

Customer P and Sumo – decision and reasons

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

7 October 2020

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Referral from the ombudsman

1. On 21 May 2020, the Energy and Water Ombudsman (Victoria) referred this matter to the commission for decision. The matter arises from a complaint made to the ombudsman by a residential customer, Customer P.
2. The referral concerns the application of section 40B of the Electricity Industry Act 2000 (the Act) to a disconnection by Sumo Power Pty Ltd (ACN 601 199 151) (Sumo) of Customer P's electricity supply at the relevant premises. Specifically, the ombudsman seeks the commission's clarification whether Sumo complied with its obligations to provide information about the customer's entitlement to assistance under Part 3 of the Energy Retail Code (the code) prior to disconnecting Customer P.
3. Customer P's electricity supply to the premises was disconnected by Sumo as a result of non-payment of bills from 10:04am to 2:34pm on 12 December 2019 – a period of 4 hours and 30 minutes.

Issues for decision

4. The ombudsman has raised four questions for decision by the commission. One question relates to the disconnection warning period and the remaining three questions concern whether Sumo complied with its obligations to provide clear and unambiguous information about the customer's entitlement to assistance under Part 3 of the code.
5. The first question is whether Sumo complied with its obligation for the disconnection warning period to be not less than 6 business days starting from the date of issue, in accordance with clauses 108 and 110(2)(c)(i) of the code.
6. The second question is whether the information in Sumo's reminder notice satisfied the requirement to provide clear and unambiguous information about the assistance available under Part 3, in accordance with clauses 89(1)(b) and 80(2) of the code.
7. The third question is whether the information in Sumo's disconnection warning notice satisfied the requirement to provide clear and unambiguous advice about the assistance available under Part 3, in accordance with clause 110(2)(ba)(ii) of the code.
8. The fourth question is whether Sumo complied with its obligation to use its best endeavours to contact the customer in relation to the matter and, in so doing, provide clear and unambiguous information about the assistance available under Part 3, in accordance with clause 111A(1)(a)(iv).
9. If the commission finds Sumo complied with these requirements, then the disconnection was not wrongful and no further issues arise.
10. If the commission finds that Sumo has not complied in relation to any of the four questions, then the issue arises of whether compensation is payable to the customer in accordance with section 40B of the Act.

Relevant facts

11. The commission analysed the ombudsman's request for a decision and sought additional submissions from Customer P and Sumo. Having assessed the matter and the submissions, the commission makes the factual findings set out below.
12. On 20 July 2018, Customer P established an electricity account with Sumo for the premises.
13. On 9 October 2019, Sumo issued Customer P a bill for \$4,442.65 payable by 25 October 2019. The bill was not paid by the due date and caused the disconnection process to commence.
14. On 31 October 2019, Sumo issued Customer P with a reminder notice for \$4,442.65. Relevantly for the purposes of this matter, the second page of the reminder notice contained the following in relation to the assistance available under Part 3 of the code:

We are here to help.

Please call us if you are experiencing payment difficulties. We offer a number of payment options, and can help with information about government energy assistance programs...

Other information

For more information regarding your rights for payment assistance and obligations, please read the Important Information on the following page...

Payment assistance

To find out about Victorian Government energy concessions and rebates, Centrepay and Sumo payment plans, visit: sumo.com.au/helpandsupport

15. The third page of the reminder notice also contained the following more detailed information about the customer's assistance options available under Part 3 of the code:

Important information

You have received this notice because you have not paid your bill and are at risk of losing your service.

You need to pay your account in full, or contact Sumo on 13 88 60 to discuss alternative arrangements. You are entitled to further assistance from us, to make it easier for you to pay your ongoing energy use, repay your arrears and lower your energy costs.

Assistance measures may include:

- a payment plan with weekly, fortnightly or monthly payments based on what you can afford, where your arrears are paid off over a period of up to 2 years
- advice about payment options that would enable you to repay your arrears over not more than 2 years, including via Centrepay
- advice about the likely cost of your future energy use, and how to reduce this cost

- information about any government or non-government assistance you may be entitled to, including available concessions, government grants (such as the Utility Relief Grant Scheme) and other support agencies or schemes available to help you meet your energy costs.

If you cannot pay the full cost of your ongoing energy use, we will also offer the following additional support measures:

- practical assistance to help you reduce your energy costs including, but not limited to:
 - the tariff that is most likely to minimise your energy costs, based on what we know about your usage and payment history; and
 - practical assistance to help you reduce your use of energy, based on your pattern of energy use and on the circumstances of where you live and the ability to take action in reducing your energy usage
 - information about how you're going at reducing your energy costs, given at sufficient intervals for you to be able to adequately assess your progress.
- offering an initial period of six months where repayment of your arrears is put on hold, and you pay less than the full cost of your ongoing energy use while working to lower that cost. In these circumstances, we will add any amount unpaid for energy use to your arrears.

Within 6 business days of receipt of this letter, please either pay your arrears in full or contact us on 13 88 60 or email paymentassistance@sumo.com.au to propose a payment arrangement in line with the requirements above.

If you do not contact us within 6 business days, we will continue with our collection process which may include disconnection of your energy supply.

For full details of the assistance available to you, call us, or read our Bill Assist Policy at: sumo.com.au/payment-assistance-vic

16. On 12 November 2019, Sumo called Customer P who said she was in a meeting and terminated the call.
17. On 12 November 2019, Sumo issued a disconnection warning notice for \$4,442.65, dated the following day. Sumo produced extracts from their management systems and third-party print house showing that the notice was issued on the 12 November 2019 however, the date printed on the notice was 13 November 2019. The notice stated that the overdue amount needed to be paid by 20 November 2019 to avoid disconnection. The second page of the disconnection warning notice contained the following in relation to the assistance available under Part 3 of the code:

Payment Assistance

You have received this notice because you have not paid your bill and your energy supply is now at risk of being disconnected.

We are here to help.

To avoid disconnection, you need to pay your account in full, or **contact Sumo on 13 88 60** to discuss alternative arrangements.

You are entitled to further assistance from us, to make it easier for you to pay your ongoing energy use, repay your arrears and lower your energy costs.

Assistance measures may include:

- a payment plan with weekly, fortnightly or monthly payments based on what you can afford, where your arrears are paid off over a period of up to 2 years
- advice about payment options that would enable you to repay your arrears over not more than 2 years, including via Centrepay
- advice about the likely cost of your future energy use, and how to reduce this cost
- information about any government or non-government assistance you may be entitled to, including available concessions, government [sic] grants (such as the Utility Relief Grant Scheme) and other support agencies or schemes available to help you meet your energy costs.

If you cannot pay the full cost of your ongoing energy use, we will also offer the following additional support measures:

- practical assistance to help you reduce your energy costs including, but not limited to:
 - the tariff that is most likely to minimise your energy costs, based on what we know about your usage and payment history; and
 - practical assistance to help you reduce your use of energy, based on your pattern of energy use and on the circumstances of where you live and the ability to take action in reducing your energy usage
 - information about how you're going at reducing your energy costs, given at sufficient intervals for you to be able to adequately assess your progress.
- offering an initial period of six months where repayment of your arrears is put on hold, and you pay less than the full cost of your ongoing energy use while working to lower that cost. In these circumstances, we will add any amount unpaid for energy use to your arrears.

For full details of the assistance available to you, call us, or read our Bill Assist Policy at sumo.corn.au/payment-assistance-vic

For more information about assistance provided by government or community [sic] services, visit sumo.corn.au/payment-assistance-vic

18. The third page of the disconnection warning notice contained further information about the assistance available under Part 3 of the code which was substantively the same as that quoted in paragraph 15 above. It also included the following additional text:

You can also access information directly about support available from the following services:

- National Debt Hotline - ndh.org.au or 1800 007 007
- Moneysmart - moneysmart.gov.au or 1300 300 630
- Concessions - services.dhhs.vic.gov.au/concessions-and-benefits or 1300 650 172

19. On 25 November 2019, Sumo called Customer P on two occasions. Customer P said that she was not with Sumo and had changed companies months ago. The operator advised her that she still had an active electricity account with Sumo. Customer P then terminated the call.

20. On 3 December 2019, Sumo issued a letter by registered post to Customer P warning of the imminent disconnection. The disconnection imminent notice contained information about the assistance entitlements under Part 3 of the code which was substantively the same as that contained in the disconnection warning notice.
21. On 6 December 2019, Customer P called Sumo. She again disputed having an account with Sumo and said she had an electricity bill with EnergyAustralia in front of her. When the operator asked what the NMI listed on page 2 of the bill was, she responded that she did not have the bill with her right now. The operator then confirmed her address to ensure Sumo was billing the correct site. The operator requested that if she had photos of the bills with EnergyAustralia, she should email Sumo a photo of them. He also advised that if she was still paying EnergyAustralia, that account may be in credit so she should contact them urgently. Customer P then stated she could only afford \$5 per fortnight as she was on a pension. The operator advised someone from the bill assist team would call her back the next business day regarding a payment plan and the Utility Relief Grant Scheme (URGS). He further advised she should look for her EnergyAustralia bills over the weekend as this may assist.
22. On 9 December 2019, the bill assist team called Customer P. When Customer P requested to cancel the contract, she was advised that if she closed the account she could not be offered bill assist and she would not be eligible for a payment plan or URGS. She was also advised that she would need to speak to her preferred retailer to arrange the transfer and that closing the account would result in the debt going to a collections agency. Customer P said this did not worry her. The operator informed her 'we will need to set up a payment plan moving forward to ensure the power actually does stay on'. Customer P then became abusive and terminated the call.
23. On 10 December 2019, Sumo sent Customer P the following text message:
- Hi [redacted]
Please be advised your Electricity Account 1140303 at [redacted] is due to be disconnected on 12/12/2019.
To prevent disconnection please make immediate payment and contact us on 03 9103 2920.
Please note, if payment is made and you do not notify us at latest the business day prior to the scheduled disconnection date, we cannot guarantee the disconnection will not go ahead
24. On 10 December 2019, Sumo also raised the service order with the distributor for the premises to be disconnected.
25. On 12 December 2019 at 10.04 am, Customer P's electricity supply was disconnected for non-payment. The outstanding balance was \$4,925.042.
26. On 12 December 2019 at 2.34pm, Customer P's electricity supply was reconnected after two phone calls with Sumo and her making a payment of \$150 on the account.

Relevant obligations

27. The relevant obligations in this matter arise from the [Electricity Industry Act 2000](#), the [Energy Retail Code \(Version 13\)](#), [Sumo's electricity retail licence](#) and Sumo's contract with the customer.

Legislative requirement to pay compensation for wrongful disconnections

28. Section 40B(1) of the Act includes a statutory condition into electricity retail licences to make a payment of the prescribed amount to a relevant customer if the licensee fails to disconnect the customer in accordance with the terms and conditions of their contract.

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

30. Sumo holds an electricity retail licence and is therefore subject to the statutory condition contained in section 40B(1) of the Act.

Obligation under Parts 3 and 6 of the code

31. The relevant obligations in this matter concern Parts 3 and 6 of the code. Part 3 sets out the payment difficulties framework, and establishes an entitlement to minimum standards of assistance for customers anticipating or facing payment difficulties so that disconnection of a residential customer for not paying a bill is a measure of last resort. Part 6 provides a retailer's obligations for arranging de-energisation of small customer's premises.

32. Clause 111A(1) of the code provides:

A retailer may only arrange de-energisation of the premises of a residential customer for not paying a bill if:

(a) the retailer:

(i) has complied with all of the retailer's obligations to the customer under clause 89; and

(ii) has issued a reminder notice to the customer that complies with clause 109; and

(iii) has issued a disconnection warning notice to the customer that complies with clause 110; and

(iv) has, after the issue of the disconnection warning notice, used its best endeavours to contact the customer in relation to the matter and, in so doing,

provided clear and unambiguous information about the assistance available under Part 3; and

(v) has at all times acted fairly and reasonably in relation to the customer.

33. Clause 111A(1)(a)(iii) requires a retailer to issue a disconnection warning notice that complies with clause 110 prior to arranging de-energisation. Clause 110(2)(c)(i) requires the disconnection warning notice to state the date on which the disconnection warning period ends. Clause 108 states:

disconnection warning period means the period that starts on the date of issue of a disconnection warning notice under clause 110...and ends no earlier than 6 business days from the date of issue of the disconnection warning notice.

34. Clause 111A(1)(a)(i) incorporates compliance with clause 89 as a precondition for arranging de-energisation. Clause 89 is contained in Part 3 of the code and contains a number of retailer obligations. The ombudsman has drawn particular attention to clause 89(1)(b) which provides that a retailer must:

at all times when it is relevant to do so, including on being contacted by a residential customer, give the customer in a timely manner clear and unambiguous information about the assistance available under this Part.

35. In addition to the obligation to comply with clause 89(1)(b) at all times where it is relevant, clause 111A(1) provides a foundation for three instances prior to arranging disconnection, at which a retailer is required to provide customers with clear and unambiguous information (or advice) about their assistance entitlements. The code explicitly requires a retailer to provide information about the assistance available under Part 3 at three specific instances as part of a disconnection process:

- a. Within 21 business days of the pay-by-date where a residential customer has not paid their bill by the pay-by-date and has arrears of more than \$55, under clause 80(2) of the code.
- b. When the retailer issues a disconnection warning notice under clause 110(2)(ba)(ii) of the code.
- c. As part of the obligation on the retailer to use its best endeavours to contact the customer in relation to the matter after issuing a disconnection warning notice, and, in so doing, provide clear and unambiguous information about the assistance available under Part 3 under clause 111A(1)(a)(iv) of the code.

36. Three of the questions raised by the ombudsman are concerned with whether the information provided at each of these relevant points satisfied Sumo's obligation to provide clear and

unambiguous information (or advice) about the assistance available under Part 3. The remaining question concerns whether Sumo complied with the relevant disconnection warning period.

Licence conditions regarding the code

37. Clause 12.1 of Sumo's electricity retail licence requires it to ensure Sumo's contracts for the sale of electricity expressly deal with each matter which is the subject of a term or condition of the code.
38. Clause 12.2 of Sumo's electricity retail licence requires each term or condition of Sumo's contracts for the sale of electricity to not be inconsistent with each term and condition of the code.
39. Clause 12.3 of Sumo's electricity retail licence requires it to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer.
40. Clause 8.1 of Sumo's electricity retail licence requires it to comply with all applicable provisions of the code.
41. Clause 21.1 of Sumo's electricity retail licence requires it to comply with all applicable laws.

Contract term to disconnect in accordance with the code

42. Clause 25.2 of Sumo's contract with the customer specifies that it:

[will comply with the terms, conditions and procedures set out in the Energy Laws when disconnecting the energy supply to the Premises.](#)

Under clause 41 of the contract 'Energy Laws' is defined as including the Energy Retail Code in Victoria.

43. In accordance with the terms of its contract with Customer P, Sumo was therefore required to comply with the relevant provisions of the code before disconnecting Customer P and non-compliance with the code would constitute non-compliance with the terms and conditions of the contract which specify the circumstances in which the premises may be disconnected.

Submissions

The ombudsman's submissions

44. Through its letter of referral and accompanying memorandum, the ombudsman acknowledged that Sumo demonstrated compliance with clause 109 of the code, which concerns the obligations for reminder notices. The commission acknowledges that compliance with this clause is not in dispute.
45. As outlined in the issues section of this decision, the ombudsman has raised four questions for decision by the commission. The first question concerned whether Sumo complied with its obligations in relation to the disconnection warning period. The remaining three questions are concerned with whether Sumo complied with its obligations to provide 'clear and unambiguous' information/advice about the customer's entitlement to assistance under Part 3 of the code.
46. In relation to the first question, the ombudsman submits that the disconnection warning period was less than six business days and that the disconnection warning notice was therefore non-compliant with the code.
47. In relation to the remaining three questions, the ombudsman acknowledges that the information provided by Sumo to the customer in relation to assistance under Part 3 is 'reasonably comprehensive' however it nonetheless seeks clarification on the application of these provisions of the code.

Sumo's submissions

48. The ombudsman's referral stated that Sumo had advised they had complied with the minimum standards of conduct required when disconnecting Customer P.
49. The commission invited Sumo to provide any further submissions, information and/or documents it considered the commission should have regard to in making its decision. Sumo provided a written submission and additional documents for the commission's consideration in this matter.
50. In relation to the first question raised by the ombudsman, concerning whether Sumo complied with its obligations in relation to the disconnection warning period, Sumo submitted that the issue date of 13 November 2019 which was printed on the disconnection warning notice was an error. Sumo submitted extracts from their management systems and third-party print house showing that the notice was issued on 12 November 2019. Sumo further submitted that the notice satisfied the purpose of disconnection warning notices as set out in clause 110(1A) of the code which is to:

give the customer clear and unambiguous advice about what the customer needs to do to avoid being disconnected from their energy supply.

51. In relation to the remaining three questions, Sumo submitted that at all times when it was relevant to do so, Sumo gave the customer clear and unambiguous information about the assistance available under Part 3 of the code including in the reminder notice, disconnection warning notice and disconnection imminent notice.

Customer's submissions

52. The commission invited Customer P to provide submissions, however no response was received.

53. The referral provided by the ombudsman to the commission stated Customer P had informed them:

In 2018, she declined a door-to-door sales offer from Sumo.

She believed she remained with her preferred retailer, EnergyAustralia, to which she was paying \$30 per fortnight.

She received a final disconnection notice from Sumo for over \$4,000.

Her electricity was disconnected on 12 December 2019.

Decision

54. The commission has had regard to the submissions of the ombudsman, Sumo, and the customer's statement.
55. Sumo disconnected the electricity supply to Customer P's premises at 10:04am on 12 December 2019.
56. Sumo was required to comply with the code as a condition of their contract with the customer.
57. The commission considers that Sumo complied with its obligation for the disconnection warning period to be not less than 6 business days starting from the date of issue, in accordance with clauses 108 and 110(2)(c)(i) of the code.
58. The commission considers that the information in Sumo's reminder notice satisfied the requirement to provide clear and unambiguous information about the assistance available under Part 3, in accordance with clauses 89(1)(b) and 80(2) of the code.
59. The commission considers that the information in Sumo's disconnection warning notice also satisfied the requirement to provide clear and unambiguous advice about the assistance available under Part 3, in accordance with clause 110(2)(ba)(ii) of the code.
60. Sumo also complied with its obligation after issuing the disconnection warning notice and prior to arranging de-energisation, to use best endeavours to contact the customer in relation to this matter and, in so doing, provide clear and unambiguous information about the assistance available under Part 3, in accordance with clause 111A(1)(a)(iv).
61. Sumo has therefore complied with its obligations in relation to each of the four issues raised by the ombudsman.
62. Accordingly, the commission considers that the disconnection was not wrongful, and Sumo is not required to make a payment to the customer in relation to the disconnection of Customer P's electricity supply.

Reasons

Disconnection warning period

63. The ombudsman submits that the disconnection warning notice issued by Sumo was non-compliant with the code, as it provided for a disconnection warning period of less than 6 business days.

64. Clause 108 defines 'disconnection warning period' as:

the period that starts on the date of issue of a disconnection warning notice under clause 110...and ends no earlier than 6 business days from the date of issue of the disconnection warning notice.

65. The date of issue printed on the disconnection warning notice in this matter was 13 November 2019 and as such, the disconnection warning period started on this date. Six business days starting from 13 November 2019 is 20 November 2019. The notice showed that the disconnection warning period ended on 20 November 2019. The disconnection warning period therefore did not end earlier than 6 business days from the date of issue.

66. The commission also notes the evidence provided by Sumo which indicated that the disconnection warning notice was issued on 12 November 2019.

Clear and unambiguous information about the assistance available under Part 3

67. The commission was requested to assess whether the information provided in Sumo's reminder notice and disconnection warning notice satisfied the requirement to provide clear and unambiguous information about the assistance available under Part 3, in accordance with clause 89(1)(b) and 110(2)(ba) of the code.

68. The intent of the provisions requiring retailers to provide customers with 'clear and unambiguous' information about their entitlements under Part 3 is to ensure customers facing payment difficulty understand their rights, and that disconnection is a measure of last resort. This understanding promotes the outcome of customers contacting their retailer and arranging the assistance which best suits their circumstances.

69. In assessing the 'clear and unambiguous' information requirement, the commission had regard to the following considerations:

- a. The information must be accurate and not misleading.

- b. The information must be expressed in plain language, legible, and presented clearly and appropriately having regard to its nature.¹
- c. The information must not have any major omissions of the assistance available under Part 3: it should clearly identify the forms of standard assistance made available by the retailer in accordance with clause 76(2), as well as the tailored assistance measures in clause 79(1) of the code.

70. The commission considers that the assistance information provided by Sumo in the notices is accurate, generally expressed in plain language, and does not contain any significant omissions about the assistance available.

71. The information in both the reminder notice and disconnection warning notice therefore satisfies the requirement to provide clear and unambiguous information about the assistance available under Part 3.

Best endeavours to provide information

72. The commission must also assess whether, after issuing the disconnection warning notice and prior to arranging de-energisation, Sumo complied with their obligation to use best endeavours to contact the customer in relation to this matter and, in so doing, provided clear and unambiguous information about the assistance available under Part 3.

73. As noted in the relevant facts, after issuing the disconnection warning notice and prior to arranging de-energisation by raising the service order on 10 December 2019, Sumo made the following attempts to contact the customer:

- a. Telephoned Customer P on two occasions on 25 November 2019;
- b. Sent Customer P a registered post letter on 3 December 2019, warning of the imminent disconnection and providing her with information about her assistance entitlements under Part 3 of the code;
- c. Spoke to Customer P on 6 December 2019 after she telephoned Sumo;
- d. Telephoned Customer P on 9 December 2019;
- e. Sent Customer P a text message on 10 December 2019.

¹ Clause 87(1) of the code.

74. Retailers are expected to exercise judgement and use the information available and known to them about an individual customer when fulfilling their obligations to use best endeavours.² If known, retailers should attempt to contact customers via their preferred contact method.³
75. Sumo used the information available to it to contact Customer P through both post and phone.
76. The information provided in the registered post letter on 3 December 2019 was substantively the same as that contained in the disconnection warning notice. As already assessed above, the commission considers that this information constitutes clear and unambiguous information about the assistance available under Part 3.
77. On the occasions Sumo spoke to Customer P by phone, Sumo had limited opportunities to provide Customer P with meaningful tailored assistance as Customer P terminated calls and denied she was a customer of Sumo. The commission considers that in these circumstances, Sumo did use its best endeavours to provide clear and unambiguous information about the customer's assistance entitlements however Customer P refused to take reasonable action towards remedying the matter.⁴
78. Sumo therefore satisfied their obligations to use best endeavours to contact the customer and, in doing so, provided clear and unambiguous advice about the assistance available.

² Energy Compliance and Enforcement Policy: Guidance note – Payment difficulty and disconnection 2017 at 8.3.3.

³ Ibid at 8.3.5.

⁴ Clause 111A(1)(c) of the code.