

## Compensation for damage and loss following voltage variation October 2020

### Background

EWOV receives and investigates complaints about claims for damage or loss following supply quality issues, such as voltage variation events.<sup>1</sup> 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 and past outcomes for similar complaints
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.
- Proof of the damage or loss.<sup>2</sup>
- 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<sup>3</sup>
- 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.<sup>4</sup>
- Whether the customer has been disadvantaged financially or has recovered money elsewhere.
- Whether the distributor accepts any liability or responsibility.

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<sup>1</sup> Typically, these relate to power surges or spikes in voltage, but sometimes can be about low voltage (for example, brownouts causing motor burnout).

<sup>2</sup> The proof required may vary depending on the circumstances or claimed amount. Larger amounts normally require more robust proof.

<sup>3</sup> EWOV may assess replacement of appliances on a "new-for-old" basis rather than an "old-for-old" basis where this is fair and reasonable in the circumstances. This can include where an item was less than two years old, its lifespan has been significantly reduced or a customer has had limited use of an appliance.

<sup>4</sup> For example, insurance, surge or other 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.<sup>5</sup>
- 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.<sup>6</sup>
- If and how the distributor could have controlled the impact of the voltage variation through the design and maintenance<sup>7</sup> 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,<sup>8</sup> 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. These obligations are minimum standards and are just one factor considered by EWOV when assessing a fair and reasonable outcome for an individual complaint. What is fair and reasonable will usually include, but is not limited to, relevant legal requirements.

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> For example, more frequent maintenance may be required in areas close to the sea where corrosion can be an issue (compared to inland parts of a distributor’s network).

<sup>8</sup> Communications with all distribution staff, including field officers, inspectors as well as customer service representatives.



There are a number of relevant laws and codes applicable to compensation complaints about damage or loss following unauthorised voltage variation. Even where a distributor may not be liable to pay compensation under one code or guideline, the distributor may still be required to pay under a different law. For example, while compensation may not be payable under *Electricity Industry Guideline No. 11 – Voltage Variation Compensation (Voltage Variation Guideline)*, a distributor may still be liable under the *Australian Consumer Law* or common law (contract or negligence).

#### Electricity-specific laws and codes

There are a number of laws and codes which apply specifically to the electricity sector, including the *Electricity Safety Act 1998 (Electricity Safety Act)*, the *Electricity Distribution Code* and the *Voltage Variation Guideline*.

#### *Electricity Safety Act*

Electricity distributors are required by the *Electricity Safety Act* 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.<sup>9</sup> This is an overarching obligation electricity distributors must meet, which is supported by more specific requirements in other laws and codes.

#### *Electricity Distribution Code*

The *Electricity Distribution Code* contains obligations relating to the quality of electricity supplied to customers. Distributors must maintain nominal voltage at the point of supply<sup>10</sup> and must supply electricity within specified allowable ranges.<sup>11</sup> Under the *Electricity Distribution Code*, 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 assessed and provided in accordance with the *Voltage Variation Guideline*<sup>12</sup> and is payable to a customer on an “old-for-old” basis, which will usually require payment of the current market value of any item.<sup>13</sup>

#### *Voltage Variation Guideline*

The purpose of the *Voltage Variation Guideline* is not to set out or replace other laws under which distributors may be liable for damage resulting from voltage variation. Instead, the *Voltage Variation Guideline* is intended to enable efficient allocation of risk and good customer service when assessing these types of claims. The *Voltage Variation Guideline* is to be considered independently of any other rights available to a customer.<sup>14</sup> Under the *Voltage Variation Guideline*, there is no obligation to compensate customers who use more than 160MWh in any year,<sup>15</sup> or where the amount claimed

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<sup>9</sup> *Electricity Safety Act* s98

<sup>10</sup> *Electricity Distribution Code* cl 4.2.1

<sup>11</sup> *Electricity Distribution Code* cl 4.2.2

<sup>12</sup> *Electricity Distribution Code* cl 4.2.7

<sup>13</sup> 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.

<sup>14</sup> 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.”

<sup>15</sup> *Voltage Variation Guideline* cl 1.1.1

exceeds EWOV's Binding Decision monetary limit,<sup>16</sup> to the extent of the excess. This does not mean a distributor is not liable to pay compensation for damage in these instances, but simply that assessment of the claimed amount does not need to be done in the manner set out in the *Voltage Variation Guideline*. Instead, a distributor would be able to assess the claim and liability under other laws, for example, the *Australian Consumer Law* or common law (contract or negligence).

#### *Claims under the Voltage Variation Guideline*

For a distributor to be required to pay a customer's claim under the *Voltage Variation Guideline*:

- the customer must complete and return a completed claim form to the distributor
- there must be voltage variation, which affects the customer's electrical installation and results in property damage
- the voltage variation must be outside the allowable limits prescribed<sup>17</sup> in the *Electricity Distribution Code*.

EWOV's view is that the cause of a voltage variation event is not relevant in assessing whether or not the distributor is liable under the *Voltage Variation Guideline*, even if the variation event occurs as a result of something outside the distributor's control.

Where a customer's claim is under the threshold in the *Voltage Variation Guideline*, and the customer has completed a claim form and obtained (if requested) a statement from a qualified person that the damage to their appliance is consistent with voltage variation, then the distributor is required to pay the customer's claim. EWOV considers that 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 an unauthorised voltage variation. EWOV's view is that in this situation the *Voltage Variation Guideline* requires a distributor to pay the customer's claim without disputing it, unless the distributor can show that the unauthorised voltage variation event did not occur. 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 *Voltage Variation Guideline*.<sup>18</sup>

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 customer's property before it can determine whether to pay or to reject the claim.<sup>19</sup> 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 assess the reasonableness 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 free from liability in a situation where the claimed amount is higher than the threshold or where the distributor disputes the claim under the *Voltage Variation Guideline*.

If the customer has obtained a statement by a qualified person that the damage is consistent with unauthorised voltage variation, EWOV considers this to be the starting point for the distributor's assessment. Once damage consistent with a voltage variation event is established by the customer, the

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<sup>16</sup> *Voltage Variation Guideline* cl 1.2.1. The Binding Decision monetary limit is currently \$20,000

<sup>17</sup> *Electricity Distribution Code* cl 4.2

<sup>18</sup> *Voltage Variation Guideline* cl 2.4.2. Repairer or assessor costs associated with substantiating damage consistent with unauthorised voltage variation.

<sup>19</sup> *Voltage Variation Guideline* cl 2.4.1(e)



burden of proof falls on the distributor to show, on the balance of probabilities, that there was no unauthorised voltage variation.<sup>20</sup>

*Assessment of whether an unauthorised voltage variation event occurred*

Distributors frequently provide EWOV with voltage data where the voltage has been recorded at either five or 15-minute intervals. Because this data only captures the voltage once every five or every 15 minutes and does not capture the voltage for the periods in-between, EWOV's view is that this data cannot prove that the voltage supplied was within the allowed limits, or that there was no voltage variation outside those limits.

To assist our investigation, we may ask distributors to provide:

- events log data from the customer's smart meter data
- site outage history to confirm if any events matched the date, or were close to the date the customer states the voltage variation event occurred
- site outage history for neighbouring properties, or properties on the same phase
- relevant data from the distributor's high voltage network, such as event data and high voltage power quality data.

In the absence of conclusive evidence, EWOV uses this information to help assess whether, on the balance of probabilities, an unauthorised voltage variation event occurred. If it seems more likely than not that an unauthorised voltage variation event occurred, EWOV would expect the distributor to pay a customer's substantiated claim.

The *Voltage Variation Guideline* outlines the circumstances when a distributor is not obliged to pay compensation for unauthorised voltage variation damage.<sup>21</sup> Neither the threshold, nor the cause<sup>22</sup> of the unauthorised voltage variation, affect a distributor's obligation to compensate a customer. Where there is unauthorised voltage variation which has caused proven 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 *Electricity Distribution Code* and the *Voltage Variation Guideline* require business customers to take reasonable precautions to minimise the risk of damage or loss.<sup>23</sup> EWOV considers that the "reasonable precautions" required 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

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<sup>20</sup> *Voltage Variation Guideline* cl 2.3.2

<sup>21</sup> *Voltage Variation Guideline* cl 2.5

<sup>22</sup> including whether the event is within the control of the distributor.

<sup>23</sup> *Electricity Distribution Code* cl 16(c), *Voltage Variation Guideline* cl 2.5(b) and *ESC Guideline No. 11 – Voltage Variation Compensation: Interpretation of 'reasonable endeavours' and 'consequential loss' (ESC Voltage Variation Compensation Interpretations)* dated 30 November 2004. There may also be similar or additional provisions in the distributor's deemed contract with the customer.



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.<sup>24</sup> It may also be appropriate for a business to have other protection devices installed or to back up computer data.<sup>25</sup>

#### Other relevant laws and codes

Even where compensation is not payable under the *Voltage Variation Guideline*, a customer may be entitled to compensation under other laws.<sup>26</sup>

#### *Australian Consumer Law*

The *Australian Consumer Law* provides certain guarantees for consumers when buying goods and services. These include requirements that goods or services will be of an acceptable quality and that they will be fit for the purpose for which they are commonly acquired or supplied.<sup>27</sup>

Electricity and gas are defined as goods in the *Australian Consumer Law*, and therefore must be of acceptable quality and fit for purpose when supplied to consumers, otherwise the supply will breach the statutory guarantees in the *Australian Consumer Law*.

The electricity supplied to a customer in cases of unauthorised voltage variation may be neither of acceptable quality nor fit for purpose. This is because it is reasonable for customers to expect electricity supplied to them will be suitable for powering household appliances without causing damage. In addition, the reason or cause of any unauthorised voltage variation may be irrelevant to whether a distributor is liable to pay compensation if the electricity supplied is not of acceptable quality or fit for the purpose for which it is being supplied. Consequently, this may be enough to require a distributor to compensate a customer for the full proven amount claimed where there is unauthorised voltage variation, even where compensation is not payable under the *Voltage Variation Guideline*.

#### *Common Law - compensation*

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.

A distributor may be in breach of its contract with a customer if the supply was not consistent with the terms and conditions of the customer's contract. For example, the contract may specify that electricity

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<sup>24</sup> 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. This would normally be more relevant for businesses which rely heavily on continuous electricity supply.

<sup>25</sup> See *ESC Voltage Variation Compensation Interpretations*. Other protection can include surge diverters, line conditioners or uninterruptible power supply devices. EWOV considers what would amount to reasonable precautions on a case-by-case basis.

<sup>26</sup> The *Voltage Variation Guideline* explicitly states that "a person's other rights in relation to an unauthorised voltage variation are not affected by this guideline" (cl 1.1.4).

<sup>27</sup> *Australian Consumer Law* s54 (acceptable quality) and s55 (fitness for purpose)



will be supplied within the ranges allowed under the *Electricity Distribution Code*, so supply outside the allowable ranges would be a breach of contract.

Some compensation claims may also arise out of voltage variation events caused by the distributor's negligence or where appropriate actions have not taken place. EWOV considers that a distributor should take reasonable action to maintain its assets against reasonably foreseeable damage. This includes considering the location of the assets and how the particular environment may accelerate the deterioration of assets, or require the distributor to have a more frequent maintenance schedule. For example, considering the difference between seaside assets affected by potential corrosion compared to assets located inland, and factoring this into appropriate inspection regimes.

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 *Electricity Distribution Code* or unauthorised voltage variation).

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

### **3. Regulatory considerations and advice**

In the past, EWOV has received informal advice from the Australian Energy Regulator and the Australian Competition and Consumer Commission.

The advice from the Australian Energy Regulator indicated 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 *Voltage Variation Guideline*.
- The *Voltage Variation Guideline* does not affect a person's rights to seek compensation under the common law or other relevant legislation.

The advice from the Australian Competition and Consumer Commission related to the provisions of the *Trade Practices Act 1974 (Trade Practices Act)*, and suggested that:

- The *Trade Practices Act* 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 *Trade Practices Act* 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 *Australian Consumer Law* are similar to the provisions in the *Trade Practices Act*. It makes sense that the new provisions relating to acceptable quality and fitness for purpose will still apply to the supply of electricity<sup>28</sup>, and that past and current interpretation of the application of the consumer protections will be consistent. This could mean distributors have strict liability<sup>29</sup> for any damage or loss incurred due to unauthorised voltage variation under the *Australian Consumer Law*.

When assessing what is fair and reasonable, EWOV considers all available information. Past pricing determinations by regulators 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 and past outcomes for similar complaints**

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 *Voltage Variation Guideline* 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/contribution<sup>30</sup> 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 proven.
- 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.

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<sup>28</sup> Regulations can be enacted to exclude electricity, gas and telecommunications from the statutory guarantees/protections (*Australian Consumer Law* s65), however there are currently no regulations in place.

<sup>29</sup> Liability for damage without the need to prove negligence or fault.

<sup>30</sup> For example, a business customer may have been able to take additional precautions, but failed to do so.



Most Binding Decisions also awarded financial recognition for customer service issues, sometimes reasonably significant amounts. EWOV considers past case outcomes, including Binding Decisions, in any assessment of what is fair and reasonable in the circumstances.

#### **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.

A customer's claim is assessed on the basis that a customer should be no worse off, that is, the customer should be compensated for the cost of repairing or replacing the damaged property so that it will be substantially of the same functionality, age and appearance. A customer needs to provide evidence to show the loss or damage and to support their claimed amount. Customers can do this by providing quotes, receipts or other evidence, including a statement by a qualified person that the damage is consistent with voltage variation. If the claim is payable, EWOV expects a distributor to also pay any reasonable costs incurred by the customer in providing this evidence.

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 prove 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.