

**Submission
No 7**

INQUIRY INTO UNFAIR TERMS IN CONSUMER CONTRACTS

Organisation: Energy & Water Ombudsman NSW
Name: Ms Clare Petre
Telephone: 02 8218 5251
Date Received: 11/10/2006



PO Box K 1343
Haymarket NSW 1240

Admin (02) 8218 5250
Fax (02) 8218 5233
Freecall **1800 246 545**
Email omb@ewon.com.au
Web www.ewon.com.au

ABN 21079 718 915

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Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Thank you for the opportunity to provide a submission to the inquiry into unfair terms in consumer contracts currently being conducted by the Legislative Council Standing Committee on Law and Justice.

The Energy & Water Ombudsman NSW investigates and resolves complaints from customers of electricity and gas providers in NSW, and some water providers. A number of these complaints involve difficulties faced by customers regarding the terms of their connection or supply contracts.

EWON's experience suggests that there are particular issues that the Standing Committee may wish to consider when examining contracts that supply essential services such as electricity, gas and water. We have limited our response to the terms of reference to those matters that our experience suggests will have the potential to most impact customers, particularly those who are already in vulnerable circumstances.

If you would like to discuss this matter further, please contact me on 8218 5250, or Brendan French, Deputy Ombudsman, on 8218 52651.

Yours sincerely

A handwritten signature in cursive script that reads "Clare Petre".

Clare Petre
Energy & Water Ombudsman NSW



Energy & Water
Ombudsman NSW

*New South Wales Legislative Council Standing Committee on
Law and Justice*

Inquiry into Unfair Terms in Consumer Contracts

October 2006

Submission by the

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Introduction

The Energy & Water Ombudsman NSW (EWON) is the approved industry ombudsman under section 96B of the *Electricity Supply Act 1995* and section 33G of the *Gas Supply Act 1996* and also receives and investigates complaints from customers of the major NSW water providers. While we are not in a position to comment on all areas raised in the terms of reference, we have provided comments in relation to our observations of the use of contracts in the energy and water industries. We have provided these comments from the perspective of EWON's experience as an independent dispute resolution mechanism for energy and water customers in NSW.

The inquiry into unfair terms in consumer contracts is particularly relevant to the energy and water industries in NSW. At present, all consumers who wish to be supplied with electricity, gas or water are required to accept a contract for that supply. There are therefore substantial numbers of consumers who are taken to have accepted contracts for supply of essential services. However, it is EWON's experience that most consumers do not see or read, let alone negotiate, the terms of these contracts. There is presently a strong focus on further deregulation of the energy and water markets. To date, deregulation of the energy markets has been the catalyst for increased complexity for the consumer. A deregulated energy market has led to increased use of "negotiated" contracts by suppliers, and this in turn has led to confusion and complaints from many consumers, as such contracts are still relatively new to most consumers. At present there is limited regulation to protect consumers in this regard.

The 2005/2006 financial year has seen a substantial increase in the numbers of complaints regarding energy competition received by EWON. There was a 305% increase in issues involving the marketing of electricity and gas contracts, with complaints highlighting many consumers' negative experience of the sales process with marketers. Many consumers complained about marketers misleading or coercing them into a contract. Some consumers complained that their account had been transferred to another retailer without their knowledge or permission. Others were surprised to find their account cancelled without consent when another person in their household signed a contract.

Any practice of misleading consumers, or failing to provide them with accurate and comprehensive information about their contracts, hinders the creation of a positive, competitive energy market. The Minister for Water Utilities will soon be introducing legislation to State Parliament that would initiate the deregulation of the water industry in NSW. EWON anticipates that such a change will raise issues regarding the contracts used by water retailers.

In the deregulated energy market, there is increasing reliance on contract terms in the regulation of the relationship between energy suppliers and consumers. However, there is a significant potential for power imbalance between the parties. Consumers rely heavily on suppliers of energy and water to maintain their quality of life, and any loss of these essential services would severely impact individual consumers and families. The

contracts that govern the consumer-supplier relationship in these industries are drafted by the suppliers and it is probably fair to say that the contracts seek to operate for their benefit. Because the contracts involve the supply of essential services, EWON believes that the need for consumer protection in this area is particularly high, and we recommend consideration of legislation for New South Wales similar to the unfair contract terms legislation implemented in Victoria and in the United Kingdom.

A review of the Victorian and UK Regulations

The operative provisions

While there are slight differences in the wording of the unfair contract term regulations that have been implemented in Victoria and in the United Kingdom, the key provisions of each instrument appear to have very similar effects. That is, a term in a consumer contract is to be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The United Kingdom model differs from the Victorian model in that in the United Kingdom, a contract term can only be found to be unfair if it was not "individually negotiated"¹.

Although there is a difference in the construction of the operative provisions, in EWON's experience, it appears that regardless of which model is adopted, the effect of the law would be largely the same. In the vast majority of cases dealt with by EWON, there is no negotiation between the parties. Most domestic and many small business consumers in NSW are supplied electricity and gas under standard form regulated contracts. The consumer is taken to have accepted such a contract when they contact a supplier to open an account. No negotiation of the terms is entered into, and the customer often is not required to sign any document, as in most cases the supply arrangement is created over the telephone². Although there is increasing prevalence of "negotiated" market contracts (ie those that are offered by retailers other than the standard form contract of the local retailer), in EWON's experience this has not led to an increase in the number of customers negotiating their contract terms. Although they are labeled "negotiated" contracts, these documents are essentially standard form contracts in that they tend to be contracts of adhesion, which the consumer either accepts or does not accept.

A requirement that a contract term can only be found to be unfair if it has not been "individually negotiated" is likely to have little impact in the energy and water markets. However, we believe it is important that this issue is considered and clearly regulated. Suppliers are likely to debate whether or not a contract, or a particular term of the contract, has been "individually negotiated". Therefore, if NSW were to consider introducing an approach similar to that adopted in the UK, we would also recommend consideration of the provisions of regulation 5(2) of the *Unfair Terms in Consumer Contracts Regulations 1999 (UK)* in which certain terms are always regarded as not having been individually negotiated. In such a context we would also support the UK approach whereby the onus is on the supplier to prove that a particular term was not individually negotiated³.

¹ *Unfair Terms in Consumer Contracts Regulations 1999 (UK)*, regulation 5(1)

² The creation of a supply contract over the telephone is both reasonable and desirable given the need for essential services of electricity to be quickly accessible for consumers

³ *Unfair Terms in Consumer Contracts Regulations 1999 (UK)*, regulation 5(4)

The possible inclusion of small business customers

The operative provisions of the Victorian legislation apply to "consumer contracts", which are defined in section 3 of the *Fair Trading Act 1999* as agreements *whether or not in writing and whether of specific or general use, to supply goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, for the purposes of the ordinary personal, domestic or household use or consumption of those goods or services.*

The effect of this definition is that small business consumers are excluded from the protections afforded by the regulations.

EWON acknowledges the argument that business people ought to be mindful of the contracts they enter into, and are in a better position to assess the terms of a contract offer. However, we have received many complaints from small business consumers about the way in which a supplier has exercised its rights under the supply contract. The contracts offered by energy and water suppliers to small business customers are usually similar (or identical) to the contracts offered to residential customers. As such, small business consumers often find themselves in similar situations to those discussed in this submission regarding residential customers. Further, the considerable reliance of certain small businesses on energy and water places them at a significant disadvantage when trying to resolve disputes with providers, especially when the latter have strong sanctions available to them (eg disconnection of supply, credit listing). In EWON's experience, unfair contract terms may in certain circumstances have even more dramatic implications for small businesses than for residential customers.

Due to their status as small businesses, these customers tend to receive less consideration from energy and water suppliers when it comes to handling matters relating to the terms of their contracts. There may be several reasons for this, including the generally reasonable view that businesses are more likely to have experience in reading and/ or negotiating contract terms. However, just like residential consumers, small businesses have little or no choice regarding the terms of their contracts - they need energy and water to survive – and it is also quite likely that they have little or no experience in navigating the contestable energy market. This leads to a significant imbalance in power between the parties to the contract. The following case study illustrates one such difficulty faced by a small business customer:

MARIA'S STORY

Maria runs a small wholesaling food business so, even though hers is a very small enterprise, it uses a lot of electricity because of industrial refrigerators and cooling rooms. Recently she received a letter from her provider advising her that she was required to be supplied electricity under a market contract rather than the standard form regulated contract.

Maria asked the provider why they had not automatically offered her this contract when she opened her account, but did not receive a response. Maria then received a letter advising that unless she signed a contract, she would be charged "mandated" rates, which were significantly higher than the rates she had been paying.

Because she had not yet received a response to her query, Maria did not sign a contract. In response, her provider then issued her a bill on the "mandated rates". Maria contacted the provider to dispute this invoice and was advised that because she had not paid the bill by the due date she would have to pay a \$3000 security deposit in addition to the \$2600 "mandated rates" invoice. She was told that if she did not pay these amounts within one week, her premises would be disconnected.

Maria was very upset at this request, as electricity supply was vital for powering her freezers. She managed to pay the amounts under protest, and contacted EWON about the provider's actions. She felt that she shouldn't have to pay the higher "mandated rates" which weren't listed anywhere on the contracts she'd seen, and that she shouldn't have to pay a security deposit in these circumstances.

EWON believes that there would be benefit in ensuring that small businesses are included in NSW provisions protecting customers from unfair contract terms. In EWON's experience, small business consumers have been keen to participate in the competitive energy market, and we would anticipate that the introduction of unfair contract terms legislation could foster further participation in the market by small business.

EWON acknowledges that there may be a reluctance to extend the protections afforded by legislation to all contracts entered into by small business consumers. As such, we would suggest that, as a minimum, one alternative might be to expand the coverage of unfair contract terms legislation to include "small business consumers of electricity, gas and water"⁴ as well as all residential consumers. We believe that this minor expansion of the protections would have relatively little impact on the compliance costs of suppliers, but could potentially lead to significant reductions in contract problems faced by small

⁴ Note that under the *Electricity Supply Act 1995* and the *Gas Supply Act 1996*, consumers are not defined by their status as residents or small businesses. Rather, a customer is either a "small retail customer" or a "large retail customer" depending on the amount of electricity or gas consumed annually. There are other means to define a business as small or large, eg. through annual turnover (see s 6D of the [Privacy Act 1988](#) [Cth]) or staff size (the Australian Bureau of Statistics recommends a small business to be one that employs fewer than 20 people: see [Small Business in Australia, 2001](#)).

businesses and the prevalence of complaints to bodies such as EWON, the Office of Fair Trading and the courts.

The assessment of what is an unfair contract term

Section 32X of the *Fair Trading Act 1999* (Vic) deals with factors relevant to the assessment of whether a particular contract term is unfair. These include:

- whether the term was individually negotiated
- whether it is a prescribed unfair term under the regulations
- whether the term has the object or effect of:
 - permitting the supplier but not the consumer to avoid or limit the contract or terminate the contract
 - permitting the supplier but not the consumer to renew or not renew the contract
 - penalizing the consumer but not the supplier for a breach of the contract
 - permitting the supplier but not the consumer to vary the terms
 - allowing the supplier to determine the price without giving the consumer the option to terminate
 - limiting the consumer's right to sue the supplier.

The United Kingdom regulations contain a Schedule that provides an indicative list of terms that may be regarded as unfair. This list appears similar to some of the factors listed in the Victorian legislation.

EWON recognizes that there is utility in providing a list of factors that are relevant in considering whether a particular term is unfair, and would support either the Victorian or the United Kingdom approach in this regard. EWON has identified a number of terms in electricity and gas supply contracts that significantly alter the rights and obligations of the parties to the contract to the detriment of the consumer. The factors identified in both the Victorian and United Kingdom legislation as being relevant to the consideration of a particular contract term appear to be in accordance with the types of terms which EWON considers may be “unfair”. Some examples of these are given further below.

The need for regulation in NSW

EWON believes that the introduction of unfair contract term legislation/ regulations in NSW would benefit both consumers and suppliers, and would foster a positive, competitive market.

There are factors in the energy market at present that indicate a need for such regulation, including:

- the wide scale use of contracts in the energy supply industry, and the increasing use of unregulated market contracts
- the use of contract terms that may be “unfair contract terms” under the Victorian and United Kingdom models
- features that pose difficulties for consumers in understanding the way in which energy contracts work.

These issues are discussed below, with case studies provided to highlight typical issues faced by consumers.

The use of standard form contracts in the energy and water markets

All electricity and gas consumers in NSW are supplied under a “customer connection contract” and a “customer supply contract”. The customer connection contract is a contract with the electricity or gas network for the provision of the network services associated with the sale of electricity and gas. The customer supply contract is with an electricity or gas retailer for the sale of the electricity or gas itself. Traditionally, each of these contracts was with the same company – the network service provider for the area. At present, water consumers in NSW are supplied water under a single contract with their provider, whether it be a state owned corporation such as Sydney Water, or a local council.

A layer of complexity has arisen in recent years with deregulation of the energy industry. In the past, electricity and gas supply was essentially a monopoly service, with consumers being compelled to take supply from the deemed provider for their geographical location. However, since 1 January 2002, consumers have been able to choose their energy retailer irrespective of the area in which they live. The customer connection contract is still dependent on the customers’ geographical location, as the network provider remains the same, but customers can choose to take out a “negotiated” customer supply contract with a retailer other than the default network provider. The move to deregulation has opened the market to many other retailers, and each retailer brings with it its own “negotiated” contract.

Although consumers are to some degree accustomed to the reality of contract terms when it comes to large purchases (cars, houses etc), they have not historically been required to think of utility accounts in the same way. EWON’s experience is that although most

energy customers in NSW are bound by standard form contracts, only a tiny minority are aware of the fact, let alone aware of the terms under which they are supplied – until such time, for instance, as a compensation claim is denied ‘on contract grounds’. In a newly-contestable energy market the learning curve for consumers, and the utilities themselves, has been very steep. These contracts are for the most part unregulated and it is clear from our experience that there is significant potential for elements to be included that are unfair to consumers.

The use of terms which penalise the consumer but not the supplier when there is a breach of the agreement

1. Contract termination fees

Many of the negotiated contracts for the supply of energy are duration-based contracts. Often these contracts contain terms that penalise the consumer but not the supplier for breach or early termination of the contract⁵. The provisions of the negotiated contracts in the market appear to be relatively similar across providers, and some such provisions are outlined below:

Provider Z General terms for Gas and Electricity Market Contracts (Feb 2006)

3.1.1 If this Energy Plan is terminated before the expiry of the term of your Energy Plan, we may charge you an Early Termination Fee set out in the Offer to reflect our costs of processing the termination and any other loss or damage suffered by us due to your early termination.

...

4.1.1 We may disconnect the Supply Address or request that the distributor disconnect the Supply Address if you do not pay for any charges incurred at your current or any previous supply addresses.

Provider Y Energy Contract Information (Mar 2004)

10 Terminating this Contract

If, in respect of a type of energy:

- *this contract is terminated by you or us, or*
- *supply is discontinued or the premises are disconnected or we commence the process to do so,*

with effect before the end of the term for that type, then you indemnify us against (and therefore must pay us for) loss or damage that results from that event...Loss and damage includes our administration costs, special meter reading charges, disconnection fees, loss of profits, and costs we incur in continuing to comply with, renegotiating or cancelling contracts and arrangements with ... the network operator.

⁵ Under section 32X(c) of the *Fair Trading Act 1999 (Vic)*, this consideration is a factor to be considered in assessing whether a particular term is unfair.

Provider X Negotiated Supply Agreement Terms and Conditions (Jul 05)

12 If this Agreement is terminated by us under this condition 12, or by you under the election provision in condition 2, in respect of all of the properties subject to this Agreement and with effect before the end date, then you must pay us the early termination fee. You acknowledge that this fee is a genuine pre-estimate of our losses incurred as a result of early termination of this Agreement...

In EWON's experience, none of the negotiated contracts offered by suppliers in NSW provide penalties against the supplier for early termination of the contract. This is clearly a significant imbalance in the parties' rights under the contract, and the imposition of penalties on consumers arguably amounts to an unfair contract term under the Victorian and United Kingdom legislation.

EWON has received significant numbers of complaints involving the application of termination fees. In some of the early cases received on this issue, the supplier sought to recover all presumed consumption (and other) charges for the remainder of the contract period. This meant that some customers, who had signed the contract on the promise that it would save them \$90 or thereabouts over three years, ended up paying hundreds (or, in the case of small businesses, even thousands) of dollars to terminate the contract early.

The issue of termination fees poses additional problems. If a supplier attempts to enforce payment of a termination fee through either disconnection of supply or credit listing, they are potentially seeking to enforce (via significant legal sanctions) what may well be unfair terms. This is clearly an unacceptable situation for consumers in NSW.

Although many suppliers argue that the imposition of termination fees on customers is an attempt to recover the reasonable costs of losing the customer's contract, the effect is that the termination fee penalises the consumer for breaching the contract. Studies undertaken by the Victorian Essential Services Commission indicated that in many cases the actual quantum of the termination fee was well above the actual costs incurred by the supplier involved, and in some cases the supplier actually made a significant profit on the termination fees⁶. As there are no such provisions penalising suppliers for breaching the contract in NSW or recovering well in excess of their reasonable losses for early cancellation, EWON suggests that regulation is needed to level the playing field for consumers.

2. Disconnection of supply

One of the key enforcement mechanisms granted to suppliers under the terms of energy and water contracts is the ability to disconnect or restrict supply. As energy and water are "essential services", suppliers hold a powerful tool - the ability to take away the service - for persuading consumers to do, or refrain from doing, a particular action. The following

⁶ Essential Services Commission, [Early Termination Fees Compliance Review](#) (Issues Paper 05/07/2005; Preliminary Findings 05/04/2006; Draft Determination 30/07/06)

list outlines some examples of the events which enable a supplier to disconnect a consumer under the terms of a regulated standard form customer supply contract:

Supplier A Standard Form Customer Connection Contract (October 2002)

We may arrange to disconnect your property if:

- *you do not pay on time any amount due to us under this contract for the supply of electricity or connection services arranged by us*
 - *you do not provide the security that we require*
 - *you otherwise fail to comply with the terms of this contract*
 - *a receiver, administrator or liquidator is appointed for any of your assets*
 - *you refuse or fail to give an authorised person access to your property in accordance with any rights of access provided for in the Electricity Supply Act*
 - *you obstruct an authorised person in relation to anything in connection with this contract*
 - *you assign your rights under this contract without first obtaining our consent (which may be given or withheld at our discretion) or you vacate your property.*
-

Aside from the consequential costs to customers of the disconnection, suppliers are also able to charge customers disconnection/ reconnection fees to recover costs of carrying out the disconnection. These fees, regulated by the Independent Pricing and Regulatory Tribunal, tend to range between \$50 and \$100, and are often a prerequisite for reconnection of supply.

Most ‘unrequested’ disconnections of electricity, gas or water occur as the result of non payment of accounts. The consumers who are most likely to have their energy or water supply disconnected are those consumers who are already in vulnerable circumstances. In EWON’s experience, these consumers are often receiving Centrelink payments, living in public or private rental accommodation, and are often facing very significant social and economic challenges. Disconnection of energy or water supply is unlikely to improve a consumer’s ability to pay their bills on time, rather it is likely to lead to essential services being out of reach for many consumers, particularly if administrative charges (eg late fees, disconnection fees) are added to the consumption and service charges. As such, EWON would support the introduction of unfair terms legislation to encourage discussion of alternative options for suppliers, and to enable regulatory bodies to improve the protection afforded to vulnerable consumers. This is particularly important at present as disconnection rates for electricity and gas in NSW are concerningly high. The most recent publicly available data suggests that 26,872 customers were disconnected for non-payment in 2004-05, a rise of 25% in one year.

The use of terms which allow the supplier to unilaterally vary the price or characteristics of the services without notice to the consumer

1. Contract “rollover” provisions

EWON has received a number of complaints from customers about the “rollover” of the contract at the end of the contract term. The following are some examples of the “rollover” provisions of some negotiated contracts reviewed by EWON:

Supplier X Negotiated Supply Agreement Terms and Conditions (Jul 05)

7 This Agreement may be extended for further periods on the following terms.

We will notify you at least 28 days before the earliest end date is to occur (the “Contract end date”).

At this time, we may (but are not required to) send you a proposal to extend this Agreement for a further period (“renewal proposal”). The renewal proposal will identify the period over which the Agreement may be extended (the “renewal term”). ... If you do not reject this renewal proposal at least 14 days before the Contract end date, you are taken to have accepted the renewal proposal and this Agreement will continue on the same terms except as varied by the renewal proposal and except that the end date will be the last day of the renewal term.

Provider Z General terms for Gas and Electricity Market Contracts (Feb 2006)

2.4.2 At least one month, but no more than two months, before the expiry of the term of your Energy Plan, we will:

- (a) notify you that the term of your Energy Plan is about to expire, and the date of that expiry;*
- (b) notify you of the charges, terms and conditions that will apply to you if you do not exercise any other option once the term of your Energy Plan has expired...*
- (c) notify you of your other options once the term of your Energy Plan has expired, which will include,*
 - (i) entering into a standard form contract with your standard supplier*
 - (ii) entering into any negotiated contract offered to you by us or another supplier, or*
 - (iii) requesting disconnection.*

...

2.4.4 If you do not exercise any of the options in the manner set out in clause 2.4.2 above, before the expiry of the term of your Energy Plan, then from the expiry of the term of your Energy Plan, the charges, terms and conditions set out in the notice will apply and will form a new Energy Plan.

Provider Y Energy Contract Information (Mar 2004)

3 Extending the term

We may send you an offer not less than 60 days before the end of the term containing a proposal to vary this contract by extending the term on terms we specify (including various amounts payable). If you do not reject that offer within 30 days after receiving the offer, you are taken to have accepted the offer and this contract is to be varied accordingly.

Many customers have been unaware of the rollover provisions of the contract, often because reference to this provision is not highlighted or easy to understand. EWON has had a number of complaints from customers who have been deemed to have accepted a new contract even though they had not received any notice of the renewal. In these cases, the supplier has effectively been able to unilaterally vary the terms of the contract, which would arguably amount to an unfair contract term in light of the Victorian and United Kingdom regulations. The following cases are typical illustrations of the effect of rollover provisions on residential customers:

STEVE'S STORY

Steve was being supplied electricity by Provider A under a negotiated contract that was due to expire in July 2005. After July 2005, he contacted Provider B and took up a new 3 year contract. His final bill from Provider A had a \$95 early termination fee on it.

Steve was confused as to why this fee had been charged, as he believed the contract with Provider A had expired. EWON investigated the matter and found that Provider A had "rolled over" Steve's contract in early July 2005. Steve had not received any correspondence regarding this rollover, and EWON negotiated with Provider A to waive the termination fee that had been charged.

DINO'S STORY

Dino's contract with Provider B was for 3 years. Provider B wrote to Dino before the expiration of the term to advise that he had the choice of continuing with them, or changing to another supplier. Dino did not respond to this letter and the contract was extended.

EWON's investigation found that the terms of the initial contract stated that the contract could be extended for 12 month periods, however Provider B's letter to Dino purported to extend the contract for another 3 years. In the circumstances, Provider B agreed to waive the termination fee that would have applied to the new contract.

Rollover of contracts can assist many customers continue their supply arrangements with little effort or inconvenience for them. However, EWON's experience is that the opt-out provisions that are utilised by energy providers to renew or rollover contracts can be unreliable. Many customers state that they did not receive the letters and were thus unaware of the impending rollover. We acknowledge that in some cases letters have been sent by retailers, but they have gone astray in the mail or elsewhere, or customers may not pay attention to them on the assumption that they are advertising material. In some cases it is not possible to confirm that the letters were sent in the first place, as customer records held by retailers typically do not record mail-outs of this nature. EWON suggests it is unfair that contracts are rolled over without the explicit agreement of the consumer, particularly where any provisions of the contract are varied.

We note in particular that one of the key terms of the contract that is often altered in the "rolled over" contract is the tariff that applies to the energy supply. It is usually the case that the supplier changes the applicable tariffs under the contract when the contract is renewed. By implementing such a change in a "rolled over" contract, in some cases the supplier has effectively varied the price of the goods without the notice of the consumer.

We suggest that there needs to be a higher standard met by suppliers before they rollover contracts in this manner, and that rollover provisions in any contract should be clear, transparent and obvious to the customer. If a high standard of information is met by retailers, it is then reasonable to expect customers to take responsibility for either agreeing to the rollover and any changed provisions, or advising the retailer in due time that they do not wish to proceed with a further contract.

Third party acceptance of contract offers

EWON has been contacted by a number of domestic and small business customers who have had their original energy account closed as a direct result of a third party – either a spouse or fellow occupant of the property – signing a new negotiated contract in response to direct marketing activity.

We have seen a range of different scenarios:

- the new account is opened in the name of, but not in fact *by*, the original account holder
- the new account is opened in the name of the third party who signed the contract
- the new account is for a three-year contract with the original retailer
- the new account is for a three-year contract with a new retailer

All have in common the fact that the original account holder has not signed the new contract nor authorised the closure of their existing account. If they want to cancel the new contract and return to their original retailer, they may be liable to pay a termination fee, as they often do not discover the existence of the new contract until well after the expiry of the 10-day cooling off period.

A number of the negotiated contracts we have seen contain warranty statements that some retailers consider sufficient to support this practice:

Retailer A Negotiated Contract (Jan 05)

You also warrant that you are the account holder or are authorised to accept this offer on behalf of the account holder.

Retailer B Negotiated Contract (Oct 04)

When signing for a customer, the signatory warrants that they are authorised to do so.

Retailer C Negotiated Contract (Oct 03)

If signing for a residential account I am warranting that I am over 18 years of age and that I am an owner or occupier of this property.

EWON has received large numbers of complaints from consumers whose contracts had been terminated as a result of a non-account holder signing a contract with another supplier. This can be a particularly complex area for consumers, and the person whose account has been cancelled often experiences substantial difficulty obtaining information about the cancellation due to privacy laws. The following case studies illustrate the problem:

CHRISTINE'S STORY

Christine was visited by some electricity marketers from Provider A. She told the marketers that she was not the account holder for the premises and would prefer if they could leave some information for her husband (the electricity account holder) to consider. Despite her protests, the marketers asked her to sign a document confirming that they had left her some information.

Christine's husband then received a letter from his electricity retailer advising that his account had been closed. Christine was very upset at this as she had not consented to the transfer of the account, and felt that she was not authorised to do so.

EWON discussed the matter with the old and new retailers and was able to negotiate the cancellation of Christine's account, and the re-opening of her husband's account.

LEE'S STORY

Lee called EWON on behalf of his father who had recently received a final notice from his energy supplier, saying the account had been transferred to a new retailer. Lee's father was concerned as he had not requested the transfer and wasn't sure how it could have happened without his authority.

Lee explained that his father owned a property with six units which were rented to individual tenants. There was only one meter for the whole property, so Lee's father paid the electricity bills for all the units. He was having difficulty sorting out the problems with the original retailer because he was told that due to "privacy laws" the company could not tell him who the new account holder was.

EWON worked with Lee and the new and former retailers to establish how the transfer came about, without infringing the privacy of the tenants. We discovered that when the most recent tenant had signed a lease with the real estate agent, they mistakenly checked a box saying they wanted an electricity account set up. When informed of the issue, the real estate agent arranged for the tenant to contact the new retailer to confirm the error. The new retailer accepted that the contract had been established in error, agreed to cancel it and waived the termination fee.

The account for Lee's father was returned to his original retailer. Lee indicated that he would speak to the real estate agent about amending the lease form to avoid the problem of the unwanted transfer happening again.

EWON believes the warranty terms referred to above are unfair on consumers. As noted above, retail competition in the energy supply market is relatively new to many customers, and in EWON's experience, marketers representing energy companies do not always adequately explain contracts to consumers. There is currently no regulation that renders the warranty terms that enable non-account holders to sign binding contracts unfair or void. Therefore, we are left with a situation in which there can be third party alteration of contractual rights. This situation is clearly unsatisfactory, and EWON suggests consideration of legislation/regulation to render such purported warranties "unfair terms".

The use of terms which cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer

1. The absence of "negotiated" terms and the imbalance of power

EWON's experience in the review of the terms of electricity and gas contracts has indicated that there is little to no "negotiation" of any contract terms by consumers. Given that electricity and gas supply are essential services, consumers are left with little choice if they do not agree to a particular contract term. The bargaining power of the small consumer is very weak, while the supplier can effectively control the quality of life of the consumer by discontinuing supply. In these circumstances, there is very little choice for consumers, and it is open to suppliers to include those contract terms they see fit.

While many customers are supplied under standard form "regulated" contracts, there is no regulation of the actual terms of those contracts, and there are many terms added to these contracts that are not required by the regulatory bodies.

There are currently no checks and balances on these contract terms, and most customers are not in a position to test the contracts in a court of law. By implementing unfair contract term legislation, other dispute resolution agencies, such as EWON and the Office of Fair Trading would be in a position to deal with such cases more effectively – to the benefit of all parties.

2. The use of exclusion clauses to limit the liability of suppliers

Standard form customer connection contracts are written by the network providers themselves, and often contain waivers of liability for all manner of network events. While it is clear that a number of network events (particularly those relating to extreme weather conditions, or other "acts of God") are beyond the control of the network company, a number of the waivers contain elements that are somewhat surprising. The following extract is an example of some of the restrictions included in such connection contracts (emphasis added):

Retailer B Standard Form Customer Connection Contract (Feb 05)

16.3 Exclusion of liability for supply interruptions, distortions or fluctuations
Subject to the above, and as far as the law permits [Retailer B] is not liable for any loss the customer may suffer (including, without limitation, where caused by any negligent or wilful act or omission by [Retailer B]) arising from:

- b) any fluctuation or distortion (in voltage magnitude, voltage waveform or frequency) or interruption to the supply (by the customer's retail supplier) of electricity to the customer's premises or from any such supply not being or remaining continuous;*
 - c) the customer's retail supplier discontinuing supply of electricity to the customer; or*
-

d) *[Retailer B] interrupting the supply of electricity by the customer's retail supplier to the customer's premises.*

16.4 *To the extent that [Retailer B] has any liability to the customer despite the effect of paragraph 16.3, [Retailer B]'s liability (under contract, tort or any other basis), is limited, as far as the law permits, as follows:*

a) *[Retailer B] is not liable for any indirect, economic, special or consequential losses of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind), and*

b) *[Retailer B]'s liability for all other losses suffered by the customer is limited to the lesser of:*

i. *The total amount billed to the customer's retail supplier (or to the customer under clause 7.4) for network charges relating to the use of [Retailer B]'s distribution system for the supply of electricity by the customer's retail supplier to the customer's premises) during the year that [Retailer B]'s breach, act or omission (which gives rise to the claim) occurred, or*

ii. *\$5,000 (GST inclusive, if any),*

for all claims the customer makes in any one calendar year.

Such exclusion clauses are frequently relied on by suppliers to deny claims submitted by customers for compensation for damaged appliances. The denial of the claim can have a significant effect on customers, and the operation of the exclusion clause certainly attempts to limit “the consumer’s right to sue the supplier”⁷.

In our experience there appears to be no consistency in the terms of the various connection contracts applying across NSW, or in the internal policies that are used by suppliers to assess claims. Often consumers are reliant on the good will of the supplier in paying compensation for damaged goods, and it does not seem reasonable that there should be differences in the criteria used to assess the claim based on the location of the consumer.

In our view there does not appear to be any sound reason for an inconsistent approach by electricity suppliers in NSW to customer claims for damage measured against reasonable minimum standards. We cannot see any competitive advantage to a different approach by suppliers, and it does not seem equitable for customers to be treated differently in relation to claims depending on the distribution area in which they live. We have called for discussion of these issues by relevant stakeholders, including electricity distributors, regulatory bodies, and consumer groups.

⁷ Under section 32X(k) of the *Fair Trading Act 1999 (Vic)*, this consideration is a factor to be considered in assessing whether a particular term is unfair.

In the absence of any clear guidelines for customer claims in NSW, it has been left to EWON to investigate claims which have been denied by distributors. Since 1998, the Energy & Water Ombudsman NSW has made 54 Determinations under clause 6.1 of the EWON Constitution. Of these, 53 have related to network claim matters.

Given that there is no regulation of the terms of these customer connection contracts, EWON would support the introduction of unfair contract terms legislation to improve the protection afforded to consumers in NSW. We would hope that such legislation could act to encourage the development of minimum standards across NSW in relation to the assessment of claims.

The following case study is an example of how the application of the exclusion clause can be used by a supplier in a way that leads to the limitation of a consumer's rights:

GEORGE'S STORY

George contacted EWON in relation to a claim for compensation for damage to his dishwasher following an interruption to his electricity supply.

George's electricity supply had been interrupted for about four hours, and when power was restored, his dishwasher made a buzzing noise, and was later found to have malfunctioned. George had made a claim to the supplier for the \$1090 that it had cost to repair the dishwasher. The supplier rejected the claim on the basis that although there had been an interruption to George's electricity supply, the connection contract excluded any liability.

During EWON's investigation, the supplier advised that the cause of the interruption to George's supply in this case was damage to underground cables by a hole borer operated by a field operator employed by the supplier. Independent technical advice confirmed that the outage that followed the damaged was likely to have caused the damage to George's dishwasher. Even though their worker caused the outage, the supplier continued to deny the claim on contractual grounds.

EWON carefully considered the available information and determined that the supplier should pay George's claim, as the cause of the event, and the damage, were within the supplier's reasonable control.

If the terms of a customer's contract can substantially limit the right of a customer to recover compensation from a supplier for damaged property, they can have a detrimental impact on consumers. Complaints regarding damaged property are often highly technical,

complicated matters that are largely beyond the layperson's knowledge. Therefore, EWON would support moves to regulate and simplify the use of exclusion clauses in energy contracts.

Confused customers – insufficient disclosure of contract terms by energy and water suppliers in NSW

EWON's experience has been that a number of negotiated contracts offered to customers do not sufficiently disclose information to customers. This means that many customers are not sufficiently aware of the ramifications of signing a contract, in particular the penalties that may apply for cancellation. For instance, many of the negotiated contracts reviewed by EWON specify words to the effect of "if you terminate this contract before the end of its term, termination charges may apply". A significant number of the early contracts (and some of those currently being offered) did not contain any figures to indicate the extent or range of charges that 'may' apply. EWON investigated a number of complaints from customers who had in fact been charged for the 'remainder' of the contract (in effect a total of all charges, including an estimate of consumption). This appeared to be inappropriate activity by retailers on several grounds. The following case illustrates the difficulty for some consumers:

ALEX'S STORY

Alex rang on behalf of her aunt, who had been visited by a door-to-door marketer. Her aunt doesn't speak English very well so her young daughter translated into Greek. Unfortunately the daughter's Greek was not fluent and her aunt ended up signing a contract without realising this meant transferring her account to a new retailer.

Alex tried to cancel the contract but was told she would have to pay a termination fee. Alex was quite upset because she felt the marketer was taking advantage of people who did not speak English well, and did not explain the contract fully.

JILL'S STORY

Jill had signed a negotiated contract with Provider A about 3 years ago. When the contract approached its expiry date, Jill contacted Provider B to arrange a new contract. The transfer of Jill's account to Provider B occurred 2 months before the contract with Provider A was due to expire. Jill received a bill from Provider A including a termination fee of \$95.

Jill was very upset at this, as she was not aware that a termination would apply. She had reviewed the terms of

her contract, which stated that fees for early termination “*may*” apply. She felt that it was unfair for Provider A to charge such a fee when she was almost at the end of the contract.

EWON reviewed Jill’s contract and was unable to find any contractual breach by Provider A. However, EWON negotiated with Provider A to reduce the termination fee as a customer service gesture.

A number of customers have also complained to EWON that the terms and conditions of the negotiated contract are extremely detailed and difficult to understand, particularly for those not accustomed to reading or signing contracts. Some contracts contain deep within their text details about specific fees and charges (which do not apply to standard form contracts), reduced options for payment, and less inflated explanation of the bonus or incentive than appears in the advertising material. EWON’s experience is that few customers have read the contract in detail and fewer still are aware of the implications this may have for them. This is clearly a challenge that is currently facing the utilities: how to provide comprehensive information in a comprehensible and concise way.

This problem is particularly well highlighted in the format of the published contracts themselves. A number of customers have complained to EWON about the small, dense type/ font of the contracts. This has implications for the readability and comprehension of all consumers, but particularly for people with literacy difficulty or visual impairment. Other jurisdictions (such as Victoria) have regulated for a minimum font size for contracts and we would recommend similar provisions be adopted in NSW. Though this is not an issue involving unfair terms per se, if customers are to be bound to contract provisions it is reasonable to expect that they will have had every opportunity to make themselves reasonably aware of them.

In EWON’s experience, there are certain groups of consumers who are at a particular disadvantage in dealing with contracts. A significant proportion of complaints received by EWON in this regard have been from or on behalf of customers from non-English speaking backgrounds, customers with literacy issues, the elderly and frail, and people with an intellectual or physical disability. There is currently very limited regulation to protect these consumers. Therefore, we would support the introduction of unfair contract term legislation as an attempt to reduce the confusion faced by vulnerable consumers, and hence reduce the numbers of complaints received by suppliers and by EWON.

It is unlikely that the level of consumer awareness about the terms and conditions of energy contracts will increase in the short term. Thus, there will be cases where consumers are affected by contract terms unknown to them at the time of entering the contract. While EWON acknowledges that customers have responsibility for reviewing the terms and conditions of a contract before signing it, we would support the introduction of regulations to ensure consumers are protected from unfair contract terms.

Conclusion

Customer complaints to EWON indicate that the playing field on which consumers arrange for the supply of essential services is not a level one. The contracts that are used to create the supply relationship are drafted by the suppliers with very limited regulation of the actual terms of the contracts. The result of this is that consumers can be at a significant disadvantage. Energy and water supply are essential services that are required to maintain basic quality of life. While consumers now have the right to choose their energy retailer, each supplier uses similar contracts, and domestic and small business consumers rarely if ever have the power to negotiate the terms of their contract. The terms of the contracts used in NSW have rarely been examined in the courts, as most consumers do not possess the economic capacity to run such a case.

Based on the terms of the Victorian and United Kingdom legislation, we anticipate that the introduction of unfair contract terms legislation in NSW could require energy and water suppliers to review their contracts. We can see a number of potential benefits following this process.

- By leveling the playing field we would hope that essential services are kept within reach of vulnerable members of our community. The unfair contract terms legislation could operate as a catalyst for making the contractual relationship between energy and water consumers and suppliers fairer and more equitable. This would ensure that consumers are able to maintain their energy and water supply and meet basic standards of living.
- We would expect a decrease in the numbers of complaints received by suppliers and by EWON in relation to contract terms. This means reduced costs for suppliers, and increased satisfaction for consumers generally.
- With appropriate consumer protection, consumers would be in a better position to participate in the contestable energy (and possibly water) market. This is recognised as an important outcome in terms of efficiency of the energy and water markets.

We believe that significant improvements to the relationship between suppliers and consumers in the energy and water market could eventuate following the introduction of unfair contract term legislation. For this reason, EWON commends the NSW government for examining the issue of unfair contract terms legislation, and offers our support for the introduction of such legislation.