

Compensation for damage and loss following voltage variation October 2014

Background

EWOV receives and investigates complaints about claims for damage or loss following supply quality issues, often relating to voltage variation events. Sometimes complaints relate to low voltage supply which can cause damage through motor burnout, however voltage variation complaints are more commonly about damage and loss caused by power surges. This statement outlines EWOV's view of what is fair and reasonable in situations where there has been a claim following unauthorised voltage variation.

Considerations during an EWOV investigation

Each complaint is reviewed on its individual merits and its outcome will depend on the circumstances of the complaint. However, for complaints about damage or loss following a voltage variation event or events, EWOV will usually consider:

1. A timeline of events and the relevant facts
2. Laws and codes
3. Regulatory considerations and advice
4. Current good industry practice, past outcomes for similar investigated complaints and previous Binding Decisions
5. Electricity distributor policies and their application
6. Other relevant considerations

1. A timeline of events and the relevant facts

For this type of complaint it is important for EWOV to establish:

- Whether there has been any damage or loss experienced, and the value of the damage or loss.
- Substantiation of the damage or loss.¹
- The age and type of items included in the claim, and whether market valuation, depreciation or some other form of assessment is most relevant to establish value.²
- Whether the customer has any insurance, and whether the event is covered by the insurance, as well as the amount of any excess or increase to premiums as a result of a claim.
- Precautions or loss minimisation strategies and steps undertaken by the customer, both planned and implemented.³
- Whether the customer has been disadvantaged financially or has recovered money elsewhere.
- Whether the distributor accepts any liability or responsibility.

¹ The substantiation required may vary depending on the circumstances or claimed amount. Larger amounts normally require more robust substantiation.

² If an item was less than two years old, its lifespan has been significantly reduced or a customer has had limited use of an appliance then EWOV may, when all circumstances are considered, assess that replacement of "new-for-old" rather than "old-for-old" compensation is fair and reasonable.

³ For example, insurance, surge protection devices, a business risk mitigation plan or use of a generator. EWOV is more concerned with loss minimisation strategies actually implemented than whether customers have formal written business risk mitigation plans in place. In relation to unplanned events, use of a generator would not normally be expected for most customers.



- Precautions or loss minimisation strategies and steps undertaken by the distributor, both planned and implemented.⁴
- Whether there were any aspects of the event or events within the distributor's control and the actions of the distributor in response to the event or events – technical as well as customer service related.⁵
- If and how the distributor could have controlled the impact of the voltage variation through the design and maintenance of its network, including installation of protective devices, or whether the damage or loss is otherwise attributable to the distributor. Steps taken to limit the effect of commonly occurring, but unpredictable circumstances, such as wildlife incursion, falling tree branches and vehicle impact to infrastructure may be relevant. The vicinity of the customer's property to the incident may also be relevant.
- Whether the distributor has applied for and/or been granted a guaranteed service level payment exemption from the regulator.
- Any representations made by the distributor about the claim process or compensation, such as those made in a Customer Charter, terms and conditions of a contract or media statements, and whether the distributor has met those representations.
- The communication between the customer and the distributor regarding the event, damage and loss or claim so far,⁶ including whether the communication was customer or distributor driven/initiated. EWOV will consider whether, based on the communications with the distributor, it was reasonable for the customer to assume or expect that their claim would be paid or that submitting paperwork was a mere formality.
- Any relevant customer circumstances, including the impact on the individual customer and whether the damage or loss has caused financial or other hardship.
- Other relevant information depending on the facts of an individual complaint, as the above list is not exhaustive.

2. Laws and codes

EWOV expects customers and distributors to meet their legal and regulatory obligations. Obligations under laws and codes represent minimum standards. Consideration of what is fair and reasonable includes, but is not limited to the legal requirements.

There are a number of relevant laws and codes applicable to compensation complaints following damage or loss from unauthorised voltage variation including, but not limited to, the *Electricity Industry Guideline No. 11 – Voltage Variation Compensation (VVCG)*.

⁴ For example, appropriate contractual arrangements with transmission businesses. Some past Binding Decisions held the distributor responsible for losses arising from the actions of the transmission business' employees on the basis that the distributor had failed to put appropriate measures in place in its contract with the transmission business to mitigate the effects of such events. The Binding Decisions were upheld in the Supreme Court.

⁵ EWOV expects distributors to accept responsibility for their responses (which they can control) to external events (which they cannot control). This could include network design, installation of protective devices in line with best practice, information around restoration times available to customers and information provided regarding the claims process. EWOV may also consider whether the distributor could have offered additional assistance to the customer, such as help finding an appropriate assessor or repairer.

⁶ Communications with all distribution staff, including field officers, inspectors as well as customer service representatives.

Electricity specific laws and codes

Electricity distributors are required by the *Electricity Safety Act 1998* to design, construct, operate, maintain and decommission their networks to minimise hazards and risks to people's safety, or to minimise hazards and risk of damage to property. Distributors must minimise the hazards and risks arising from the supply network as far as practicable.⁷

In addition, the *Electricity Distribution Code (EDC)* contains obligations relating to quality of supply. Distributors are required to maintain nominal voltage at the point of supply⁸ as well as supplying electricity within specified allowable ranges.⁹ There is a requirement to control over voltage in accordance with the relevant standard.¹⁰ Distributors must compensate any person whose property is damaged due to an unauthorised voltage variation event (voltage outside the prescribed limits). Compensation is to be provided in accordance with the *VVCG*.¹¹ Compensation payable to a customer will be on an "old-for-old" basis, which will usually require payment of the current market value of any item.¹²

The principles underpinning the *VVCG* are efficient allocation of risk and good customer service, and the *VVCG* is to be considered independently of any other rights available to a customer.¹³ Under the *VVCG*, there is no obligation to compensate customers who use more than 160MWh in any year,¹⁴ or where, the amount claimed exceeds EWOV's Binding Decision monetary limit,¹⁵ to the extent of the excess.

Where a customer has provided the required substantiation and the amount claimed is under the threshold contained in the *VVCG*, distributors are required to pay the customer's claim. EWOV considers that a customer's repairer statements which reference damage caused by a power surge, or which have similar wording, will be sufficient proof that the damage was caused, or was likely to have been caused, by unauthorised voltage variation. Where a customer has incurred reasonable costs in substantiating a claim, EWOV expects these costs will be reimbursed to the customer, in line with the requirements in the *VVCG*.¹⁶

If a customer's claim is for an amount over the threshold, distributors are allowed to dispute a claim. When disputing a claim, the distributor must complete its own assessment of the damage to the

⁷ *Electricity Safety Act* s98

⁸ *EDC* cl 4.2.1

⁹ *EDC* cl 4.2.2

¹⁰ *EDC* cl 4.2.3

¹¹ *EDC* cl 4.2.7

¹² Where there is no direct comparison obtainable or where market value cannot be readily established, EWOV would consider available information or benchmarks in any fair and reasonable assessment. EWOV would expect a distributor to offer whatever is required to place the customer in the same position (or as close as possible to the same position) to that which existed prior to the unauthorised voltage variation event.

¹³ Clause 1 outlines the purpose – "This Guideline does not seek to codify existing law on how distributors may or may not be liable for damage due to unauthorised voltage variations. Instead, in paying compensation to a person in accordance with this guideline, a distributor gives effect to good customer service principles and achieves an efficient allocation of risk. It is these considerations which underpin this guideline and payment of compensation in accordance with it. A person's other rights in relation to an unauthorised voltage variation are not affected by this guideline."

¹⁴ *VVCG* cl 1.1.1

¹⁵ *VVCG* cl 1.2.1. The Binding Decision monetary limit is currently \$20,000

¹⁶ *VVCG* cl 2.4.2. Repairer or assessor costs associated with substantiating damage consistent with unauthorised voltage variation.

customer's property before it can determine the appropriate outcome.¹⁷ EWOV believes the purpose of this is to allow the distributor to ascertain whether the damage or loss being claimed was likely to have been caused by an unauthorised voltage variation event and to appropriately assess the validity of the claimed amount. The operation of the threshold does not mean that a distributor has an automatic right of rejection without conducting its own assessment, or that the distributor is automatically without any liability in a situation where the claimed amount is higher than the threshold.

The *VVCG* outlines the circumstances when a distributor is not obliged to pay compensation for unauthorised voltage variation damage.¹⁸ Neither the threshold, nor the cause¹⁹ of the unauthorised voltage variation, affect a distributor's obligation to compensate a customer. Where there is unauthorised voltage variation which has caused substantiated damage or loss, EWOV presumes that compensation will be payable unless the investigation clearly reveals that compensation should be reduced or excluded for some other reason.

"Reasonable precautions"

Both the *EDC* and the *VVCG* require business customers to take reasonable precautions to minimise the risk of damage or loss.²⁰ EWOV considers that the "reasonable precautions" required are scenario specific, and will depend on the circumstances of an individual complaint, including the nature and size of a particular business. However, generally a business may be able to demonstrate that it has taken reasonable precautions by:

- Having insurance, or having investigated whether insurance is available. EWOV's experience is that insurance covering business loss due to supply quality or reliability issues can be very expensive, or unavailable for certain businesses. Depending on the circumstances of the complaint, including availability or the amount of the insurance premium it may not be fair and reasonable to expect insurance coverage for voltage variation events, especially for smaller businesses.
- Implementing mitigation strategies to limit the amount of damage or loss. While a formal written business mitigation risk plan is preferable, it is not essential to demonstrate a business has taken reasonable precautions. This is because it is better to implement mitigation strategies in practice rather than having a formal plan which is not implemented during or after an event.

In relation to unplanned events, EWOV does not normally expect business customers to install a back-up power source or generator to minimise risk, but installation of a generator may be appropriate in a particular case.²¹ It may also be appropriate for a business to have surge protection devices installed.

Other relevant laws and codes

In addition to electricity specific laws and codes, there are other applicable laws which can attach liability to an electricity distributor following damage or loss caused by unauthorised voltage variation.

In the past the *Trade Practices Act 1974 (TPA)* offered protections to energy consumers. The *TPA* has been replaced by the *Competition and Consumer Act 2010* and the consumer protections have been

¹⁷ *VVCG* cl 2.4.1(e)

¹⁸ *VVCG* cl 2.5

¹⁹ including whether the event is within the control of the distributor.

²⁰ *EDC* cl 16(c), *VVCG* cl 2.5(b) and *ESC* explanatory memorandum dated 30 November 2004. There may also be similar or additional provisions in the distributor's deemed contract with the customer.

²¹ Depending on the circumstances, it may be fair and reasonable for a business customer to have arranged for installation of a generator to minimise loss during a planned interruption.



transferred to the *Australian Consumer Law (ACL)*.²² Similar to in the *TPA*, electricity and gas are defined as goods in the *ACL*.²³ Goods are required to be of acceptable quality and fit for purpose,²⁴ otherwise the supply of the goods will breach the statutory guarantees in the *ACL*. The cause of any unauthorised voltage variation may be immaterial to the question of liability if the electricity supplied is itself not of acceptable quality or fit for the purpose for which it is being supplied.

In addition to legislative protections, the common law may also be applicable, and there may be the potential for a claim to succeed under the principles of contract or negligence law. In order to establish liability a court may consider things such as:

- Whether damage actually occurred
- The link between any damage caused and the person or entity defending the case
- Whether it would have been reasonably foreseeable to the defendant that damage may occur
- Whether supply had been consistent with terms and conditions of the customer's contract (supply within the ranges allowed under the *EDC* or unauthorised voltage variation)

Similar considerations will be relevant when EWOV is assessing a fair and reasonable outcome.

3. Regulatory considerations and advice

EWOV has received informal advice from the Australian Energy Regulator (AER) indicating that:

- The cause of a voltage variation event, including whether the event is within the control of a distributor, is not relevant to the question of whether compensation is payable under the *VVCG*.
- The *VVCG* does not affect a person's rights to seek compensation under the common law or other relevant legislation.

In addition, EWOV has previously received advice from the Australian Competition and Consumer Commission regarding the provisions of the *TPA*, which suggested that:

- The *TPA* applied to the supply of electricity by virtue of the statutory contract and because electricity was included in the definition of "goods".
- The electricity in a "power surge" is unsuited to the powering of household appliances and has a tendency to cause damage to those appliances. The propensity of the electricity to cause considerable damage to household appliances will ordinarily deprive the supply of the requisite qualities for fitness for consumption.
- Electricity supply businesses subject to the *TPA* were likely to be liable for damage sustained by consumers in consequence of power surges, notwithstanding that the power surges were not referable to fault on the part of the suppliers. This was because the excessive voltage associated with power surges rendered that electricity as not fit for the purpose for which the electricity was usually acquired.

EWOV notes that the provisions in the *ACL* are similar to the provisions in the *TPA*. It makes sense that the new provisions relating to acceptable quality and fitness for purpose will still apply to the supply of electricity²⁵, and that past and current interpretation of the application of the consumer protections will

²² The *ACL* applies in Victoria under provisions of the *Australian Consumer Law and Fair Trading Act 2012*(Vic).

²³ *ACL* s2. Electricity and gas were also defined as goods in the *TPA*.

²⁴ *ACL* s54 (acceptable quality) and s55 (fitness for purpose)

²⁵ Regulations can be enacted to exclude electricity, gas and telecommunications from the statutory guarantees/protections (*ACL* s65), however there are currently no regulations in place.

be consistent. This could mean distributors have strict liability²⁶ for any damage or loss incurred due to unauthorised voltage variation under the ACL.

When assessing what is fair and reasonable, EWOV considers all available information. The two most recent pricing determinations from the Essential Services Commission (ESC) and AER incorporated increased funding to electricity distributors to cover anticipated additional compensation payouts to customers resulting from climate change and increases in the number, frequency and intensity of adverse weather events. EWOV may take these factors into consideration when assessing a fair and reasonable outcome for a compensation complaint.

4. Current good industry practice, past outcomes for similar investigated complaints and previous Binding Decisions

When assessing what is fair and reasonable in an individual complaint, EWOV expects the actions of an electricity distributor will be consistent with or exceed current good industry practice, as well as being consistent with appropriate past complaint outcomes and previous Binding Decisions. Other industry practice, particularly that of the water and/or telecommunications industries, may also be relevant.

EWOV's experience in dealing with these types of complaints indicates:

- Some distributors assess claims under the VVCG and then assess liability separately, which is consistent with EWOV's interpretation and approach. Often this means only the amount of the claim is disputed, rather than whether the claim should be paid. These complaints tend to resolve quickly.
- It is common for complaints to be resolved on the basis of joint responsibility/contribution²⁷ and a lower payment than the full claimed amount. Often cases are resolved without admission of liability by the distributor, and with the completion and signing of a release document.
- Where customers have insurance covering voltage variation events, complaints are often resolved by distributors paying the customer's excess and sometimes contributing to increased premiums resulting from the claim.
- Rather than solely considering liability, some water providers consider the nature of the event and whether the customer had any control. The water providers aim to maintain a positive ongoing relationship and often feel an obligation to assist their customers. This can mean significant offers are made to resolve complaints even where the provider does not admit liability or where some claimed amounts may not have been fully substantiated.
- There is quite often a customer service element, which may require financial recognition separate to the customer's claim.

A number of EWOV's past Binding Decisions relate to claims for compensation following supply quality or reliability issues. In most instances customers were awarded most of their claimed amount, however it was rare for a customer to be awarded the full amount claimed. Some Binding Decisions awarded a portion of the customer's claim, even where loss minimisation was limited or where customers had contributed to the circumstances. Most Binding Decisions also awarded financial recognition for customer service issues, sometimes reasonably significant amounts. EWOV considers past Binding Decisions in any assessment of what is fair and reasonable in the circumstances.

²⁶ Liability for damage without the need to prove negligence or fault.

²⁷ For example, a business customer may have been able to take additional precautions, but failed to do so.



5. Electricity distributor policies and application

Where distributor policies or Customer Charters make statements or representations as to how an electricity distributor will deal with compensation claims, EWOV will consider the application of those policies. EWOV expects that electricity distributors will adhere to any statements or representations made in their policies and charters. In addition, EWOV will consider any representations which may have been made to customers about whether their claim may be paid, either during the event, or afterwards. This may be through direct contact with individual customers, or through other channels, such as media statements. Where distribution staff have indicated to a customer that their claim is likely to be paid, or that submitting paperwork is merely a formality, this will generally add weight to the customer's position.

6. Other relevant considerations

EWOV considers any relevant customer circumstances, including whether the issue relates to domestic or business premises, if the customer is covered by insurance, the impact on the individual customer of the event and whether the customer can afford to cover the damage or loss without compensation or financial assistance.

When determining a fair and reasonable outcome, EWOV will also consider the actions of the customer, for example, the steps taken by a customer to minimise their loss or damage before, during and after an unauthorised voltage variation event.

Complaint resolution and outcomes

Where EWOV's investigation indicates that a distributor is not responsible for the damage or loss and has appropriately assessed the claim, EWOV will advise a customer that the claim should not be paid. However, EWOV's investigation may also indicate that it is fair and reasonable for the distributor to pay part of the customer's claim and/or financial recognition for customer service issues that impacted the customer. Where a payment is made, it is often appropriate for the customer to agree to completion and signing of a release document.

In situations where an electricity distributor is not able to demonstrate that it acted fairly and reasonably, EWOV may:

- Ask the distributor to pay all or part of the claimed amount.
- Ask the distributor to pay all or part of appropriate and reasonable expenses incurred by the customer to substantiate their claim, such as assessments by repairers.
- Ask the distributor to make any additional appropriate offers to resolve the complaint, which could include further recognition for customer service issues.