



ENERGY AND WATER  
OMBUDSMAN  
Victoria Listen Assist Resolve



# Compensation and Financial Recognition Policy and Procedure

August 2018



## OVERVIEW

This document is to be read in conjunction with the following EWOV policies: Jurisdiction – what’s in and what’s out, Payment of Undisputed Amounts Policy and Legal and Paid Advocate Representation Policy.

### Overview and objective

The Energy and Water Ombudsman (Victoria) (EWOV) complies with the *National Benchmarks for Industry-Based Customer Dispute Resolution and Key Practices for Industry-Based Customer Dispute Resolution (March 2015)*.<sup>1</sup> EWOV receives, investigates and facilitates the resolution of customer complaints about electricity, gas and water providers operating in Victoria. EWOV’s services are free to customers - customers are not required to pay for lodging a complaint or for testing, auditing, independent advice or other information obtained by EWOV during an investigation.

In general, where a decision maker<sup>2</sup> considers that a person has wrongly suffered a loss or other detriment, it will seek to put that person in a similar position to that which would have existed had the circumstances giving rise to the loss or detriment not occurred. If this is not practicable, then an alternative remedy must be found.

Monetary payments can be an appropriate form of redress, and are a valid part of a conciliated outcome or a decision made by the Ombudsman.

This policy deals with cases where payment of money may be considered as remedy to:

- recognise administrative failures or deficiencies
- recognise other customer service issues
- compensate a customer in situations where things have not gone as they should or where a customer has experienced loss or detriment

This policy does not deal with cases relating to direct monetary issues, such as when an adjustment may be required to the customer’s account to meet regulatory obligations or for other reasons (e.g. application of a time limitation for backbilling, the correct tariff or lost payments).

This policy outlines:

- Financial recognition compared to “compensation”
- The types of compensation claims EWOV considers
- The types of compensation claims EWOV does not consider
- The procedures and processes EWOV uses when considering compensation claims

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<sup>1</sup> <http://www.consumersonline.gov.au/downloads/selfreg/benchmarks/BMARK1.rtf>

<sup>2</sup> Such as a court, tribunal or other body, like an Ombudsman

## Financial recognition compared to “compensation”

Sometimes an energy or water provider may offer a financial remedy in recognition of non-quantifiable matters arising from a complaint. Unlike compensation, financial recognition does not require substantiating documentation, but takes the general merits of a complaint into account, such as administrative deficiencies or customer service issues (eg. delayed resolution, inconvenience).

Where customers seek financial recognition for non-quantifiable matters, EWOV has regard to existing benchmarks, such as the Wrongful Disconnection Payment<sup>3</sup>, guaranteed service level payments, past complaint outcomes (including decisions), industry practice and amounts applied through the Court process. EWOV also has regard to outcomes applied by other Ombudsman schemes and research undertaken by those organisations<sup>4</sup>.

Administrative failure or deficiency, and the appropriate monetary remedy, are more easily understood by a provider and customer when the failure or deficiency is categorised. These categories can include such things as:

- Unreasonable delay
- Inadequate advice, explanation or reasons
- Legal error
- Factual error
- Human error
- Procedural deficiency
- Unreasonable/harsh/discriminatory action or decision
- Flawed administrative process
- Unprofessional behaviour by an employee
- Breach of duty or misconduct by an employee
- Breach of privacy

## Compensation claims EWOV considers

Compensation is considered as a remedy in order to put a customer in a similar position to that which would have existed had the circumstances giving rise to the complaint not occurred. EWOV will generally only consider compensation claims for quantifiable amounts.

The circumstances where financial compensation for a customer may be appropriate include:

- Damage to property, including appliance damage, food loss, damage to other items (eg. flooring in the case of a water/sewage spill)
- Business or income loss (loss of profit, not loss of revenue/turnover)
- Expenses incurred

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<sup>3</sup> \$500 per day pro rated for periods off supply, where the disconnection is not consistent with the terms and conditions of the energy contract between provider and customer

<sup>4</sup> Such as the Commonwealth Ombudsman report “Putting things right – compensating for defective administration” (Aug 2009)

- Financial detriment (eg. due to uptake of less beneficial offer)
- Loss relating to credit default
- Any other relevant loss or damage, as the above list is not exhaustive

EWOV reviews each complaint on its individual merits and any outcome will depend on the circumstances of the complaint. In a particular case, EWOV may decide that in addition to any compensation payable, a provider should also offer financial recognition for administrative deficiencies or customer service issues.

## Compensation claims EWOV does not consider

EWOV does not consider monetary claims for the following:

### Punitive/exemplary damages

As an independent and informal body, EWOV does not consider payments of a punitive/exemplary nature. This is best left to the Courts or the appropriate regulators<sup>5</sup>. EWOV seeks to prevent future recurrences by reporting actual systemic issues to regulatory bodies and providers so that they can take appropriate action.

EWOV notes that a monetary remedy for inconvenience or distress (suffered as a result of administrative failure or deficiency) is not a payment of a punitive/exemplary nature. Where EWOV identifies that a customer has experienced a degree of frustration and/or inconvenience, EWOV may consider it fair and reasonable for a provider to offer a monetary payment as a gesture to assist in resolving the complaint. This gesture will be in addition to any other payments required to resolve the other issues in the complaint.

### Claims for injuries to feelings

EWOV does not investigate claims for injuries to a customer's psychological or emotional state. Claims for injuries to feelings can include claims for trauma, (mental) distress, pain and suffering, humiliation and loss of reputation<sup>6</sup>. These are specialist fields of expertise and claims of this nature are more appropriately dealt with by other bodies, such as the courts or the Victorian Civil and Administrative Tribunal.

However, EWOV can take into account where inconvenience, distress or even mental anguish, is suffered by a customer as a side effect of administrative deficiency.

### Reasonable costs associated with a customer's complaint

EWOV offers its services free to customers, however EWOV expects customers to spend the time required to actively participate in its processes. This will generally require a customer to bear some inconvenience or incur some expenses, such as postage, writing paper/envelopes, telephone calls. To minimise inconvenience and cost, EWOV can be contacted by email or Freecall and in appropriate cases, EWOV can provide stamped, self-addressed envelopes for a customer's use. EWOV does not consider it appropriate to provide a monetary remedy for reasonable time, costs or expenses associated with the presentation and investigation of a case.

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<sup>5</sup> Such as the Essential Services Commission Victoria ([www.esc.vic.gov.au](http://www.esc.vic.gov.au)), the Australian Energy Regulator ([www.aer.gov.au](http://www.aer.gov.au)), the Australian Competition and Consumer Commission ([www.accc.gov.au](http://www.accc.gov.au)) or Consumer Affairs Victoria ([www.cav.vic.gov.au](http://www.cav.vic.gov.au)).

<sup>6</sup> For definitions of these terms refer to the Glossary in Appendix 1

Similarly, EWOV does not require customers to engage a lawyer or other third party to represent them. Where EWOV's investigation requires technical expertise, financial counselling, onsite energy audits, independent legal advice or other specialised information to resolve a complaint, EWOV will arrange for these services without any cost to the customer. Accordingly, where customers choose to engage their own professionals (eg. accountants, electricians, lawyers or credit repair agents) they do so at their own expense.

Generally EWOV expects costs associated with providing substantiation for loss of profit (eg. accounting records) to be borne by a customer. However, in an individual case it may be appropriate for some or all of the costs associated with substantiating loss or damage to be reimbursed to a customer.

#### Reasonable bank or interest charges

There is no general legal entitlement to interest, an agreement or statutory duty is required. Consistent with the requirement of a customer's participation in EWOV's processes, EWOV expects customers to absorb reasonable amounts of bank charges or interest for loss of use of money.

This does not include significant amounts of interest or bank charges paid as a direct and natural result of a default on the provider's part (eg. bank fees where a direct debit error overdraws the customer's account).

#### Breach of privacy

EWOV will not investigate monetary claims based on breaches of privacy where it appears that the matter is more appropriately dealt with by a Privacy Commissioner<sup>7</sup>. However, where a customer raises concerns with EWOV about breach of their privacy as a side effect of administrative deficiency or other factors (eg. transfer in error, incorrect default listing) EWOV will take into account the inconvenience or distress experienced by the customer.

## Procedure and processes for compensation claims

When EWOV receives a complaint involving a claim for compensation or financial redress, EWOV will:

1. Assess jurisdiction and confirm that the complaint can be investigated by EWOV
2. Consider whether EWOV is the most appropriate forum for the dispute, taking into consideration the \$20,000 limit for Binding Decisions and any high risk element of the complaint
3. Generally investigate compensation issues where
  - a. the information provided suggests the loss claimed may be directly attributable to the actions/inaction of the energy or water provider
  - b. the energy or water provider has been given the opportunity to consider the customer's claim
  - c. the customer and provider have been unable to reach agreement about the claim for compensation

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<sup>7</sup> Federal or state as appropriate

### Payment of undisputed amounts

Customers should not withhold payment of undisputed amounts in lieu of a compensation claim which has not been accepted by the energy or water provider. EWOV expects customers to participate and show good faith in EWOV's investigative process by continuing to pay ongoing accounts in accordance with the Payment of Undisputed Amounts Policy.

### Assessment

EWOV reviews each complaint on its facts and any outcome will depend on the individual circumstances of the complaint.

Legal obligations and responsibilities represent the minimum standards with which EWOV would expect a provider to adhere. Other aspects of EWOV's fair and reasonable framework may be particularly relevant when investigating compensation complaints, such as past Binding Decisions, other industry practice or special customer circumstances.

When investigating a complaint relating to a compensation claim, EWOV will consider:

- whether the claim relates to a voltage variation or outage event if it is about loss of electricity supply<sup>8</sup>
- the appropriate laws and codes, in particular the Voltage Variation Compensation Guideline, the Electricity Distribution Code, the Gas System Distribution Code, the Water Service Codes, the Australian Consumer Law and the relevant common law<sup>9</sup>. The codes and guidelines may provide for payment to be made to the customer if the provider is found to be non-compliant
- whether the claim has been made by a residential, small business or large business customer
- any substantiation provided by the customer and provider
- any steps taken by the customer or provider to minimise loss before or after the event, which could include installation of a safety switch, using ice to keep food cold, appropriate insurance, and/or regular attempts to resolve the event leading to the claim
- any communications or contacts between the parties during or after the event or claim, call recordings and transcripts may be especially relevant
- any representations made by either party, including representations to a customer by a provider that their claim would be paid (eg. before it was lodged)
- whether any compensation should be payable to the customer and the amount of compensation, taking into consideration "old-for-old" rather than "new-for-old" replacement and market value compared to depreciated value
- the costs to the customer of substantiating their claim and whether any costs should be reimbursed

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<sup>8</sup> Voltage Variation is variation in voltage outside the limits prescribed by the Electricity Distribution Code. An outage is an interruption to an electricity supply, of any duration, whether or not it was scheduled interruption. The Voltage Variation Compensation Guideline does not apply to outage events, only to voltage variation events

<sup>9</sup> Usually negligence and contract law

- whether the customer has insurance which covers the claim and would result in a better outcome for the customer (eg. “new-for-old” replacement), and whether payment of, or contribution towards, any excess and/or premium increases may be appropriate
- whether there are any administrative deficiencies or customer service issues which require financial recognition, instead of, or in addition to, any compensation amount

Unless there is strict liability<sup>10</sup> for a provider to pay a compensation claim, generally a customer will need to establish:

- That damage or loss has occurred
- A causal link or connection between the damage or loss and the action/inaction of the provider
- Whether the provider should have known its action/inaction could result in damage occurring (“reasonably foreseeable” test)

### Substantiation

EWOV is under a duty to deal with cases in an informal and economical and timely way<sup>11</sup>, so EWOV does not require strict proof of claim in the same way as a court of tribunal would. However, EWOV still requires customers to actively participate in the investigation by providing reasonable and appropriate material in support of a claim.

This may take the form of verbal responses, written documents or records, or even photographs or diagrams. Refer to Appendix 2 for a list of the types of documents or information which can be used as substantiation.

As appropriate to the circumstances of the case, the material required from a customer will usually need to address the following:

- the impact and degree of inconvenience, loss or detriment experienced
- the circumstances leading to the inconvenience, loss or detriment
- the period over which the issue occurred including attempts to resolve the matter
- delays caused by either party
- the provider’s actions (or inaction)
- the reasons why a provider’s processes may seem to be inadequate or unfair
- previous offers of resolution and/or reasons why they appear to be disproportionate or unreasonable
- steps taken to mitigate or minimise loss or detriment, as avoidable losses are generally not recoverable
- substantiation for the amount claimed, including receipts or accounting records. Each item must claimed must be individually substantiated, although the degree of substantiation required will depend on what is fair and reasonable – business customers will be expected to keep more rigorous records than domestic customers. While documentary material is preferable (receipts, repairer statements), estimates are acceptable (quotes)
- where a customer is unable to provide information and/or evidence to substantiate their claim for compensation, EWOV would not generally take the matter further

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<sup>10</sup> Imposition of liability on a party without a finding of fault

<sup>11</sup> As outlined in clause 1.6 of the EWOV Charter

Substantiation is part of the process of establishing the true value of each item forming a claim. It is the customer's responsibility to substantiate the amount claimed. Customers may be required to pay for the normal costs of substantiating their claims, such as accounting costs to show loss of profit.

#### Taking reasonable precautions and minimising loss

EWOV aims to resolve complaints on a fair and reasonable basis and takes the view that parties should be taking reasonable steps to keep their loss to a minimum.

EWOV notes that different standards apply to providers and customers in relation to their obligations to minimise their loss. EWOV also applies different standards between residential customers, small business customers and large business customers in this regard.

EWOV will consider whether or not a party is legally obliged to minimise loss and whether or not a party actively tried to mitigate loss in a timely manner.

Business customers may be required to demonstrate that they implemented reasonable precautions to protect against risk of loss or damage. Reasonable precautions will depend on the size and circumstances of the business, including dependence on uninterrupted supply.

While residential customers are not required to install devices designed to protect their appliances against voltage variations, they are required to reasonably minimise their loss after such an incident becomes known to them.

#### Latent damage

Following a voltage variation, sometimes appliances can have their functionality impaired, but it takes a while for the damage to become evident. This is known as latent damage.

Latent damage is often not identified when the appliance is first used after the voltage variation event, and can take a while to become obvious.

In addition to standard case handling procedure, when EWOV is dealing with a compensation claim for latent damage, EWOV will:

- obtain a detailed description from the customer of any changes observed in the operation of an appliance, whether or not such changes occurred gradually or acutely, and the timeframe over which the changes occurred
- attempt to establish whether an appliance was affected by cumulative damage or its lifespan was reduced (a customer may need to provide proof of this)
- consider whether continued use of the equipment may have increased the extent of any damage, and whether this has an impact on the compensation claim

Customers should not contribute further to any damage caused by a voltage variation after the initial damage becomes known to them by continued use of an appliance.

#### Depreciation compared to market value

When investigating compensation claims, and the appropriate level of compensation payable to a customer, EWOV will consider:

- whether the item was relatively new, or the customer had only had limited use of the item. 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 (eg. a heater which worked intermittently over a period of time due to low voltage causing motor burn out) then EWOV may consider that replacement of “new-for-old” rather than “old-for-old” compensation is fair and reasonable
- the most appropriate method to calculate the value of an item. Depending on the item, depreciation may not be the most appropriate method, and market valuation or some other method should be used (eg. a “vintage” 1950s refrigerator will have no depreciated value, however may have a higher market value than its original purchase price)

EWOV may need to seek advice from a loss adjuster for more complex compensation complaints or where there is significant disagreement as to the value of damaged or lost items.

#### Special customer circumstances

Due consideration will be given to customers in special circumstances, such as those who live in isolated areas who may not have access to repairers or the prompt replacement of appliances, or those reliant on particular appliances such as electronic medical equipment or a washing machine/refrigerator. In these circumstances, EWOV will ask that the provider give appropriate assistance to customers in order to prevent a recurrence of appliance damage.

#### Scale of remedy

If a monetary remedy is deemed to be appropriate, the amount payable will be determined having regard to the degree of inconvenience, loss or detriment experienced.

However, depending on individual circumstances, other remedies may be deemed more suitable, either instead of, or in conjunction with, a monetary remedy. These remedies may include one or more of the following:

- Provision of conclusive information
- Provision of a letter of apology
- Commitment to review internal processes/conduct/training
- Change of internal policies/procedures
- Provision of a more appropriate service
- Assistance in transferring an account

## Document history

Action and Date	Updated By
Redrafted : June 2013	JVE and TMM
Charter updates August 2018	HMN and JVE
Converted to PDF	HJH

## Appendix 1

### GLOSSARY

<b><i>Detriment</i></b>	is damage, harm or loss
<b><i>Distress</i></b>	includes embarrassment, anxiety, disappointment and loss of expectation
<b><i>Humiliation</i></b>	includes the perception that one is put in a lower position by another
<b><i>Inconvenience</i></b>	can include any expenditure of time and/or effort by a customer that has resulted from a scheme participant's conduct
<b><i>Loss of reputation</i></b>	includes the perception of loss of status or name
<b><i>Pain and suffering</i></b>	can be considered as more extreme forms of distress and inconvenience
<b><i>Personal information</i></b>	means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion
<b>Privacy</b>	in the context of EWOV relates to "information privacy". All collection, use and disclosure of personal information by the Ombudsman will be done for the purpose of complaint investigation and resolution
<b><i>Trauma</i></b>	is an event or situation that causes great distress and disruption

## Appendix 2

### EXAMPLES OF SUBSTANTIATION

#### Loss of perishables

- Purchase invoices
- Photographs of spoiled stock
- Lists of spoiled stock
- Supplier price lists
- Stock lists
- Insurance claim

#### Loss of profit

- Trading records for the relevant period and comparative periods – eg. same day for 2 or 3 weeks before and after, or for the same days in previous years
- Appointments diary
- Production records
- Price lists
- Bank statements
- Business plans - Business records are admissible as evidence in court sections 55(1)(b), (5) & (6) of the Evidence Act)
- Financial records

#### Relevant questions relating to potential lost profit:

- Were appointments rescheduled or production made up later?
- Was time otherwise occupied?

#### Damage/loss of equipment, stock or other items (eg. appliances)

- Purchase invoices
- Photographs of items
- Repair quote/invoice – repairer's statement stating cause and extent of damage and reason for replacing as opposed to repairing
- Repairer statement – clarifying value of the item at time of damage/loss
- Supply quote
- Stock lists
- Phone records