ESSENTIAL SERVICES COMMISSION

Customer M and Simply Energy - decision and reasons

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

19 August 2020

Commissioners:

Ms Kate Symons, Chairperson
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Referral from the ombudsman

1. On 21 August 2019, the Energy and Water Ombudsman (Victoria) referred this matter to the commission, which arises from a complaint made by a residential customer, Customer M.

2. The referral concerns the application of section 40B of the Electricity Industry Act 2000 to a disconnection by Simply Energy ABN 67 269 241 237 (a partnership between IPower Pty Limited ACN 111 267 228 & IPower 2 Pty Limited ACN 070 374 293) of Customer M's electricity supply at the relevant premises.

3. The key issue posed by the ombudsman is whether a wrongful disconnection payment to Customer M should be the prescribed capped amount (Simply Energy's position) or whether it should be calculated up to the point of reconnection of electricity at the premises in circumstances where Customer M no longer occupied the premises at the time of reconnection (the ombudsman's position).

4. The electricity supply to the premises was disconnected from 11:50am on 11 September 2018 to 7:33am on 10 October 2018 - a period of 28 days, 20 hours and 5 minutes.

Issues for decision

5. The first issue for decision by the commission is whether or not Simply Energy breached a condition of its electricity retail licence regarding an obligation to make a prescribed payment to Customer M in circumstances where:

   (a) Simply Energy disconnected the supply of electricity to the premises of Customer M; and

   (b) Simply 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.

6. If so, the second issue is whether, under section 40B(3) of the Act, Simply Energy was obliged to make a prescribed payment to Customer M as soon as practicable after the supply of electricity was reconnected to the premises.

7. The third issue is then whether the prescribed payment should be capped under s 40B(1A) on the basis that Customer M refused reconnection with Simply Energy.

Relevant facts

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

Circumstances leading to the disconnection

9. On 22 October 2015, Simply Energy established a gas and electricity account for Customer M for the premises. The initial term of the contract was for two years.

10. On 18 December 2017, Simply Energy's records indicate that Customer M's contract was renewed with effect from 30 November 2017.

11. On 30 August 2018, Customer M contacted Simply Energy via webchat to advise that she was moving out of the premises and wished to disconnect her electricity and gas service, effective from 11 September 2018. Simply Energy raised two service orders for the disconnections to occur (one for each fuel type).

12. On 10 September 2018, one day prior to the requested disconnection date, Customer M contacted Simply Energy and asked that they delay her disconnection by one week until 18 September 2018 to allow her to finish cleaning the property. Simply Energy accepted Customer M's request and commenced steps for this to occur.

13. Following the contact with Customer M on 10 September 2018, Simply Energy's 'front of house' agent (the agent who spoke directly with Customer M) opened the original disconnection service order (which was scheduled for 11 September 2018 – the following day) and attempted to cancel it. For unknown reasons, this cancellation was not completed successfully.

14. The 'front of house' agent then sent a request to the 'back of house' team to change the disconnection date for Customer M to 18 September 2018. The 'back of house' agent reviewed this service order later that day and realised that the original disconnection service order (scheduled for the following day) had not been cancelled correctly by the 'front of house' agent. It does not appear that the 'back of house' agent corrected the original disconnection service order, rather, they raised a new service order with the distributor (Powercor) for disconnection on 18 September 2018. Simply Energy stated that the correct process, that was not followed at this point, was for their agents to contact the distributor by phone to cancel the original disconnection service order, rather than submit a new disconnection service order.

15. The distributor received the new disconnection service order at 4:35pm on 10 September 2018. At the time of receiving the new disconnection service order, the original disconnection

service order was still pending, so the new service order was automatically placed in a queue for manual actioning the following day (due to it being received at the end of the day).

16. On 11 September 2018, the new service order was rejected by the distributor. The distributor advised the commission that it was rejected because market rules do not allow for a second disconnection order to overwrite a preceding one. The distributor advised that if Simply Energy had wanted to halt the original disconnection process, they should have cancelled the original disconnection service order first.

17. Customer M's electricity was disconnected at 11:50am on 11 September 2018.

Attempted Reconnection

18. At 9:03am on 14 September 2018, Customer M contacted Simply Energy by phone to enquire about why her electricity had been disconnected after they had agreed to delay the disconnection until 18 September 2018.

19. Simply Energy advised Customer M that she had not given the required three days notice to change the disconnection date, therefore, her electricity was disconnected as initially planned on 11 September 2018. It is noted that Customer M was not informed about the three-day notice requirement when she previously called Simply Energy on 10 September 2018 to delay her disconnection date.

20. Also during this phone call, Customer M requested Simply Energy to reconnect the electricity to the premises. Simply Energy advised Customer M that in order to do so, she needed to ensure that the main switch and main appliance switch was switched off, otherwise it would be too dangerous to reconnect. Customer M agreed to do this.

21. At 1:01pm on 14 September 2018, Powercor (the electricity distributor) attempted to remotely reconnect the electricity to Customer M's property, however it failed due to a "load on meter". Simply Energy later clarified to the commission that this meant that a main switch had been left on and it was therefore too dangerous to reconnect the electricity supply to the premises.

22. At 2:34pm on 14 September 2018, Simply Energy attempted to contact Customer M to instruct her to turn off the main switch, however she did not answer. A voicemail was left requesting a callback. Customer M did not return the call, nor did she make contact with Simply Energy about the electricity not being reconnected to the premises.

Reconnection

23. On 17 September 2018, Customer M submitted a complaint to the ombudsman.

24. Also on 17 September 2018, Simply Energy attempted to contact Customer M by phone, however she did not answer. A voicemail was left requesting a callback.

25. On 18 September 2018, Simply Energy successfully contacted Customer M by phone. During this phone call, Customer M advised that her premises still did not have power, however she no longer required it as she had moved out.

26. The electricity was next reconnected to the premises at 7:33am on 10 October 2018. As stated, Customer M had already moved out and this reconnection was not related to her.

27. The supply of electricity to the premises was disconnected for a period of 28 days, 20 hours and 5 minutes.

28. Simply Energy has not made any wrongful disconnection payment to Customer M.

Relevant obligations

29. In this matter, Simply Energy's relevant obligations arise from the following:

(a) The Act:

(i) Section 40B(1) prescribes as a condition into Simply Energy's electricity retail licence an obligation to make a payment of the prescribed amount to a customer if Simply 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

(ii) Sections 40B(3) and (5) which require payment of the prescribed amount as soon as practicable after the supply of electricity is reconnected. The prescribed amount is currently $500 for each full day, and a pro rata amount for each part of a day, that the supply of electricity is disconnected.

(iii) Section 36(1) which states that a term or condition in a contract for the supply or sale of electricity by a licensee to a relevant customer is void to the extent that it is inconsistent with terms and conditions decided by the Commission that specify the circumstances in which the supply of electricity to premises may be disconnected.

(b) The Code (version 11b):

(i) Clause 118(1)(a) of the Code states that if a customer requests the retailer to arrange for de-energisation of the customer's premises, the retailer must use its best endeavours to arrange for this to occur in accordance with the customer's requests.

(ii) Clause 118(1)(3) of the Code states that clause 118 applies to market retail contracts.

(c) Simply Energy's electricity retail licence:

(i) Clause 7.1 of the licence which requires Simply 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 Simply 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 Simply Energy to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer

(iv) Clause 14.1 which requires Simply Energy to comply with all applicable provisions of the Code.

(v) Clause 21 which requires Simply Energy to comply with all applicable laws.

30. Simply Energy also had relevant obligations arising from its contract with Customer M. The 2017 Market Retail Terms, which applied to Customer M at the time of her disconnection, include:

(a) Clause 8 – Disconnection

8.1 When you could be disconnected

(a) Please tell us if you require a disconnection and we will arrange this through your distributor including any necessary meter reading and final bill.

8.2 Your protections

We will observe all the protections for disconnection you have under the law,[1] for example if:

(a) you are in hardship;
(b) the amounts you haven't paid are less than any minimum set under the law or relate to something other than energy we have sold you;
(c) you have raised a relevant complaint with us which is unresolved;
(d) you have an outstanding application for a concession;
(e) there is an ongoing extreme weather event; or
(f) there is life support equipment at your *premises*

8.3 Reconnection

If we arrange to disconnect you and, within ten business days, you resolve the disconnection matter and pay any charge for reconnection, we will arrange to have your premises reconnected.

(b) Clause 9 – Termination of the Contract

9.2 Termination when you move out of your premises

(a) If you are moving out of your premises, you'll need to give us at least 3 business days' notice indicating that you wish to terminate the contract. You must include the date you are moving out in your notice, as well as a forwarding address to which we can send you a final bill.

[1] "Law" is defined in the contract as any law, or regulatory or administrative document.

(b) We will do what we can to have your meter read on the date specified in your notice, or as soon as practicable after that date if there are difficulties accessing your meter.

(c) The contract will terminate when you move out. However, you will still have to pay your final bill which will cover the period up until when we have read your meter.

(d) If you do not give us notice that you are moving out, the contract will continue after you have moved out. You will have to pay for energy supplied to your premises even if someone else is using it.

Submissions

The ombudsman's submissions

31. In the ombudsman's referral, it stated that Simply Energy had agreed that the disconnection of Customer M's electricity was wrongful and that the issue in dispute related to the amount of compensation that should be payable.

32. The ombudsman was of the view that because Customer M had notified Simply Energy within 14 days of the electricity being disconnected, the compensation payment cannot be capped, as per section 40B(1A) of the Act, and therefore, Simply Energy are required to pay compensation up to the point of electricity being reconnected to the premises at 7:33am on 10 October 2018 (a period of 28 days, 20 hours and 5 minutes).

Customer M's submissions

33. The ombudsman referral provided a short customer statement about the matter. Customer M stated that she had asked Simply Energy to disconnect her electricity service, however this occurred a week earlier than requested.

34. The commission invited further information and submissions from Customer M however nothing further was provided.

Simply Energy's submissions

35. The ombudsman referral stated that Simply Energy were of the view that any payment of compensation to Customer M should be capped to the point that they (unsuccessfully) attempted reconnection to the premises - that is, 1:01pm on 14 September 2018 (a period of 3 days, 1 hour and 11 minutes).

36. As part of the investigation, Simply Energy were invited to provide any additional information and documents which it considered the commission should have regard in making its decision.

37. Simply Energy made submissions for the commission's consideration in a letter dated 30 January 2020. These submissions were further clarified in emails to the commission dated 23 March 2020 and 20 April 2020.

38. Simply Energy's submissions were consistent with the timeline of events as detailed in the relevant facts above. However, there was some variance in their position as to whether they believed their conduct amounted to a wrongful disconnection and whether compensation was payable.

Simply Energy's submissions about the disconnection

39. Simply Energy agreed that they accepted Customer M's request on 10 September 2018 to delay the electricity disconnection by one week.

40. However, Simply Energy submitted that because Customer M had not provided three business days' notice of the termination date (which they claim was required by her contract) they were unable to fulfil her request with the distributor – resulting in the electricity to the premises being disconnected on the original date of 11 September 2018.

41. Simply Energy acknowledged that during negotiations with the ombudsman to resolve Customer M's complaint, they had conceded that they fell short of meeting the requirements of clause 118(1) of the Energy Retail Code by failing to disconnect the electricity to Customer M's premises in line with her request on 10 September 2018.

42. Further, in Simply Energy's email to the commission dated 20 April 2020, they acknowledged that their agents had not followed the correct process for moving the date of Customer M's disconnection. Simply Energy stated that their agents should have contacted the distributor by phone and cancelled the original disconnection order prior to submitting the updated disconnection order. Simply Energy further stated that because of this error, they had agreed with the ombudsman to pay Customer M an amount of compensation for the error, however the amount of compensation proposed was rejected by the ombudsman.

Simply Energy's submissions about the reconnection

43. As per the timeline of events stated above, following Customer M's request on 14 September 2018 to reconnect her electricity, the distributor was unable to due to a main switch at the premises being left on. Simply Energy stated that they attempted to call Customer M about the failed reconnection on the same day, however the call went unanswered and Customer M did not call them back.

44. Simply Energy stated that they ceased attempts to reconnect the electricity to the premises on 18 September 2018 following Customer M making a complaint to the ombudsman and confirmation from Customer M that power was no longer required at the premises.

Simply Energy's submissions about whether Customer M was a 'relevant customer'

45. Simply Energy submitted that after the electricity to the premises had been disconnected on 11 September 2018, Customer M was no longer a 'relevant customer' for the purposes of section 40B of the Act.

46. Simply Energy stated that if Customer M's electricity was successfully restored when attempted on 14 September 2018, she would still have been a 'relevant customer'.

47. However, because the reconnection failed, Customer M had moved out, and the next customer who requested the reconnection on 10 October 2018 was not Customer M, Simply Energy believe that from the point of disconnection on 11 September 2018, Customer M was not a 'relevant customer' for the purposes of Section 40B of the Act.

Simply Energy's submissions about payment of compensation to Customer M

48. Simply Energy submitted that if it is found that a wrongful disconnection payment should be made to Customer M, it should be limited to the time that they attempted to reconnect the electricity to her premises – that is, 1:01pm on 14 September 2018. To go beyond this, they stated, would mean Simply Energy were unable to comply with the reconnection request due to Customer M failing to turn off the mains switch.

Decision

49. Simply Energy is required to comply with the statutory licence condition set out under section 40B(1) of the Act.

50. Simply Energy disconnected the electricity supply to Customer M's premises at 10:50am on 11 September 2018.

51. Simply Energy was required to comply with the Code as a condition of its contract with Customer M.

52. Simply Energy failed to comply with Clause 118(1)(a) of the Code by failing to use its best endeavours to arrange de-energisation of the premises in accordance with Customer M's request.

53. Simply Energy therefore failed to comply with the terms and conditions of the contract with Customer M that specified the circumstances in which the supply of electricity to the premises may be disconnected.

54. Despite finding that a wrongful disconnection occurred, Simply Energy is not required to make a wrongful disconnection payment to Customer M as the obligation to do so under section 40B(3) did not crystalise.

Reasons

Compliance with clause 118(1)(a) of the Code

55. Clause 118(1)(a) of the Code requires a retailer to use its 'best endeavours' to arrange the de-energisation of a customer's premises in accordance with that customer's request.

56. As detailed above, Customer M made two requests to Simply Energy for the disconnection of her electricity (with the second request to prevail over the first):

    (a) 30 August 2018 – requesting the disconnection to occur on 11 September 2018.

    (b) 10 September 2018 – requesting the disconnection be delayed by one week and to instead occur on 18 September 2018.

57. In its negotiations with the ombudsman, Simply Energy acknowledged falling short of the requirements of clause 118(1)(a) of the Code with respect to Customer M's second request on 10 September 2018. When specifically asked this question by the commission, Simply Energy's submissions were not as frank, however they accepted that the correct process for disconnection was not followed by their agents.

58. Following Customer M's contact with Simply Energy on 10 September 2018 to delay the disconnection date by one week, pursuant to clause 118(1) of the Code, Simply Energy were obligated to use their "best endeavours" to arrange the disconnection of Customer M's electricity according to that request. The Code does not specify notice periods or timeframes for when a customer must contact their retailer to request a disconnection, rather, the retailer must simply use their "best endeavours" to accommodate the request, even if it ultimately ends up being unsuccessful.

59. As already stated, the correct process was not followed by the Simply Energy agents after Customer M had requested a delay to her disconnection. Rather than submit a new disconnection service order to the distributor, the agents should have contacted the distributor directly to cancel the initial disconnection service order prior to submitting the amended disconnection service order. This process was known to Simply Energy, not onerous and was well within Simply Energy's capability.

60. It is for this reason that the commission finds that Simply Energy did not use their best endeavours to arrange the de-energisation of Customer M's premises in line with her request dated 10 September 2018, and therefore, have not complied with Clause 118(1)(a) of the Code.

Compliance with section 40B of the Act

61. Section 40B(1) of the Act provides that it is a condition of a licence agreement that a licensee will pay a relevant customer a prescribed amount (commonly known as a 'wrongful disconnection payment') if the licensee:

    (a) disconnects the supply of electricity to the customer's premises; 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.

62. There is no dispute that Simply Energy disconnected the supply of electricity to Customer M's premises as per subsection 40B(1)(a).

63. However, for the purposes of subsection 40B(1)(b), it is necessary to examine the relevant terms and conditions of the contract that was in place at the time of disconnection between Simply Energy and Customer M.

Clause 8 of the contract - Disconnection

64. Clause 8.1 is titled "When you could be disconnected". Clause 8.1(a) requires a customer to tell Simply Energy if they need to be disconnected. Following that, Simply Energy arrange for disconnection to occur through the relevant distributor. Relevant to Customer M's matter, there is no three-day notice requirement under this clause, however, consideration should be given to clause 9.2(a) of the contract, which is discussed below at paragraph 68.

65. Clause 8.2 is titled "Your protections". It states that Simply Energy "will observe all the protections for disconnections" that a customer has "under the law". The "law" in the contract is defined as "any law or regulatory or administrative document". While this definition is broad, it is reasonable to conclude that the Energy Retail Code, as the key regulatory document for Victorian energy retailers, is included in this definition. Simply Energy has not disputed the application of the Code. As such, the customer protections with respect to disconnections, as detailed in Part 6 of the Code, will be captured by clause 8.2.

66. Within Part 6 of the Code sits clause 118(1)(a), which, as detailed above, requires a retailer to use its "best endeavours" to arrange the de-energisation of a customer's premises in accordance with that customer's request. For the reasons already stated, Simply Energy failed to comply with clause 118(1)(a). Failing to comply with clause 118(1)(a) means that Simply Energy has not 'observed all of the protections for disconnections under the law' and is therefore in breach of clause 8.2 of its contract with Customer M.

Clause 9 of the contract – Termination

67. Clause 9.2 of the contract needs to be noted as it deals with termination of the contract when a customer moves out of their premises. This clause is arguably related to clause 8 as the disconnection of electricity supply and the termination of a contract can be linked, although not necessarily so.

68. Clause 9.2(a) requires customers who are moving out of their premises to give at least three business days' notice if they wish to terminate their contract. In their submissions to the commission, Simply Energy relied on this clause and claimed that because Customer M had not provided three business days' notice when contacting them on the second occasion to delay her original disconnection date, this amended disconnection request was unsuccessful.

69. However, the request made by Customer M was for disconnection and not termination of the contract. The fact that these issues are dealt with in separate clauses is a strong indicator that the applicable terms and timeframes should not be conflated.

70. Further difficulties arise in relation to Simply Energy's position when the contractual provisions are read in conjunction with clause 118(1)(a) of the Code, which requires a retailer to use its "best endeavours" to arrange the de-energisation of a customer's premises in accordance with that customer's request. Clause 118(1)(a) imposes no timeframe or notice period for when a customer needs to contact their retailer to arrange disconnection, just that the retailer must use its "best endeavours" to arrange for the disconnection to occur as requested. This would be inconsistent with the three business days' notice requirement listed in clause 9.2(a).

71. Given this inconsistency, section 36(1) of the Act would become relevant. It states that a licensee's contract terms and conditions are void to the extent of any inconsistency with the requirements of the Energy Retail Code. As the "three business days" notice requirement in clause 9.2(a) of Simply Energy's terms and conditions would be inconsistent with the "best endeavours" requirement of clause 118(1)(a) of the Code, it would become void.

72. Applying this to the facts of the current matter, following the second contact with Customer M to delay her disconnection date, Simply Energy was required to use its "best endeavours" to arrange the disconnection in accordance with that request.

73. This means that Simply Energy has not complied with section 40B of the Act and the requirement to make a wrongful disconnection payment to Customer M must be considered.

Was Customer M a "relevant customer"?

74. Under section 40B(1) of the Act, should a prescribed amount of compensation become payable, it is to be made by a licensee to a "relevant customer" in accordance with this section.

75. Section 40B(3) requires that any payment to be made under section 40B(1) must be made as soon as is practicable after the electricity has been reconnected to "the premises of the relevant customer".

76. Section 40B(5) provides that a "relevant customer" has the same meaning as in section 36 of the Act. Section 36(6) of the Act provides that "relevant customer" means "a person, or a member of a class of persons, to whom an Order under subsection (3) applies".

77. Subsection 36(3) provides for the Governor in Council to declare, by order published in the Government Gazette, that a person or class of persons is, for the purposes of section 36, a relevant customer or class of relevant customers.

78. The two published orders are contained in Government Gazette 2008-S315 and Gazette 2002-S11. Pursuant to these orders, a person is a "relevant customer" in relation to "a supply of electricity from a supply point" if, relevantly, the person "purchases electricity principally for personal, household or domestic use at the supply point".

79. There is no question that Customer M was a "relevant customer" for the purposes of section 36 of the Act (and therefore section 40B(5)) for the time that she was still living at the premises. However, for the purposes of a wrongful disconnection payment, section 40B(1) requires that a wrongful disconnection payment is to be made "in accordance with this section".

80. If "this section" (section 40B as a whole) is taken into account, then the timing of any wrongful disconnection payment must be made in accordance with section 40B(3) – "as soon as practicable after the supply of electricity is reconnected to the premises of the relevant customer".

81. In this case, by the time of reconnection, the premises were no longer occupied by Customer M and she did not arrange for the reconnection. Accordingly, the premises ceased to be "the premises of the relevant customer" after she had moved out of the premises on or around 17 September 2018. Because the electricity was not reconnected to the premises until after that date, the obligation to make a wrongful disconnection payment did not crystalise.

82. It follows that the dispute between the ombudsman and Simply Energy as to whether the compensation payment should be either the "prescribed amount" or the "prescribed capped amount" is not relevant.

83. No compensation is payable under s 40B(3).

Other observations

84. It is noted that the ombudsman referral relates only to the disconnection of the electricity supply at the premises. While the gas supply to the premises was also disconnected at the same time as the electricity, the ombudsman and Simply Energy were able to negotiate a suitable resolution for Customer M and has therefore not been included in this decision.

85. The commission also acknowledges that while the disconnection by Simply Energy was found to be wrongful, the reconnection of electricity to the premises on 14 September 2018 was inhibited by Customer M agreeing to, yet failing to turn off a main switch or main appliance switch when asked to do so by Simply Energy. Simply Energy's attempt to contact Customer M following the failed reconnection (on the same day) went unanswered. Customer M also did not return their call. The commission recognises that Simply Energy used its best efforts to reconnect Customer M's electricity on that date, and notes that customers are expected to engage with their retailer to ensure a successful reconnection.