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10

Consumers

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CONSUMER PROTECTION LAWS

Legislation – the legal framework

[10.10] The *Australian Consumer Law* (ACL) commenced operation on 1 January 2011. It applies to all transactions after that date. The previous *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1987* (NSW) continue to apply to earlier dealings, and readers are referred to previous editions of this book and to the *Lawyers Practice Manual* for a discussion of previous legislation and protections available to consumers.

The ACL is contained in Sch 2 of the *Competition and Consumer Act 2010* (Cth). The law applies in NSW by virtue of s 28 of the *Fair Trading Act 1987* as a law of the State. The law has national application and is administered and regulated by both the national regulators, the Australian Competition and Consumer Commission, and the various state and territory consumer protection agencies. In NSW, Fair Trading NSW is the relevant state regulator. The NSW Civil and Administrative Tribunal (NCAT) and courts have the power to enforce the ACL.

The *Contracts Review Act 1980* (NSW) remains in force. That Act does not limit any other law providing relief against unfair contracts or unjust contract terms, nor does any other law limit the operation of that Act to the contract (see s 22). The *Sale of Goods Act 1923* (NSW) also remains in force. It regulates the sale of goods only (but not services) and implies certain terms into contracts for the sale of goods.

The commentary in the following paragraphs deals primarily with the consumer protections contained in the ACL.

Protections in relation to trader conduct

[10.20] The ACL has general protections and specific protections in relation to trader conduct. General protections have a broader application as they are not limited just to consumers. They apply in all aspects of trade and commerce which means that, for example, businesses, re-suppliers and wholesalers are entitled to rely on these protections.

In contrast, specific protections only apply to consumers, which are defined in s 3 of the ACL as a person who acquires goods or services for personal, domestic or household use, which have a value less than $40,000. This limit of $40,000 does not apply to motor vehicles. These protections are targeted at specific kinds of activities that are considered to be particularly detrimental to consumers such as illegal marketing practices and product safety.

The specific protections also include the new consumer guarantees that are derived from the previous statutory and implied warranties found in the *Trade Practices Act 1974*. The consumer guarantees create additional obligations for businesses to comply with when undertaking the sale of consumer goods or the provision of a consumer service.

General protections

[10.30] Unconscionable conduct

Unconscionable conduct can be a difficult concept to understand as there is no clear definition of what makes up this conduct. Unconscionable conduct has been a doctrine in equity which was ordinarily understood to be conduct that was so harsh that is goes against good conscience. It was often described as conduct which showed a high degree of moral fault.

The ACL has partly adopted this doctrine but re-interpreted and extended its application to the supply or acquisition of goods and services. The Act makes it clear in its wording that unconscionable conduct is not limited to the unwritten law (meaning not limited to the previous definition in equity) allowing for the once narrow doctrine to be given a wider application in the consumer sphere.

The Full Federal Court case of *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90 has also provided some further guidance by clarifying that the test to be applied is one of the norms and standards of today, which is guided, but not limited by governing legislation. The case also clarified that it was not always necessary to show a high degree of moral fault or "moral obloquy" which had been referred to in much case law over the years. Despite this, the case fell short of saying that a finding of moral fault would no longer be required in all cases as some matters may require that level of behaviour to prove unconscionability.

Under the ACL, the court may consider whether conduct is unconscionable, by reference to a series of factors set out in s 22 which include, but are not limited to:

1. the relative strengths of the bargaining positions of the supplier and the consumer; and
2. whether, as a result of conduct engaged in by the person, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
3. whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services; and
4. whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
5. the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the supplier.

Other case law stemming from the ACCC's enforcement proceedings provides some examples of conduct that the courts have found to be unconscionable:

- using deception to enter consumers' homes and then exerting high pressure sales techniques to get them to purchase goods (*ACCC v Lux Distributors Pty Ltd* [2013] FCA 47);
- structuring mobile phone contracts in such a way that the consumer was extremely likely to incur high excess use charges and further imposing a $75 cooling off fee (*ACCC v Excite Mobile Pty Ltd* [2013] FCA 350);
- failing to provide written records of contracts that Indigenous consumers living in a remote area had entered into for educational materials. These contracts included indefinite bank account deductions and other onerous conditions that were not reasonably necessary to protect legitimate business interests (*ACCC v Keshow* [2005] FCA 558).

[10.40] Misleading and deceptive conduct

A broad prohibition against misleading and deceptive conduct exists in the ACL mimicking the former provisions of the *Trade Practices Act 1974*, which are now contained in s 18 of the ACL. The ACL provides that a person must not in the field of trade or commerce engage in conduct which is misleading or deceptive, or is likely to mislead or deceive.

It is unnecessary to prove that the conduct was fraudulent or even negligent. It is necessary to prove that the conduct was misleading or deceptive, and that:

- the complainant relied upon that conduct; or
- was induced by that conduct; and
- thereby suffered loss.

Misleading and deceptive conduct has a wide application to all aspects of the goods or service in question. This provision is concerned with the conduct, not just the contract. By way of example, the conduct to be considered includes, but is not limited, to:

- how the product or service is marketed;
- on what medium the marketing occurred, that is, print, television, radio;
- the product packaging;
- the use of fine print or quotations;

- the sales tactics used, including high pressure sale techniques;
- any promotions used to entice consumers; and
- any specific statements made by a representative.

The conduct is considered whether it occurred in the course of negotiating a contract, or whether it occurred after the contract had been entered into.

Contravention of the prohibition can also include conduct that occurs by an act of omission and no intention to mislead is required. In the case of an omission, the court may look at whether it was reasonable to expect that information would have been disclosed as it was relevant to the consumer's decision to purchase the goods or services. However, the case of *ACCC v AGL South Australia Pty Ltd* [2014] FCA 1369 suggests misleading omissions will not be caught unless there is a "reasonable expectation for disclosure".

The conduct is to be examined by the overall impression created to the consumer. As explained, all relevant circumstances surrounding the conduct will be taken into account. It will then be assessed against an ordinary member of a relevant class of people, who are likely to be affected by that conduct. For example, conduct that may be acceptable to an urban educated community will be considered differently in respect of a non-English speaking community living in a remote area.

Misleading and deceptive conduct for future matters

There is an additional protection relating to misleading and deceptive conduct for future matters provided in s 4 of the ACL. This means that if is a person makes a representation about how the product will perform in the future, that does not have reasonable grounds, that representation can be considered misleading.

A breach of these provisions can help to assess claims in relation to property damages and economic loss. They can also assist a court or tribunal in determining whether there has been a breach of a statutory warranty or consumer guarantee, or whether a product is defective.

[10.50] Unfair terms in contracts

The ACL covers unfair terms in standard form consumer contracts in Pt 2-3. A consumer contract is one that is made for an individual for wholly or predominantly personal, domestic or household use in relation to:

- a supply of goods or services; or
- a sale or grant of an interest in land.

A standard form contract is not defined in the ACL, but will usually be a contract that is not open to negotiation between the parties. This means a consumer is not given an option to change the terms of the contract when they sign up to it.

If a consumer alleges that a contract is a standard form contract, then the onus is on the other party, that is the business, to prove it is not. Factors that the court will consider in deciding whether a contract is a standard form contract are outlined in s 27 of the ACL and include:

- whether one party has all the bargaining power in a transaction;
- whether the contract was prepared before any discussion occurred between the parties;
- whether any opportunity was given to accept, reject or negotiate the terms of the contract;
- whether the contract took into account specific characteristics of the transaction or another party.

A consumer can apply to a court to have a specific term of a contract declared unfair and therefore void. They can also seek a remedy for any loss that is incurred due to an unfair term in a standard form contract. If a certain clause or term in a contract is found to be unfair, this does not mean that the entire contract is void. The ACL provides that if the contract is capable of operating without the unfair term, the contract will continue to apply.

It is important to note that some terms are expressly excluded under the unfair contracts terms law. These are terms that:

- define the main subject matter of the contract;
- set an upfront price payable under the contract (if disclosed before the contract was entered into);
- are required or permitted by law; or
- have been negotiated between the parties.

There are some specific contracts which are excluded from the unfair contracts regime which include:

- insurance contracts, except those types of insurance that are not regulated by the *Insurance Contracts Act 1984* (Cth), for example, private health insurance;

- contracts of marine salvage or towage, for a charter party of a ship; or
- contracts for the carriage of goods by ship.

In order to determine whether a term is unfair, a consumer must prove pursuant to s 24 of the ACL that the term:

1. would cause a significant imbalance in the parties' rights and obligations arising under the contract;
2. is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
3. would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The ACL provides in s 25 some examples of unfair terms, which mainly involve one party unilaterally making changes to the contract to the detriment of the other party. In summary, some of the terms considered to be unfair are terms that:

- allow one person to avoid or limit that performance of the contract;
- allow one person to terminate the contract;
- penalise one party for a breach or termination of the contract;
- allow one party to vary or renew, or not renew the contract;
- allow one party to vary the upfront price payable or the characteristics of the goods, services or interest in land to be sold;
- allow one party to unilaterally determine whether a contract has been breached;
- limit vicarious liability of agents or one person's right to sue another;
- permit one party to detrimentally assign the contract without consent;
- limit the evidence that can be adduced during a dispute or imposes an evidentiary burden on the other party.

In addition to consumers rights under the ACL to have unfair terms removed from a contract, the *Contracts Review Act 1980* remains in force. The Act deals with the concept of unjustness in relation to all contracts, including consumer contracts. The Court will consider various factors that can be found in s 9 of the *Contracts Review Act 1980* but, in brief, these factors broadly relate to the balance of power between the parties due to the specific characteristics of the parties and any unfair conduct used to enter into the contract.

Specific consumer protections – illegal marketing practices

[10.60] Making false or misleading representations

Division 1 of Pt 3-1 of the ACL is directed towards specific types of false or misleading representations. It is an offence for a business to make false and misleading representations about goods and services when supplying, offering to supply, or promoting those goods and services.

Section 29 of the ACL prohibits businesses from making false or misleading representations in relation to the following matters:

- that the goods are of a particular standard, quality, value, grade, composition, style or model;
- that services are of a particular standard quality, value or grade;
- that a particular person has agreed to acquire the goods or services;
- that goods or services have sponsorship, approval, performance characteristics, uses or benefits;
- a testimonial by any person or a representation that purports to be a testimonial;
- with respect to the price of goods and services;
- the availability of facilities for the repair of goods or parts for goods;
- the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy or a requirement to pay for a contractual right that is wholly or partly equivalent to a guarantee, warranty or right of remedy.

Whether a representation is considered to be false or misleading will depend on the circumstances of

the case. In relation to testimonials, the ACL says that a representation is taken to be misleading unless there is evidence to the contrary. However, this does not represent a reversal of the onus of proof, which remains with the claimant.

There is a further offence under ss 33 and 34 which also prevents businesses from engaging in conduct which is liable to mislead the public as to the:

- nature of goods or services;
- the manufacturing process of goods;
- the characteristics of services;
- the suitability for their purpose of goods and services; or
- the quantity of any goods or services.

Court proceedings taken by the ACCC in relation to false or misleading representations provides some examples of conduct that has been found to contravene the ACL, for example:

- a business which supplied eggs in containers labelled as "free range" and further promoted that the hens roamed freely when the hens were mostly confined was found to have made misleading representations (*ACCC v Pirovic Enterprises Pty Ltd* [2014] FCA 1028);
- painkillers that were marketed as targeting specific types of pain, but which actually contained exactly the same ingredients were found to be false and misleading representations (*ACCC v Reckitt Benckiser Pty Ltd (No 4)* [2015] FCA 1408).

There are additional prohibitions in relation to false or misleading representations about sale of land (s 30), misleading conduct relating to employment (s 31) and making certain misleading representations about particular business activities, including business activities that are represented as being able to be carried out from a person's home (s 37).

The ACL also prohibits certain kinds of advertising which may be considered to fall within the category of conduct which misleads. It is prohibited to:

- offer a rebate, gift or prize with the intention of not providing it, or not providing it as offered (s 32); or
- engage in bait advertising (whereby a business advertises goods or services for a price that the business has no reasonable grounds for believing that they can sell the goods at that price).

Penalty provisions for these offences can be found in Div 1 of Pt 4-1 of the ACL.

[10.70] Unsolicited goods and services

Under the ACL, there is specific regulation around unsolicited sales of goods and services, which can be found in Div 2 of Pt 3-1. An unsolicited sale is defined in the ACL as the provision of goods or services to someone who has not requested them.

Where this occurs, there are additional protections for consumers preventing businesses from:

- asserting a right to payment for an unsolicited sale, which includes threatening to bring legal proceedings or placing the person on a list of defaulters or debtors, or threatening to commence collections procedure in regards to that unsolicited sale (ss 10, 40);
- asserting a right to payment for advertising or unauthorised entries (s 43); or
- sending unsolicited credit or debit cards to consumers (s 39).

The exception to this is limited to whether the business reasonably believes that that they have the right to assert payment, or in respect of where a card is sent to a consumer, the recipient has requested the card. If there is a dispute between a consumer and a business demanding payment, the business must prove that they have a legitimate right to have demanded that payment.

These provisions mean that consumers do not have to pay for unsolicited goods or services received. They are also not liable for the loss or damage of the goods, or due to the supply of the service (ss 41, 42).

However, if the consumer willfully or unlawfully damages the goods, then they may have to pay compensation for those goods. This only applies if the damage occurred within what is known as the recovery period. This period is ordinarily three months, but is reduced to one month if the consumer notifies the supplier in writing, their name and address, that they do not want the goods and provides information on how to collect those goods.

[10.80] Other specific protections

There are further specific protections, which are covered by Divs 3, 4 and 5 including:

- an absolute prohibition on pyramid schemes (ss 44–46). Pyramid schemes make money by recruiting businesses or additional people to participate through the payment of a fee, rather than selling a product or providing a service;
- provisions in relation to multiple pricing, which require that if there is more than one displayed price for goods, the sale must be made at the lowest price shown (ss 47, 165) and an additional prohibition on component pricing, that is only stating the price that is only part of the cost (ss 48, 166);
- a prohibition on referral selling (s 49). Referral selling is where a consumer is induced to purchase goods or services by promising that after the purchase they will receive a rebate, commission or benefit for providing other potential customers names or assisting the person to supply goods or services to other consumers;
- a prohibition on the use of physical force, or undue harassment or coercion, in connection with the supply, or possible supply, or payment for, goods or services or an interest in land (s 50).

[10.90] Consumer guarantees

Consumer guarantees are based on the previous state and territory statutory and implied warranties and can be found in Div 1 of Pt 3-2 of the ACL. A consumer is a person who buys goods or services to the value of $40,000, or goods more than this amount, which are normally used for personal, domestic or household purposes or a vehicle which is used to drive on public roads, irrespective of cost.

These guarantees cannot be excluded or limited by contract and to do so is a breach of s 64 of the ACL. The guarantees do not apply to goods purchased for resupply, meaning that they are specific to consumers and not to retailers. They are also not applicable for goods purchased by way of auction, except for guarantees in relation to the title and possession.

[10.100] Guarantees for goods

A supplier and a manufacturer provide the following guarantees in relation to goods:

- that the goods are of acceptable quality (s 54);
- that goods supplied will correspond with the description provided (s 56);
- that any express warranties will be honoured (s 59).

The supplier also separately guarantees on their own that the consumer is purchasing goods which:

- have a clear title, unless otherwise disclosed (s 51);
- are free from undisclosed securities (s 53);
- are fit for any disclosed purpose (s 55);
- have a right of undisturbed possession (s 52);
- correspond to a sample or demonstration model provided or disclosed (s 57).

A manufacturer provides an additional guarantee as to the availability of repairs and spare parts.

The guarantee as to acceptable quality is a new protection under the ACL. Previously, the *Trade Practices Act 1974* referred to merchantable quality and this terminology still exists in the *Sale of Goods Act 1923*. However, the new provision of acceptable quality provides a broader protection for consumers. The term comes from the New Zealand consumer legislation and has been interpreted more favourably for consumers.

Goods are deemed to be of acceptable quality if they are:

- fit for all the purposes for which goods of that kind are commonly supplied;
- acceptable in appearance and finish;
- free from defects;
- safe; and
- durable.

This is then determined in relation to what a reasonable consumer fully acquainted with the goods would find acceptable taking into account:

- the type and price of the goods;
- any statements or representations made about the goods;
- any label or packaging of the goods; and
- any other relevant circumstances.

There are exceptions to the guarantee of acceptable quality also found in s 54 of the ACL where the defects have been drawn to the consumer's attention prior to the purchase, or a reasonable examination

by that consumer would have revealed that the goods were not of acceptable quality. Additionally, if after purchase the consumer causes the goods to become unacceptable or damages the goods by abnormal use, then the supplier or manufacturer is not responsible.

[10.110] Guarantees for services

There are separate and specific consumer guarantees which apply to the supplier in respect of the provision of a service:

- a guarantee that services will be rendered with due care and skill (s 60);
- a guarantee that the service is fit for the disclosed purpose (s 61);
- a guarantee that services will be supplied within a reasonable time (s 62).

These guarantees do not apply to the services of architects and engineers, for the transport and storage of goods (where the consumer is a business) or contracts of insurance.

[10.120] Remedies for failure to comply with consumer guarantees

In regards to a breach of a consumer guarantee, Div 1 of Pt 5-4 prescribes the remedy that applies. The remedy will vary based on whether the failure is deemed to be a major or minor failure. It is worth noting that the ACL does not use the terminology or have a definition of minor failure, but rather specifies whether the failure is "not a major failure". For ease of reference, this book will refer to a non-major failure as a minor failure.

Minor failure – goods and services

If the issue in relation to the goods or service supplied is minor, then a repair is the appropriate remedy (ss 259, 267). However, if the supplier does not repair the goods within a reasonable time, or their repairs are unable to fix the problem, then the consumer has the right to:

- get the repairs done elsewhere;
- ask for a replacement;
- ask for a refund; or
- recover compensation for the drop in value below the price paid.

The ACL regulations (reg 91) state that a repair notice must be provided by a business where the goods being repaired include user-generated data such as mobile phones, computers and other electronics and repair of the goods may result in the loss of the data.

Major failure – goods

If a trader is unable to remedy a minor failure, or a failure is a major failure, a consumer may reject the goods and may at their own election ask for a refund or a replacement of the goods pursuant to s 259 of the ACL.

A breach of consumer guarantees is deemed to be a major failure in relation to goods pursuant to s 260 of the ACL if:

- a reasonable consumer fully acquainted with the nature and extend of the failure would not have acquired the goods; or
- the goods do not match the description, sample or demonstration if supplied by reference to that description, model or sample; or
- the goods are substantially unfit for the purpose which they are commonly supplied and cannot be remedied within a reasonable time; or
- the goods are unfit for a disclosed purpose and cannot be remedied within a reasonable time; or
- the goods are unsafe.

A consumer cannot reject the goods if the rejection period has ended or the goods are lost, destroyed or disposed of or the goods were damaged after delivery. The rejection period is the period within which it would be reasonable to expect the failure would become apparent. It begins from the time of the supply (s 262). This time period must take into account the type of the goods, the use the consumer would have for the goods, the length of time it is reasonable for the goods to be used and the amount of use which is reasonable. Furthermore, if a consumer has notified a supplier of goods that they have rejected those goods, the ACL also gives the consumer a right to terminate any contracts connected with the rejected goods (s 265).

Major failure – services

If the major failure relates to the supply of a service, the consumer can choose between cancelling the contract and receiving a refund, or

keeping the contract and receiving compensation for the difference in value due to the failure (s 267). If a consumer terminates a contract for the supply of services and goods have also been supplied in connection to those services, the consumer is taken to have rejected those goods as well (s 270).

A breach of consumer guarantees is deemed to be a major failure in relation to services:

- if the services would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or
- the services are unfit for a purpose that services of that kind are commonly supplied for and they cannot be remedied to make them fit for that purpose; or
- the services are unfit for a particular purpose disclosed and cannot be remedied within a reasonable time; or
- the services are not of such a nature or quality, state or condition that they might be expected to be by the consumer and that was made known to the supplier; or
- the supply creates an unsafe situation (s 268).

Damages

In addition to the above, a consumer may recover damages for any loss or damage suffered by the consumer from both the supplier and the manufacturer (s 271).

In regards to the supplier, the consumer may recover damages because of a failure to comply with a guarantee pertaining to goods, if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of the failure (s 259(4)).

In relation to a manufacturer, if the guarantee of acceptable quality is not complied with the consumer may claim:

- any reduction in the value of the goods from the failure to comply below the lower price of the average retail prices at the time of supply or the price paid by the consumer;
- the cost of inspection and returning the goods;
- any loss or damage which was reasonably foreseeable (s 272).

However, if the goods were not of acceptable quality due to an act, default or omission of another person, or due to independent human control, the consumer cannot recover damages from the manufacturer (s 272). There is also three-year time limit against the manufacturer from when the consumer became aware, or ought to have reasonably become aware, of the failure to comply with the guarantee (s 273).

Linked credit contracts

A linked credit contract is a contract that a consumer enters into with a credit provider for the supply by way of sale, lease, hire or hire-purchase of goods to the consumer. By way of example, a linked credit arrangement may be where a consumer has purchased a car from a dealer and that dealer has also organised finance for the purchase. A supplier and a linked credit provider are jointly and severally liable if a consumer suffers loss or damage due to:

- a misrepresentation relating to the credit provider under the linked contract;
- a breach of the linked credit contract or of a contract for related supply;
- a failure to comply with a consumer guarantee; or
- a breach of a warranty implied by s 12ED of the *Australian Securities and Investments Commission Act 2001* (Cth).

The consumer must join both the linked credit provider and the supplier in any court proceedings.

Recent case law suggests that in order for a relationship between a supplier and a credit provider to be found to be "linked credit" there must be evidence of a consensual arrangement between the credit provider which was strong and pre-existing (*Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Ltd (in liq)* [2013] FCAFC 5).

[10.130] Unsolicited consumer agreements

Unsolicited consumer agreements occur when an agreement is made outside of the seller's usual place of business, or is from an uninvited call or approach. The total value of goods or services must be more than $100, or the value was not established when the agreement was made.

Unsolicited consumer agreements commonly come from marketers or suppliers door knocking households, telephoning consumers, or approaching consumers in shopping centres. However, an agreement is still considered to be unsolicited if a consumer gave their contact details

to a business for one purpose and the business contacts that consumer to negotiate the sale of goods or services, which is considered to be a different purpose.

As a consumer has not invited the contact from the business, these agreements attract different and more stringent protections that are found in Div 2 of Pt 3-2 of the ACL. In a dispute, it will be up to the business to prove that the consumer approached them for the agreement.

A person who makes unsolicited contact with consumers in order to enter an agreement for the supply of goods or services must comply with a number of requirements. These include:

- not contacting the consumer outside prescribed business hours (s 73);
- making disclosures to the consumer about their purpose and identity both before commencing negotiations and before the agreement is made (s 74);
- notifying the consumer that they may ask the seller to leave the premises and that the seller must immediately do so if requested (ss 74, 75). If this occurs, the seller must not contact the consumer again for at least 30 days. A do not knock sign is considered to be a request to leave (*ACCC v AGL Sales Pty Ltd* [2013] FCA 1030; *ACCC v AGL Sales Pty Ltd (No 2)* [2013] FCA 1360);
- informing the consumer that they have a cooling off period and a right to terminate the agreement within a certain time frame;
- giving the consumer information on how to exercise their termination right (s 76);
- ensuring the agreement is in writing and that a copy with the businesses contact details is given to the consumer immediately after the agreement is made (or within five business days if the agreement is negotiated by telephone) (ss 78, 79, 80); and
- not accepting or requesting payment or making supplies during the 10-day cooling off period (s 86).

Terminating an unsolicited consumer agreement

A consumer may terminate an unsolicited agreement within 10 days after the agreement was made or if the agreement was negotiated by telephone, within 10 days after the consumer was given a copy of the agreement. A supplier must return or refund any money paid under an agreement or related contract when a consumer exercises their right to terminate the agreement within the cooling off period. This will also terminate a related contract or agreement, such as a contract of guarantee or indemnity or credit or finance arrangements (s 83).

However, if a consumer has received goods from an unsolicited contract they must return those goods or tell a supplier where to collect them. If they have not taken reasonable care of the goods, the supplier can seek compensation for a drop in the value. If the goods are not collected within 30 days after termination, the goods become the consumer's property.

A consumer may also cancel an unsolicited agreement within three or six months, if certain requirements have not been met, such as:

- the seller did not provide information to the consumer about the cooling off period or termination rights;
- the seller did not provide a written copy of the agreement, or the agreement they did provide did not including certain required information;
- a supply of goods to the value of more than $500 was made to the consumer in the 10-day cooling off period;
- a supply of services was made to the consumer in the 10-day cooling off period;
- the supplier accepted or requested payment for goods or services during the cooling off period (s 82).

The agreement may be terminated by the consumer giving the supplier written or oral notice of the consumer's intention to terminate. It is unlawful under the ACL to attempt to limit the rights of consumers to terminate agreements (s 89) and a consumer cannot waive any rights under the ACL that relate to unsolicited agreements (s 90).

[10.140] Injuries or damage from unsafe goods

It may be possible depending on the circumstances for a person to sue for damages if they suffer an injury from unsafe goods (see Chapter 3, Accidents and Compensation).

Protections from unsafe goods for consumers in the ACL include recalls, bans, safety warning notices and mandatory reporting for businesses. These are to ensure that the public are aware of

safety issues with products, particularly where there has been a serious injury or a death, and that the product can be quickly removed from the market.

[10.150] Lay-by sales

The provisions addressing lay-by sales are set out in the ACL at ss 188–191. Lay-by agreements are where a customer pays for goods in more than three instalments and does not receive the goods until the final instalment is made. These agreements must be in writing and specify all terms and conditions, including any termination amounts (which are only payable if an agreement is terminated by the consumer). A business must ensure a lay-by agreement is transparent so there are no hidden terms and conditions.

If the agreement is terminated, the consumer is entitled to recover all monies paid, less any termination fee, in accordance with the terms of the agreement. There are limited circumstances in which a supplier can terminate a lay-by agreement such as a breach by the consumer of the agreement, the supplier no longer being in business, or the goods no longer being available.

[10.160] Gift cards

The ACL (ss 99A–99F) requires gift cards to meet the following requirements:

- the card must be redeemable for at least three years;
- the date the card ceases to be redeemable must appear prominently on the card;
- terms and conditions of the card are not to allow post-supply fees (a fee or charge after supply of the card).

[10.170] Remedies

The ACL provides a broad range of remedies to ensure that businesses comply with consumer protections. Some of these have already been addressed above. In addition, there is the general ability of a court or tribunal to order payment of compensation for loss or damage suffered because of a breach of the consumer protection provisions (s 236). An injunction may also be granted to prevent contravening behaviour, on the application of a regulator or other person (s 232).

Resolving consumer disputes

[10.180] It is often possible to resolve a consumer dispute by contacting the business who supplied the goods or services directly. It is a good idea to set out the dispute in writing to the business, so that it is clear what the issue is and the outcome you want. Depending on the problem, it may also be useful to approach the manufacturer or the Australian distributor of the goods, if they are manufactured elsewhere.

NSW Office of Fair Trading

If you cannot resolve your issue with the business directly, a consumer may speak with the Fair Trading NSW who will provide free information to consumers about their rights and options to resolve the dispute. Consumers can also lodge a formal complaint against the business with the Fair Trading NSW. Once this occurs, the Fair Trading NSW can contact the business directly on behalf of the consumer and attempt to negotiate a solution or settlement to the dispute.

Court or tribunal

Where the dispute is not resolved, the consumer may need to commence proceedings in either a court or a tribunal. The choice is whether to take the proceedings to the New South Wales Civil and Administrative Tribunal (NCAT), or to the Local or District Court of NSW (depending on the amount of your claim). In order to make this decision, it is useful to understand the differences between these forums.

NCAT has a time limit of three years from the time the cause of action giving rise to the claim accrues or from 10 years from the last supply of the goods and services (*Fair Trading Act 1987*, s 79L). If a claim is taken to a court, the limit is six years from the date the cause of action accrues per ss 236 and 237 of the ACL. Different limitation periods apply for claims about personal injury.

NCAT sees most consumer claims in NSW and has a general jurisdictional limit up to the value of $40,000. There is no limit in relation to claims for a new motor vehicle that is used substantially

for private purposes, within the meaning of the *Motor Dealers and Repairers Act 2013* (NSW). In addition, there is no limit on claims concerning the commission payable to an agent under s 36 of the *Property, Stock and Business Agents Act 2002* (Cth). The power of NCAT to determine consumer claims comes from Pt 6A of the *Fair Trading Act 1987*.

Where there is a consumer claim for more than the NCAT limit, which could be the case for personal injury claims, the proceedings must be in a court. The Local Court, which is the most common alternative forum to NCAT, has a jurisdictional limit of $100,000. The District Court's jurisdictional limit is $750,000.

There are a few advantages to taking proceedings to NCAT rather than a court, such as:

- the filing fee at NCAT is less than a court;
- legal representation is not normally allowed unless the parties satisfy specific tests and NCAT makes an order permitting legal representation;
- proceedings are much less formal than a court, as the rules of evidence do not apply, although a consumer will still need to bring evidence such as photos, receipts and statements to prove their claim;
- NCAT is required "to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible";
- NCAT will encourage the parties to undertake mediation as they must use their best endeavours to bring the parties to their own resolution of the dispute;
- if a party is unsuccessful they will not normally be ordered to pay the costs of the other party, unless special and unusual exceptional circumstances exist.

NCAT also has obligations to ensure the parties understand the tribunal procedures, the assertions each person is making, the legal implications of those assertions, and the ultimate decision that is made. This means that they move at a pace that is more accessible to unrepresented parties and there is commonly an explanation provided to the consumer about what is occurring.

The power of NCAT to makes orders can be found in ss 79N and 79O of the *Fair Trading Act 1987*, and there is a comprehensive list allowing for an order:

- for the payment of money;
- that defective goods or services be fixed;
- that goods be returned;
- that goods be replaced;
- that money claimed to be owing is in fact not owing;
- which is a combination of the above; or
- an order that the proceedings be dismissed.

Generally, decisions are given orally at the hearing however a party may request a written statement of reasons within 28 days of becoming aware of the NCAT's decision.

Once a decision is made, the parties may have the right to appeal the decision internally, within 28 days, to the NCAT Appeal Panel for an error of law or with permission (leave) of the Tribunal about the merits of a decision. The parties can also appeal directly to the Supreme Court of NSW, within three months, by way of judicial review in regards to questions of NCAT's jurisdiction, or a denial of natural justice.

NCAT cannot enforce its decisions as it has no enforcement powers of its own. Money orders made by NCAT may be registered with the court for enforcement. Once a judgment is registered, then it can be enforced for a period of up to 12 years as if it were a judgment of that court. For example, if a money order has not been paid and the order is registered with the Local Court, then that court can order that certain property be seized for sale (known as a writ for levy of property) or that money be taken out of another party's wages or a bank account (known as a garnishee order).

If an order has been made for work to be carried out, or for goods to be returned, and that order has not been complied with, the application may be renewed by the person in whose favour the order has been made. A renewal means that a person is asking NCAT to change the original orders into a money order, or in some circumstances a further work order. A person can file for a renewal within 12 months of the final date for compliance.

ENERGY CONSUMERS

[10.190] Both electricity and gas industries have undergone a process of reform since the mid-1990s (electricity) and early 2000s (gas).

One significant reform was the harmonisation of state-based regulations for the electricity and natural gas retail markets and distribution sectors

into a single set of national rules, under the National Energy Consumer Framework (NECF). The NECF was formally adopted in NSW on 1 July 2013. Under the NECF, the term "energy" covers both electricity and natural gas.

Generally the main pieces of legislation/regulations under the NECF are the *National Energy Retail Law* (NSW) (NERL) and the *National Energy Retail Rules* (NERR). The NERL provides the "big picture" provisions regulating the supply and sale of energy to small retail customers, whereas the NERR provides the detailed content to these provisions.

While the NECF provides a consistent set of national customer protection measures, government-funded rebate and emergency assistance programmes remain under state jurisdiction.

Customers in NSW have a choice of which retailer supplies their energy services (which now includes meter provision/replacement). Customers can choose to enter into a market retail contract with an electricity or gas retailer (see [10.200]).

Electricity customers in NSW normally have direct dealings with electricity suppliers from two sectors of the industry: distributors (or networks) and retailers.

- *Distributors* are responsible for the "poles and wires" that bring the power to a customer's property (see [10.490]). The NSW government owns the three distribution networks covering most of Sydney and the Hunter Valley (Ausgrid), Western Sydney and the Illawarra (Endeavour Energy); and the rest of NSW (Essential Energy). Partial privatisation of Ausgrid occurred in December 2016 and in May 2017 for Endeavour Energy.
- *Retailers* sell electricity to customers on a contractual basis (see [10.200]).

Likewise natural gas customers in NSW may have dealings with the distributor when there are supply problems or leaks in the street, but most of their business will be with the retailer. In NSW, there are six reticulated gas distributors:

- Jemena, covering the Illawarra, Sydney, Central Coast, Hunter, Southern Highlands, Blue Mountains, Riverina, Central West and Orana;
- Evoenergy, covering Queanbeyan, Bungendore and Nowra;
- Australian Gas Networks, covering Albury;
- Allgas Energy, covering Tweed Heads;
- Central Ranges Pipeline, covering Tamworth;
- Envestra (NSW), covering Riverina, Temora, Cooma, Bombala and Murray Valley.

Energy contracts

[10.200] Opening and closing accounts

Small customers are required to open an energy account when they move into a new property and start consuming energy. They must also close the account when moving out, to avoid paying for the energy use of others. A security deposit may be charged on the opening of a new account (see [10.230]) but cannot be charged if the retailer has identified the customer as a hardship customer or any other retailer has identified the customer as a hardship customer and the customer tells the new retailer of this.

[10.210] Types of contracts

When opening an account, energy customers are entitled to choose between the following types of contracts for their energy services:

- a standard retail contract with standing offer tariffs which are set by the retailer, and standard terms and conditions (see NERR, Sch 1);
- a standard retail contract with an agreed retail price approved by the Independent Pricing and Regulatory Tribunal (IPART), and standard terms and conditions (gas only);
- a market retail contract with competitive tariffs and terms and conditions that may vary from contract to contract.

Retail electricity prices were deregulated in NSW from 1 July 2014 and regulated tariffs are no longer available. Retail gas prices are subject to voluntary retail pricing that are agreed to between IPART and the local area retailer (see below), and are also known as "regulated offer prices" (NERL, s 37C).

All retailers must have a standing offer, which gives domestic and small retail customers the automatic right to supply (see NERL, ss 22–32). Small retail customers are those who consume less

than 100 megawatt hours (MWh, which is 1,000 kilowatt hours) of electricity per year or less than 1 terajoule (TJ, which is 1,000,000 megajoules) of gas per year (*National Energy Retail Law (Adoption) Regulation 2013* (NSW), cl 4(1)).

Where the customer is opening an account at a site without a previous connection, they have an automatic right to supply from the local area retailer for the relevant geographical area (NERL, s 2 definition of "designated retailer").

The local area retailers for electricity are:

- Origin Energy for premises in Essential Energy and Endeavour Energy's network areas;
- EnergyAustralia for premises in Ausgrid's network area.

The local area retailers for gas are:

- Origin Energy for premises in Envestra and Central Ranges Pipeline's network areas;
- AGL for premises in Jemena's network area;
- ActewAGL Retail for premises in Evoenergy's network area (*National Energy Retail Law (Adoption) Regulation 2013*, cl 5).

The local area gas retailers must offer both standing and regulated pricing offers to customers (NERL, s 37C(9)).

Where the customer is opening an account at a site where there is an existing connection, they have an automatic right to supply, under a standing offer, from the retailer who currently supplies the site (NERL, s 2 definition of "designated retailer").

Alternatively, customers may source a market retail contract from another energy retailer but there is no obligation on another retailer to offer a customer a market or standing contract. Under a market retail contract, the quality of energy supply will not change but these contracts generally offer different terms and conditions from the standard contract and sometimes have benefits attached to them. Market contracts may also bind customers to set periods, usually one, two or three years. Administrative and penalty fees may be charged in certain circumstances or if contract terms are broken, usually by early termination of the contract. From 1 January 2018, retailers can no longer apply Early Termination Fees to contracts (with certain exclusions) even if the terms and conditions of a customer's market contract provide for the payment of an early termination charge. However, retailers are not prevented from recovering the reasonable cost of installing certain equipment, such as a solar photovoltaic system, a battery storage system or a digital meter at the customers premises. A retailer is also not prevented from recovering a charge where a customer terminates a fixed benefit period early if the benefit to the customer during the period includes a fixed tariff or a fixed charge for the energy provided under the contract (*National Energy Retail Law (Adoption) Regulation 2013*, cl 9C).

Some retailers offer "dual fuel" contracts which include both electricity and natural gas.

If a customer does not have a contract with a retailer and is using energy at the site, a deemed customer retail arrangement is taken to apply between the customer and the current retailer of the site. This can happen where a customer moves into a site and commences using energy (gas or electricity) but fails to open an account. It can also occur where their current market retail contract expires and a new contract has not been entered into (NERL, s 54(2)). The current retailer of the site has several obligations to fulfill as soon as they are become aware that energy is being consumed. These include informing the customer of the terms and conditions of the deemed customer retail arrangement, the customer's options for establishing a contract and their right to disconnect (NERR, r 53).

[10.220] Choosing the right contract

If considering a market retail contract, customers should consider:

- the prices at which energy will be supplied, and whether prices are calculated according to levels of usage (block tariffs) or according to peak and off-peak usage times (time-of-use tariffs);
- the cost of the service to property charge (Service Availability Charge (SAC));
- duration and expiry date of the contract;
- the arrangements when the contract expires;
- any price adjustments over the life of the contract;
- fees for late payment, dishonoured payment, move in/out, special meter reading, meter test, disconnection and reconnection (see [10.320]);
- solar feed-in tariff rates;
- billing frequency (eg, monthly or quarterly);
- payment options (eg, BPay, Centrepay, direct debit, post office) and associated fees;
- security deposit requirements.

From 1 January 2018, energy retailers cannot charge a fee for issuing a paper bill or charge a fee

to a customer who pays a bill in person over the counter at an Australia Post outlet (see [10.330]).

Customers have a "cooling off" period of 10 days in which to cancel a market retail contract without incurring any penalty (see [10.280]).

Customers should note that transfers from one retailer to another may not take place immediately, as the new arrangement will generally be from the next scheduled meter reading (which should be no more than 90 days).

For an immediate transfer, the customer can ask whether the retailer can do a special meter read. This service generally incurs a fee (see [10.330]).

[10.230] Security deposits

Energy retailers may request a security deposit when a new account is opened. For residential customers, this can only occur at the start of the contract, while for small business customers this may occur at the start of or during the term of the contract (NERR, r 40(1)).

The retailer can only request a security deposit under any of the following circumstances:

- the customer owes money to that retailer and this is not in dispute;
- the customer has fraudulently acquired energy within the past two years;
- the customer has refused to provide acceptable identification;
- the retailer reasonably considers that the customer has a poor credit history;
- the customer has refused the retailer permission to obtain a credit check;
- the customer has been offered a payment plan and declined it or failed to pay an instalment;
- the retailer reasonably considers that the customer has no history of or has a poor record of paying their account (for business customers) (NERR, r 40(2)).

If a retailer requires the customer to pay a security deposit because they consider that the customer has a poor credit history, the retailer must tell the customer that they can dispute the decision (NERR, r 40(5)).

The retailer cannot require the customer to provide a security deposit where they have been identified as a hardship customer by any retailer (NERR, r 40(3)).

Standard retail contracts

If a customer has entered a standard retail contract, retailers must not require a security deposit of more than 37.5% of the customer's estimated bills over a 12-month period. This estimation is based either on the customer's billing history or the average usage of a comparable customer over a comparable 12-month period (NERR, r 42(1)).

Retailers must, in-line with the customers reasonable instructions, refund the security deposit, together with accrued interest, within 10 business days after a residential customer completes one year of on-time payments. Business customers are entitled to a refund when they complete two years of on-time payments.

Customers are also refunded when they move out, transfer to another retailer or request disconnection, provided the security deposit is not required to settle the final bill (NERR, r 45).

Market retail contracts

If a customer has entered a market retail contract, information about the collection and return of security deposits will be in the contract.

Marketing and transfers

[10.240] Energy retailers and their marketing agents may approach customers in person by door knocking or at shopping centre kiosks, by mail, online or by phone to sell market retail offers.

[10.250] Customer choice and explicit informed consent

A customer who is approached by a retailer or their marketing agent is not obliged to sign or agree to any contract. Customers who decline to take up an offer will continue to receive electricity and gas services from their existing retailer.

A retailer must obtain the customer's explicit informed consent before they enter into a market retail contract (NERL, s 38). This involves clear, full and adequate disclosure of all matters relevant to the consent of the customer (see Marketers must disclose information at [10.260]), and the customer gives their consent to the offer (NERL, s 39(1)(a)).

Consent can be given:

- in writing, signed by the customer;
- verbally, so long as the verbal consent can be verified and made the subject of a record (eg, a voice recording);
- by electronic communication generated by the customer (eg, an email) (NERL, s 39(2)).

The retailer must retain a record of the consent for two years and must provide a copy to the customer, without charge, on request (NERL, s 40).

Customers who query whether explicit informed consent was provided must raise a complaint within 12 months of the transaction. Customers can ask the retailer for proof of their consent and if it is not produced within 10 business days or the retailer otherwise admits that it was not obtained, the contract is void and the retailer should transfer the customer back to their previous retailer. Additionally the retailer cannot recover any amount for any energy supplied as a result of the void transaction (NERL, s 41(a), 41(b), 41(c)), subject to the information below.

For electricity customers: The retailer should transfer the customer back to their previous retailer, however this depends on the length of time which has passed since the void transaction occurred:

- if the transfer occurred less than six months prior, market procedures allow the retailer to retrospectively transfer the customer back to their previous retailer. This places the customer in the same position they were in before the transfer occurred, and they will be billed by the previous retailer for the energy supplied as if the transfer had not occurred. Any payment made to the retailer must be transferred to the previous retailer;
- if the transfer occurred more than six months prior, market procedures prevent the retailer from retrospectively transferring the customer back to their previous retailer as if the transfer had not occurred. Instead, the transfer can only be backdated to six months, which means that the retailer may be financially responsible for the customer's site for one or two billing periods prior to the backdate. The retailer cannot bill the customer for these periods (NERL, s 41(5), and see *AEMO MSATS Procedures: CATS Procedure Principles and Obligations*).

For gas customers: The six-month limit rule does not apply to gas customers, and the transfer can go back to the date of the void transaction. The customer's previous retailer is entitled to bill the customer as if the transfer had not occurred. Any payment made to the retailer must be transferred to the previous retailer (NERL, s 41(5)).

If the void transaction did not involve the transfer of the customer from one retailer to another (eg, if their existing retailer had offered the customer a different contract), the customer will be billed for the energy supplied under their existing contract (NERL, s 41(4)).

Transfers where there has been no contact with a marketer

A customer (Customer A) might find they have been transferred to another retailer without their explicit informed consent or contact by a marketer. This can happen when another customer (Customer B) has opened an account with a new retailer but an error has occurred as part of the new retailer's administration of the transfer process.

For example, the marketer may have recorded the address or meter number of Customer B incorrectly, resulting in Customer A being transferred. If the transfer occurred less than six months prior, the new retailer can organise for a retrospective transfer back to Customer A's previous retailer. This places Customer A in the position they would have been in if the error had not occurred and the previous retailer may bill Customer A for the energy supplied during this period.

If the retrospective transfer fails or, in the case of electricity customers, more than six months has passed since Customer A's site was taken in error, the new retailer cannot bill Customer A for any period in the absence of their explicit informed consent (NERL, s 41(3)).

[10.260] Door-to-door and telephone marketing

Energy marketers must abide by consumer protections in the ACL. Customers who feel that marketers have breached the ACL should contact the energy retailer involved as a first step or the Energy and Water Ombudsman NSW (EWON) if the retailer's response is unsatisfactory (see [10.540]).

Retailers must retain, for 12 months, a record of all marketing activities, including details of energy marketing visits, telemarketing calls and any activity by their marketing agents. Retailers must

also ensure that their employees have immediate access to these records (NERR, r 68).

Permitted contact hours

Marketers must not contact customers:

- at any time on a Sunday or a public holiday;
- before 9 am on any other day;
- after 5 pm on a Saturday;
- after 6 pm on any other day (ACL, Sch 2, s 73).

Marketers must disclose information

When selling a market contract to a customer, energy retailers or their marketing agents must, either electronically, verbally or in writing, provide information about:

- prices, fees and charges, concessions and rebates, security deposits, billing and payment arrangements and how any of these may be changed;
- the commencement date, duration of the contract and provisions regarding termination;
- the customer's right to withdraw from the contract during the 10-day cooling off period;
- the customer's right to complain about the marketing activity to the retailer and to EWON (NERR, rr 63, 64).

From 1 January 2019, when retailers or their agents (all outsourced sales channels, including third party comparison websites and utility connection services) engage in marketing activities, they must have two plan documents which contain the detailed information listed above. The Basic Plan Information Document (BPID) includes key plan information for a customer to use when assessing a plan's suitability; it can also be used when comparing between plans. The Detailed Plan Information Document (DPID) provides more detailed information about the fees, prices, contract details and eligibility criteria for an energy plan and is designed to assist customers who need extra detail about prices, fees, terms and conditions, before they feel confident enough to consider switching.

Retailers, as a minimum, must provide on their website a prominent link to the BPID on the Australian Energy Regulator's online price comparison website Energy Made Easy (www.energymadeeasy.gov.au) for all generally available plans they market. Customers must be able to access BPID links without having to provide additional information and should also be able to access a link to the BPID as an initial step in any online search or sign up process (*Retail Pricing Information Guideline April 2018*, cl 79). After the customer has agreed to a contract, this information must be provided to the customer in writing, accompanied by a copy of the market retail contract (NERR, r 64(2)).

A marketer contacting a customer in person must also provide a BPID for each plan offer at the time of contact, which summarises key terms and conditions of the contract and refers the customer Energy Made Easy (*AER Retail Pricing Information Guideline April 2018*, cl 93). The NSW Government also operates an online comparison website called "Energy Switch" (https://energyswitch.service.nsw.gov.au/) which is designed to help customers not only find a better electricity or gas plan but can initiate the request to switch retailers.

Marketers must not mislead or deceive

Energy marketers must not engage in misleading or deceptive conduct, such as claiming the marketer is representing the government, insisting that a contract must be accepted immediately, or insisting customers show current electricity and gas bills. Marketers also must not coerce or pressure a customer into agreeing to a contract.

Door-to-door marketers must identify themselves and clearly inform the customer that they are selling a product and they are obliged to leave the premises immediately on request (ACL, Sch 2, ss 74, 75).

Marketers must follow customer's contact wishes

Energy marketers are restricted from contacting customers against their wishes or at certain times (see Permitted contact hours at [10.260]). Marketers must leave a home immediately or end a phone call when asked.

A customer may choose to be placed on a "no contact" list for door-to-door or mail marketing by notifying the energy retailer that has approached them. The register remains current for two years (NERR, r 65). Customers may also display a "No Marketing" "No Canvassing" or "No Advertising" or similar sign on their premises. Marketers must abide by such signs (NERR, r 66).

Alternatively, customers who do not wish to be contacted by any telemarketers may register on the Commonwealth Do Not Call Register

(see www.donotcall.gov.au or call 1300 792 958 for more information).

Marketing to others in the household

Although customers may complain about this, marketing to a non-account holder is not prohibited. A non-account holder can cancel an existing contract and transfer to a new retailer if they acknowledge they have the authority to do so.

People who manage the affairs of another person, such as advocates or carers, should be aware that marketers may set up a contract with the person in their responsibility or care if that person consents.

If a customer cannot sort out a problem with an unwanted account transfer with the retailer, they can contact EWON (see [10.540]).

[10.270] Green energy

Green energy is electricity produced from renewable sources, such as the sun, wind, water and waste, and produces substantially lower greenhouse gas emissions than energy generated from coal- or gas-fired power stations.

GreenPower™ is a national accreditation programme administered by the NSW government which ensures that green energy products on offer meet strict requirements for renewable energy production (see www.greenpower.gov.au/ for more information).

Customers can nominate what percentage of their electricity consumption comes from GreenPower accredited renewable sources. This percentage should be clearly displayed in the retailers' marketing material. Generally, the higher the proportion of renewable energy in a product (eg, 10%, 20%, 25%, 50%, 75% or 100% green energy), the higher the price.

Customers can view and compare the range of green energy tariffs available on the Australian Energy Regulator's price comparison website (www.energymadeeasy.gov.au) as well as on the NSW Governments comparison website (https://energyswitch.service.nsw.gov.au/).

[10.280] Changing your mind

A customer who enters into a market retail contract has the right to withdraw from the contract within 10 business days without penalty (NERR, r 47(1)). The cooling off period starts from the date the customer receives the information that retailers are required to disclose (see Marketers must disclose information at [10.260]).

For door-to-door marketing, this information will be provided at the time the contract is entered into. Where a customer agrees to a contract over the phone, the written documentation will be posted to the customer and it is industry practice to assume that delivery takes place on the third business day after the contract is formed.

To terminate a contract within the cooling off period, a customer may notify the retailer verbally or in writing (NERR, r 47(4)). Retailers must keep a record of the customer's notice of termination as if it were a record of explicit informed consent (NERR, r 47(6)) (see Customer choice and explicit informed consent at [10.250]).

Billing

[10.290] Customers on standard retail contracts are entitled to receive a bill at least once every 100 days (NERR, r 24(1)). If a customer has a market retail contract, information about billing frequency will be contained in the contract and may vary from monthly to three monthly billing depending on the type of meter you have installed.

Bills are divided into two distinct service and usage charges:

- Service Availability Charges (SAC) are minimum rates per day charged for connection to the electricity or gas network;
- consumption charges are calculated on levels of usage as measured by the meter.

Bills may also contain other fees and miscellaneous charges (see [10.320] and [10.330]).

While energy customers are obliged to pay their bills on time, energy retailers in NSW provide hardship assistance programmes to help people who are having difficulty paying their bills. Customers who are experiencing financial difficulties should contact their energy retailer as soon as possible to discuss their situation (see [10.350]).

[10.300] Estimated usage bills

Customers are obliged to provide safe and unhindered access to their meter. Energy retailers may estimate a customer's energy usage when the distributor or meter provider is unable to access the meter to perform a meter reading. Lack of access may be due to locked gates, an unrestrained dog or other obstructions, or a faulty meter. However, best endeavours must be made to conduct an actual read at least once every 12 months, with bills adjusted accordingly (NERR, r 20(2)). This means that where previous bills have been under- or over-estimated, a customer may be sent a bill that has a catch-up component because they were undercharged or a bill that has a credit on it because they were overcharged. Estimations are based on the customer's previous usage where data is available, the customer's self-read or the average amount of usage for a comparable customer over the corresponding period. The estimated bill must clearly state that it was based on an estimated reading (NERR, r 21(2), 21(3)). From 1 February 2019, customers with electricity accumulation meters and gas meters who receive an estimated bill will be able to ask their retailer to adjust the estimated bill by providing their own reading of the meter. They must do this before the payment due date on the bill (NERR, r 21(3A)(b)).

Customers with meter access issues can request a special meter read, which will attract a fee. Where there is no meter access, the retailer or distributor may require a special meter read to ensure the meter is read at least once every 12 months, and the customer may be charged for this (see [10.330]).

[10.310] Undercharging and overcharging

Where a customer's (see [10.210]) energy account is undercharged, their account may be re-billed for the period of the undercharge. This will result in the customer receiving a back-bill. There is a limit of nine months on the time a retailer can recover an amount undercharged on a small customer's account. This means that if the retailer has been undercharging a customer for a two year period, it is only able to issue a back-bill to recover charges for nine months prior to the date the customer is notified of the undercharging (this is usually the date the back-bill is issued) (NERR, r 30(2)(a)).

Undercharging can occur when there has been:

- a meter read error;
- an under-estimated bill;
- a billing error, such as an incorrect tariff or service to property charge;
- a failure to issue a bill for all or part of the billing period.

The nine-month limitation does not apply where the undercharge occurs as a result of the customer's fault, unlawful act or omission, for example where the customer refuses to provide access to their meter (NERR, r 30(2)(a)).

Customers are entitled to pay a back-bill by instalment over an extended period of time. The time period allowed depends on the length of the undercharged period:

- if the undercharging was for a period of less than 12 months, customers have an amount of time to pay that is equivalent to the period of the undercharging;
- if the undercharging was for a period of more than 12 months, the retailer can only recover for nine months but they must allow customers 12 months to pay (NERR, r 30(2)(d)).

When a retailer becomes aware that a customer has been overcharged, they must inform the customer of this within 10 business days. Interest is not payable on overcharged amounts (NERR, r 31(1)). There is no rule which states how far back a retailer is required to refund overcharge amounts unless the overcharge has occurred as a result of a customer's unlawful act or omission. In this case, the retailer is only required to repay, credit or refund the customer the overcharged amount for a 12 month period before the error was discovered (NERR, r 31(5)).

If the overcharged amount is below $50, the retailer is only required to credit the amount to the customer's account. However, if the overcharged amount is over $50, the customer can decide how the refund is to be paid. If the customer does not provide instructions, the retailer must credit the amount to their account.

If the customer has closed their account, the retailer must use their best endeavours to refund the money within 10 business days (NERR, r 31(2)(c)).

[10.320] Late payment fees

Customers under standard and market retail contracts (see [10.210]) may be charged a late payment fee for failure to pay bills on time. Customers should consult their own contracts to ascertain any late payment fees they may incur, and the dollar amount of these fees. A late payment fee cannot be charged if the customer is a hardship customer participating in their retailers hardship programme (NERR, r 73). Retailers must also waive the fee under these circumstances:

- if the customer receives the Low Income Household Rebate or Medical Energy Rebate;
- if the retailer has agreed to give the customer an extension of time to pay;
- where the customer and retailer have entered into a payment plan;
- the energy retailer is aware that the customer has contacted a welfare agency or support service for assistance;
- payment or part payment is made by an EAPA voucher (see [10.400]);
- when the customer has made a billing related complaint to EWON (*National Energy Retail Law (Adoption) Regulation 2013*, cl 10).

[10.330] Miscellaneous charges

Customers may be charged a range of fees for certain additional network-related work. Network fees are set by the Australian Energy Regulator (AER) but energy retailers may add a retail component to the fee when billing customers. GST is payable on all miscellaneous fees.

These include fees for:

- a special meter reading;
- meter testing;
- disconnection;
- reconnection;
- rectification of illegal connections.

From 1 January 2018, energy retailers in NSW are prohibited from charging small customers a fee for receiving a paper bill and making a payment towards their energy account at an Australia Post outlet (*National Energy Retail Law (Adoption) Regulation 2013*, Sch 1, cll (9B), (9C)).

Before being charged, the energy company should inform the customer of the amount of the fee and the reason it may be charged.

Customers should consult their own contracts to confirm any miscellaneous fees have been outlined in the terms and conditions.

[10.340] Disputing bills

Customers can dispute a bill they believe is incorrect. Customers should contact their retailer with their concerns as they may be able to explain how the bill has been calculated or may offer to conduct an investigation. Customers can also request an investigation.

If dissatisfied with the result, the retailer must provide the customer with a referral to EWON (NERR, r 29(7)). EWON can investigate the accuracy of the bill. If EWON does not find any errors, they can help negotiate a payment plan between the customer and the retailer.

While an investigation is underway, customers should pay what they would normally pay or that part of any bill not in dispute to show the retailer that they are acting in good faith.

Hardship and payment difficulty

[10.350] In March 2019, the AER released its Customer Hardship Policy Guideline. The guideline provides clear actions and obligations which retailers and customers are required to adhere to when addressing hardship. The guidelines are designed to assist customers who are experiencing short or long-term payment difficulty.

[10.360] Payment plans

All customers, and appropriately authorised advocates, can negotiate with retailers to pay their bill by instalment to help manage their budget. Customers who adhere to payment plans are protected from debt recovery proceedings (NERL, s 51) and disconnection (NERR, r 116(1)(d)).

This protection is not confined to hardship customers and applies to all residential customers on payment plans.

A retailer must offer and apply payments plans for hardship customers and those residential customers experiencing payment difficulties as long as the customer tells the retailer (in writing or over the phone) that they are experiencing payment difficulties – or if the retailer otherwise believes the customer is experiencing repeated difficulties in paying their bill or requires payment assistance (NERL, s 50). When offering or negotiating a payment plan, retailers are required to consider:

- the customer's capacity to pay;
- any arrears owing by the customer; and
- the customer's expected energy consumption needs over the next 12 months (NERR, r 72).

However there is no obligation to offer a payment plan to customers who have had two payment plans cancelled in the previous 12 months due to non-payment (NERR, r 33).

Retailers can also disconnect a customer who was offered two payment plans in the previous 12 months where:

- the customer has not agreed to either of the payment plans; or
- the customer has agreed to one but not the other of them, and the payment plan agreed to has been cancelled due to non-payment; or
- the customer has agreed to both, but the plans have been cancelled due to non-payment (NERR, r 111(2)).

Notice requirements must be met before a disconnection takes place and this is covered in [10.420].

It is important to note that disconnection of hardship customers, because they cannot pay their energy bills, should be a last resort option (NERL, s 47).

If a customer has problems negotiating a realistic payment arrangement with their retailer, that considers their capacity to pay, what is owed on their account and what they expect their usage will be over the next 12 months, they can contact EWON for help.

[10.370] Retailer hardship policies and hardship programmes

All energy retailers are required to have Hardship Policies that detail steps retailers use to identify residential customers experiencing payment difficulties due to hardship and what they will do to assist those customers to better manage their energy bills on an on-going basis (NERL, Div 6, cl 43(2)).

Retailers must tell customers about their hardship policy if a customer tells them they are having trouble paying their bill, a financial counsellor refers them to the programme, or they are concerned the customer may be experiencing financial hardship because of a history of broken payment plans or late payments or if the customer has requested payment extensions or they have received a disconnection warning notice or have been disconnected for non-payment. The retailer must recommend the customer speak with a staff member who will assess their eligibility to join the hardship programme (*AER Customer Hardship Policy Guideline – version 1*).

A retailer's hardship programme must not include unreasonable conditions or conditions that require a customer to meet an obligation set by the retailer, such as attending a financial counselling session or making a set amount of payments towards their account before they can be eligible to join the Hardship Programme (*AER Customer Hardship Policy Guideline – version 1*, s 2.4, cl 37).

If customers are accepted on to a retailer's hardship programme, they will be protected from disconnection, debt recovery action and late payment fees as long as they adhere to the payment plan agreed to under this programme. If a customer is not accepted on to a retailer's hardship programme, the retailer must explain why (*AER Customer Hardship Policy Guideline – version 1*, s 2.4, cl 36).

[10.380] Centrepay

Customers on pensions or benefits can also set up Centrepay deductions with their retailer. Centrepay allows recipients of Centrelink payments to authorise automatic transfer of an amount from their pension or benefit (at a minimum of $10 per fortnight) into their energy account. At the end of a billing period, a customer using the Centrepay scheme will only be billed for the outstanding amount on their energy account.

If the hardship customer is on a standard retail contract, their retailer must allow the customer to use Centrepay as a payment option. For hardship

customers on a market retail contract, the use of Centrepay will depend on whether it is a payment option under that contract. If Centrepay is not available, the customer may be transferred to a more appropriate contract by their retailer, provided the customer has given their explicit informed consent (NERR, r 74).

[10.390] Rebates

The NSW Government funds rebate programmes for energy customers who are pensioners, have certain medical conditions or require the use of approved life support equipment. The available rebates are:

- the Low Income Household Rebate;
- the Family Energy Rebate;
- NSW Gas Rebate;
- the Medical Energy Rebate;
- the Life Support Rebate.

Information about the amount of each rebate paid, eligibility, application process and payment procedures can be found on the NSW Planning and Environment's energy website (www.resourcesandenergy.nsw.gov.au/energy-consumers), at Service NSW (www.service.nsw.gov.au) in the NSW Social Programmes for Energy Code.

With the exception of the Family Energy Rebate, eligible customers can apply for rebates by contacting their energy retailer in person, in writing or by phone. Eligible customers can apply for the Family Energy Rebate at any Service NSW Office or through the Service NSW website (www.service.nsw.gov.au).

Customers who have a person in their household requiring life support equipment should inform their retailers of this fact, as special obligations are imposed on electricity suppliers to maintain a continuous supply of electricity (see also [10.410]).

The list of approved life support equipment for the Life Support Rebate is set out in the Social Programmes for Energy Code and includes:

- positive airways pressure (PAP) device;
- enteral feeding pump;
- phototherapy equipment;
- home dialysis;
- ventilator;
- oxygen concentrators;
- total parenteral nutrition (TPN) pump;
- external heart pump.

This list is different from the list of approved life support equipment under the NERL, which is used to determine if the premises are protected from disconnection (see [10.430]). This means that a premises with life support equipment approved under the NERL may not necessarily qualify for the Life Support Rebate if the equipment is not also approved under the Social Programmes for Energy Code.

Customers who hold a Commonwealth or DVA concession card and have specific medical conditions that require heating or cooling may be eligible for the Essential Medical Equipment Payment from the Commonwealth Government. This covers a wider range of equipment than the NSW Medical Energy and Life Support Rebates. Customers have to apply via the Department of Human Services website and the rebate is paid annually.

Information about rebates for residential park residents is covered in [10.530].

[10.400] Energy Accounts Payment Assistance (EAPA) vouchers

EAPA is a NSW government voucher programme designed to help residential customers who are experiencing difficulty paying their electricity and/or gas bills because of a crisis or emergency situation. Each voucher is worth $50. To be eligible for EAPA, the customer must be the account holder, the account must be for a NSW address and the customer must be experiencing financial hardship. The customer should also be able to demonstrate they are going without basic needs in order to pay their energy bill or they are at risk of disconnection because they do not have enough money to pay their energy bill.

Customers can make an appointment to be assessed for EAPA by contacting a community welfare organisation that administers the programme. Energy companies or EWON can supply customers with a list of organisations in their area. These include:

- St Vincent de Paul Society;
- The Salvation Army;
- Anglicare;
- Lifeline;
- some migrant resource centres;
- some community or neighbourhood centres;
- some Indigenous community services.

In the assessment, customers may be asked questions about their income and expenses. The most recent energy bill should be brought to the interview. The agency will determine the number of $50 vouchers to be given, but this will not usually be for the total amount of the bill. Customers may need to arrange a further payment plan with their retailer in respect of the outstanding amount (see Payment plans at [10.590]) or discuss referral to the retailer's Hardship Programme if they are in longer term financial difficulty. The total amount of EAPA vouchers that can be issued in a financial year is limited to 12 per energy type. The total number of vouchers that can be issued for a single bill in any quarter is six per energy type. However, these limits can be exceeded in exceptional circumstances that may place a customer into an unduly harsh situation, particularly if the circumstances are unforeseeable (*NSW Planning & Environment EAPA Scheme Guideline*, cll 4, 7). EAPA cannot be used on a closed or inactive account and cannot be used to put an account into credit.

Customers waiting to be assessed for EAPA cannot be disconnected from their electricity or gas. However, if the customer has already been disconnected, they can still apply for EAPA and the vouchers issued can be used to pay consumption costs on an outstanding bill.

Changes in July 2017 now mean that EAPA vouchers are electronically submitted through the online EAPA assessment tool. Vouchers are sent directly to the retailer and should be paid to the customer's account within five business days. More information is available at www.service.nsw.gov.au/transaction/energy-accounts-payment-assistance-eapa-scheme.

Disconnection and reconnection

[10.410] Grounds for disconnection

If a customer does not pay a bill by its due date, the retailer will issue notices prompting the customer to either pay the bill in full or make contact to request an extension or a payment arrangement. If the customer does not respond to these notices, or is unable to pay the amount due, the retailer can, after complying with certain obligations, proceed to disconnection.

A retailer may arrange to disconnect a customer in limited circumstances:

- where the customer has not paid a bill by the pay-by date;
- where the customer has accepted an offer to pay the bill by instalment or, having agreed to the offer, has failed to adhere to an instalment arrangement;
- where the customer is on a payment plan with the retailer but has not kept to the terms of the plan;
- where the retailer has issued all the required notices to the customer and used its best endeavours to make personal contact with the customer to discuss payment options;
- where the customer has refused or failed to take any reasonable action towards settling the debt (NERR, r 111).

A customer may also be disconnected in other circumstances:

- where the customer has failed to pay any required security deposit (NERR, r 112);
- where the customer has failed to open an account (eg, after moving into the premises and starts consuming energy (NERL, s 54) (NERR, r 115));
- where the customer has failed to allow access to their meter for three consecutive scheduled meter readings (NERR, r 113);
- where the customer has used energy illegally (NERR, r 114);
- where there are health and safety reasons warranting disconnection (NERR, r 119(g)).

If a customer has both their gas and electricity supplied by the same retailer and the retailer becomes entitled to disconnect both these fuels for non-payment, the retailer must disconnect the gas supply first and wait 15 business days before disconnecting the electricity supply (NERR, r 117(4)). Customers who have been disconnected may have to pay a disconnection and/or reconnection fee. There may also be extra fees if reconnection is scheduled after hours (after 3 pm weekdays) or if the disconnection has occurred at the pole rather than the meter box (see [10.330]).

When a customer's supply is disconnected at the meter box, the distributor places a sticker over the main switch, with a phone number to call for assistance. It is an offence for a customer to remove that sticker and reconnect supply. If the arrears remain unpaid, the retailer may arrange for a pole-top disconnection at the customer's expense (see [10.480]).

If a customer on a standard retail contract has been disconnected for 10 business days, their contract terminates at the end of the 10th business day. This can mean a customer will have to apply to a retailer for a new account, which may involve the payment of a security deposit (NERR, r 70(1)(e)).

[10.420] Notice requirements before disconnection

Before disconnecting energy supply, energy retailers are required to provide the customer with several opportunities to make contact or to seek assistance with paying their energy bills, so that disconnection of supply is a last resort. This applies to both standard and market retail contracts.

If the customer has not paid a bill by the pay-by date, or has not adhered to an agreed payment plan, their retailer may arrange for disconnection but only after the following:

- the retailer has issued a reminder notice giving the customer no less than six business days to pay their bill or make an alternative payment arrangement (NERR, rr 108, 109(1));
- the retailer has issued a disconnection warning notice, no earlier than the next business day after the end of the reminder notice period, giving the customer no less than six business days to pay their bill or make an alternative payment arrangement (NERR, rr 108, 110(1));
- after issuing the disconnection warning notice, the retailer must use its best endeavours to make personal contact (either in person, by phone, fax or email) and the customer acknowledges receipt of the message (NERR, r 111(1)(e)).

Reminder notices must be dated, state the date on which the reminder notice period ends for payment of the bill, as well as the retailer's phone number for complaints and disputes (NERR, r 109(2)).

Disconnection warning notices must be dated, state the reason for disconnection, the date the disconnection warning period ends for payment of the bill, contact details for EWON and phone numbers of the retailer and the distributor (NERR, r 110(2)).

A customer may be placed on a shortened collection cycle if they are late in paying and have received reminder notices for two consecutive bills. The shortened collection cycle removes the need for a reminder notice. This means that a retailer can disconnect the customer after providing a disconnection warning notice and using its best endeavours to make personal contact. The customer stays on a shortened collection cycle until they have paid three consecutive bills by the pay-by date (NERR, rr 34, 111(3)).

If a customer fails to open an electricity or gas account after moving in (and commences using energy) or does not enter into another contract after their market contract has expired and continues using energy, the existing retailer responsible for supply at the premises may arrange to disconnect the customer. Before doing so, the retailer must:

- give the customer a notice of intention to disconnect; and
- not less than five business days later, give the customer a disconnection warning notice (NERR, r 115).

[10.430] When disconnection is prohibited

Customers cannot be disconnected:

- where the premises are registered as having life support equipment (this is different to planned or unplanned outages where the distributor can interrupt supply provided appropriate notifications are issued (NERR, r 89));
- where the customer has made a complaint, directly related to the reason for the proposed disconnection, to the retailer or EWON and the complaint remains unresolved;
- where the customer is a hardship customer or a residential customer and is adhering to a payment plan;
- where the retailer is aware that the customer has formally applied for a rebate or EAPA and the application is being assessed;
- where the customer has failed to pay an amount on a bill that relates to goods and services other than for the sale of energy;

- for non-payment of a bill where the amount outstanding is less than $300 and the customer has agreed to repay that amount;
- on a Friday, Saturday or Sunday;
- on a public holiday or any day before a public holiday;
- on the days between 20 December and 31 December (both inclusive) in any year;
- before 8 am or after 3 pm on any other day (NERR, rr 108, 116).

Under the NERL, life support equipment includes the following:

- an oxygen concentrator;
- an intermittent peritoneal dialysis machine;
- a kidney dialysis machine;
- a chronic positive airways pressure respirator;
- Crigler-Najjar syndrome phototherapy equipment;
- a ventilator for life support;
- in relation to a particular customer – any other equipment that a registered medical practitioner certifies is required for a person residing at the customer's premises for life support (see NERR, r 3, definitions).

Debt collection and credit reporting

[10.440] Debt collection

Energy retailers may refer a customer's debt to a debt collector that specialises in collecting overdue accounts. Retailers may either refer the debt while retaining ownership of it, in which case the debt collector collects the debt on the retailer's behalf or sell the debt to a debt collector instead. If the debt is sold, the retailer must notify the customer of the sale (*Credit Reporting Privacy Code*, cl 13.1 (*CR Code*)).

[10.450] Credit reporting

If the customer is overdue on their bills by more than 60 days, the energy retailer may register the debt with a credit reporting body. A default is recorded on the customer's credit report for five years (or seven years for serious infringements). This can result in the customer being refused consumer credit, such as when they apply for a loan, credit card or mobile phone.

A customer cannot be credit listed unless the following requirements are met:

- the retailer has issued an overdue notice to the customer's last known address requesting payment of the amount overdue;
- 30 days later (or more), the retailer has issued a notice of intent to credit list to the customer's last known address;
- the customer is at least 60 days overdue in making the payment;
- the overdue amount is not less than $150;
- the credit listing occurs between 14 days and three months after the notice of intent to credit list is sent;
- the retailer is not prevented by a statute of limitations from recovering the overdue amount (ie, the retailer must not recover a debt more than six years after it first arose) (*CR Code*, cl 9.3; *Privacy Act 1988* (Cth), ss 6Q(1), 21D(3)(d)).

If the customer pays the account after listing, the debt is notated on their credit file as "default paid", but remains listed for the remainder of the listing period.

Customers disputing the amount of the debt or that they owe money should contact their energy retailer in the first instance. If they are not satisfied with the retailer's response, they should make a complaint to EWON (see [10.540]). If EWON finds that the retailer has made an error or that the listing is non-compliant, they will try to ensure that the customer's credit rating is restored, at no cost to the customer.

There are credit fix or credit repair agencies operating in NSW which offer a service of assisting customers to remove incorrect credit listings. These agencies usually charge the customer a fee upfront when an agreement is entered into, and a further fee when a listing is removed.

Customers are entitled to one free credit report a year and can approach a credit reporting body to request a copy of their credit report, which must be provided within 10 days. Customers are also entitled to a free credit report if they are declined credit, provided they request the report within 90 days of the date they were declined. At the time of publication, there are three credit reporting bodies operating in NSW:

- Equifax;
- Dun & Bradstreet;
- Experian.

If the credit report is incorrect or misleading, a customer may request any credit provider or credit reporting body to correct the information. The credit provider or credit reporting body must be holding credit information about the customer, but not necessarily the particular information that the customer is seeking to have corrected. The credit provider or credit reporting body must consult with other credit providers or reporting bodies as soon as practicable to resolve the correction request. If the credit provider or reporting body is satisfied that credit information is inaccurate, out of date, incomplete, irrelevant or misleading, they must take reasonable steps to correct the information within 30 days (*Privacy Act 1988*, ss 20T, 21V; *CR Code*, cl 20.2).

In practice, it may be more convenient for customers to raise their concern directly with their energy retailer. If not satisfied, a complaint can be made to EWON or the Office of the Australian Information Commissioner.

Powers of entry

[10.460] Electricity and gas distributors and retailers have powers to enter private land in specific circumstances for maintenance purposes and to read meters. Except in emergencies, these powers must only be exercised in daylight hours (*Electricity Supply Act 1995* (NSW), s 54 (*ES Act*); *Gas Supply Act 1996* (NSW), s 55 (*GS Act*)).

Prior notice of the intention to enter property on a specific day must be given to the owner or occupier of a property, except:

- in emergencies;
- where the entry is with the consent of the owner or occupier; or
- where the sole purpose of the entry is to read a meter (*ES Act*, s 55(3); *GS Act*, s 56(3)).

Reasonable force may be used to enter the property, but only if specifically authorised by the distributor (*ES Act*, s 56; *GS Act*, s 57). However, authorised officers who enter the property must do so via existing openings wherever possible, such as gates or pathways, and by causing as little damage as possible (*ES Act*, s 58; *GS Act*, s 59). This also applies to work requiring the digging of holes or interfering with gardens.

An owner or occupier is entitled to compensation from the distributor or retailer for damage caused as a result of entering the property (*ES Act*, s 60; *GS Act*, s 61). The exception to this is damage caused as a result of the owner's or occupier's failure to abide with obligations under the Act or regulations.

Interference with electricity and gas works

[10.470] Electricity and gas distributors have powers and obligations to ensure a safe and uninterrupted energy supply. For example, an electricity distributor has the power to issue a notice requiring a property owner or occupier to trim or remove a tree where the distributor has reasonable cause to believe that the tree could damage or interfere with electricity works, become a fire hazard, or constitute a risk to public safety (*ES Act*, s 48). In emergencies, an electricity distributor may trim or remove the tree of their own accord the cost of which, in most cases, will be borne by the electricity distributor (*ES Act*, s 48(3)(c), 48(4)).

Similar provisions apply to structures and other things that a distributor has reason to believe are damaging or interfering with its electricity or gas works (*ES Act*, s 49; *GS Act*, s 50). However, unless removed by the distributor in an emergency, the cost of removing structural obstructions will fall on the owner of the structure.

It is an offence for a person to climb on or enter a distributor's electricity assets (such as electricity poles and substations) without a reasonable excuse, lawful purpose or authorisation by the distributor or retailer (*ES Act*, s 65A).

[10.480] Unauthorised energy usage

Retailers and distributors can immediately arrange to disconnect customers who fraudulently or illegally use energy (NERR, r 114). Distributors

also have broader powers to disconnect where there is:

- interference with the supply of energy to a third party;
- interference with the distributor's equipment at the premises;
- meter tampering (NERR, r 119(2)).

It is an offence to consume electricity, or cause electricity to be wasted or diverted from a distribution system unless authorised to do so under an energy contract (*ES Act*, s 64). The same applies for gas (*GS Act*, s 65).

Maintenance and upgrade of services

[10.490] The distributor is responsible for ensuring the safety and reliability of electricity and gas supply to customers up to the point of connection with the customer's installation.

For electricity, this point is commonly located:

- for overhead connections, at the point the service is attached to the building (or the customer's first private pole);
- for underground connections, at the meter box which is typically on the wall of the building. In some cases, the point of supply is the point at which the service crosses the boundary of the property or at a private ground-level connection cubicle.

For gas, the point of supply will be where the customer's installation joins with the distribution main.

Distributors are responsible for maintaining the wires, poles and pipes up to the point of supply; for example, fixing fallen power lines or broken gas pipes in the street. Maintenance of the meter is the responsibility of the meter provider regardless of where it is located.

Accumulation meters are maintained and read by distributors, in their role as meter providers, but since December 2017 the provision and maintenance of electricity meters has been the responsibility of retailers who then appoint meter providers. From that date any newly installed meter, whether because a new meter is required or an existing meter needs upgrading or replacement, will be a digital meter with remote communications, sometimes called a smart meter. A customer can object to the installation of the communications part of the meter and have that facility disabled, although they may then incur ongoing meter reading costs (NER, cl 7.8.4).

Gas distributors also have certain obligations with respect to pipes or other items between the boundary and the customer's meter. However, the customer may be required to pay for any installation or upkeep of these items.

Property owners are responsible for the maintenance of electricity and gas installations from their side of the point of connection. This includes maintaining the private poles, wires and pipes inside a residence.

Property owners are responsible for the costs of new connections to distribution networks. This includes the connection between the point of connection on their property to the network. New connection costs can be very expensive and customers should contact their energy retailer for more information before proceeding, particularly if purchasing a property in a rural area or in a new residential estate as this may require extending the network or increasing its capacity. For more information, see the AER's Connection Charges Guideline, which came into force in NSW on 1 July 2014.

Customer service standards

[10.500] Energy distributors in NSW must adhere to a minimum level of customer service. The distribution service standards in the NERR require distributors to:

- maintain a 24 hour fault reporting hotline service (r 85);
- provide information about the customer's usage or the distributor's charges to either the customer or their retailer (r 86(1)(a), 86(1)(b));
- refer a residential customer to an interpreter service where appropriate (r 87).

A further five NSW-specific standards are listed under the *Electricity Supply (General) Regulation 2014* (NSW):

- post-disconnection notice – the distributor must leave behind a notice after disconnection, with information about the reason for disconnecting, the retailer and EWON's telephone numbers, and what the customer is required to do for reconnection including any related costs payable (cl 9);
- repair of faulty street lights – if a customer reports a faulty street light abutting their premises and the distributor responsible for that light fails to repair it within the agreed timeframe, they must pay the customer at least $15 (cl 10).

Supply quality and reliability

[10.510] Energy distributors have a right to interrupt the supply of energy at any time to carry out planned maintenance or development works, or as a result of an unplanned interruption (NERR, r 89). Where a supply interruption is planned, distributors must notify the affected customer by any appropriate means at least four business days before the date of the interruption, unless the distributor and customer have agreed to a shorter notice period in writing (r 90A, inserted by the *National Energy Retail Law (Adoption) Regulation 2013*, cl 11).

The notification must:

- specify the expected date, time and duration of the interruption;
- include a 24 hour telephone number for enquiries; and
- refer any enquiries to the distributor (NERR, r 90(2)).

The standard requirement to give at least four business days' notice applies to premises with life support equipment approved under the NERL, but this must be in written form (NERR, r 125(2)(d)). Additionally, retailers have obligations around life support equipment, including maintaining a register and notifying distributors of customers registered with life support equipment (NERR, r 124).

Unplanned interruptions may occur where there is a need to carry out unanticipated maintenance or repairs due to a threat to safety, reliability or security of supply (NERR, r 88). Faults on the network may also occur due to a natural event such as a lightning strike, or third party action such as a vehicle hitting a power pole. Distributors must use their best endeavours to restore supply as soon as possible. Within 30 minutes (or otherwise as soon as practicable) of being informed of the unplanned interruption, distributors must make available a 24 hour telephone service to provide information on:

- the nature of the interruption; and
- an estimate of the time when supply will be restored or when reliable information on restoration of supply will be available (NERR, r 91).

When a customer registers their premises with a distributor as having life support equipment, the distributor must advise the customer that an unplanned interruption may occur at any time and provide information to help the customer prepare a plan of action in case an interruption occurs (NERR, r 125(2)(c)).

The quality of energy supply is regulated by legislation and industry standards, including voltage standards, voltage variations and gas pressure.

Customers may be entitled to compensation for any damage or loss resulting from supply incidents, such as frequent or lengthy interruptions to supply, voltage or mains pressure fluctuations, or lack of notifications for planned interruptions. Claims of compensation can include damage to property or household appliances and food spoilage. However, there is generally no compensation given for loss of trade or business, or losses incurred where a supply incident was caused by a natural event such as a lightning strike, fire or flood.

Customers who wish to make a claim for compensation should contact their distributor and may need to provide:

- a description of the damage to property or any losses incurred;
- a repairer's report about the damage and quotes/receipts for any repairs necessary;
- the exact date and time the problem was discovered;
- an outline of what was observed during the event.

Tenants

[10.520] Public and private housing tenants

Public and private housing tenants are generally responsible for energy bills and should open an account when moving into a new property and they commence using energy (see [10.210]).

If electricity and gas are included in the rent, this will be written in the lease and the landlord will be responsible for paying the bills. If a landlord fails to pay an account on time and the tenant is facing disconnection, the tenant should contact NSW Fair Trading or the Tenants Union for more information (see [10.540]). With the exception of boarding houses, a landlord cannot charge a tenant for the supply of electricity unless there is a separate meter which complies with the regulations for the electricity supplied, and the sum charged does not exceed the maximum allowable amount under the *AER Retail Exempt Selling Guideline March 2016*. Likewise, a Landlord cannot charge a tenant for gas service availability charges (even if there is a connection) if there are no gas appliances provided by the landlord for which gas is required and the tenant does not use gas supplied to the premises for any purpose (*Residential Tenancies Regulations 2010* (NSW), cl 12).

Landlords of boarding houses can charge for utilities as a separate charge on top of the room rate, provided:

- they have notified the resident of the utility charge before entering into the occupancy agreement; and
- the amount charged is based on the cost of providing the utility and a reasonable measure or estimate of the resident's usage (*Boarding Houses Act 2012* (NSW), Sch 1, cl 7).

Residents of boarding houses with complaints can make a complaint to NCAT or the Tenants Advice and Advocacy Service (visit www.tenants.org.au).

Tenants in share houses should be aware that the people whose names appear on an energy account are responsible for bills. Tenants should ensure the names on the account are up-to-date and that an agreement is in place between residents for paying the bills. For more information on share housing, contact the Tenants Union or visit www.tenants.org.au (see also Chapter 27, Housing).

[10.530] Tenants in residential communities

Tenants in residential communities or parks may be supplied electricity directly from an energy retailer or from the park owner.

Residential park tenants who have a direct supply contract with an energy retailer have all the rights and responsibilities that other customers would have under the NECF, outlined above.

Permanent residents of residential parks who are supplied electricity through the park's internal network and are metered separately have a more limited range of rights and responsibilities prescribed by the *Residential (Land Lease) Communities Act 2013* (NSW) (*RC Act*), the *AER Retail Exempt Selling Guideline March 2018* (ES Guideline) and the *Residential (Land Lease) Communities Regulation 2015* (*RC Regulation*). A permanent resident is defined as a person occupying a site or dwelling in a residential park under a residential tenancy agreement or residential site agreement as the person's principal place of address. If the customer owns a cabin, van or a mobile home in a park, but their primary residence is elsewhere, they are referred to as a holiday park customer and different regulations apply.

From March 2018, all exempt sellers who service residential customers within NSW must belong to, and comply with the requirements of, EWON (*AER (Retail) Exempt Selling Guideline April 2018 Condition 17*).

Metering and billing

The billing of electricity for permanent residents of residential communities has been the subject of a Supreme Court ruling. Further, the billing methodology has been subjected to a subsequent review by the NSW Civil and Administrative Tribunal (NCAT). For more information, refer to NSW Fair Trading's website and their frequently asked questions on Residential Community Electricity www.fairtrading.nsw.gov.au.

However as a guide, tenants in residential communities whose sites are metered separately

cannot be charged more than the amount charged by the utility service provider to the operator who is providing the service used at the residential site (*AER (Retail) Exempt Selling Guideline, Class R4, Condition 7(1)*; *RC Act*, s 77(3); *RC Regulation*, cl 11).

When calculating the service availability charge, which can be billed under certain methodologies (see [10.290]), park owners must set a rate relative to the supply quality. Where the supply is less than 60 amps, the park owner must charge a reduced service availability charge (see the table below) (*RC Regulation*, cl 12).

Maximum service availability charge (SAC)

Level of supply to site	Maximum level of SAC
Less than 20 amps	20% of local standard retail supplier's SAC
20–29 amps	50% of local standard retail supplier's SAC
30–59 amps	70% of local standard retail supplier's SAC
60 amps or more	100% of local standard retail supplier's SAC

At the commencement of the tenancy or on the request of the tenant, the owner of the residential park must provide:

- information about the payment arrangement for electricity, including payment plans;
- information on government rebate schemes and any other relevant non-government relief schemes;
- information about dispute resolution procedures, including EWON (*AER (Retail) Exempt Selling Guideline, Class R4, Condition 2, 9, 16*).

Tenants can be charged late fees for accounts which are not paid or not paid in full by the due date but no more than would be charged under the standing offer of the local area retailer (*RC Act*, s 78(1)). The residential park owner must keep records of account details, such as meter readings, charges applied and security deposits withheld. Receipts for any amount paid for electricity must be issued to the tenant (*RC Act*, s 84).

Tenants should be aware that being in default of energy bills can mean the tenant is in breach of their residential tenancy or site agreement, which may lead to termination notices or may constitute grounds for eviction.

Permanent residents of residential communities are eligible for the Low Income Household, Gas, Family, Life Support and Medical Energy rebates (see [10.390]), but are not eligible for EAPA assistance (see [10.400]).

Payment difficulties and disconnection

The ES Guideline provides the same level of protection as those covered by the NECF for permanent residents of residential parks. This includes protections around payment plans, security deposits and disconnection (*AER (Retail) Exempt Selling Guideline, Class R4, Conditions 9–11*; see [10.410], [10.360] and [10.230]).

Residents on life support are protected from disconnection if they provide the park owner with confirmation from a registered medical practitioner that a person at their premises requires life support equipment. Where the resident is supplied energy by an authorised retailer and distributor, the park owner must inform them that life support equipment is used at the premises. The park owner must also maintain records of any residents who have life support equipment (*AER (Retail) Exempt Selling Guideline, Class R4, Condition 16*).

Technical and safety standards

Owners of residential parks are responsible for maintaining the park's electrical installation, including metering, other than the electrical installation within the premises occupied by the tenant. The owner must comply with all appropriate legislation and standards on technical and safety matters, including:

- Australian Standards 3000-2007 – Wiring Rules for Electrical Installations;
- *Gas and Electricity (Consumer Safety) Act 2017* (NSW) and *Gas and Electricity (Consumer Safety) Regulation 2018* (NSW);
- Service and Installation Rules of NSW;
- AER Electricity Network Provider Registration Exemption Guideline.

Tenants are responsible for notifying the park owner of any electrical defects of which the tenant becomes aware, including any damage or tampering with metering equipment.

Rights to dispute resolution

Owners of residential parks must provide residents with information about their rights to complain to EWON. Residents can also take disputes to NCAT.

Making a complaint – energy

[10.540] Customers with complaints about energy services can make a complaint to the Energy & Water Ombudsman NSW (EWON). This can include complaints relating to:

- energy contracts, marketing and transfers;
- payment difficulty, disconnection of supply;
- billing;
- customer service issues;
- debt collection and credit default listing;
- supply quality, such as damage or loss to property from interruptions of supply;
- other network issues;
- any rights or obligations conferred on energy suppliers by law.

EWON generally expects customers to contact their energy provider in the first instance. If the provider cannot resolve the problem, customers are advised to speak to someone in a more senior position. Customers are advised to keep records of any correspondence or discussion with their provider (eg, date, time, details of correspondence).

If the problem is not resolved by the provider or not dealt with in a reasonable time, call EWON on 1800 246 545. Complaints can be lodged by phone, letter, fax, email, in person or online (www.ewon.com.au).

EWON's service is free for customers.

EWON can investigate customer complaints by:

- seeking further information from the provider and/or customer;
- seeking independent expert advice (eg, from an engineer).

In most cases, EWON is able to negotiate a resolution between the customer and their provider. Where a resolution cannot be reached, the Ombudsman can make a determination to settle the matter. If the customer chooses to accept the determination, it will be binding on the provider.

EWON is not able to review disputes relating to tariff or price increases or government policy. EWON can however, conduct an investigation to ensure tariff or prices increase have been correctly calculated and applied to a bill, and it can similarly review that government policy has been appropriately applied. EWON cannot conduct reviews about private contractors or landlords or matters that have been dealt with in another forum.

WATER CONSUMERS

[10.550] Water services are provided to customers in NSW through suppliers that largely exercise a monopoly over the supply of water, sewerage and stormwater drainage services across their geographic areas.

Metropolitan areas

The largest water services supplier in NSW is Sydney Water Corporation, a state-owned corporation operating under the *Sydney Water Act 1994* (NSW) (*SW Act*). It provides water services to the Sydney, Blue Mountains and Illawarra regions. Sydney Water treats and supplies water bought from Water NSW, which operates under the *Water NSW Act 2014* (NSW) (*WNSW Act*).

Hunter Water Corporation, a state-owned corporation operating under the *Hunter Water Act 1991* (NSW) (*HW Act*), provides services to the lower Hunter region of NSW, including Newcastle, Lake Macquarie, Maitland, Cessnock and Port Stephens. Hunter Water treats and supplies water from its catchment facilities.

Central Coast Council provides water to residents on the NSW Central Coast, and Shoalhaven Council provides water to residents in their region. Both of these operate under the *Local Government Act 1993* (NSW) (*LG Act*).

Rural and regional areas

At present, over 100 separate local authorities supply water, sewerage and drainage services in rural and regional NSW. These water suppliers are chiefly regulated under the *LG Act*.

An exception to this is Essential Energy which has authority under cl 116 of the *Water Management (General) Regulation 2018* (NSW)

to provide water and sewerage services to the residents and businesses of Broken Hill, Menindee, and Sunset Strip along with defined special areas. Essential Energy has the functions of a water supply authority in those areas, and water and sewerage bills for these customers are issued under the letterhead of "Essential Water".

Maximum service prices are determined by each of the local government water utilities having regard to the Best Practice Management of Water Supply and Sewerage Guidelines (August 2007).

Water Industry Competition Act

Reforms under the *Water Industry Competition Act 2006* (NSW) have allowed for the introduction of a licensing regime, to encourage competition in water and wastewater services. The licensing regime allows private water utilities to provide these services, pursuant to obligations which impose minimum standards for the protection of public health, the environment and customer interests. Some companies now compete in constructing or maintaining water infrastructure and in the supply of water or sewerage services, for example in commercial sites or residential developments.

Offences relating to water

[10.560] Stealing or diverting water

It is an offence to steal or divert water, or to tamper with a meter to prevent its accurate recording of water usage and penalties apply (*SW Act*, s 48; *HW Act*, s 30; *WNSW Act*, s 93; *LG Act*, s 636).

[10.570] Water restrictions

The Minister for Water may impose restrictions on the use of water on public interest grounds. It is an offence to contravene water restrictions and penalties may apply.

Customers should contact their water supplier for details about current restrictions.

[10.580] Discharging prohibited substances and polluting water supply

It is an offence to discharge any substance into a system owned or controlled by a water supplier without written agreement from that supplier or to cause pollution of a public water supply (*SW Act*, s 49; *HW Act*, s 31; *WNSW Act*, s 94; *LG Act*, s 638).

Customers should contact their water supplier if they are unsure of how to dispose of unusual or potentially dangerous substances, such as trade waste.

Metropolitan customers

[10.590] Billing

The most common customer issues related to billing concern payment difficulties, disputed high bills or restriction or disconnection of water supply.

In general, customers should contact their water retailer in the first instance to discuss billing issues. If they are not satisfied with the retailer's response, Sydney Water and Hunter Water and Shoalhaven Council customers should contact the Energy & Water Ombudsman NSW (EWON). Other customers of local councils who have a water complaint should contact the NSW Ombudsman.

Accounts

The property owner is the account holder on water accounts. Responsibility for the water account is transferred to the new owner of the property upon purchase, and charges are then apportioned based on the date of settlement. This is organised by the person who conducts the property settlement, usually the conveyancer or solicitor.

If the account has not been transferred, the old owner and/or the new owner should contact the people who conducted the settlement to ensure title of the property has correctly transferred into the new owners name; the local council and the water authority have transferred the accounts

for the property into the new owners name. Otherwise, the property may remain in the old owners name and, as a result, they will continue to be responsible for water and council charges.

Types of charges

Most customers will incur two types of charges for water services:

- service charges are set charges for connecting to water, sewerage and stormwater drainage networks;
- usage charges are calculated on the levels of water used or sewerage discharged over a period.

The Independent Pricing and Regulatory Tribunal of NSW (IPART) sets maximum prices for the provision of water, sewerage and stormwater services provided by Sydney Water and Hunter Water.

Sydney Water, Hunter Water, and Shoalhaven Water may also charge a range of ancillary fees at maximum amounts set by IPART. These include charges for:

- water reconnection during and outside business hours;
- special meter readings (eg, where the water supplier has been unable to access the meter);
- meter testing;
- building plan approvals;
- dishonoured or declined payments;
- technical services.

For Sydney Water and Hunter Water customers: Under respective operating licences, Sydney Water and Hunter Water are obliged to provide information on their charging policies and current charges free of charge upon request by a customer, and in other specified circumstances such as when charges change.

For Shoalhaven Water customers: Shoalhaven Council (Water) provides some information about charges on their website.

Meter

Customers are responsible for ensuring reasonable access to their meter.

For Sydney Water and Hunter Water customers: Sydney Water and Hunter Water will attempt to check the meter at least once a year. If they are unable to access the meter, Sydney Water or Hunter Water may bill the customer based on an estimation of water usage and costs. If Sydney Water or Hunter Water is unable to access the meter on two or more occasions, they may:

- relocate the meter;
- seek access to the meter at another suitable time (this may incur an additional fee to the customer);
- make other arrangements with the customer, such as allowing the customer to self-report meter readings.

If no solution can be reached, Sydney Water or Hunter Water may treat the customer's property as "unmetered" and charge an unmetered service charge.

For Shoalhaven Council (Water) customers: Shoalhaven Council (Water) will attempt to read your water meter on a cyclical, quarterly basis.

Other information relating to the frequency of meter readings is available on each council's website or by contacting the relevant council directly.

Hardship and concessions schemes

Customers are required to pay their bills on time, or they may face debt recovery actions by their retailer, including the restriction of their water supply.

Payment plans

If a customer is having difficulty paying their bill, they should contact their water retailer as soon as possible. Retailers such as Sydney Water, Hunter Water, and Shoalhaven Council (Water) provide payment plans, where the customer makes regular instalments of an agreed amount.

For Sydney Water and Hunter Water customers only: Under the Operating Licences for Sydney Water and Hunter Water, customers will not face disconnection or restriction of their water supply if they enter into a payment plan and make regular payments. If a customer has problems negotiating a realistic payment arrangement with their supplier, they can contact EWON for help.

For Shoalhaven Council (Water) customers: Agreeing on a solution, making regular payments and maintaining contact with Shoalhaven Water will prevent restriction of a customer's water service and avoid additional costs to have normal flows restored.

Centrepay

For Sydney Water, Hunter Water and Shoalhaven Council (Water) customers: Customers who receive a government pension or benefit can set up Centrepay as a payment option. Centrepay transfers a nominated amount (a minimum of $10 per fortnight) directly into a customer's water account. Centrepay may be set up by contacting Centrelink or their water retailer.

Pensioner rebate

Pensioners who are customers of Sydney Water, Hunter Water, and Shoalhaven Council (Water) are eligible for a NSW government-funded pensioner rebate. The following cards are recognised:

- Pensioner Concession Card;
- Department of Veterans' Affairs Gold Card, embossed with TPI/TTI or Widow/Widower or Extreme Disablement Adjustment (EDA).

Sydney Water also provides a concession to customers who receive a Department of Veterans' Affairs intermediate rate pension.

Customers should contact Sydney Water, Hunter Water, or Shoalhaven Council (Water) directly to claim the pensioner rebate.

Payment Assistance Scheme

For Sydney Water and Hunter Water customers only: Sydney Water and Hunter Water customers who experience financial difficulty can apply for the Payment Assistance Scheme (PAS). PAS vouchers can be used to pay water *usage* charges only (see Types of charges at [10.590]).

Hunter Water uses a voucher system and applications for PAS vouchers can be made by contacting Hunter Water, or a local community organisation, such as St Vincent de Paul or the Salvation Army.

Sydney Water no longer provides vouchers and instead applies a PAS credit directly to the customer's account. This is done over the phone, on the recommendation of community workers to Sydney Water.

Shoalhaven Council (Water) also assists customers facing financial difficulty and may be eligible for vouchers (equivalent of $25.00 per voucher for offset against water usage charges) through the Payment Assistance Scheme. The scheme is available to property owners and residential tenants who are responsible to pay for water usage charges and can provide an original copy of a Shoalhaven Water Account. Customers should contact Shoalhaven Water to obtain a list of participating agencies.

Other water suppliers may have other assistance available and customers should contact their water supplier for more information.

[10.600] Disconnection or restrictions of supply

It is more common for water supply to be restricted rather than disconnected. Restriction of supply involves installing a flow restriction washer at the meter, which allows enough water to fill a jug but insufficient water for a shower and it may take several minutes to refill a toilet cistern. Water services are usually not disconnected due to the impact on public health. However, if disconnected, customers may be charged a fee for reconnection (see Types of charges at [10.590]).

Customers who require water supply to operate a life support machine or to meet other special health needs should notify their water supplier.

Grounds for restriction or disconnection

For Sydney Water and Hunter Water customers: Under their respective operating licences, Sydney Water and Hunter Water can restrict or disconnect water supply when a customer:

- fails to pay any due amount;
- fails to ensure access to the meter;
- has a private installation that is defective or does not comply with set standards;
- breaches a relevant law, the terms of the customer contract or any other agreement between the supplier and customer, concerning the use or taking of water or the discharge of wastewater;
- discharges unauthorised trade wastewater;
- discharges chemicals that pose a health risk;
- fails to install a backflow prevention device when required;
- uses recycled water improperly.

Shoalhaven Council (Water) customers: Under cl 207 of the *Water Management (General) Regulation 2018* (NSW), Shoalhaven Council's Water Supply Authority (Shoalhaven Water) can restrict or disconnect water supply on similar grounds.

Notice requirements before restriction or disconnection for non-payment

For Sydney Water and Hunter Water customers only: If restriction or disconnection is the result of a failure to pay a bill on time or a default on an agreed payment plan, Sydney Water and Hunter Water will provide customers with:

- a reminder notice advising of the amount overdue, contact details for the retailer and an explanation of alternative payment options, and inform the customer of their right to contact EWON;
  (Note: Hunter Water will only issue a reminder notice if the customer has a good payment history over the last 12 months. If the customer has a poor payment history, Hunter Water will proceed directly with a final notice.)
- a final or disconnection notice advising the customer that their account is significantly overdue and action may be taken to restrict or disconnect the customer's water supply or initiate debt recovery processes if their account is not paid. The notice must also provide the retailer's contact details and inform the customer of their right to contact EWON;
- attempt personal contact, either by phone or mail, or in person (see Sydney Water and Hunter Water's Customer Contract).

Sydney Water and Hunter Water will advise the customer of when the disconnection or restriction will take place.

For Shoalhaven Council (Water) customers only: If restriction or disconnection is the result of a failure to pay a bill, Shoalhaven Water will:

- issue a reminder notice;
- issue an overdue notice;
- issue an impending water/flow restriction notice;
- install a flow restrictor and/or commence legal action for the recovery of debt.

Limitations on disconnection or restriction

For Sydney Water and Hunter Water customers: Sydney Water and Hunter Water will not restrict or disconnect a customer's water supply where:

- the customer has failed to pay due amounts on time and notice requirements have not been met (see Notice requirements before restriction or disconnection for non-payment at [10.600]);
- the retailer has not provided the customer with reasonable opportunity to pay the account;
- water supply is required for a life support machine or other special needs;
- the retailer has not advised the tenant that they may be able to pay the outstanding charges and deduct the amount from the rent payable to the owner of the premises;
- there is a complaint being considered by Sydney Water, Hunter Water or EWON;
- the customer is experiencing financial difficulty and has entered into (and is complying with) a payment plan (see Hardship and concessions schemes at [10.590]);
- the customer has notified the retailer that they have sought assistance under the PAS scheme and that assistance is imminent (see Hardship and concessions schemes at [10.590]);
- it is a Friday, weekend, public holiday or the day before, or after 3 pm on a weekday (2 pm for Hunter Water).

Sydney Water or Hunter Water customers who have complaints related to restriction or disconnection should contact their water retailer in the first instance or EWON if they are not satisfied with their retailer's response (see [10.540]).

For Shoalhaven Council (Water) customers: Information about disconnection or restriction is available via Shoalhaven Water's website or by contacting them directly. Tenants and property owners living within the Shoalhaven Government Area who have complaints related to restriction or disconnection should contact their water supplier in the first instance. Shoalhaven Council (Water) customers can contact EWON if they are not satisfied with their supplier's response (see [10.540]).

[10.610] Powers of entry

Sydney Water and Hunter Water

Sydney Water and Hunter Water are authorised to enter private land in specific circumstances for:

- maintaining water and sewer systems;
- ascertaining whether a customer contract is being breached;
- restricting or disconnecting water supply if amounts on the account are unpaid (see [10.600]);
- carrying out work required by the operating licence, such as work to maintain water quality;
- reading meters;

- making a valuation or assessment of the usage of the land or of any building on the land;
- rectifying defective or improper work that has not been rectified under a notice served by the supplier;
- finding the source of pollution of water supplied by the distributor (*SW Act*, s 38; *HW Act*, s 20).

Entry must be made in daylight hours except in cases of emergency. Authorised persons should carry identification with them that must be produced at the request of the occupier of the property. They must use no more force than is reasonably necessary to gain entry (*SW Act*, s 40(2); *HW Act*, s 21(2)).

Notice of entry must be provided in writing to the owner or occupier, unless the entry is with the consent of the owner or occupier, in an emergency situation, or to read a meter (*SW Act*, s 40(1); *HW Act*, s 21(1)).

In exercising powers of entry, Sydney Water and Hunter Water are obliged to do as little damage as practicable and remove all rubbish and equipment brought onto the property. Customers who suffer damage in the exercise of entry powers are entitled to compensation (*SW Act*, s 41; *HW Act*, s 22).

Customers who believe their rights have been breached should complain to Sydney Water or Hunter Water in the first instance, or to EWON if their supplier's response is unsatisfactory (see [10.540]).

Water NSW

Customers who reside in catchment areas under the authority of Water NSW should note that Water NSW is authorised to enter and occupy land for:

- the reading of any of its metering equipment;
- operating, maintaining and improving current or extending new facilities;
- ascertaining whether an offence has been committed, such as the pollution of water supply;
- finding and removing a source of pollution in a catchment area (*WNSW Act*, s 32(1)).

These powers must only be exercised in daylight hours and prior written notice of the intention to enter property on a specified day(s) must be given to the owner or occupier, except when it authorises the entry after forming the opinion that the giving of the notice would cause undue delay (*WNSW Act*, s 32).

In exercising powers of entry, Water NSW is obliged to do as little damage as practicable (*WNSW Act*, s 37(1)) and may remove any material excavated from the land (*WNSW Act*, s 32(3)).

Customers who suffer damage as a result of the exercise of entry powers are entitled to compensation (*WNSW Act*, s 37).

Shoalhaven Councils' Water Authority

In addition to general powers of entry given to Shoalhaven Council (Water) under the *Local Government Act 1993* (ss 191–201), the Water Authority is authorised to enter private land in specific circumstances for:

- maintaining water and sewer systems;
- carrying out authorised work;
- reading meters (*WM Act*, s 296).

These powers must generally be exercised in daylight hours. In exercising powers of entry, the Councils' Water Authority is obliged to do as little damage as practicable. Customers who suffer damage in the exercise of entry powers are entitled to compensation (*WM Act*, s 296(5)(b)).

Customers who believe their rights have been breached should complain to Shoalhaven Council (Water) in the first instance. Shoalhaven Council customers can contact EWON if they are not satisfied with their supplier's response (see [10.540]).

[10.620] Interference with water or sewerage works

Obstruction or interference with works

For Sydney Water and Hunter Water customers: Owners and occupiers of property must not undertake any building, landscaping or construction work which interferes with, obstructs or damages a water or sewer system owned by Sydney Water or Hunter Water (*SW Act*, s 44; *HW Act*, s 25).

If any structure obstructs or interferes with water or sewer works, Sydney Water and Hunter Water can give notice to the person who placed it to remove the structure and compensate Sydney Water or Hunter Water for any loss or damage suffered as a result (*SW Act*, s 44(5); *HW Act*, s 25(5)). If the structure is not removed, Sydney Water or Hunter Water may remove the structure and recover the cost of the removal (and any loss or damage suffered as a result of the structure) from the person who placed the structure (*SW Act*, s 44(5), 44(6); *HW Act*, s 25(5), 25(6)).

Sydney Water and Hunter Water can also recover compensation for any damage or interference suffered to their water or sewerage systems, from any activity, if the person carrying out the activity (or their agent or assistant) should have known that damage or interference would result (*SW Act*, s 45; *HW Act*, s 26).

For Shoalhaven Council customers: Similar provisions apply to structures and things that obstruct works owned by Shoalhaven Councils' Water Authority (Shoalhaven Water). The councils are authorised to demolish or remove the obstruction, repair their works and recover the costs from the person who placed the obstruction (*WM Act*, s 300).

Interference by trees

For Sydney Water and Hunter Water customers only: Except for trees protected by heritage listings, Sydney Water and Hunter Water may give 14 days' written notice to a property owner to remove a tree that is damaging or interfering with water or sewerage works. Upon receiving notice, the owner can take steps at their own expense to minimise the obstruction without removing the tree. If the land owner does not comply with the notice within the specified period, Sydney Water and Hunter Water may remove the tree (*SW Act*, s 46; *HW Act*, s 27; see also their respective operating licences).

Sydney Water and Hunter Water will generally reimburse the land-owner for the reasonable costs of the removal of the tree unless:

- the landowner would have reasonably known that the planting of the tree would result in damage or interference; or
- an easement existed in favour of works owned by Sydney Water or Hunter Water when the tree was planted (*SW Act*, s 46(2); *HW Act*, s 27(2)).

[10.630] Service and maintenance obligations

This section contains information for Sydney Water and Hunter Water customers. Customers who reside in the Shoalhaven Council area should contact their council for policies relating to service and maintenance obligations.

Responsibility for maintenance

Customers have responsibility for the maintenance of all pipes and fittings up to the point that they connect to the water and sewerage mains owned by Sydney Water or Hunter Water (the "customer's system"). The water supplier is responsible for any blockages or spills caused by problems on their water or sewer network (the "supplier's system").

Customers have an obligation to notify Sydney Water or Hunter Water of any failures of which they become aware, such as interruptions to supply or leaks in the supplier's system. If the failure is located in the customer's system between the water meter and the water main, both Sydney Water and Hunter Water will repair the customer's system up to one metre from the main, as a customer service gesture (see Sydney Water and Hunter Water customer contracts).

Meter

Unless a person has caused damage to the meter either negligently or on purpose, Sydney Water and Hunter Water have responsibility over the maintenance (and costs of maintenance) of meters regardless of where they are placed.

Customers may also ask for their meter to be tested. If the meter is working accurately, the customer will be required to pay for the cost of testing (see Types of charges at [10.590]). However, if the meter is over-recording by more than 3% of the actual amount of water passing through it, Sydney Water will:

- repair or replace the meter;
- refund any meter testing charges; and
- adjust the customer's account on a basis that is representative of the customer's consumption pattern.

The same applies to Hunter Water where the meter is over-recording by more than 4%.

Sewer blockage

Customers are responsible for maintaining their private sewer pipes up to the junction where they connect with Sydney Water or Hunter Water's sewer main. If the blockage is in the customer's system, the customer is responsible for arranging for a licensed plumber to clear the blockage.

Sydney Water and Hunter Water will clear any blockages in their sewer main at their own cost, upon the notification of a blockage by a customer. However, a customer may be liable for the cost of clearing the blockage to the extent that they caused it.

Sewage overflow

Sydney Water and Hunter Water are responsible for cleaning up any damage and minimising health risks to the public if there is a sewage spill on a customer's property caused by a failure of the supplier's system, such as a blockage.

For Sydney Water customers: In the event of a sewer overflow, customers usually call their private plumber. If the plumber identifies the blockage as being in Sydney Water's sewer main, they will need to notify Sydney Water as they are not authorised to perform work on Sydney Water's mains. Sydney Water will investigate and if they accept responsibility, Sydney Water will fix the problem. The customer can claim for the plumber's reasonable costs under Sydney Water's sewer choke policy.

For Hunter Water customers: In the event of a sewer overflow, customers should call Hunter Water first to discuss the blockage and what next steps to take. The customer is responsible for costs associated with the work to determine the blockage, if the customer requests the work be undertaken by a licensed plumber prior to any contact with Hunter Water to report a suspected blockage. If a customer reports a sewage overflow and Hunter Water confirms that it is a one-off dry-weather overflow due to a failure in their system, Hunter Water provides customers with a rebate of 30 kL of water that is applied to their next bill. If a customer experiences three or more dry weather sewage overflows in a financial year due to a failure in Hunter Water's system, the customer is entitled to have a rebate of 270 kL of water applied to the water component of their next bill after the third event. Customers are not entitled to a rebate for subsequent events.

Service interruptions

It may be necessary for Sydney Water or Hunter Water to interrupt a customer's water supply or sewerage service for maintenance purposes. In the event of a planned service interruption, Sydney Water and Hunter Water will provide customers with two days' written notice (seven days for non-residential customers) outlining the expected time and length of the interruption. Sydney Water and Hunter Water will attempt to ensure that any planned interruptions are no longer than five hours.

If customers experience an unplanned interruption to their water supply or sewerage service, Sydney Water and Hunter Water will attempt to restore the service as soon as possible and provide information on a 24-hour emergency phone service. The suppliers may provide emergency supplies of water in specific circumstances.

For Sydney Water customers:

- if a planned interruption is longer than five hours, customers are entitled to an automatic rebate of $35, this rebate is for each and every event of this type that customers experience;
- if an unplanned interruption is longer than five hours, customers are entitled to an automatic rebate payment of $35 for each of up to two unplanned interruption events. Customers experiencing three or more unplanned interruptions in a 12-month period customers are entitled to a rebate equal to the whole annual water service charge, less any applied concessions, after the third event.

For Hunter Water customers:

- if a customer experiences three or more planned interruptions to their drinking water in a financial year, each exceeding five hours in duration, the customer is entitled to a rebate of 15 kL to be applied to their next bill;
- if a customer experiences an unplanned interruption, to their drinking water, for over five hours between 5 am and 11 pm, the customer is entitled to a rebate of 15 kL to be applied to their next bill. The same entitlement applies where a customer experiences three or more unplanned interruptions between 5 am and 11 pm in a financial year, each lasting more than one hour in duration.

Water pressure

Sydney Water supplies drinking water at a minimum pressure of 15 m head at the point of connection with the customer's system (see Responsibility for maintenance at [10.630]). Hunter Water supplies drinking water at a minimum pressure of 20 m head.

For Sydney Water customers: If drinking water is supplied at less than 15 m head at the point of connection for a continuous period of 15 minutes, customers are entitled to an automatic rebate of $35 and is payable for one event each quarter.

For Hunter Water customers: If water is supplied at less than 15 m head at the point of connection due to a failure of Hunter Water's system, customers are entitled to a rebate of 15 kL to be applied to their next bill. Only one rebate can be applied each financial year.

Water quality

Drinking water must comply with the *Australian Drinking Water Guidelines* developed by the National Health and Medical Research Council (NHMRC).

Dirty water

If customers are not supplied clean water suitable for normal domestic purposes, they may be eligible for rebates or compensation. Customers should contact Sydney Water or Hunter Water to investigate.

For Sydney Water customers: If the cause of dirty water is the fault of Sydney Water, customers may be eligible to a rebate of $35 for each occasion clean water is not provided.

For Hunter Water customers: If the cause of dirty water is the fault of Hunter Water, customers may be eligible to compensation for damage caused by the dirty water or a refund of the costs associated with flushing the customer's water system.

Contaminated water

If NSW Health issues a "boil water" alert due to a contamination of drinking water caused by Sydney Water or Hunter Water, Sydney Water customers are entitled to a rebate of $35 for each incident and Hunter Water customers are entitled to a rebate of 15 kL to be applied to their next bill.

Recycled water

Sydney Water and Hunter Water may supply recycled water to a customer under a separate agreement. Both suppliers will give information on the appropriate use of recycled water.

Rural and regional consumers

[10.640] The majority of local councils in rural and regional NSW exercise water supply functions under Ch 6 of Pt 3 of Div 2 of the *Local Government Act 1993*.

Rural and regional customers should contact their water supplier for policies concerning:

- billing, including concerns about payment difficulties or disputed high bills;
- the disconnection and restriction of water supply, including under what circumstances customers will be given notice;
- hardship and concession schemes, including pensioner rebates, payment plans (including Centrepay for Centrelink customers) and other rebates and hardship schemes;
- meter reading and testing arrangements;
- powers of entry onto customers' property;
- service and maintenance obligations, including the division of responsibilities between the water supplier and the customer for the maintenance of water and sewerage systems;
- precautions that should be taken to avoid damaging the supplier's water or sewer system, particularly before commencing building or landscaping work or planting trees;
- the performance of the water supplier with regard to measures of water supply, pressure, and quality and rates of compliance with the *Best-Practice Management of Water Supply and Sewerage Guidelines*;
- any special health needs that require specific water supply arrangements.

Rural and regional customers who have complaints relating to water or sewerage services provided by local government authorities should be directed to the relevant council in the first instance, or the NSW Ombudsman if they are not satisfied with the council's response. However, Essential Energy water customers (in the Broken Hill region) can make a complaint to EWON if they are not satisfied with Essential Energy's response.

Tenants

[10.650] Private housing tenants

Water accounts are always in the name of the property owner. Private tenants are not responsible for paying the service charges on the water bills issued to the owner of their rental premises but may be responsible for the water usage charges if the owner chooses to pass them on. Before a tenant is responsible, the premises must be separately metered, they must contain

water efficiency measures, and the charge may not exceed the charge made to the landlord. A tenant must receive the benefit of any rebate paid to the landlord. A landlord who pays the charge may seek to recover the payment made, within time limits (*Residential Tenancies Act 2010* (NSW), s 39).

Where an account is overdue, Sydney Water and Hunter Water are required to issue notices warning of an impending restriction or disconnection (see Notice requirements before restriction or disconnection for non-payment at [10.600]). Sydney Water and Hunter Water will issue reminder notices to the property owner, and final or disconnection warning notices to both the tenant and property owner. If a landlord fails to pay an account on time and the tenant is facing disconnection or restriction of their water supply, the tenant should immediately contact their landlord or estate agent to discuss the matter. If this proves unsuccessful, the tenant can contact NSW Fair Trading or the Tenants' Union for more information. If the tenant is at immediate risk of having their water supply restricted or disconnected, or if this has already occurred, they can contact the Energy & Water Ombudsman NSW (EWON) for assistance.

The tenant is allowed under law to pay the unpaid water bills of the property owner and to deduct this from their rent (*HW Act*, s 41; *SW Act*, s 62). Sometimes a lease may require tenants to pay the water usage charges, subjected to the above conditions, however the property owner is still responsible for service charges.

[10.660] Public housing tenants

Generally, public housing tenants are charged for their water usage in addition to their rent (*Residential Tenancies Act 2010* (NSW), s 139). Tenants do not pay for connection, sewerage and other charges not related to water usage. Tenants are required to pay in accordance with the *Community Housing Water Charging Guidelines* (July 2012). The Guidelines provide instructions on the calculation of water usage charges, adjustments to tenants' water charging accounts, allowances and exemptions to water charging.

A small number of properties are exempt from water charges. If a tenant is unsure about whether water charges apply to them, they should contact Housing NSW or the applicable community housing provider.

Percentage water charges

The percentage water charge is set as a percentage of the rent a tenant pays (adjusted to a maximum amount). If a whole household is absent from the property in excess of six weeks with the approval of Housing NSW, the tenant will not be liable for percentage water charges.

The Department of Communities and Justice reviews the percentage water charge to take into account the specific usage needs of residents and the costs involved with the specific circumstance of the property, such as common grass areas.

Actual water charges

Homes that are metered separately are charged for water based on the actual water usage at the premises.

Tenants who are charged actual water charges may be eligible for an allowance where there is:

- a resident who uses a kidney dialysis machine;
- a resident who can demonstrate a health issue or disability which necessitates the use of significantly higher amounts of water;
- a large household with six or more persons.

Payment difficulties

Tenants who face payment difficulties should notify Housing NSW immediately. Housing NSW will work with the tenant to resolve the difficulty.

Getting help

Tenants should speak to their client service officer if they have concerns over:

- possible errors in the application or calculation of water charges;
- the rectification of water leaks on the property;
- meter readings;
- eligibility for exemptions from water charges.

If the problem is not resolved, the tenant may appeal to Housing NSW (see Complaints and appeals in Chapter 27, Housing).

[10.670] Residential communities' tenants

Residential communities or park tenants may be required to pay water availability charges. However, park tenants cannot be charged for water usage unless the home or site has its own

water meter. A park owner cannot charge tenants for the installation costs of water meters.

Park residents who pay for their water consumption separately from their rent are able to apply to the NSW Civil and Administrative Tribunal for a rent deduction. Park owners cannot charge these residents water consumption charges above those charged by the local water authority (*Residential Parks Act 1998* (NSW), s 39(2)) and the water availability charges must be no more than $50 per year (*Residential Parks Regulation 2006* (NSW), cl 18). They must give park tenants regular accounts setting out the meter readings, water usage and the charge per unit of water.

For more information, park residents should contact NSW Fair Trading (see also Tenants in residential communities in Chapter 27, Housing).

Making a complaint – water

[10.680] Customers should approach their supplier directly in the first instance to make a complaint. If the initial point of contact with the water supplier cannot resolve the problem, customers can ask to speak to someone in a more senior position. Customers are advised to keep records of any correspondence or discussion with their supplier (eg, date, time, who they spoke to).

If a customer is not satisfied with the response, they may consider making a further complaint to the relevant authority listed below.

Sydney Water, Hunter Water, Essential Energy and Water NSW customers

For customers of Sydney Water, Hunter Water, Essential Energy or Water NSW, if the problem is not resolved by the relevant supplier or is not dealt with in a reasonable time, contact EWON on 1800 246 545.

EWON also has jurisdiction over the following water providers:

- Aquacell;
- Aquanet;
- Flow Systems;
- Living Utilities;
- Narara Ecovillage;
- Solo Water;
- Sydney Desalination Plant;
- Veolia Water Solutions & Technologies.

Complaints can be lodged by phone, letter, fax, email, in person or online (www.ewon.com.au). EWON's service is free for customers.

Complaints to EWON can relate to:

- billing, credit and debt management;
- disconnection or restriction of supply;
- service and maintenance obligations, including supply quality;
- damage or loss to property resulting from such events as interruptions to supply, burst water mains and sewer chokes;
- any rights or obligations conferred on the water supplier by law or under their operating licences.

EWON's investigation may include:

- seeking further information from the supplier and/or customer;
- independent expert advice.

In most cases, EWON is able to negotiate a resolution with the customer and their supplier. Where a resolution cannot be reached, the Ombudsman can make a determination to settle the matter. If the customer chooses to accept the determination, it will be binding on the provider.

EWON is not able to review disputes relating to price increases, government policy, private contractors or landlords although, EWON can review bills to ensure energy price increases have been calculated and applied correctly to your bill.

Local authority customers

For water customers of local authorities, if the problem is not resolved by the council responsible or not dealt with in a reasonable time, they can contact the NSW Ombudsman.

For information on making a complaint to the Ombudsman, see The Ombudsman in Chapter 9, Complaints.

HOME BUILDING CONSUMERS

[10.690] Home building consumers in NSW have special consumer protections under the *Home Building Act 1989* (NSW) (HBA) and the *Home Building Regulation 2014* (NSW) (HBR). There have been several amendments to the legislation throughout the years and those noted in this chapter are the statutory schemes:

- from 1 March 2015 to the present;
- from 1 February 2012 to 28 February 2015; and
- prior to 1 February 2012.

Builders, contractors and tradies are generally required to hold a current license to perform residential building work. In this chapter, we will call this person "the builder". The person seeking residential building work will be called "the consumer".

Legislation

[10.700] The HBA and HBR regulate the relationship between builders and consumers in NSW.

The legislation regulates the building industry and sets out the responsibilities of builders, and imposes penalties for breaches of the HBA.

Some of the subject matter of the HBA includes:

- definitions of "residential building work" (HBA, Sch 1);
- date for completion of residential building work (HBA, s 3B);
- licensing of builders (HBA, s 4);
- the formalities of contracts (HBA, s 7);
- maximum deposits and progress payments (HBA, ss 8, 8A);
- "unlicensed contracting" and "uninsured work" (HBA, ss 10, 94);
- statutory warranties for residential building work (HBA, s 18B);
- limitation periods for breach of statutory warranty (HBA, s 18E);
- definition of building claim (HBA, s 48A);
- New South Wales Fair Trading (NSWFT) Investigation and dispute resolution (HBA, ss 48C–48F);
- jurisdiction of NSW Civil and Administrative Tribunal NCAT (HBA, s 48K);
- transfer of proceedings to NCAT (HBA, s 48L);
- the requirements for insurance "Home Build Compensation Fund Insurance (HBCFI)" (HBA, ss 92, 94).

The *Civil and Administrative Tribunal Act 2013* (NSW) (CATA) and the *Civil and Administrative Tribunal Regulation 2013* (NSW) (CATR) and *Civil and Administrative Tribunal Rules 2014* (NSW) ("The CAT Rules") set out the jurisdiction of NCAT and the practice and procedure of the resolution of building claims, appeals, reviews, and enforcement of orders.

Threshold for "residential building work"

[10.710] From 1 March 2015, works valued at over $5,000 are "residential building work" under the HBA. Building works under this threshold (other than "specialist work") are covered under s 60 of the ACL rather than the HBA.

"Specialist work" like plumbing, gas-fitting, electrical work, refrigeration or air-conditioning of any value is always considered residential building work.

"Residential building work"

[10.720] "Residential building work" includes:

- construction of a dwelling;
- making of alterations or additions to a dwelling;
- repairing, renovation, decoration or protective treatment of a dwelling (HBA, Sch 1).

"Dwelling" is defined as a building or a part of a building used as a residence, and an inclusive list of dwellings is given as follows:

- detached or semi-detached houses;
- transportable houses;
- terraces or town houses;
- duplexes;
- villa-homes;
- strata or company title home units or residential flats (HBA, Sch 1).

Common property in a strata scheme is governed by *Strata Schemes Management Act 1996* (NSW). However, there is a clear connection between strata building matters and home building consumers, and a consumer under a strata scheme may initiate NSWFT investigation of a strata building matter, even though the owners would collectively be the party to bring a claim against a builder for defective works on the common property (HBA, s 48C).

Before entering into a home building contract, a consumer should:

- conduct a licence check on the NSWFT website to ensure that the builder is licensed to perform all works under the contract;
- read through the contract, including the consumer guide usually required to be attached to the contract;
- if valued at over $20,000, ensure that the builder has provided a certificate evidencing a policy of Home Building Compensation Fund Insurance for the works.

Home building contracts

[10.730] The law of contracts facilitates trade and commerce.

Therefore, it is very important for the parties to consider the voluntary obligations they are agreeing to be bound by in their contract. Consumers, generally, have the obligation of payment. Builders, generally, have an obligation of carrying out the works.

The parties often do not strictly follow the voluntary obligations they have agreed to fulfil, and, as a consequence, the contractual relationship can become difficult.

A lawyer in such circumstances should consider the relevant facts and circumstances, and will often assist a person to repair the building relationship between the parties.

The HBA regulates the enforceability of contracts of two categories:

"Small job" contracts

The HBA threshold for "small jobs" contracts is:

- $5,000 for contracts entered into on or after 1 March 2015; and
- $1,000 for contracts entered into before 1 March 2015 (HBA, s 7AAA).

Contracts for "large jobs"

The HBA threshold for large jobs contracts is:

- $20,000 for contracts entered into on or after 1 March 2015; and
- $5,000 for contracts entered into before 1 March 2015 (HBA, s 7).

Whether a "small job" contract or not, all building contracts must:

- be in writing;
- be dated and signed by or on behalf of each party;
- contain the names of the parties, including the name of the builder as shown on their building licence;
- include the builder's licence number;
- describe the works;
- attach any plans and specifications for the works; and
- note the contract price, if known.

The builder must give a signed copy of the contract to the consumer no later than five clear business days after entering into the contract (HBA, s 7B).

In addition to the requirements just noted above, contracts for "large jobs" must contain:

- a statement about the statutory warranties;
- a "conspicuous statement" setting out the cooling-off period that applies;
- progress payments payable under the contract;
- a statement that the contract may be terminated in certain circumstances (under the contract or under the general law of contract);
- a "check list" set out in Sch 2 of the HBA, for contracts dated on or after 1 March 2015;
- a certificate of insurance under the HBCFI scheme before the builder commences work or receives any payment, including as a deposit (HBA, s 7).

[10.740] Types of building contracts

Fixed price contracts

A fixed price contract is intended by the parties to be for a specified amount, known as a "fixed price". Such a contract will estimate a price for the entire project and will usually specify when progress payments should be paid. These contracts are intended to remain fixed throughout the entire build, but are usually subject to variations (see below for variations).

"Cost plus" contracts

A "cost plus" contract is used by the parties where a price may not be determined upfront. In a "cost plus" contract, a builder may estimate the overall cost to the consumer of the project, but is reimbursed periodically by a consumer for any direct or indirect costs of the work, including labour and materials, plus a builder's fee or margin. A consumer using a "cost plus" contract should monitor costs of the project closely and communicate effectively with their builder in accordance with the contract.

[10.750] Clauses in contracts

Maximum deposits

The maximum deposit a builder can ask from a consumer for contracts entered into after 1 March 2015, regardless of the overall cost of the works, is 10% of the contract price (HBA, s 8). Prior to 1 March 2015, the maximum deposit that could be sought was:

- 10% for jobs over $20,000; and
- 5% for jobs under $20,000.

Variations

Variations are changes, either adding to or deleting from, a contract, plans or specifications, which can be sought by a builder or a consumer. All variations must be in writing and signed by both parties prior to the variation taking effect (HBA, Sch 2).

The variation clause in standard form contracts (either the NSWFT, HIA or MBA contracts) is sometimes not strictly followed by builders and this may lead to disputes.

Variation of price – if the contract price is not known or may be varied under the contract, the contract must contain a warning and an explanation of the variation clause (HBA, s 7(5)).

Variation of works – before work commences on a variation, the builder should provide the consumer with a written description of any plans and specifications, and any extra costs and time required associated for the variation.

The general law and equitable principles, including the doctrines of quantum meruit and unjust enrichment, often govern variations where a variation clause has not been strictly followed by the builder.

Progress payments

A progress payment clause and associated table must be included in contracts for jobs over $20,000 (HBA, s 8A).

Progress payments are "authorised" only:

- after completion of a specified stage of works;
- for a "cost plus" contract, for work completed that is supported by invoices, receipts and other documents; or
- if "authorised" by the HBR.

Delays in construction

Most standard form building contracts contain a clause often called a "Liquidated Damages Clause". It is recommended that consumers negotiate such a clause prior to entry into the contract, based on a genuine pre-estimate of any losses that may be sustained by consumers in the event of delays to the works that are the sole responsibility of the builder.

An effective Liquidated Damages Clause entitles a consumer to an amount for each day of delay that is the sole responsibility of a builder.

The "Construction Period" clause in a standard form contract estimates the time the works will take to reach Practical Completion, as defined by the contract. Poor weather and other delays outside of the sole responsibility of a builder, can push out construction periods, and are not compensable under a Liquidated Damages Clause.

If a Liquidated Damages Clause has not been negotiated by the parties, a consumer is protected by s 18B(1)(d) of the HBA, which provides for an implied statutory warranty that the works will be completed with due diligence and within the time stipulated in the contract, and, if no time is so stipulated, then within a reasonable time. However, the consumer bears the onus of demonstrating the cause of any delay and a genuine estimate of losses sustained by them, showing a sufficient connection between the delay and the losses incurred.

Notices and dispute resolution clauses

Most standard form contracts contain clauses that are intended to assist the parties to:

- communicate issues with each other optimally; and
- to resolve disputes that may arise about performance of obligations under the contract.

Consumers should follow any provisions of a "Notices clause" to properly communicate any concerns they may have with a builder. Most of these make provision for a formal written notice to be given to a builder. Oftentimes, consumers email, text or speak directly with a builder in circumstances that can lead to a deterioration in the contractual relationship.

A "Dispute Resolution clause", when a Notice has been given, provides a procedure by which a consumer may raise and resolve issues or concerns with a builder, and document any resolution between the parties about those issues or concerns.

When the parties manage their relationship optimally, through good use of "Notices" and "Dispute Resolution" clauses, negotiations are more likely to be successful and lead to achievable and acceptable outcomes for both parties about those issues that have caused a dispute.

Suspension clauses

A consumer must always ensure that they are meeting their obligations under the contract. A failure to make a progress payment, for example, may cause a builder to suspend the works until the dispute is resolved.

Such a failure may be considered a substantive breach of contract.

Termination clauses

Most standard form contracts contain a clause allowing the parties to terminate the contract, as well as the proper procedure for doing so, and any implications that flow from a termination.

For a consumer, to terminate a contract is very serious and an absolute last step. A consumer may face legal and monetary consequences for terminating a contract without sufficient legal reason, and it is recommended that a consumer seek legal advice on the contract and the proper performance of the parties' obligations before taking any action that might be seen to terminate a contract.

Termination of a contract without a sufficient reason is a breach of contract by the terminating party, an action in damages for breach of contract may result.

Statutory warranties

[10.760] Section 18B of the HBA sets out warranties that are implied into every contract, however large, for the performance of residential building work, whether or not a builder is licensed to carry out those works. Therefore, consumers are entitled to the benefit of the statutory warranties from licensed and unlicensed builders.

The statutory warranties protecting a consumer are that:

- the work will be performed with due care and skill and in accordance with the plans and specifications set out in the contract;
- all materials supplied will be suitable for the purposes for which they are used;

- the materials will be new, unless otherwise specified;
- the work will be done in accordance to, and will comply with, the HBA, or any other law;
- the work will be done with due diligence and within the time stipulated in the contract, or, if not so stipulated, completed within a "reasonable time";
- the work will result in a dwelling that is reasonably fit for occupation as a dwelling;
- the work will be fit for any particular purposes communicated by a consumer, so that the consumer can be said to rely on the builder's skill and judgment.

Breach of statutory warranties – defective works

Defective works for which a claim by a consumer for a breach of statutory warranties may be made against a builder, include any breach in relation to any of the statutory warranties under s 18B of the HBA.

A defect is a building problem resulting from:

- defective design; or
- defective works or poor quality works; or
- the use of defective materials; or
- a failure to comply with the performance requirements of the National Construction Code.

Defective works are characterised in the HBA as either "major defects" or "other defects".

"Major defects"

Section 18E of the HBA defines "major defects". A major defect is a defect in a "major element" of a building, attributable to a failure of the kind noted above, and that causes or is likely to cause:

- the inability to inhabit or use the building (or any part of the building) for its intended purpose; or
- the destruction of the building (or part of the building); or
- the threat of collapse of the building (or part of the building).

A "major element" of a building means:

- an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including, but not limited to foundations and footings, floors, walls, roofs, columns and beams); or
- a fire safety system; or
- waterproofing; or
- any other element prescribed by the HBR (currently, none).

"Other defects"

"Other defects" are not defined by the HBA. They are simply defective works that are not characterised as "major defects".

Limitation periods for building claims for "major defects" and "other defects"

The limitation period to commence proceedings for an alleged breach of statutory warranty resulting in a "major defect" is six years from the date of completion of the work.

The limitation period to commence proceedings for an alleged breach of statutory warranty that is not characterised as a "major defect" is two years from the date of completion of the work.

Duties imposed on consumers

Section 18BA of the HBA provides that consumers must:

- mitigate any losses that occur from defective works;
- notify any defective works in writing to a builder within six months of becoming aware of defective works;
- allow a builder reasonable access to rectify any defective works.

Building disputes

[10.770] A building dispute may arise from either:

- an alleged breach of contract; or
- an alleged breach of statutory warranty, contrary to s 18B of the HBA.

Resolution of building disputes

[10.780] It is important that a consumer seeks to resolve any building disputes with the builder first, using any Notices and Dispute Resolution clauses that might resolve any issues, and to give the builder a reasonable opportunity to rectify any alleged defective works, and to complete any incomplete works.

If the building dispute is not resolved in a way that is satisfactory to both parties', consumers should contact NSW Fair Trading (NSWFT) and lodge a formal complaint about the matter (fairtrading.nsw.gov.au, 13 32 20).

Dispute resolution through NSWFT

NSW Fair Trading deals with building disputes in relation to alleged breaches of statutory warranties, such as defective and incomplete works, and also damage caused by builders when carrying out residential building work (HBA, ss 48C, 48E). NSWFT officers will attempt to negotiate achievable and acceptable outcomes between a consumer and a licensed builder.

If a builder is not licensed to carry out the residential building work, NSWFT officers will not make Rectification Orders, as the builder is not authorised to carry out the works.

If a consumer does not attain achievable and acceptable outcomes through NSWFT dispute resolution, NSWFT will usually inform a consumer to contact the Home Building Advocacy Service (HoBAS) auspiced by Western Sydney Community Legal Centre Ltd since 2007.

HoBAS is a state-wide specialist home building service, giving legal advice to, and representing consumers in diverse building matters, including contractual disputes and alleged breaches of statutory warranty.

If NSWFT refers a consumer to NCAT, HoBAS can provide legal services to consumers about lodging a building claim in NCAT (HoBAS, 8833 0911).

Unlicensed contracting

Where a builder is not licensed to perform the residential building works, s 10 of the HBA provides that the builder:

- is not entitled to damages or to enforce any other remedy in respect of a breach of contract committed by the consumer; and
- the contract is unenforceable; and
- the builder is liable for damages and subject to any other remedy in respect of a breach of contract committed by the builder.

Resolution of building claims

[10.790] Building claim

A building claim is a claim, arising from a supply of building goods or services, for:

- a money order – payment of a specified sum of money, or an order that money be not owed; or
- a work order – for goods or services to be supplied; or
- other orders; or
- a combination of any of the above (HBA, s 48A).

The NSW Civil and Administrative Tribunal (NCAT)

[10.800] Building claims up to the value of $500,000 are heard and determined in the Consumer and Commercial Division of NCAT (HBA, s 48K). The Supreme Court of NSW has jurisdiction to hear and determine building claims in excess of $500,000.

[10.810] Limitation dates

Alleged breaches of contract

A party alleging a building claim that amounts to a breach of contract under the HBA must commence proceedings within three years of the date of the last supply of building goods and services under the contract (HBA, s 48K).

Alleged breaches of statutory warranty

As noted above, proceedings for alleged breaches of statutory warranty are set out in s 18E of the HBA. As a result of amendments to the HBA since 2012:

- for contracts entered into after 1 March 2015, a consumer must commence proceedings for "major defects" within six years from the date of completion of the works, and for "other defects" within two years from the date of completion of the works;
- for contracts entered into from 1 February 2012 and before 1 March 2015, a consumer must commence proceedings in the timeframes stipulated above, although the old HBA characterised the defects as "structural and non-structural";
- for contracts entered into before 1 February 2012, a consumer must commence proceedings for all defects, however characterised, within seven years from the date of completion of the works.

Section 3B of the HBA defines "completion date" for building works as follows:

- as defined by the contract; or
- if the contract is silent, then upon "practical completion" of the works.

"Practical completion" is often defined in standard form contracts. However, s 3B of the HBA defines "practical completion" as the event that occurs earliest of:

- handing over possession of the works to a consumer; or
- when the builder is last on site carrying out works under the contract; or
- the date of an Occupation Certificate; or
- where the works were carried out by an owner-builder, 18 months after the issue of the owner-builder permit for the works.

If the works are incomplete, the statutory warranty period commences on:

- the date the contract is terminated; or
- if the contract is not terminated, the date on which the works ceased; or
- if the contract is not terminated and the works had not commenced, the date of the contract.

[10.820] NCAT procedures

It was noted above that NCAT is the primary jurisdiction for resolution of building claims valued at under $500,000. The Tribunal, it is noted elsewhere, promotes self-representation of parties and conciliation of all kinds of disputes, while seeking to attain the just, quick and cheap resolution of the real issues in dispute between the parties.

The NCAT website has many useful factsheets on home building claims and practice and procedure, including on the acceptance of building claims, the practice and procedure applicable to resolution of home building matters, and preparing and presenting the evidence and documents that are essential to consumers regarding a building claim.

Lodging an application

Consumers can obtain a Consumer and Commercial Division (CCD) Home Building Application Form from the NCAT website and from NSWFT. Consumers should read the form carefully and there are some helpful explanatory notes that highlight important issues to be considered.

A filing fee is to be paid to complete the application process.

Orders sought

It is important for consumers to remember that s 48MA of the HBA provides that work orders are the "preferred outcome" in NCAT. This is not to say that money orders are not made by the Tribunal, but that a consumer should think about what are the "just, quick and cheap" resolutions that may be able to be obtained in the NCAT setting.

If a builder is unlicensed, for example, or where otherwise a builder has attempted to rectify alleged defects ineffectively, the Tribunal may invite a consumer to make submissions on the presumption of the preferred outcome, and NCAT can and does make money orders against builders where breaches of statutory warranty have been proved by a consumer.

Transfer of building claims from a court to NCAT

Section 48L of the HBA provides that NCAT is chiefly responsible for resolving building claims within its jurisdictional limits.

If, for example, a consumer receives a Statement of Claim alleging unpaid monies under a contract to perform residential building work, the consumer should obtain urgent legal advice about filing a Notice of Motion with the court, and Affidavit in support, seeking the matter to be transferred to the Tribunal because the matter is a building claim that NCAT is chiefly responsible for resolving.

A Defence should not be filed. Filing a Defence implies that the consumer submits to the jurisdiction of the court. Transferring the proceedings to NCAT has the benefit of being case managed in a specialist consumer jurisdiction, that promotes conciliation, and in a jurisdiction in which the parties pay their own costs of, and incidental, to proceedings.

Cross claim applications

A cross application may be filed at NCAT where a respondent party to a building claim has a counter claim. This is often the case where a builder claims unpaid monies under a contract, and a consumer alleges defective works.

A cross application should be filed no later than the first Directions/Group Hearing. Once filed, the Tribunal will consider the application and cross application together.

[10.830] NCAT procedure for building claims

The Tribunal has published NCAT Procedural Direction 5 on "Acceptance of home building claims".

Generally, the procedure of the Tribunal is discussed elsewhere in this chapter. NCAT is required to attempt conciliation of building claims, just like any other type of consumer claim, but building claims often differ in quantum and complexity, around both legal argument and facts.

The parties are under a duty to co-operate with the Tribunal to ensure the just, quick and cheap resolution of proceedings (CATA, s 36).

If a building claim is settled, the Tribunal will make consent orders to give effect to the agreement reached at conciliation. Orders made by consent are enforceable through the process of renewal of proceedings, if the orders are alleged to have not been complied with.

If a building claim is not settled, the Tribunal will make procedural directions for the exchange of evidence, and the matter will be adjourned for final hearing to determine the application and any cross application.

A consumer bears the onus of proving an alleged breach of statutory warranty on the balance of probabilities.

As in the Tribunal generally, parties tend to represent themselves and must apply for leave to be represented (CATA, s 45), and costs are only awarded against a party in special circumstances that may warrant the awarding of costs (CATA, s 60).

[10.840] Evidence in building claims

The parties must be prepared to provide evidence that is sufficient to support the claims made by them. In a building claim, such evidence, including documents and other supporting evidence, may include:

- the building contract, including the plans and specifications;
- quotes for the works (especially for "small jobs");
- variations to the works;
- correspondence about the scope of works, including emails and other communications;
- the certificate of HBCF Insurance if the works are valued at over $20,000;
- the builder's licence information from the NSWFT licence check website;
- records of payments made by a consumer (bank statements, accounts, bills, invoices, receipts, and so on);
- any building reports on alleged defective or incomplete works (see below);
- a Scott Schedule, if needed;
- photographic evidence of defective works;
- quotes, if needed, for defective and incomplete works.

If the contract was verbal and not in writing, a party should prepare an Affidavit or Witness Statement setting out the circumstances giving rise to the agreement, and the scope of the agreement.

The quantum and complexity of the claim will affect the type of evidence that may be needed.

The parties, under a duty to assist the Tribunal, should always seek to comply with any procedural orders or directions made by the Tribunal, but it is also the case that the parties may seek extensions of time to comply with any procedural orders or directions made.

In addition to the above, a consumer alleging breaches of statutory warranty should prepare:

- a chronology of events; and
- a document entitled Points of Claim or Points of Defence, which should concisely set out the law and the jurisdiction of the Tribunal to make the orders sought.

A builder responding to alleged breaches of statutory warranty should prepare:

- a chronology of events; and
- a document entitled Points of Defence, which answers the Points of Claim filed by a consumer.

Complex matters – expert building reports

In matters where the amount of a claim by a consumer is relatively small, a series of quotes that may indicate alleged defective and incomplete works may be sufficient for the consumer to discharge the onus upon them to prove that the works are defective or incomplete.

However, in complex matters, often where alleged defective and incomplete works are of a higher order of value, engagement by a consumer of an expert building consultant to provide a written report, consistently with NCAT Procedural Direction 3 is almost always indicated.

Such a report will clearly be superior in scope and detail to quotes which lack an independent patina. A quote is, after all, an instruction from a consumer to perform works, without really providing an opinion as to why any alleged defects would amount to a breach of statutory warranty, contrary to s 18B of the HBA. The builder quoting on the works is merely estimating costs of performing the works directed.

NCAT Procedural Direction 3 contains a code of conduct for a building consultant providing an expert report. Such a consultant:

- acknowledges that they owe a duty to the Tribunal, and is not an "advocate" of the party who engaged them;
- agrees to be bound by the NCAT Expert Witness Code of Conduct;
- sets out their qualifications and experience in the area;
- sets out the substantive basis of any investigations, tests, measurements and observations that may be made;
- sets out any assumptions upon which their opinions are based;
- refer to any Australian Standards and the National Construction Code, applicable to the works, upon which the opinions are based;
- acknowledges any limitations on their observations or opinions and recommends some further specialist investigation;
- should be available to the Tribunal to adopt their report under examination and to be cross-examined in accordance with procedural fairness principles.

A report by a building consultant that complies with NCAT Procedural Direction 3 will clearly:

- identify any defective and incomplete works;
- identify responsibility for any defective and incomplete works;
- identify the methods of rectification and completion for any defective and incomplete works; and
- identify the costs of the different methods of rectification and completion for any defective and incomplete works.

Such reports are expensive and currently (2019) range in price up to $6,000 or more. A consumer should receive legal advice on costs consistently with s 60 of the CATA, which may be awarded by the Tribunal in special circumstances in light of the costs of obtaining a report from a building consultant.

In many cases, both parties obtain the opinions of experts who may complete a Scott Schedule, identifying any defective and incomplete works and estimating the costs of the methods of rectification and completion.

Renewal of proceedings

A party may apply to NCAT to renew the proceedings if an order, such as a work order, was not complied with in the time stipulated by the NCAT order. A renewal must be filed within the time specified in the original order. If no time was specified, the renewal application must be filed within 12 months after the work was to be completed, for a work order (CATA, Sch 4).

Appeals from NCAT decisions

Generally, a party must appeal a decision of NCAT within 28 days after the decision has been notified or reasons have been given (NCAT Guideline 1 – Internal Appeals).

Internal appeals are heard by an NCAT Appeal Panel, usually consisting of senior Members. A party in a building claim must seek leave to appeal the original decision unless the appeal is based upon a "question of law". The party seeking leave to appeal must demonstrate that they have suffered a "substantial miscarriage of justice" because:

- the decision was not "fair and equitable"; or
- the decision was "against the weight of evidence"; or
- "significant new evidence has arisen" being evidence that was "not reasonably available at the time of the original hearing".

It must be said that proving a substantial miscarriage of justice in the circumstances will ordinarily be quite difficult, and the person proposing to appeal should obtain legal advice at the earliest opportunity on the prospects of success of an appeal.

As noted above, NCAT Guideline 1 contains very useful information on the making of an internal appeal.

[10.850] Enforcing NCAT money orders

If NCAT made a money order and a consumer alleges that the money order has not been complied with, the consumer may:

- formally notify the HBCF Insurer of the non-compliance with the money order, provided the builder is licensed (HBA, s 92). Non-compliance with a money order in such circumstances is regarded as the deemed "insolvency" of the builder (HBA, s 101); or
- in the absence of HBCF Insurance because, for example, the builder is unlicensed, seek to enforce the order by pursuing enforcement action in the court against the unlicensed builder. A consumer has 12 years from the date of the order to enforce it in the usual manner.

[10.860] Insurance under the Home Building Compensation Fund (HBCF)

A consumer alleging breaches of statutory warranty under the HBA must pursue the licensed builder first, in the manner described above.

Where the contracted works are valued at over $20,000, a licensed builder is required to provide a consumer with a certificate evidencing a policy of Home Building Compensation Fund Insurance (HBCFI), before performing any work, or taking money under a contract, even as a deposit. HBCFI is insurance of "last resort".

Nevertheless, a consumer alleging breaches of statutory warranty must formally notify the HBCF Insurer of action being taken against a licensed builder, within six months of becoming aware of any defective or incomplete works. The formal notification is called the "Loss Notification Form".

Where a consumer is pursuing a licensed builder, a claim on the HBCF Insurance may be made:

- as a result of the death, disappearance or insolvency of the licensed builder (HBA, s 99); or
- where the consumer had actively pursued the licensed builder in NCAT and a money order has not been complied with by the licensed builder and, that as a result, NSW Fair Trading has suspended the builder's licence (HBA, ss 42A, 101).

Whether or not a builder may have performed unlicensed contracting, or undertaken uninsured works is a matter for legal advice, depending on the facts and circumstances.

It is sometimes the case that a builder, seeking to avoid the implications of HBCF Insurance because, for example, they are not licensed to perform residential building work valued at over $20,000, may sometimes "split up" the works into a series of jobs valued at under $20,000, but that in "total" may exceed 20,000. It is important to note that s 92(4) of the HBA provides that the contract price may be "taken to be the sum of the contract prices under each of the contracts".

From 1 February 2012, HBCFI policies must provide a minimum cover of $340,000 (HBA, s 102; HBR, r 45).

HBCF Insurance coverage arising from alleged defective works are provided for a period of:

- six years from the date of completion for "major defects"; and
- two years from the date of completion for "other defects" (HBA, s 103B).

HBCF Insurance also covers losses arising from non-completion of the works for a period of 12 months after the failure to commence or cessation of the works (HBA, s 103B).

An additional six month HBCFI coverage applies in circumstances where the loss "becomes apparent" in the final six months of the period of insurance (HBA, s 103BA).

Uninsured work

Section 94 of the HBA provides that if a contract of HBCF Insurance is not in force in relation to any residential building work, the builder who did the work:

- is not entitled to damages, or to enforce any other remedy in respect of a breach of contract committed by the consumer, in relation to that work; and
- is not entitled to recover money in respect of that work under any other right of action, including a quantum meruit, unless the Tribunal were to consider such "just and equitable" (HBA, s 94).

TELEPHONE AND THE INTERNET

[10.870] Introduction

Communications systems – the telephone (fixed line and mobiles) and access to the internet – are nationally regulated. The primary national communications regulator is the Australian Communications and Media Authority (ACMA), with other national regulators – the ACCC and the OAIC – also regulating industry competition and providing consumer protections.

The landscape of consumer protection in communications is changing. As the national broadband network (NBN) is rolled out nationally, NBN Co is replacing Telstra as the primary provider of broadband infrastructure to the home.

At the same time, increasingly Australians are using mobile rather than fixed line services for communication and, increasingly, communicate online (see ABS Report 8153.0). Indeed, using ACMA statistics, "Finder" reports that Australians have dropped their home phone every year from 83% in 2011 to 64% in 2017, and they predict only half of Australian homes will have a home phone by 2021.

[10.880] The regulatory framework

The *Telecommunications Act 1997* (Cth) (TA) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) (T(CPSS)A) are the two main pieces of legislation that provide industry specific consumer protections. General consumer protections are provided by the ACL, in Sch 2 of the *Competition and Consumer Act 2010* and the *Privacy Act 1988*.

Some of the consumer protections discussed below are provided by either the TA or the T(CPSS)A. See also the *Spam Act 2003* (Cth) for the prohibition on sending unsolicited electronic messages (spam), and the *Do Not Call Register Act 2006* (Cth), to prevent those on the register from receiving telemarketing calls.

However, most of the consumer protections are provided by industry codes, particularly the *Telecommunications Consumer Protection Code* (*TCP Code*). All codes are available on the ACMA's Register of Codes available at www.acma.gov.au/theACMA/Library/Corporate-library/Forms-and-registers/register-of-codes.

Part 6 of the TA sets out the process to be followed in the development of "registered" codes. While codes are developed by what the legislation calls "a section of the industry", at least one consumer organisation, the ACCC and, in codes that impact on privacy, the OAIC, must be consulted in their development. Once the communications regulator, the Australian Communications and Media Authority (ACMA) is satisfied that the legislative requirements for the development of the code have been met, it "registers" the code. Once a code is registered, the ACMA then has the power to issue a "formal warning" to

a service provider(s) for non-compliance with provision(s) of the code, followed if necessary by a direction to comply, which can be enforced in the Federal Court. The ACMA can also request industry to develop a code to address issues that provide "appropriate community safeguards" or otherwise, the performance of participants in the industry (TA, s 118). The ACMA can also then develop a mandatory industry standard either if industry fails to respond to the ACMA's formal request for a code, or a registered code is, in some way deficient (TA, ss 123, 125). The ACMA can also require enforceable undertakings (TA, Pt 31A) or issue Infringement Notices (Pt 31B) to ensure compliance with registered Codes.

Codes discussed in this chapter are all registered codes.

Some definitions:

- customer in this chapter refers to consumers who acquire a service(s) primarily for domestic purposes, or a business or non-profit organisation that acquires the service(s) under a standard contract, with a maximum annual spend estimated on reasonable grounds to be less than $40,000 and does not acquire the service(s) for resale;
- carriage service providers (CSPs) means the retail providers of telecommunications services to the public;
- fixed line service is a telecommunications service (phone and/or Internet access) that is provided through a socket in the premises or over a cable that can provide a subscription television service. The communications system (phone and/or Internet) is provided by a device(s) plugged into the socket or using the cable and connected to the communications device (telephone handset, Internet modem, etc);
- internet is a transmission system that lets the customer(s) access a range of communications services (emails, the web, a Voice over IP – VoIP – service such as Skype, apps etc) using specific transmission protocols;
- wireless service is a communications service provided by radio communications technology and the communications device(s) not physically "connected" to communications infrastructure.

[10.890] Getting a service

Most companies offer a "bundle" of services that can include a standard telephone service (fixed line or wireless) to the premises, a mobile phone service, an Internet access service and/or a pay TV service. The "bundle" may also offer communications equipment such as a handset and/or a modem as part of the package.

Generally, the cost to consumers of the "bundled" package will be cheaper than if the customer had acquired each service and/or piece of equipment individually. However, such "bundles" are more commonly available under a contract for a minimum period, with penalties for early termination of the contract.

Before signing up to a telecommunications contract, customers should be advised to carefully consider what communications services they use and how much of each service is used on a regular basis. Looking over past accounts will help customers determine what their specific communications needs are.

CSPs are required to provide a "critical information summary" that allows customers to compare products and services offered by various providers. Each summary must include a description of the service(s) provided (including whether it is offered as part of a "bundle"), the minimum term applicable and any exclusions or limitations on the offer. Under pricing information, the summary must include minimum monthly charges as well as any minimum spend over the life of the contract, any termination charges, and any limitations on the offer. CSPs must also provide a range of information on pricing, including standard charges that allow customers to compare the offer with service offers from other CSPs (*TCP Code*, cl 4.2.2).

[10.900] National Broadband Network (NBN)

Under bi-partisan communications policy, the telecommunications network is being upgraded to provide fast (or faster) broadband speeds to customers' homes or business premises. For metropolitan areas, the connection will be fibre (fibre link direct to the premise or fibre to a distribution point in the street near the premises, using existing copper connection to the premises), or HFC (Hybrid Fibre Coxial cable – the "PayTV" cable) to the premises. For those outside the urban areas, faster broadband speeds will be provided through fixed wireless services infrastructure or satellites. The rollout of infrastructure will be done by the government owned National Broadband Network Company (NBN Co).

As NBN Co's rollout approaches an area, all those affected (residents, strata managers, or business owners) are being notified and asked whether they want to be connected to the NBN. Those notified will have 18 months to switch over to the NBN. If people want to continue to use fixed line services, they must switch over to the NBN. All standard connections are free. People can check the NBN Co website to see when NBN Co is coming to their area nbnco.com.au. In the process of switching over to NBN infrastructure, customers will deal with their choice of retail service provider (Telstra, Optus, TPG for example). The NBN Co website has a range of information available on their network, including how to make complaints about the installation. The TIO will also deal with those complaints if they are not resolved by NBNCo.

In the process of switching over to NBN infrastructure, customers will deal with their choice of retail service provider (Telstra, Optus, TPG for example). The NBN Co website has a range of information available on their network, including how to make complaints about the installation. The TIO will also deal with those complaints if they are not resolved by NBNCo. For all other issues with their telecommunications services, customers will continue to deal with their retail service provider in the first instance, or with the TIO if the issue is not resolved.

[10.910] Additional information

Customers living outside of city areas should also ask about mobile phone coverage if that service is included in the package. CSPs are also required to tell customers with a disability about any features of telecommunications equipment they provide that has features that will assist the customer to use the equipment (*TCP Code*, cl 4.3.1(j)). For customers travelling overseas, CSPs must also make available information about international roaming charges for use of a phone or internet service overseas (*TCP Code*, cl 4.3.1(h)). Customers with particular privacy needs should also ask about any charges to have a silent or unlisted number.

[10.920] Credit assessment

Before providing post-paid services to a customer, CSPs must undertake a credit assessment of the customer and advise them of the financial implications of the service(s). If, as a consequence of the credit assessment, the CSP will provide restrictions on their service, the CSP must provide reasons for that decision, the nature of the restrictions and the circumstances under which restrictions will be removed (*TCP Code*, cl 6.1).

[10.930] Managing expenditure on telecommunications

All CSPs must provide their customers with information about the "spend management tools" they offer (*TPC Code*, cl 6.5). Those tools help customers to take timely action to manage and/or limit their expenditure on a telecommunications product. Such tools can include usage notifications, barring of access to particular types of services, or, for Internet services, reducing download speeds.

[10.940] Connection

The timeframes that CSPs should meet for the connection of fixed line service are as follows:

Connection type	Community location	Community size (No. of people)	Connection time (after receipt of customer's application)
In-place connection	All	All	Within two working days
No in-place connection	Urban	Equal to or more than 10,000 people	Within five working days
(close to available infrastructure)	Major rural	Between 2,500 and 10,000 people	Within 10 working days
	Minor rural and remote	Up to 2,500 people	Within 15 working days
Where there is no infrastructure or spare capacity	All	All	Within 20 working days (equivalent to one month after request)

There are also requirements for CSPs to make, and keep, appointments for the connection of standard phone services. If a CSP makes an appointment with a customer for connecting a service, the appointment period must be no longer than five hours (ie, either for the morning or afternoon of an agreed date). The company must keep this appointment unless it gives the customer reasonable notice. The timelines do not apply where a customer has agreed to accept an alternative or interim service or where there are situations beyond the CSP's control, such as natural disasters. Under s 115 of the T(CPSS)A, the Minister directed the ACMA to set service standards on connections, fault repair and appointment times. They were set by the ACMA in the *Telecommunications (Customer Service Guarantee) Standard 2011*. However, the government is currently reviewing standards set under the legislation.

[10.950] During the life of a service(s)

Billing

Itemised charges

CSPs must provide itemised bills for all charges relating to the provision of a "standard telephone service". The obligation does not include itemisation of all local (untimed) calls unless requested by the customer (TA, Sch 2, Pt 5).

The bill

Customers who are not using a prepaid service must be offered a choice of whether to receive a paper bill through the mail, by email or online. Customers can, instead, agree to having their account paid through direct debit, but unless the amount debited is the same charge each billing period, or within 10% of an agreed fixed charge, customers must receive a bill in the agreed format.

In most cases, CSPs cannot bill a customer for charges older than 160 days from the date that the charge was incurred. CSPs must ensure that customers have access to itemised details of all charges included including all timed call charges, unless advised by the customer otherwise (*TCP Code*, cl 5.3).

[10.960] Financial hardship

CSPs must have a financial hardship policy to assist customers experiencing difficulties in meeting their financial obligations. The policy must be easily accessible and information about it made available in any reminder notices. If a customer is assessed as eligible for the policy, options will include flexible repayment options to meet customer needs. Any credit management action must be suspended while discussions about the application of a financial hardship policy are under way (*TCP Code*, Cl 7.7.1).

[10.970] Repairs

CSPs must repair a service within timelines, as set out below unless, again, the CSP has agreed to provide an interim or alternative service. CSPs must also keep agreed appointments, as set out above for service connection times (Standards set under T(CPSS)A, ss 115, 177, 120).

Community	*Community size (No. of people)*	*Repair time*
Urban	Equal to or more than 10,000 people	End of next working day after report
Rural	Between 201 and 9,999 people	End of second working day after report*
Remote	Up to 200 people	End of third working day after report*

* In certain circumstances, for example, where the fault can be rectified by the company without attending the customer's premises, the fault rectification period is the end of the next working day after report.

[10.980] Making a complaint

The first point of call if a customer has a complaint is their CSP. All CSPs must have a process to handle complaints that is easy to use and accessible. The CSP must have a complaints handling process that is available on request and free of charge, noting that complaints can be made by telephone, letter, email and online.

The CSP must use its best efforts to resolve complaints on first contact and provide confirmation of a proposed resolution within two working days or receiving an urgent complaint and within 15 working days of receiving other complaints (*Telecommunications (Consumer Complaints Handling) Industry Standard 2018*).

[10.990] Telecommunications Industry Ombudsman (TIO)

The TIO handles complaints made by residential and small business customers. Complaints can be made online, by phone using a toll free number, by mail or in person and are at no cost to the customer (www.tio.com.au has details for all the ways in which customers can make a complaint). Before handling a complaint, the TIO will ask that the customer try to resolve the complaint with their CSP if they have not already done so. The customer will referred back to the CSP, but generally to a more senior level within the CSP organisation. Most complaints are resolved at this stage. If the customer is disputing a bill and has taken the matter to the TIO, any debt collection action by the CSP must be put on hold while the matter is being resolved.

If the complaint is still not resolved to the customer's satisfaction, the TIO will investigate the complaint, seeking first to conciliate the matter. If still unresolved, the complaint may be fully investigated and/or the matter arbitrated. On completion of an investigation into a complaint, the TIO can make binding decisions on its members to do (or refrain from doing) actions and pay compensation of up to $50,000. It can make further recommendations for payment of up to $100,000. For information on TIO powers and Complaint Handling Procedures, see tio.com.au.

All carriers and CSPs that provide a standard telephone service, a mobile service or an Internet access service must be members of the TIO scheme and are required to comply with the scheme (T(CPSS)A, Pt 6).

[10.1000] Privacy

There are several aspects to privacy in the context of telecommunications. The general data retention protections are provided in the Australian Privacy Principles of the *Privacy Act 1988*. They cover the traditional issues of collection, use and secure storage of personal information, as well as specific provisions relating to the use of personal information for marketing purposes and an individual's access to their own personal information.

Part 13 of the TA also contains provisions protecting the collection and use of personal information by carriers, CSPs and their employees and contractors. This includes not only the personal information necessary for the installation, service, billing, etc of services but other personal information gained in the performance of the carrier/CSP's employees' duties – potentially the content of communications.

The TA also provides for the establishment of what is called the integrated number database (IPND). Each CSP must provide the IPND manager with the name, service address, billing address, and public numbers (fixed line, mobiles etc) for all their customers (TA, Sch 2, Pt 9). The use of IPND data is restricted to emergency services, and under certain circumstances, law enforcement agencies and listed government regulators. IPND data, with the exception of unlisted numbers, may also be used by directory producers and for research purposes (TA, ss 277–278, 285).

The final relevant piece of legislation providing privacy protection in communications is the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIAA). The TIAA prohibits the interception of communications passing over a telecommunications system. The exceptions to the prohibition include any interception carried out in the course of the installation, maintenance and repair of the communications system, for emergency purposes or when lawful under a warrant (TIAA, s 7). The other offence is accessing (or authorising access) stored communications without the knowledge of either the recipient or sender (TIAA, s 108). Stored communication is defined in s 5 to mean a communication that is not passing over a telecommunications system, is held on equipment operated by and in the possession of a carrier and cannot be accessed by a person who is not a party to the communication without the assistance of the carrier. Two examples would be emails or SMS messages.

The other important privacy protection is contained in the industry code on calling number display that requires providers of a standard telephone service to ensure their customers have

the option of blocking calling number display on both a permanent and call by call basis (ACIF C522:2007 Calling Number Display, s 3).

[10.1010] Changing providers

If customers want to change their CSP, the new CSP must ensure that the customer is informed of timelines for the transfer, possible interruption of service, possible incompatibility of equipment for that service, as well as full details of the terms, conditions and pricing of the new service (*TCP Code*, Ch 9).

[10.1020] Special tips about the internet

Spam

The *Spam Act 2003* prohibits sending unsolicited commercial electronic messages with an "Australian link" through, for example, emails or text messages. See ss 5–7 for definitions of commercial electronic communications, and Australian link, and Sch 2 to determine if the message was unsolicited, or the customer's consent was expressly given or can be inferred. The Act also requires that commercial electronic messages must contain an "unsubscribe facility" that consumers can use to stop receiving any further commercial electronic messages from that sender (*Spam Act 2003*, s 18).

[10.1030] Do Not Call Register

The ACMA is responsible for maintaining the Do Not Call Register. After 30 days of applying for inclusion on the register (www.donotcall.gov.au), a person should not receive telemarketing calls or faxes. There are exemptions that apply to charities or charitable institutions, educational institutions, religious organisations, government bodies, registered political parties, independent members of Parliament, and political candidates.

Telemarketing calls or marketing faxes may also be made or sent to individuals who have consented to receiving calls and/or faxes, or where consent can be reasonably inferred from their business and other relationships.

Under inferred consent, people who place their telephone or fax number on the register may receive telemarketing calls or marketing faxes from a business with which they have an established relationship, for example, a bank may contact its customers about banking products and services.

Security – stay safe online

The ACMA website provides a range of information on cyber safety, safe passwords, Internet security, information particularly for children and security, and a facility for handling Internet complaints.

Compromised computers

The Internet Industry Association developed a voluntary code, the "icode" on how Internet service providers can detect and deal with compromised computers. It also contains information on steps customers should take when informed that their computer may be compromised.

Part 10.6 of the *Criminal Code Act 1995* (Cth) creates a range of criminal offences involving telecommunications including interference with telecommunications or the telecommunications identifier, or using a telecommunications network to commit a serious offence, to threaten, menace or harass or to improperly use the emergency call service. It is also an offence to use for child pornography or child abuse, sexual material or abhorrent violent material.

For further information on criminal offences involving telecommunications, see Chapter 30, Internet Law at [30.260].

Contact points

[10.1040] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service (NRS) by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). The NRS also provides an SMS relay number **0423 677 797**, and an Internet Relay Service. For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Australasian Legal Information Institute (AustLII)
www.austlii.edu.au

Australian Communications and Consumer Action Network (ACCAN)
www.accan.org.au
ph: 9288 4000

Australian Communications and Media Authority (ACMA)
www.acma.gov.au
ph: 1300 850 115 or email: info@acma.gov.au
Sydney office
ph: 9334 7700 or email: info@acma.gov.au

Australian Competition and Consumer Commission
www.accc.gov.au
Infocentre: 1300 302 502

Australian Consumers Association (Choice)
www.choice.com.au
ph: 9577 3399

Australian Direct Marketing Association (ADMA)
www.adma.com.au
ph: 9277 5400

Australian Information Commissioner, Office of the (Cth)
www.oaic.gov.au
ph: 1300 363 992

Australian Retailers' Association (ARA)
www.retail.org.au
ph: 1300 368 041

Australian Securities and Investments Commission
www.asic.gov.au
infoline: 1300 300 630

Communications, Department of
www.communications.gov.au
ph: 1800 254 649

Communications Alliance
www.commsalliance.com.au
ph: 9959 9111

Do Not Call Register (Cth)
www.donotcall.gov.au
ph: 1300 792 958

Energy & Water Ombudsman NSW (EWON)
www.ewon.com.au
ph: 1800 246 545

Environment and Energy (Cth), Department of
www.environment.gov.au
ph: 1800 803 772

Environment and Heritage, Office of (NSW), NSW Department of Planning, Industry & Environment
www.environment.nsw.gov.au
ph: 1300 361 967

Financial Ombudsman Service
www.fos.org.au
ph: 1800 367 287

Financial Rights Legal Centre
www.financialrights.org.au
Administration: 9212 4216
Insurance Law Service: 1300 663 464
Mob Strong Debt Help (formerly the Aboriginal Advice Service): 1800 808 488
National Debt Helpline: 1800 007 007

GreenPower
www.greenpower.gov.au
ph: 8229 2816

Home Building Advocacy Service (HoBAS) – Western Sydney Community Legal Centre
www.wsclc.org.au/how-can-we-help/home-building-disputes/
ph: 8833 0911

Housing and Homelessness (Community and Justice)
www.facs.nsw.gov.au/housing
ph: 1800 422 322

Justice, Department of (NSW)
www.justice.nsw.gov.au
ph: 8688 7777

Law and Justice Foundation of NSW
www.lawfoundation.net.au

Law Society Solicitor Referral Service
www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-referral-service
ph: 9926 0300

Legal Aid NSW
www.legalaid.nsw.gov.au
ph: 1300 888 529

NSW Civil and Administrative Tribunal (NCAT)
www.ncat.nsw.gov.au
ph: 1300 006 228

NSW Fair Trading
www.fairtrading.nsw.gov.au
ph: 13 32 20
Aboriginal Enquiry Officer: 1800 500 330

NSW Public Guardian
www.publicguardian.justice.nsw.gov.au
ph: 8688 6070 or regional NSW 1800 451 510

NSW Department of Planning, Industry and Environment
www.dpie.nsw.gov.au/
Energy
ph: 13 77 88
Industry
ph: 9338 6600
Planning and Environment
ph: 1300 305 695

Parliamentary Counsel's Office
www.pco.nsw.gov.au
ph: 9321 3333

Public Interest Advocacy Centre
www.piac.asn.au
ph: 8898 6500

Roads and Maritime Services (formerly Roads and Traffic Authority (RTA))
www.rms.nsw.gov.au/
ph: 13 22 13

Standards Australia
www.standards.org.au
ph: 1800 035 822 or 9237 6000

Telecommunications Industry Ombudsman
www.tio.com.au
ph: 1800 062 058

Tenants' Union of NSW
www.tenants.org.au
ph: 8117 3700
Tenancy advice
ph: 1800 251 101

Water, Office of (NSW Department of Planning, Industry and Environment)
www.industry.nsw.gov.au/water
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