

Customer C and Lumo Energy – Decision and Reasons

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

15 August 2018

Commissioners:

Dr Ron Ben-David, Chairperson,
Mr Richard Clarke, Commissioner, and
Ms Kate Symons, Commissioner.

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The complaint

1. In the matter of a referral for decision by the Energy and Water Ombudsman (Victoria) (the ombudsman) to the commission of a complaint by Mr RC on behalf of Customer C.
2. The complaint is about the application of section 40B of the Electricity Industry Act 2000 (Vic) (the Act) for an alleged wrongful disconnection by Lumo Energy of Customer C's electricity supply at [address redacted] (the premises), from 7:27am on 13 October 2016 to 11:35am on 5 January 2017 (a period of 84 days, 4 hours and 8 minutes).

Issues for decision

3. The issue for decision by the commission on the complaint is whether or not Lumo Energy has breached a condition of its electricity retail licence regarding an obligation to make a prescribed payment to Customer C in circumstances where:
 - (a) Lumo Energy disconnected the supply of electricity to the premises of Customer C; and
 - (b) Lumo 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.
4. If so, then under section 40B(3) of the Act, Lumo Energy was obliged to make the prescribed payment to Customer C as soon as practicable after the supply of electricity was reconnected to Customer C's premises.
5. This requires the commission to make findings and reach conclusions regarding the following matters:
 - (a) Whether or not Lumo Energy disconnected the supply of electricity to the premises of Customer C (see paragraphs 19 and 20 below);
 - (b) Was the supply of electricity to Customer C's premises reconnected, and if so, when? (see paragraph 26 below);
 - (c) If Lumo Energy did disconnect the supply of electricity to Customer C's premises, for what period of time did the disconnection occur? (see paragraph 27 below);
 - (d) What was the contract between Lumo Energy and Customer C? (see paragraphs 14 and 30(c) below);
 - (e) What were the terms or conditions of that contract which specified the circumstances in which Lumo Energy may disconnect the supply of electricity to Customer C's premises? (see paragraphs 30(c), 42 and 43 below);
 - (f) Whether or not Lumo Energy failed to comply with *those* terms and conditions (see paragraphs 43 and 50 below);
 - (g) Was Customer C entitled to receive payment of a prescribed amount because of any wrongful disconnection by Lumo Energy under section 40B of the Act? (see paragraphs 32, 38 and 39 below);

- (h) If so, when was Lumo Energy obliged to make the payment of the prescribed amount? (not applicable as, in this instance, no such obligation arises – see paragraph 39 below);
 - (i) Has Lumo Energy made the payment to Customer C in accordance with its deemed licence condition under section 40B of the Act? (not applicable as, in this instance, no such obligation arises – see paragraph 39 below);
 - (j) If Lumo Energy has not made the payment what are the consequences? (Nil – see paragraph 39 below).
6. Through its formal letter of referral and the memorandum accompanying the letter, the ombudsman identified clause 118(1) of the Energy Retail Code (version 11) (the code) as the relevant clause for Lumo Energy to have complied with prior to the disconnection.
7. However, the ombudsman considered that Lumo Energy had not complied with clause 118(1) of the code. The ombudsman considered that Lumo Energy was required to use its best endeavours to arrange a disconnection in line with a customer’s request. On review of the relevant call the ombudsman was unable to identify a point during the call where Customer C did in fact request the disconnection. According to the ombudsman, on 5 October 2016, Customer C did not request Lumo Energy to disconnect the supply of electricity on 13 October 2016.
8. Lumo Energy was invited to provide any information and documents it considered that the commission should have regard to in making its decision. Lumo Energy was also invited to make submissions on the complaint for the commission to consider. Lumo Energy provided a transcript of the telephone call between Customer C and Lumo Energy on 5 October 2016, its letter to Customer C of 9 August 2016 and a copy of its relevant market retail contract with Customer C, and made submissions for the commission’s consideration.
9. Lumo Energy did not dispute the chronology of events as presented by the ombudsman in its referral memorandum except for the entry for 5 October 2016. In Lumo Energy’s view that entry should be that:
- “On 5 October 2016, the customer was advised on three occasions that a disconnection would occur and the customer confirmed this was correct.”*
10. Lumo Energy submitted that it had complied with the requirements of clause 118(1) of the code.
11. It further submitted that the commission’s Wrongful Disconnection Operating Procedure states in part that:

“The intention behind enacting the operating procedure is to provide a simple mechanism for compensation where disruption to households and small businesses arising from disconnection which is unfair because a retailer has procured disconnection in breach of its Energy Retail Code obligations.”

Accordingly, Lumo Energy submitted that the disconnection of Customer C’s premises could not reasonably be seen to cause “disruption to the household” where the property is vacant and the customer’s intention to disconnect it reflects that it is not in active use. In the circumstances, Lumo Energy submitted that, the disconnection was not “unfair”.

Relevant facts

12. From the commission's review of the matter and information and documents received, the commission makes the factual findings set out below.

Background

13. At all relevant times, Lumo Energy was the licensee responsible for the supply of electricity to the premises.
14. On 8 October 2014, Lumo Energy obtained the billing rights for the supply of electricity to the meter at Customer C's premises and entered into a market retail contract with Customer C.
15. The consumption history indicates that there had been zero to minimal usage of electricity at Customer C's premises since it was connected with Lumo Energy on 8 October 2014.

Circumstances leading to the disconnection in October 2016

16. On 9 August 2016 Lumo Energy sent a letter to Customer C at the premises identifying Customer C's account number (2450496), and advising Customer C that his Lumo Energy Agreement was coming to an end on 6 October 2016 and that Lumo Energy would like Customer C to stay on with Lumo Energy as a customer. In that letter Lumo Energy informed Customer C of various options. Customer C could:
 - (a) enter into a new market contract; or
 - (b) do nothing, in which case Lumo Energy would extend his existing agreement, with the same pricing as well as terms and conditions on a month to month basis; or
 - (c) sign up to a standard retail contract, which was Lumo Energy's standard pricing with no fixed term; or
 - (d) switch to another retailer.
17. In response to the letter from Lumo Energy, on 5 October 2016 Customer C telephoned Lumo Energy.
18. During the call on 5 October 2016:
 - (a) Customer C queried what contract there was between Lumo Energy and himself;
 - (b) Customer C wanted to terminate his relationship with Lumo Energy from the following day – 6 October 2016;

- (c) Customer C confirmed that he wanted to cancel his account with Lumo Energy and that there would be no requirement for further billing by Lumo Energy after 6 October 2016;
- (d) Customer C informed Lumo Energy that there would be nobody staying at the premises from 6 October 2016;
- (e) Customer C was informed by the first Lumo Energy representative that he would try and arrange a disconnection for Customer C's account and that the disconnection would lead to no power at the property. To which Customer C replied "*So no power, yeah. Ok that's right.*";
- (f) Customer C was informed by the first Lumo Energy representative that Customer C should hold the line as it will take some time because the disconnection process is a lengthy one;
- (g) Customer C was asked by the first Lumo Energy representative "*...before I arrange this I just want to reiterate to you John, that I am arranging a disconnection which will lead to no power at the property. Okay?*" To which Customer C replied "*Correct.*"
- (h) Customer C was asked by the first Lumo Energy representative "*So you don't want to move retailer just want to disconnect power completely?*" to which Customer C replied "*Correct.*";
- (i) Customer C was informed by the first Lumo Energy representative that as Customer C wanted a disconnection raised for the property the call would be transferred to the relevant department and that the disconnection process would take 5-6 business days. Customer C responded "*Yeah, yeah okay.*";
- (j) The call was placed on hold and transferred to a second Lumo Energy representative;
- (k) Customer C requested the final meter reading for his account to be on 6 October 2016 and was informed by the second Lumo Energy representative that the final meter reading could not be done before 13 October 2016 as the distributor would not process final meter readings without 5 business days' notice;
- (l) Customer C emphasised that no one was living at the property and he wanted the last billing date to be 6 October 2016. The second Lumo Energy representative explained that was not possible and the earliest date would be 13 October 2016;
- (m) Customer C was informed that the distributor would charge for the final meter reading. Customer C asked the second Lumo Energy representative if the distributor would "*cut the power off as well?*" The second Lumo Energy representative replied "*No they leave the power on.*" Customer C responded "*I thought I was arranging a disconnection?*"

The second Lumo Energy representative replied *“It’s a final reading, so we know what point to stop charging you from.”*

- (n) The second Lumo Energy representative then went through a script of questions regarding 13 October 2016, including whether Customer C had:
 - (i) any electricians doing any works on exposed wiring on that day;
 - (ii) anyone on a life support machine; and
 - (iii) required a replacement re-connection.

Customer C said “no” to each of these questions.

Disconnection of electricity supply to the premises

- 19. On 5 October 2016 Lumo Energy raised a service order for the disconnection of the electricity supply to Customer C’s premises. The scheduled date for the disconnection was 13 October 2016.
- 20. On 13 October 2016 at 7:27am the electricity supply to Customer C’s premises was disconnected.
- 21. On 6 December 2016 Customer C contacted and lodged a complaint with the ombudsman.
- 22. On 6 December 2016 the ombudsman was informed by Lumo Energy that as Customer C had arranged the disconnection Customer C would have to accept charges in his name before Lumo Energy would raise a reconnection service order.
- 23. On 7 December 2016 Lumo Energy again informed the ombudsman that Lumo Energy requested that Customer C establish an account with Lumo Energy prior to raising a reconnection. Lumo Energy also sought authorisation through the ombudsman that Customer C was willing to be contacted by Lumo Energy and Lumo Energy would then call Customer C.
- 24. On 7 December 2016 the ombudsman informed Lumo Energy that the ombudsman’s office had spoken to Mr RC on behalf of Customer C. Mr RC informed the ombudsman that he will arrange a reconnection for the premises with another retailer and Lumo Energy will not be required to contact Customer C.
- 25. On 13 December 2016 Lumo Energy’s contact notes record a conversation with the ombudsman’s office in which Lumo Energy advised the ombudsman that they were still trying to ascertain the date of actual disconnection as Customer C had stated disconnection occurred on 6 December 2016, yet the move out was organised by the customer for 13 October 2016. Lumo Energy also advised the ombudsman that if Customer C wanted to

keep the electricity supply active he would need to take responsibility otherwise it would be disconnected under unknown user. The ombudsman's office was to discuss this with the customer.

26. On 5 January 2017 at 11:35am the supply of electricity was reconnected to the premises of Customer C.
27. The premises were disconnected for a period of 84 days, 4 hours and 8 minutes.
28. Customer C did not notify Lumo Energy of the disconnection within 14 days after the disconnection.
29. As at 15 August 2018, Lumo Energy has not made any wrongful disconnection payment to Customer C.

Relevant obligations

30. In this matter Lumo Energy's relevant obligations arise from the following:

(a) The Act:

- (i) Section 35(1)(b) of the Act requiring Lumo Energy to offer to supply and sell electricity to domestic or small business customers on terms and conditions determined by Lumo Energy and approved by the commission.
- (ii) Sections 36(1) and (2) of the Act dealing with a term or condition in a contract for the supply or sale of electricity by a licensee to a relevant customer being void if it is inconsistent with terms and conditions specified by the commission that specify the circumstances in which the supply of electricity to premises may be disconnected. In such a case the term or condition specified by the commission is deemed to form part of the contract in place of the void term or condition.
- (iii) Section 39(1) of the Act which provides for circumstances where a relevant customer commences to take supply of electricity at premises from a relevant licensee without having entered into a supply and sale contract with that licensee. It deems the existence of a contract, from the commencement of the supply of electricity to the customer at the premises on the tariffs, terms and conditions provided for in sections 35 and 39(5) of the Act.
- (iv) Section 40B(1) of the Act deems a condition into Lumo Energy's retail licence of an obligation to make a payment of the prescribed amount to a customer if there has been a wrongful disconnection.
- (v) Section 40B(1A) of the Act which imposes a maximum payment as being the prescribed capped amount, if the relevant customer does not notify the retailer of the disconnection within 14 days after the disconnection.
- (vi) Section 40B(5)(b) provided, after 1 January 2016, that the prescribed capped amount was \$3,500.00.

(b) Lumo Energy's electricity retail licence:

- (i) Clause 7.1 of the licence requires Lumo 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 Energy Retail Code.
- (ii) Clause 7.3 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.

- (iii) Clause 7.4 requires Lumo Energy to comply with the terms and conditions of any contract for the sale of electricity with a relevant customer.
- (c) Lumo Energy's market retail contract with Customer C, established on 8 October 2014, that contained the following requirements:
 - (i) Clause 4(a) which states that "[Lumo Energy] also agree to meet other obligations set out in this contract and to comply with the Regulatory Requirements."
 - (ii) Clause 14.1(e) which states that "[s]ubject to [Lumo Energy] satisfying the requirements in the Regulatory Requirements, [Lumo Energy] may arrange for the disconnection of your premises if – [Lumo Energy] are otherwise entitled or required to do so under the Regulatory Requirements or by law."
 - (iii) Clause 25 which sets out a dictionary for the contract which defines "Regulatory Requirements" to include in Victoria, the Energy Retail Code published by the Essential Services Commission of Victoria.
- (d) The code:
 - (i) Clause 118 of the code which applies to both standard retail contracts and to market retail contracts. Sub-clause (1) provides that if a customer requests a retailer to arrange for disconnection of the customer's premises, the retailer must use its best endeavours to arrange for:
 - (A) disconnection in accordance with the customer's request;
 - (B) a meter reading;
 - (C) if applicable, the preparation and issue of a final bill for the premises; and
 - (D) where a customer can be disconnected by disconnecting the customer's premises remotely and the retailer believes it can do so safely, the retailer must arrange for disconnection of the customer's premises within two hours of the customer's request, unless the customer has requested disconnection at a scheduled time.

31. Lumo Energy's obligations are discussed further below in the reasons.

Decision

32. Lumo Energy is not in breach of a condition of its electricity retail licence, deemed into Lumo Energy's electricity retail licence by section 40B of the Act (the deemed licence condition).
33. Lumo Energy disconnected the supply of electricity to Customer C's premises at 7:27am on 13 October 2016.
34. Prior to disconnecting the supply of electricity to Customer C's premises, on 5 October 2016 Customer C called Lumo Energy to request or arrange for the supply of electricity to his premises to be disconnected.
35. The disconnection of the supply of electricity to Customer C's premises by Lumo Energy on 13 October 2016 was in accordance with Customer C's request.
36. The disconnection was in compliance with the requirements of clause 118 of the code and clause 14.1(e) of the contract between Lumo Energy and Customer C.
37. The disconnection was therefore in accordance with the deemed licence condition.
38. The supply of electricity to Customer C's premises was not wrongfully disconnected.
39. Lumo Energy was not obliged to make any payment to Customer C under section 40B of the Act.

Reasons

40. Lumo Energy's electricity retail licence requires that:
- (a) Lumo Energy not enter into a contract for the sale of electricity with a relevant customer unless the terms and conditions of the contract expressly deal with each matter which is the subject of a term or condition of the code (clause 7.1); and
 - (b) each term or condition of Lumo Energy's contract for the sale of electricity to a relevant customer must not be inconsistent with the terms or conditions of the code (clause 7.3); and
 - (c) Lumo Energy must comply with the terms and conditions of any contract for the sale of electricity with a relevant customer (clause 7.4).
41. The deemed licence condition requires Lumo Energy to make a prescribed payment to a customer as soon as practicable after the supply of electricity to the customer's premises is reconnected where it:
- (a) disconnects the supply of electricity to the premises of that customer; and
 - (b) fails to comply with the terms and conditions of the contract specifying the circumstances in which the supply of electricity to those premises may be disconnected.
42. The relevant contract between Lumo Energy and Customer C was a market contract. The terms and conditions of that market contract expressly required Lumo Energy to comply with the code (see clauses 4(a) and 14.1(e)).
43. Clause 14 of Lumo Energy's contract with Customer C specifies the circumstances in which the supply of electricity to Customer C's premises may be disconnected. Importantly, clause 14.1(e) of the contract expressly contemplates compliance with the provisions of the code.

Clause 118(1) of the code – Did Lumo Energy receive a request for disconnection?

44. Clause 118 of the code deals with disconnection of electricity supply in accordance with a request from a customer.
45. The extracts from the telephone call between Customer C and Lumo Energy on 5 October 2016 (as set out at paragraph 18 above) make clear the following matters:

- (a) The context for Customer C's call to Lumo Energy was in response to advice from Lumo Energy that Customer C's contract with Lumo Energy was going to end on 6 October 2016 and Customer C wanted to terminate his account and relationship with Lumo Energy;
 - (b) Customer C told Lumo Energy that nobody would be living at the premises after 6 October 2016;
 - (c) Customer C was told on three separate occasions by the first Lumo Energy representative that the power at Customer C's premises would be disconnected and on each occasion Customer C expressly confirmed that was "right" or "correct";
 - (d) Customer C was told that his call was being transferred to the relevant department and placed on hold;
 - (e) The second Lumo Energy representative made a mistake and said to Customer C that the distributor would only do a final meter reading and leave the power on;
 - (f) In response to that mistaken comment by the second Lumo Energy representative, Customer C said "*I thought I was arranging disconnection.*"
46. It is clear from this telephone call that Customer C's intention was to end his relationship with Lumo Energy and to disconnect the supply of electricity to his premises. He was told on three occasions that the power to his premises would be disconnected and Customer C confirmed that was what he wanted by saying "that's right" or "correct". Customer C did not say anything to the effect "No I want the power to be left on or connected." There is nothing at any time during Customer C's call to Lumo Energy that would suggest that he either wanted the power to his premises left on or that Lumo Energy should not disconnect the supply of electricity to his premises.
47. Further, Customer C's response to the mistaken statement by the second Lumo Energy representative is also instructive and telling. Customer C expressly said – "*I thought I was arranging disconnection.*"
48. Considered in context, it is clear that Customer C called Lumo Energy to terminate his relationship with Lumo Energy by arranging a final meter reading, a final bill and for the power to his premises to be disconnected. In making the call and by his responses to the questions put to him, Customer C requested Lumo Energy to disconnect the supply of electricity to his premises.
49. Accordingly, Lumo Energy has demonstrated that it complied with the requirements of clause 118(1) of the code in arranging for the disconnection of the electricity supply to Customer C's premises in accordance with Customer C's request.

50. Lumo Energy complied with clause 14.1(e) of its contract with Customer C which specified the circumstances in which the supply of electricity to Customer C's premises may be disconnected.
51. The disconnection of the supply of electricity to Customer C's premises on 13 October 2016 was not wrongful.
52. As a result, Lumo Energy was not required to make any payment under section 40B of the Act.

Other observations

53. Given the decision as set out above it is not necessary for the commission to deal with Lumo Energy's further submission, referring to the commission's Operating Procedure for Wrongful Disconnection, that the disconnection of electricity supply to Customer C's premises did not cause "disruption to the household" and was not "unfair" because Customer C's premises were vacant after 6 October 2016.