

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 3/08/2020 12:29:10 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: VID514/2020
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
SUMO POWER PTY LTD
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 4/08/2020 4:10:41 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Concise Statement



No. VID of 2020

Federal Court of Australia

District Registry: Victoria

Division: General Division

Australian Competition and Consumer Commission

Applicant

Sumo Power Pty Ltd (ACN 601 199 151)

Respondent

IMPORTANT FACTS GIVING RISE TO THE CLAIM

Introduction

1. The Applicant (**ACCC**) alleges that the Respondent (**Sumo**) made false or misleading representations to residential consumers in Victoria in relation to the supply, possible supply or promotion of electricity retail services in contravention of the *Australian Consumer Law (ACL)*, Schedule 2 to the *Competition and Consumer Act 2010 (Cth) (CCA)*. In essence, the ACCC alleges that from at least 4 June 2018 to at least 31 December 2018 (the **Relevant Period**), Sumo misled consumers about prices for its services through an undisclosed predetermined pricing strategy, which involved signing up new customers to electricity plans offering low rates and large discounts and then materially increasing rates a short time later. Sumo also misled consumers with respect to the affiliation of its agents who made unsolicited sales calls to consumers, and the reasons for its rate increases.

Sumo's method of organising its customer base and pricing strategy

2. Sumo conducts a business providing electricity retail services to consumers through the offering of various "plans". Each plan has a tariff (e.g. single rate, time of use) with rates for each tariff (**Plan(s)**).
3. From about October 2016, Sumo determined the electricity rates charged to residential customers using a 'book system' whereby Sumo allocated customers to front book (**FB**); (from 2017) mid book (**MB**); or back book (**BB**) (the **Book System**). Under the Book System, customers who had entered a contract for the same Plan with an identical tariff could be required to pay different rates for each tariff depending on the book to which Sumo allocated

Filed on behalf of	AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, Applicant		
Prepared by	John Fogarty		
Law firm	DLA Piper		
Tel	(03) 9274 5080	Fax	(03) 9274 5111
Email	john.fogarty@dlapiper.com		
Address for service	Level 21, 140 William Street, MELBOURNE VIC 3000		

them. Customers allocated to FB paid the lowest rates and provided low, nil or negative profit margins to Sumo. Customers allocated to MB and BB paid significantly higher rates and provided greater profit margins to Sumo.

4. Sumo had an undisclosed predetermined pricing strategy (the **Acquisition Pricing Strategy**) by which Sumo: (a) offered cheap, low margin FB rates to consumers to entice them to switch to contracting with Sumo; (b) allocated those new customers to FB; and (c) then periodically migrated certain customers from FB to MB or MB to BB (**Book Migrations**) with the effect of increasing the rates they paid. The Acquisition Pricing Strategy was designed to drive sales volume, grow market share and then gain profit margin. Prior to the Relevant Period, Sumo routinely undertook Book Migrations in at least January 2017, December 2017 and April 2018. In addition to the Book Migrations, Sumo also periodically increased the rates within each book.

Sumo's Cheap Price Offer Campaign and Marketing Agents

5. In accordance with the Acquisition Pricing Strategy, during the Relevant Period, Sumo undertook a campaign to promote and sell "pay on time discount plans" to residential electricity consumers in Victoria involving (a) low rates and (b) discounts of up to 43% off those rates (depending on the Plan and area) if the customer paid on time (the **Cheap Price Offer**). Further, from at least the time of the campaign, Sumo planned to or knew that it was likely to apply a Book Migration from FB to MB during the Relevant Period for FB customers who had received at least 1 to 3 monthly bills from Sumo (**the Planned Book Migration**). The Planned Book Migration would have the effect of materially increasing the rates charged to the customer and ultimately the price paid by the customer even after applying any pay on time discount. Sumo proposed the Planned Book Migration independently of any changes in wholesale energy costs. At all material times, the Planned Book Migration was undisclosed to consumers.
6. During the Relevant Period, through the campaign referred to in the preceding paragraph, Sumo engaged at least four companies (the **Marketing Agents**) to make unsolicited outbound sales calls to consumers on behalf of Sumo in order to entice consumers to switch to an energy retail contract with Sumo. Sumo entered into agreements with the Marketing Agents and provided them with Plan and pricing information, campaign briefs, approved scripts and gave direction in relation to marketing and selling the Cheap Price Offer. Sumo paid the Marketing Agents commission fees for each new electricity customer contracted.
7. Sumo's approved scripts instructed the Marketing Agents to (among other things): (a) greet the consumer on the basis that, "We are an energy consultancy ... I am calling to offer you a free no obligation product comparison on your energy bill"; (b) introduce Sumo's offers by promoting "X% discount off the electricity usage charges if you pay on time, for 12 months"; (c) read out Sumo's current rates; (d) inform the consumer in the course of arranging transfer

from his or her existing electricity retailer to Sumo that, “You will receive a x% discount off your electricity usage charges for 12 months, when you pay on time...”.

Conduct of the Marketing Calls

8. In the Relevant Period, at the direction of and/or on behalf of Sumo, the Marketing Agents made unsolicited sales calls to residential electricity consumers in Victoria (the **Marketing Calls**), making the Cheap Price Offer to those consumers.
9. During the Marketing Calls, the Marketing Agents made the statements identified in paragraph 7(a) above (or words to the same effect) and/or said words to the following effect in relation to their role, including: “we are an online bill comparison service”; “we are a comparison team”; “we are energy experts”; or “I am not calling you from an electricity company”.
10. Further, during the Marketing Calls, the Marketing Agents made the statements identified in paragraph 7(b) – (d) above (or words to the same effect) and/or said words to the following effect, including: “I’m calling to inform you that you will be getting [x%] discount off your next electricity bill”; “you are eligible to receive [x%] discount on your electricity consumption”; “we are offering you [x%] discount on your energy usage”; or “you are entitled to get [x%] discount on your electricity bills under the same supplier”.
11. During the Marketing Calls, the Marketing Agents did not disclose the Acquisition Pricing Strategy or the Planned Book Migration.
12. Following the Marketing Calls, new customers were switched to Sumo and were sent an “offer summary” document containing the Cheap Price Offer, including the rates, the pay on time discount and the duration as “12 Month Energy Plan”. The “offer summary” did not disclose the Acquisition Pricing Strategy or the Planned Book Migration.

Sumo’s Cheap Price Offer and Book Migration

13. During the Relevant Period, Sumo entered into contracts with a number (known to Sumo but not the ACCC) of residential electricity consumers in Victoria to whom it had made the Cheap Price Offer.
14. In about November 2018, Sumo implemented the Planned Book Migration for a number (known to Sumo but not the ACCC) of customers in Victoria who had received at least 1-3 (monthly) bills from Sumo. The Planned Book Migration was authorised by Sumo’s then Chief Operating Officer. This resulted in rate increases for these customers ranging from approximately 30% to 46% and substantially eroded or eliminated the benefit of any pay on time discount.
15. Before the Planned Book Migration and in anticipation of it, Sumo sent a letter to customers in or about October 2018 and published a statement on its website titled “Why have prices changed?” (the **Price Change Communications**). In the Price Change Communications,

Sumo attributed price increases to generation costs caused by factors such as climate change, the closure of Hazelwood power station, the cost of upgrading networks and the fees Sumo must pay to distributors (**Wholesale Energy Cost Factors**). None of the Price Change Communications disclosed Sumo's Acquisition Pricing Strategy or the Planned Book Migration.

RELIEF SOUGHT FROM THE COURT

16. The ACCC seeks the relief sought in the accompanying Originating Application.

PRIMARY GROUNDS FOR THE RELIEF SOUGHT

17. The conduct of the Marketing Agents set out above was engaged in or on behalf of Sumo within the scope of those Marketing Agents' actual or apparent authority and/or at the direction of or with the consent of Sumo and, by reason of s 139B(2) of the CCA, the Marketing Agents' conduct is also the conduct of Sumo.
18. By reason of the matters in paragraphs 6 to 8, 10, 11 and/or 12, Sumo represented to consumers in trade or commerce that, if they accepted the Cheap Price Offer, Sumo would maintain or not materially increase the rates in the Cheap Price Offer for a period of approximately 12 months (the **Cheap Offer Representation**).
19. The Cheap Offer Representation was false, misleading or deceptive or likely to mislead or deceive in that, by reason of the undisclosed Acquisition Pricing Strategy and Planned Book Migration, Sumo in fact planned to and did, during the Relevant Period, materially increase the rates for customers who had accepted the Cheap Price Offer and had received at least 1 to 3 (monthly) bills.
20. To the extent that the Cheap Offer Representation was a representation as to a future matter, the ACCC relies on s 4 of the ACL and alleges that by reason of the existence of the Acquisition Pricing Strategy and Planned Book Migration, Sumo did not have reasonable grounds for making it.
21. Further, by reason of the matters in paragraphs 6 to 8, 10, 11 and/or 12, Sumo represented to consumers in trade or commerce that, if they accepted the Cheap Price Offer, Sumo would provide the customer with the benefit of the particular "pay on time discount" off their quoted electricity usage charges for a period of approximately 12 months or that the benefit would not substantially change (the **Discount Representation**).
22. The Discount Representation was false, misleading or deceptive or likely to mislead or deceive in that, by reason of the undisclosed Acquisition Pricing Strategy and Planned Book Migration, Sumo planned to and did, during the Relevant Period, increase the rates charged to customers who accepted the Cheap Price Offer and had received at least 1 to 3 (monthly) bills such that the benefit of the discount off the quoted electricity usage charges would be and was substantially eroded or eliminated.

23. To the extent that the Discount Representation was a representation as to a future matter, the ACCC relies on s 4 of the ACL and alleges that by reason of the existence of the Acquisition Pricing Strategy and Planned Book Migration, Sumo did not have reasonable grounds for making it.
24. By reason of the matters in paragraphs 6 to 9, the Marketing Agents represented to consumers, in trade or commerce, that they were:
 - (a) from an independent company that was not affiliated with Sumo;
 - (b) affiliated with an independent energy consultancy; and/or
 - (c) engaging in services of independent price comparison,(together, the **Affiliation Representations**).
25. Each of the Affiliation Representations was false, misleading or deceptive or likely to mislead or deceive in that the Marketing Agents were:
 - (a) from a company engaged by Sumo to make the Marketing Calls on behalf of Sumo and received commission fees for new customers contracted;
 - (b) not affiliated with an independent energy consultancy; and/or
 - (c) not engaging in services of independent pricing comparison.
26. By reason of the Price Change Communications referred to in paragraph 15, Sumo represented in trade or commerce to consumers that the price increase to occur during the Relevant Period was solely attributable to the Wholesale Energy Cost Factors (the **Price Change Representation**).
27. The Price Change Representation was false, misleading or deceptive or likely to mislead or deceive in that the price increase to occur during the Relevant Period was not solely attributable to the Wholesale Energy Cost Factors (if they were factors at all), but was attributable to the Acquisition Pricing Strategy and Planned Book Migration.
28. **Cheap Offer Representation and Discount Representation:** By reason of the matters in paragraphs 4, 5 and 17 to 23, Sumo has contravened ss 18, 29(1)(g) and/or 29(1)(i) of the ACL.
29. **Affiliation Representations:** By reason of the matters in paragraphs 17, 24 and 25, Sumo has contravened ss 18, 29(1)(g) and/or 29(1)(h) of the ACL.
30. **Price Change Representation:** By reason of the matters in paragraphs 4, 5, 11, 12, 17, 26 and 27, Sumo has contravened ss 18 and/or 29(1)(i) of the ACL.

THE ALLEGED HARM SUFFERED BY CONSUMERS

31. Electricity is an essential service. The conduct is likely to have misled consumers about how much they would be required to pay for their electricity and the benefit of pay on time

discounts, leading them to switch to Sumo's Plans when their existing plan may have been preferred, or a cheaper plan was otherwise available elsewhere. Consumers were also likely to have been convinced to switch by a recommendation from a purported objective independent consultant rather than from a Sumo Marketing Agent. The conduct prevented Sumo's competitors from competing for the supply of electricity on their merits.

Certificate of lawyer

I, John William Fogarty, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 3 August 2020

A handwritten signature in black ink, appearing to read 'JWF', is positioned above a horizontal dotted line.

Signed by John William Fogarty

Lawyer for the Applicant