions for the commission's consideration.
5. Powershop did not dispute the chronology of events as presented by the ombudsman in its referral memorandum.
6. Powershop considered that the disconnection warning notice clearly stated the date by which payment must be made to avoid disconnection, and therefore the end of the disconnection warning period. Powershop further noted that under its business model direct debit is the default method of payment, and highlighted the following key excerpts from its disconnection warning template:
  - "In accordance with our Terms and Conditions, we will make a final attempt to debit your account on [Notice issue date +7 Business Days]. Please ensure funds are available to allow for our payment to process."
  - "Alternatively, you can also choose to make payment now by credit card (or) ... Bpay ..."
  - "If payment has not been received and/or declined by your financial institution or you have not made contact with us to give reasonable assurance the account outstanding will be paid; we will proceed to have the electricity supply disconnected no sooner than [Notice issue date +9 Business Days]."

7. Powershop submitted that it had complied with its obligations under the code and that it believed "... the wording of its Notice is not ambiguous as it clearly states what action the customer must take... to avoid disconnection of their electricity", noting that there is no requirement in clause 110 of the code to use the term 'disconnection warning period' in the disconnection warning notice.

## Relevant facts

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

### **Circumstances leading to the disconnection**

9. On 19 April 2017, Powershop issued a bill in the amount of \$495.83.
10. On 10 May 2017, Powershop issued a reminder notice in the amount of \$495.83.
11. On 18 May 2017, Powershop issued a bill in the amount of \$197.78.
12. On 24 May 2017, Powershop issued a disconnection warning notice by post for total arrears of \$693.61 (consisting of an overdue amount of \$495.83 and new charges of \$197.78).
13. The disconnection warning notice stated, in part:
  - (a) "In accordance with our Terms and Conditions, we will make a final attempt to debit your account on 2 June 2017... Alternatively, you can also choose to make payment now..." and stated credit card and BPay payment methods.
  - (b) "If payment has not been received and/or declined by your financial institution or you have not made contact with us to give reasonable assurance the account outstanding will be paid; we will proceed to have the electricity supply disconnected no sooner than 6 June 2017."
  - (c) "...payment of the arrears amount above will... need to be settled before 2 June 2017."
14. On 8 June 2017, Powershop issued an 'advice of disconnection' letter by registered post in the total amount of \$693.61.
15. Powershop's contact notes for Customer H's account indicate that over the two months prior to disconnection, Powershop attempted to contact Customer H in relation to his electricity account 20 times via a combination of letters, emails, telephone calls and text messages. The contact notes do not contain any record of Customer H having responded to any of these contact attempts.

### **Disconnection of electricity supply to the premises**

16. On 22 June 2017, Powershop raised a disconnection service order for the premises.



17. On 27 June 2017, at 1:03pm, the electricity supply to Customer H's premises was disconnected.
18. On 27 June 2017, Customer H called Powershop and notified that the electricity supply had been disconnected. Customer H did not give a reason for not paying the account and sought to negotiate reconnection of his premises for a reduced payment of the account. Powershop and Customer H failed to reach agreement on reconnection of the premises during the call.
19. On 3 July 2017, at 4:42pm, the electricity supply to Customer H's premises was reconnected following a complaint by Customer H to the ombudsman.
20. The supply of electricity to the premises was disconnected for a period of 6 days, 3 hours and 35 minutes.
21. As at 5 December 2018, Powershop has not made any wrongful disconnection payment to Customer H.

## Relevant obligations

22. In this matter Powershop's relevant obligations arise from the following:

(a) The Act:

- (i) Section 40B(1) of the Act deems a condition into Powershop's electricity retail licence of an obligation to make a payment of the prescribed amount to a customer if Powershop 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) From and after 1 January 2016, section 40B(5)(b) of the Act provides that the prescribed amount is \$500.00 for each whole day and a pro rata amount for any part of a day that the electricity supply is disconnected.

(b) Powershop's electricity retail licence:

- (i) Clause 7.1 of the licence requires Powershop to comply with the code to the extent it is applicable to activities it undertakes pursuant to the licence.
- (ii) Clause 11.1 requires that Powershop must not enter a contract for 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. If a term or condition of the code is incorporated by reference into the contract, it is taken to be expressly dealt with.
- (iii) Clause 11.2 requires that each term or condition of a contract for the sale of electricity by Powershop to a relevant customer must not be inconsistent with a term or condition of the code.
- (iv) Clause 11.3 requires Powershop to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer.

(c) Powershop's market retail contract, established with Customer H:

The section titled "The Gist" which states, in part:

"For Victorian customers, until the National Energy Retail Law and the Rules are adopted in Victoria (referred to as 'NECF implementation in Victoria'), the energy laws applicable in Victoria are the Electricity Industry Act 2000, the Gas Industry Act 2001 and the Energy Retail Code made by the Essential Services Commission. For customers in Victoria, prior to NECF implementation in Victoria all references to the National Energy

Retail Law and Rules in this contract should be read as references to the Energy Retail Code unless stated otherwise...”

Clause 13.1 which states, in part:

“Subject to us satisfying the requirements in the Rules, we may arrange for the disconnection of your premises if: (a) you do not pay your bill by the pay-by date and, if you are a residential customer, you: (i) fail to comply with the terms of an agreed payment plan; or (ii) do not agree to an offer to pay the bill by instalments...”

Clause 13.2 which states, in part:

“Before disconnecting your premises, we must comply with the relevant warning notice requirements and other provisions in the Rules. However, we are not required to provide a warning notice prior to disconnection in certain circumstances (for example, where there has been illegal or fraudulent use of energy at your premises or where there is an emergency or health and safety issue).”

(d) The code:

Clause 108 provides that ‘disconnection warning period’ means the period that starts on the date of issue of a disconnection warning notice, which must be no earlier than the next business day after the end of the reminder notice period, and ends no earlier than six business days from the date of issue of the disconnection warning notice.

Clause 110(2)(c) provides that where a disconnection warning notice has been issued for not paying a bill, the notice must state the date on which the disconnection warning period ends and that payment of the bill must be made during the disconnection warning period.

23. Powershop’s obligations are discussed further below in the reasons.

## Decision

24. Powershop is not in breach of a condition of its electricity retail licence, deemed into Powershop's electricity retail licence by section 40B of the Act (the deemed licence condition).
25. Powershop disconnected the supply of electricity to Customer H's premises at 1:03pm on 27 June 2017.
26. There was no failure on the part of Powershop to comply with the terms and conditions of the contract between Powershop and Customer H that specified the circumstances in which the supply of electricity to those premises may be disconnected.
27. Accordingly, the second condition that must be satisfied for section 40B of the Act to apply was not satisfied.
28. The supply of electricity to Customer H's premises was not wrongfully disconnected.
29. Powershop was not required to make any prescribed payment to Customer H under the deemed licence condition.

## Reasons

30. Powershop's electricity retail licence requires that:
- (a) Powershop 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 11.1); and
  - (b) each term or condition of Powershop's contract for the sale of electricity to a relevant customer must not be inconsistent with the terms or conditions of the code (clause 11.2); and
  - (c) Powershop must comply with the terms and conditions of any contract for the sale of electricity with a relevant customer (clause 11.3).
31. The deemed licence condition requires Powershop 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.
32. The relevant contract between Powershop and Customer H was a market retail contract. The terms and conditions of that contract expressly required Powershop to comply with the code.
33. Clause 13 of Powershop's contract with Customer H specified the circumstances in which the supply of electricity to Customer H's premises may be disconnected. Clause 13.1 of Powershop's contract with Customer H incorporated clause 110(2)(c) of the code into their agreement.

### **Was the disconnection warning notice compliant with clause 110(2)(c) of the code?**

34. Clause 108 of the code defines the disconnection warning period to be the period that starts on the date of issue of a disconnection warning notice under clause 110, which must be no earlier than the next business day after the end of the reminder notice period and ends no earlier than six business days from the date of issue of the disconnection warning notice.
35. Clause 110(1) of the code provides that a disconnection warning notice is a notice issued by a retailer to warn a customer that the customer's premises will or may be disconnected.

36. Clause 110(2)(c)(i) of the code requires a disconnection warning notice to state the date on which the disconnection warning period ends.
37. Clause 110(2)(c)(ii) of the code requires a disconnection warning notice to state that payment of the bill must be made during the disconnection warning period.
38. The disconnection warning notice stated, in part, that:
  - (a) Customer H was required to ensure funds were available in his account on 2 June 2017 to allow for Powershop to direct debit the account;
  - (b) Customer H could make payment by alternative methods of payment 'now' (meaning prior to 2 June 2017);
  - (c) If alternative payment had not been received prior to 2 June 2017 or the attempt to direct debit was declined by Customer H's financial institution on 2 June 2017, Powershop will proceed to have the electricity supply disconnected no sooner than 6 June 2017; and
  - (d) Payment of the arrears amount was required to be settled before 2 June 2017.
39. The commission considers that the disconnection warning notice stated the date that the disconnection warning period would end because, in the absence of a received payment by the alternative means detailed in the notice, Powershop would make a final attempt to direct debit Customer H's account on 2 June 2017.
40. For the same reasons, the commission considers that the disconnection warning notice stated that payment of the bill was required to be made during a period commencing from 'now' (being any time from the date of issue of the notice onwards) and ending on 2 June 2017, which reflected the disconnection warning period specified in the code.
41. Therefore, the commission considers that the disconnection warning notice complied with the requirements of clause 110(2)(c) of the code.
42. The disconnection of the electricity supply to Customer H's premises on 27 June 2017 was not wrongful. As a result, Powershop was not required to make any wrongful disconnection payment to Customer H.

## Other observations

43. The disconnection warning notice stated that if payment was not received by 2 June 2017, Powershop would proceed to have the electricity supply disconnected by no sooner than 6 June 2017. The commission notes that clause 110(2)(c) of the code does not impose an obligation on the retailer to state the date on which the retailer will arrange for the disconnection of a customer's premises in a disconnection warning notice. The provision only operates to require the notice to state the date on which the disconnection warning period will end and that payment of the bill must be made during the disconnection warning period.
44. In its memorandum, the ombudsman submitted that in its view it remains unclear whether the disconnection warning notice informed Customer H of the actions he needed to take to avoid disconnection, including the period of time within which he had to take those actions. The ombudsman based its view on the commission's decision in the disconnection dispute of AGL Sales and Customer R (8 March 2017) (see paragraph 3, above). In that decision the commission stated that a "disconnection warning notice consistent with the purpose of clause 110, under version 11 of the Code should:
- Contain only one date that indicates by when the customer must pay the outstanding amount to avoid disconnection
  - Ensure that the date was prominent and likely to be read by the customer
  - As a whole, ensure that the reasonable customer facing financial difficulties would easily understand from the notice what they must do to avoid disconnection."

The commission considers that the disconnection warning notice Powershop issued to Customer H was consistent with the approach set out in AGL Sales and Customer R.