

ENFORCEABLE UNDERTAKING

ESSENTIAL SERVICES COMMISSION ACT 2001

Undertaking to the Essential Services Commission under section 54ZD of the *Essential Services Commission Act 2001* (Vic)

by

Sumo Power Pty Ltd (ACN 601 199 151)

and

Sumo Gas Pty Ltd (ACN 606 951 713)

1. Person giving this Undertaking

1.1 This Undertaking is given by Sumo Power Pty Ltd (ACN 601 199 151) (**Sumo Power**) and Sumo Gas Pty Ltd (ACN 606 951 713) (**Sumo Gas**) (collectively, **Sumo**) to the Essential Services Commission (**Commission**), pursuant to section 54ZD of the Essential Services Commission Act (**ESC Act**).

2. Background

- 2.1 Sumo Power and Sumo Gas hold an electricity retail licence and gas retail licence, respectively.
- 2.2 On 13 December 2023 the Commission filed a proceeding in the Supreme Court of Victoria against Sumo in relation to alleged contraventions of the prohibition on 'door-to-door marketing' and explicit informed consent requirements for the sale of electricity and gas (**S ECI 2023 05897**).
- 2.3 Sumo admits the alleged contraventions in S ECI 2023 05897.
- 2.4 On 28 February 2024 the Commission filed a proceeding in the Supreme Court of Victoria against Sumo in relation to alleged contraventions of the best offer messaging requirements in the Energy Retail Code (**ERC**) and the Energy Retail Code of Practice (**ERCOP**) (**S ECI 2024 00858**).
- 2.5 Sumo admits the various of the alleged contraventions in S ECI 2024 00858.
- 2.6 This Undertaking is given by Sumo as part of the agreed resolution of the matters the subject of proceedings ECI 2023 05897 and S ECI 2024 00858 (**the Proceedings**).
- 2.7 The parties have agreed to jointly propose to the Court that the following orders be made by consent:

- (a) payment by Sumo of a civil penalty amount totaling \$10,000,000 in settlement of the Proceedings to be paid by way of instalments;
- (b) contravention orders and declarations for contraventions of civil penalty requirements of applicable energy legislation and provisions of the ERCOP;
- (c) adverse publicity orders;
- (d) establishment of a process for the verification and monitoring of best offer messaging requirements; and
- (e) injunctions; and
- (f) payment of \$200,000 by way of contribution towards the Commission's legal costs of, and incidental to, the Proceedings,

(together the **Court Orders**)

2.8 Sumo also agreed to provide this Undertaking which requires:

- (a) the implementation of a compliance management system for Victoria's Energy Laws; and
- (b) a donation of \$800,000 to the Consumer Action Law Centre (**CALC**) for the purpose of:
 - (i) conducting a consumer education and awareness campaign in respect of Victoria's energy laws especially the laws admitted to have been contravened in the Proceedings, to be determined by agreement between the Commission and CALC; and
 - (ii) providing a call centre service for the purpose of improving Victorian energy consumers' understanding of their rights under Victorian energy laws, and to identify evidence of retailer contraventions of the relevant regulatory obligations and consumer protections.

CALC is an independent, not-for-profit consumer organisation with expertise in consumer protection law, policy and direct knowledge of people's experience of modern markets in Victoria.

CALC is experienced in running consumer education and awareness campaigns, and providing call centre services for consumers. CALC's expertise in identifying significant or systemic market issues affecting consumers has been recognised by the Commonwealth Government appointing CALC as a "designated complainant" giving it a

higher standing with the Australian Competition and Consumer Commission (**ACCC**) in respect of significant or systemic consumer complaints.

3. Commencement and Term of Undertaking

3.1 Save for paragraph 4.1 below, this Undertaking comes into effect when

- (a) the Undertaking has been executed by each of Sumo Power, Sumo Gas and the Commission; and
- (b) the Court makes final orders in respect of the Proceedings (the **Commencement Date**).

3.2 Paragraph 4.1 of this Undertaking takes effect when the Undertaking has been executed by each of Sumo Power, Sumo Gas and the Commission.

3.3 The Undertaking remains in effect for a period of five years from the Commencement Date (**Term**), unless varied by agreement in writing by Sumo and the Commission.

4. The Principal Undertakings

4.1 Sumo undertakes to make a monetary donation of \$800,000 to CALC, to be paid directly to CALC within 30 days of the requirements of paragraph 3.1(a) of this undertaking being satisfied.

4.2 Sumo undertakes, at its own expense, to:

- (a) by the later of 30 days after the Commencement Date and 31 January 2025, implement a compliance management system in accordance with the requirements set out in Annexure A to this Undertaking (**Compliance Management System**);
- (b) maintain and review the Compliance Management System for a period of five years from the Commencement Date; and
- (c) provide copies of any documents described in Annexure A when requested by the Commission, within 10 days of such request.

5. Compliance with Undertaking

5.1 In the event that Sumo has reason to believe that it has actually or potentially not complied with a requirement of this Undertaking, it will report that actual or potential non-compliance to the Commission within ten (10) business days on identifying the circumstances leading to the reason for the belief. The report must be in writing and emailed to Compliance.Reporting@esc.vic.gov.au.

5.2 Sumo will provide any further information or documents reasonably requested by the Commission concerning any potential or actual non-compliance reported to the Commission within a reasonable time as requested by the Commission, which time will not be less than 30 days.

6. Monitoring of Undertaking

6.1 From the Commencement Date and for the Term of the Undertaking, at six-month intervals for the first 18 months then annually, Sumo will prepare a report in writing to the Commission on progress made toward implementing the terms of the Undertaking.

6.2 Sumo undertakes to produce any records in relation to any actions, steps, or measures it is required to take under this Undertaking to the Commission, within 30 business days, if requested during the Term of the Undertaking or within seven years following the conclusion of the Term of the Undertaking.

6.3 Within 60 days after the conclusion of the Term of the Undertaking, Sumo undertakes to provide a final report in writing to the Commission on its implementation of, and/or compliance with, the terms of the undertaking.

7. Acknowledgements and Publication of Undertaking including additional undertakings

7.1 Sumo acknowledges that:

- (a) the Commission will make this Undertaking publicly available by publishing it on its website and in its online Register of Enforcement Action;
- (b) the Commission may from time to time, make public reference to this Undertaking, including in news media statements and Commission publications; and
- (c) this Undertaking in no way limits or affects any rights or remedies available to any other person arising from the conduct.

7.2 Sumo will publish a copy of the Undertaking on a website maintained by Sumo for the Term of the Undertaking.

7.3 Sumo undertakes to publish a notice summarising the purpose and key terms of the Undertaking, to be approved by the Commission, prominently on a website maintained by Sumo for the Term of the Undertaking or such other period agreed by the Commission in writing.

7.4 Sumo acknowledges it must pay all its own costs in relation to this Undertaking including any costs related to implementation of the Compliance Improvement Action Plan.

Executed as an Undertaking

Executed for and on behalf of Sumo Power Pty Ltd (ACN 601 199 151) in accordance with section 127 of the *Corporations Act 2001* (Cth):



Signature of director

Kel Fitzalan

Name of director

30 October 2024

Date

Executed for and on behalf of Sumo Gas Pty Ltd (ACN 606 951 713) in accordance with section 127 of the *Corporations Act 2001* (Cth):



Signature of director

Kel Fitzalan

Name of director

30 October 2024

Date

Accepted by the Essential Services Commission pursuant to section 54ZD of the *Essential Services Commission Act 2001* (Vic) and signed on behalf of the Commission:



Nathan Zhivov

Executive Director Energy Division

31 October 2024

Date

ANNEXURE A

COMPLIANCE MANAGEMENT SYSTEM IN ACCORDANCE WITH AUSTRALIAN STANDARD ISO 37301:2023 (COMPLIANCE PROGRAM)

Sumo Power Pty Ltd (ACN 601 199 151) and Sumo Gas Pty Ltd (ACN 606 951 713) (referred to as **Sumo** in this Annexure) will establish a compliance program, to ensure compliance with the Energy Retail Code of Practice (**ERCOP**), the *Electricity Industry Act 2000* (Vic) (**EIA**) (for Sumo Power Pty Ltd, including the conditions of its licence granted under that Act) and the *Gas Industry Act 2001* (Vic) (**GIA**) (for Sumo Gas Pty Ltd, including the conditions of its licence granted under that Act) (together, **Victoria's Energy Laws**) (**Compliance Program**).

The Compliance Program must comply with the Australian Standard ISO 37301:2023 (or International Standard 37301:2021) (**ISO 37301:2023**), and each of the below requirements in this Annexure. To the extent that the below requirements are inconsistent with ISO 37301:2023, the requirements in ISO 37301:2023 prevail.

Appointments:

- 1** Within 30 days of the date of the final Orders of the Court in proceeding no SECI 2023 05897 and S ECI 2024 00858 (**the Proceedings**) (**Court Orders**), Sumo will appoint a director or senior manager with suitable qualifications or experience in corporate compliance as responsible for ensuring the Compliance Program is effectively designed, implemented and maintained (**Compliance Officer**).
- 2** By the later of 30 days of the Court Orders coming into effect or 1 February 2025, Sumo will appoint a suitably qualified, external compliance professional with expertise in Victorian energy laws (**Compliance Advisor**).

Risk Assessment

- 3** Sumo will instruct the Compliance Advisor to conduct a risk assessment (an external assurance process) applying the methodology described in paragraph 4 within 60 days of being appointed as the Compliance Advisor (**Risk Assessment**) and to provide to Sumo a written report outlining the findings (**Risk Assessment Report**) to Sumo within 60 days of conducting the Risk Assessment.
- 4** Sumo will use its best endeavours to ensure that the Risk Assessment Report:
 - (a) identifies the potential deficiencies in Sumo's compliance systems which may create a material risk of Sumo being in non-compliance with Victoria's Energy Laws, taking

into account but not limited to areas which are of the nature of those the subject of Proceedings;

- (b) qualitatively assesses the likelihood of these risks occurring;
- (c) identifies where there may be gaps in Sumo's existing compliance strategy procedures for managing these risks; and
- (d) provides recommendations for any actions (including, but not limited to, controls and processes) to be taken by Sumo based on the Risk Assessment.

Compliance Policy

- 5 Sumo will, within 60 days of the date of the Court Orders, issue a policy statement outlining Sumo's commitment to compliance with the ERCOP, the EIA (for Sumo Power) and the GIA (for Sumo Gas) (**Compliance Policy**).
- 6 Sumo will ensure that the Compliance Policy:
 - (a) contains a statement of commitment to compliance with Victoria's Energy Laws ;
 - (b) contains an outline of how the commitment to compliance with Victoria's Energy Laws will be realised within Sumo, including appropriate key performance indicators for Sumo's commitment to compliance;
 - (c) contains a requirement for all staff of Sumo to report any Compliance Program related issues and Victoria's Energy Laws compliance concerns to the Compliance Officer by telephone, email or in person.

Staff Training and Induction

- 7 Sumo will ensure that the Compliance Program includes a requirement for regular (at least annual) training for all directors, officers, employees, representatives and agents of Sumo (**Staff Training**), whose duties could result in them being concerned with conduct that may contravene Victoria's Energy Laws.
- 8 Sumo will ensure that the Compliance Program includes a requirement that awareness of Sumo's obligations under Victoria's Energy Laws forms part of the induction (**Induction**) of all new directors, officers, employees, representatives and agents whose duties could result in them being concerned with conduct that may contravene Victoria's Energy Laws.
- 9 Sumo will ensure that the content of the Staff Training and Induction is reviewed and settled by a suitably qualified compliance professional or lawyer with expertise in Victoria's Energy Laws.

Reports to Sumo Board/Leadership Team

- 10 Sumo will ensure that the Compliance Officer reports to the Sumo Board:
- (a) initially, in relation to the establishment of the Compliance Program and Risk Assessment Report consistent with ISO 37301:2023; and
 - (b) thereafter, every 12 months on the continuing effectiveness of the Compliance Program.

Compliance Review

- 11 Sumo will cause an annual review of the Compliance Program (**Review**) to be carried out in accordance with each of the following requirements:
- (a) Scope of Review – the Review should applying the methodology described in paragraph 4 provide Sumo with:
 - (i) a verification that Sumo has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1, and 5 to 10 of this Compliance Program; and
 - (ii) the Compliance Reports detailed at paragraph 12 of the Compliance Program.
 - (b) Sumo will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in Victoria’s Energy Laws (**Reviewer**). The Reviewer will qualify as independent if they:
 - (i) did not design or implement the Compliance Program;
 - (ii) is not a present or past staff member or director of Sumo;
 - (iii) has not acted and does not act for, and does not consult and has not consulted to, Sumo in any matters relating to Victoria’s Energy Laws, other than performing the Risk Assessment or Reviews; and
 - (iv) has no significant shareholding or other interests in Sumo.
 - (c) Evidence – Sumo will use its best endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information in Sumo’s possession or control, including without limitation:
 - (i) the ability to make enquiries of any officers, employees, representatives and agents of Sumo;

- (ii) documents relating to the Risk Assessment, including the Risk Assessment Report;
 - (iii) documents relating to Sumo's Compliance Program, including documents relevant to Sumo's Compliance Policy, Complaints Handling System, and Staff Training and Induction; and
 - (iv) any reports made by the Compliance Officer to Sumo's Risk Management Committee regarding Sumo's Compliance Program.
- (d) Sumo will ensure that a Review is completed within one year of the date of the Court Orders, and that a subsequent Review is completed annually for 2 years.

Compliance Report

12 Sumo will use its best endeavours to ensure that within 30 days of the completion of the Review, the Reviewer includes the following findings of the Review in a report to the Compliance Officer of Sumo (**Compliance Report**):

- (a) whether the Compliance Program of Sumo includes all the elements detailed in paragraphs 1, and 2 to 10 of the Compliance Program, and Risk Assessment Report or the previous Compliance Report as the case may be, in particular, whether the Compliance Program addresses the recommendations contained in the Risk Assessment Report or previous Compliance Report as the case may be. Where it does not, address the reasons why recommendations are not addressed and, in addition, what elements need to be included or further developed;
- (b) whether the Compliance Program adequately covers areas identified in the Risk Assessment or previous Compliance Report as the case may be, and if not, what needs to be further addressed;
- (c) whether the implementation of the Staff Training and Induction is materially consistent with the requirements of this Compliance Management System, and if not, what aspects need to be further developed;
- (d) whether there are any potential deficiencies in Sumo's Compliance Program that may create a material risk of Sumo being in non-compliance with Victoria's energy laws (**Material Risk**), and if so, recommendations for addressing the Material Risk.

Sumo's Response to Compliance Report

- 13** Sumo will ensure that the Compliance Officer, within 21 days of receiving the Compliance Report:
- (a) provides the Compliance Report to the Sumo Board; and
 - (b) where a Material Risk has been identified by the Reviewer in the Compliance Report, provides a report to the Sumo Board identifying how Sumo can implement any recommendations made by the Reviewer in the Compliance Report to address the Material Risk.
- 14** Sumo will work with its board to consider any recommendations made by the Reviewer in the Compliance Report to address a Material Risk and will use its best endeavours to implement reasonable measures to address a Material Risk to the extent practicable.