

Customer D and Lumo Energy – decision and reasons

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

27 August 2020

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Contents

Referral from the ombudsman	1
Issues for decision	2
Relevant facts	3
Relevant obligations	6
Legislative requirement to pay compensation for wrongful disconnections	6
Obligation to provide information about assistance under Part 3	6
Licence condition conditions regarding the code	8
Contract term to disconnect in accordance with the code	8
Submissions	9
The ombudsman's submissions	9
Lumo's submissions	9
Customer's submissions	9
Decision	11
Reasons	12
Clear and unambiguous information about the assistance available under Part 3	12
Best endeavours to provide information	13
Other observations	15
Retailer discretion to provide assistance information in a reminder notice	15
Framing the assistance available as an entitlement	15
Is a different level of information required at each stage?	16
Distinguishing between electronic and hard copy communications	16

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 D.
2. The referral concerns the application of section 40B of the Electricity Industry Act 2000 (the Act) to a disconnection by Lumo Energy Australia Pty Ltd (ACN 100 528 327) of Customer D's electricity supply at the relevant premises. Specifically, the ombudsman seeks the commission's clarification whether Lumo Energy 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 D.
3. Customer D's electricity supply to the premises was disconnected by Lumo as a result of non-payment of bills from 10:07am on 12 September 2019 to 5:55pm on 13 September 2019 – a period of 1 day, 7 hours and 48 minutes.

Issues for decision

4. The ombudsman has raised three questions for decision by the commission. All three questions are concerned with whether Lumo Energy complied with its obligations to provide information about the customer's entitlement to assistance under Part 3 of the code.
5. The first question is whether the information in Lumo Energy'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.
6. The second question is whether the information in Lumo Energy'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.
7. The third question is whether Lumo Energy 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).
8. If the commission finds Lumo Energy complied with these requirements, then the disconnection was not wrongful and no further issues arise.
9. If the commission finds that Lumo Energy has not complied in relation to any of the three questions, then the issue arises of whether compensation is payable to the customer in accordance with section 40B of the Act.

Relevant facts

10. The commission analysed the ombudsman's request for a decision and sought additional submissions from Customer D and Lumo Energy. Having assessed the matter and the submissions, the commission makes the factual findings set out below.
11. On 19 November 2018, Customer D provided an updated mobile phone number and email address during a phone call with Lumo Energy.
12. On 8 July 2019, Lumo Energy issued a bill to the account for \$554.15 (including \$228.92 overdue) payable by 25 July 2019. The bill was not paid by the due date and caused the disconnection process to commence.
13. On 31 July 2019, Lumo Energy issued a reminder notice to the account for \$554.15. Relevantly for the purposes of this matter, the first page of the reminder notice contained the following in relation to the assistance available under Part 3 of the code:

If you are unable to pay your bill please contact us on 1300 115 866 to discuss payment assistance options available and which of those options are best suited to your situation. We have multiple options, for example:

- Payment plans tailored to suit your situation
- Concessions and grants you may be eligible for
- Practical advice on how to use less energy
- Payment extensions
- Finding our most suitable offer for your situation

We have summarised some of the above options over the page.

14. The second page of the reminder notice contains the following more detailed information about the customer's assistance options available under Part 3 of the code:

Standard assistance options

If you need help staying on top of your energy bills, we have these payment options available:

Short term payment instalment plan - you get the flexibility to make equal payments on a weekly, fortnightly or monthly basis to pay your energy charges before your next bill is due.

EvenPay®- you make equal payments weekly, fortnightly or monthly based on a reasonable forecast of your future energy use over the next 12 months. This option is available if your account balance is \$55 or under.

Payment extensions - you can extend the due date of your bill once every 12 months.

Tailored assistance options

If you're a residential customer and need help to pay your ongoing energy costs whilst you repay your existing balance, we will work with you to find the right tailored assistance option to get you back on track. Call us to discuss any of the options below.

Long term payment instalment plan - you have the flexibility to make equal payments, based on your forecasted energy use, on a weekly, fortnightly or monthly basis for up to 24 months.

Concession and grants – you may be eligible for energy concessions or government funded grants that you aren't currently receiving. Visit our website at <https://www.lumoenergy.com.au/help-centre/concessions/vic> for more information.

Tariff change – you may be eligible for an alternative tariff that may help reduce your energy costs. We will review your consumption pattern and payment history to assess whether there is an alternative tariff that you may be better off on.

Lowering energy costs – you may be able to lower your energy costs based on a reasonable forecast of your future energy use. We can provide you information about the likely cost of your future energy use and advice on how you may be able to reduce this in our energy efficiency options stated below.

Energy efficiency advice - you can get an over the phone home energy audit through us to better understand the running cost of your appliances. Based on how you use your appliances at home and your historical energy usage available to us, we can provide you with information about lowering your energy use. More information on energy efficiency can be found on our website www.lumoenergy.com.au/help-centre/energy-saving-tips.

If you are unable to pay your ongoing energy costs, you can ask us to put a pause on your debt balance for 6 months. During this period you can pay us less than the cost of your energy use and the difference will simply be added to the amount you owe. At the end of the six month period, we will make an assessment and let you know if we are going to extend or suspend the assistance and our reasons.

At any time you can also access our Customer Care hardship program, just ask one of our team for more information. To view our hardship policy, please visit our website www.lumoenergy.com.au/assistance.

15. On 13 August 2019, a disconnection warning notice for \$554.15 was issued. The first page of the disconnection warning notice contains the following in relation to the assistance available under Part 3 of the code:

If you are unable to pay we urge you to call us on the number above to discuss payment assistance options available and which of those options are best suited to your situation. We have multiple options, for example:

- Payment plans tailored to suit your situation
- Concessions and grants you may be eligible for
- Practical advice on how to use less energy
- Payment extensions
- Finding our most suitable offer for your situation

We have summarised some of the above options over the page.

16. The second page of the disconnection warning notice contained more detailed information about the customer's assistance options available under Part 3 of the code in identical terms to that provided on the second page of the reminder notice.
17. On 29 August 2019, Lumo Energy attempted to telephone the customer both inside and outside of business hours however the phone number associated with the account was disconnected.
18. A further email was also sent to Customer D on 29 August 2019, which contained information about the customer's assistance options available under Part 3 of the code in identical terms to that provided with the reminder notice and disconnection warning notice.
19. On 29 August 2019, Lumo Energy also raised the service order with the distributor for the premises to be disconnected.
20. On 30 August 2019, a registered post letter was sent to the premises which again contained information about the customer's assistance options identical to that provided with the previous notices and email.
21. On 12 September 2019 at 10:07am, the electricity supply to the premises was disconnected.
22. On 13 September 2019 at 5:55pm, the electricity supply to the premises was reconnected after Customer D contacted Lumo Energy.

Relevant obligations

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

Legislative requirement to pay compensation for wrongful disconnections

24. 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.
25. 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.
26. Lumo Energy holds an electricity retail licence and is therefore subject to the statutory condition contained in section 40B(1) of the Act.

Obligation to provide information about assistance under Part 3

27. 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.
28. 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.

29. 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.

30. 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 retailers are required to provide customers with clear and unambiguous information (or advice) about their assistance entitlements. The code explicitly requires retailers 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.

31. The questions raised by the ombudsman are concerned with whether the information provided at each of these relevant points satisfied Lumo Energy's obligation to provide clear and unambiguous information (or advice) about the assistance available under Part 3.

Licence condition conditions regarding the code

32. Clause 7.1 of Lumo Energy's electricity retail licence requires it to ensure Lumo Energy's contracts for the sale of electricity expressly deal with each matter which is the subject of a term or condition of the code.
33. Clause 7.3 of Lumo Energy's electricity retail licence requires each term or condition of Lumo Energy's contracts for the sale of electricity to be consistent with each term and condition of the code.
34. Clause 7.4 of Lumo Energy'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.
35. Clause 14.1 of Lumo Energy's electricity retail licence requires it to comply with all applicable provisions of the code.
36. Clause 21 of Lumo Energy's electricity retail licence requires it to comply with all applicable laws.

Contract term to disconnect in accordance with the code

37. Clause 14 of Lumo Energy's contract with the customer specifies that any disconnection is subject to Lumo Energy first complying with 'regulatory requirements'. Under clause 25 of the contract 'regulatory requirements' is defined as including the Energy Retail Code for customers in Victoria.
38. In accordance with the terms of its contract with Customer D, Lumo Energy was therefore required to comply with the relevant provisions of the code before disconnecting the customer 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

39. Through its letter of referral and accompanying memorandum, the ombudsman acknowledged that Lumo Energy 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.
40. As outlined in the issues section of this decision, the ombudsman has raised three questions for decision by the commission concerned with whether Lumo Energy complied with their obligations to provide information about the customer's entitlement to assistance under Part 3 of the code.
41. In relation to each of the three questions, the ombudsman acknowledges that the information provided by Lumo Energy 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.

Lumo's submissions

42. The ombudsman's referral includes a position statement from Lumo Energy in which it states that it has complied with the minimum standards of conduct required when disconnecting Customer D. On each of the specific questions raised by the ombudsman, Lumo Energy states that there are no deficiencies in the Part 3 information provided to Customer D.
43. The commission invited Lumo Energy to provide any further submissions and any information or documents it considered the commission should have regard to in making its decision, Lumo Energy provided written submission and documents for the commission's consideration in this matter.
44. Lumo Energy's submissions reiterate its position that it has complied with the minimum standards required when disconnecting Customer D. They further add that the Part 3 information in the relevant communications specifically avoids copying verbatim the provisions of the code, to ensure the information is clear and unambiguous so that it can be easily understood by customers.

Customer's submissions

45. The commission invited Customer D to provide submissions, however no response was received.

46. The referral provided by the ombudsman to the commission stated Customer D had informed them:

After his sister moved out of the property in 2015, he contacted Lumo Energy and transferred the account into his name.

He also requested a Utility Relief Grant Scheme (URGS) application form once the debt was transferred into his name.

His electricity supply was disconnected in September 2019, with no prior warning.

Decision

47. The commission has had regard to the submissions of the ombudsman, Lumo Energy, and the customer's statement.
48. Lumo Energy disconnected the electricity supply to Customer D's premises at 10:07am on 12 September 2019.
49. Lumo Energy was required to comply with the code as a condition of their contract with the customer.
50. The commission considers that the information in Lumo Energy'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.
51. The commission considers that the information in Lumo Energy'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.
52. Lumo Energy 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).
53. Lumo Energy has therefore complied with its obligations in relation to each of the three issues raised by the ombudsman.
54. Accordingly, the commission considers that the disconnection was not wrongful, and Lumo Energy is not required to make a payment to the customer in relation to the disconnection of Customer D's electricity supply.

Reasons

Clear and unambiguous information about the assistance available under Part 3

55. The commission was requested to assess whether the information provided in Lumo Energy'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.
56. 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.
57. 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.
58. The commission considers that the assistance information provided by Lumo Energy in the notices is accurate, generally expressed in plain language, and does not contain any significant omissions about the assistance available.
59. In reaching the above view, the commission had particular regard to whether the statement:
- you have the flexibility to make equal payments, based on your forecasted energy use, on a weekly, fortnightly or monthly basis for up to 24 months

¹ Clause 87(1) of the code.

accurately described the requirements of payment plans under clause 79(1)(a).

60. The assistance in clause 79(1)(a) is only available to customers who are able to continue to pay the full cost of their ongoing energy use.² Repayment of arrears therefore should occur in conjunction with payment of ongoing energy use. This is supported by clause 81(3) of the code which makes it clear a compliant payment proposal provides for payments of energy use being made together with payments to reduce arrears and is based on a reasonable forecast of a customer's energy use over the next 12 months. Lumo Energy's statement that payment plans are 'based on your forecasted energy use' is accurate and does not contain any major omissions of the assistance available. When a retailer and a customer are discussing a customer's payment proposal, the retailer is then responsible for estimating a customer's consumption over the agreed period of the payment arrangement nominated by the customer (up to 12 months) based on the customer's historical usage data and any other relevant information.³
61. 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

62. The commission must also assess whether after issuing the disconnection warning notice and prior to arranging de-energisation, Lumo Energy 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.
63. As noted in the relevant facts, after issuing the disconnection warning notice, Lumo Energy made the following attempts to contact the customer:
- a. telephoned the number associated with the account both inside and outside of business hours.
 - b. sent an email to the customer containing information about their assistance options.
64. Lumo Energy also sent a letter by registered post to the supply address containing information about their assistance options however, this letter was sent after Lumo Energy raised the

² Clause 79(2) of the code.

³ Energy Compliance and Enforcement Policy: Guidance note – Payment difficulty and disconnection 2017 at 4.15.4 and footnote 21.

service order for de-energisation. The commission considers that raising the service order for disconnection was the point at which the retailer 'arranged de-energisation' for the purposes of clause 111A(1) of the code. As the registered post letter was sent after Lumo Energy arranged de-energisation, it was not considered when assessing whether Lumo Energy had complied with their 'best endeavours' obligation under clause 111A(1)(a)(iv).

65. 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.⁴ If known, retailers should attempt to contact customers via their preferred contact method.⁵
66. Although Lumo Energy was unaware of Customer D's preferred contact method for general communications, they were aware that the customer had requested bills be sent to the supply address. They were also aware of the updated phone number and email address of Customer D as provided in the 19 November 2018 phone call.
67. Lumo Energy used the information available to them to contact Customer D through a range of methods. In doing so, they provided information about the assistance available under Part 3 of the code identical to the information provided in the reminder notice and disconnection warning notice. As already assessed above, the commission considers that this information constituted clear and unambiguous advice about the assistance available under Part 3.
68. Lumo Energy 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.

⁴ Energy Compliance and Enforcement Policy: Guidance note – Payment difficulty and disconnection 2017 at 8.3.3.

⁵ Ibid at 8.3.5.

Other observations

Retailer discretion to provide assistance information in a reminder notice

69. A residential customer who has not paid their bill by the pay-by date and who has arrears of more than \$55 is entitled to be contacted by the retailer within 21 days of the pay-by-date, and given information about the assistance to which the customer is entitled.⁶ Reminder notices must also be sent within 21 days of the pay-by date.⁷
70. Providing the information about tailored assistance and the issuing of the reminder notice may occur sequentially in any order, or simultaneously.⁸ The sequencing of this information is at the discretion of retailers.⁹

Framing the assistance available as an entitlement

71. When a retailer provides information about the assistance available under Part 3, it will be misleading for retailers to frame such assistance as an option which the retailer has discretion to provide or for which the customer 'may be eligible'. The assistance set out in Part 3 of the code are minimum standards of assistance to which residential customers anticipating or facing payment difficulties are entitled.¹⁰
72. Retailers must therefore frame Part 3 assistance as an 'entitlement' or 'right' which the customer has, and which the retailer 'will' or 'must' offer. The commission considers that language which implies Part 3 assistance is at the discretion of, or form of kindness provided by the retailer, is misleading and non-compliant with the requirements of Part 3 of the code.

⁶ Clause 80(2) of the code.

⁷ Clause 109(2) of the code.

⁸ Essential Services Commission, Payment difficulty framework: Final decision, 2017, p 48.

⁹ As noted in the Energy Compliance and Enforcement Policy: Guidance note – Payment difficulty and disconnection 2017 at 4.12.3.

¹⁰ Clauses 71, 74 and 77 of the code.

Is a different level of information required at each stage?

73. There are three specific points considered in this decision at which a retailer must provide a customer with information about their assistance entitlements under Parts 3 and 6:¹¹
- 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.
74. In addition to these three specific points, there will likely be other points in time at which a retailer opts to contact a customer with information about payment assistance. There is a discretion for retailers to determine the level of detail regarding a customer's entitlements to be presented at additional points, provided that both the objective of Part 3 and the mandatory requirements of the code are met.

Distinguishing between electronic and hard copy communications

75. Also relevant to the level of detail required in providing the relevant information will be the customer's preferred communication method.
76. Where the customer has provided explicit informed consent to receiving communications electronically,¹² a retailer may provide summary information about the assistance in the body of an email accompanied by a web link directly to more detailed information, provided the retailer complies with the relevant requirements of the code
77. Under clause 56(1)(aa) of the code, a retailer must publish on its website a summary of the rights, entitlements and obligations of small customers including the entitlements of customers

¹¹ Retailers must also give the customer information about the assistance available if the customer contacts the retailer: clause 89(1)(b).

¹² In accordance with clause 87(2) of the code.

to assistance under Part 3. Under clause 56(3) of the code, the retailer must provide a copy of this information where the customer requests it.

78. A retailer must also ensure that information is readily available to customers about standard and tailored assistance and how to access that assistance.¹³ Information is considered 'readily available' if it is easily accessible on the retailer's website in printable form or is sent to any residential customer who requests to be sent that information.¹⁴
79. Retailer's may wish to provide customers with weblinks directly to the information which they are obliged to include on their website in accordance with the above provisions.

¹³ Clause 86(3)(b) of the code.

¹⁴ Clause 86(4) of the code.