



COMMENTS RECEIVED FROM CUSTOMER COUNCILS ON THE REVIEWED STANDARD SUPPLY CONTRACT

June 2002

SunWater commenced the review of its standard supply contracts (approved by the Minister for Natural Resources and Mines) by writing to customer councils in May 2001 inviting comment. Presentations on the contract were held to each customer council shortly after this time.

Nine comments were received. SunWater addressed all comments received and reviewed standard contract. In December 2001, SunWater sent a copy of the reviewed Standard Supply Contract to customer councils, inviting additional comments. This is attached.

Three customer councils responded to this letter:

- St George Customer Council;
- Callide Valley Customer Council
- South East Customer Council – Beaudesert Shire Council

This document sets out these comments and SunWater's response to the comments received. Attached are the final reviewed contracts incorporating additional comments received in this second round review. These are highlighted in yellow in the reviewed contract and referenced against comments in this document.

Clause 3. (Beaudesert Shire)

It would appear that the use of the term “use reasonable endeavours” to repair or release water does not in fact require the repair or the release. The word “shall” should be used in both cases.

SunWater’s response:

Agreed. This clause will be amended to strengthen SunWater’s obligations.

Clause 3 (a) (Callide Valley)

Delete “by the customer”.

SunWater’s response:

Agreed. This will be clarified to ensure any employee or agent for the customer can make this notification.

Clause 4(i) (Beaudesert Shire)

The definition of an Event of Force Majeure has been considerably expanded from what is normally included in that definition. It contains such things as non-availability of essential equipment and the failure of supply of electricity to a pump. Force Majeure would normally be confined to items set out in A to D in that definition. The protection offered by an event of Force Majeure should be limited to those events normally covered by the definition.

SunWater’s response:

An event of force majeure, as defined in the contract, is limited to things outside the reasonable control of SunWater. For example, SunWater cannot control the availability of electricity – this may occur due to natural factors (eg power lines being damaged in a storm).

Clause 4(g)(i) (St George Customer Council)

We note SunWater’s response to Clause 4(g)(i). We still consider this needs progressing.

SunWater’s response:

At the last review, St George Customer Council stated that “more responsibility to supply water should be placed on SunWater – finding more water is not on”.

SunWater’s position has not changed in regards to this issue. SunWater has an obligation to release water that it reasonably estimates will satisfy the demand of customers. In making such an estimate, SunWater would have to make a reasonable estimate of evaporation, seepage or other river losses.

However, there are many things outside SunWater’s control that limit its ability to supply water. This clause spells out what these things are.

Clause 5. (Beaudesert Shire)

It is considered that each agreement should stand on its own and not make default under one agreement default under all agreements.

Clause 5 (a), (c) and (d). (Callide Valley)

This is not agreed and is not consistent with other utilities.

SunWater's response:

SunWater has reconsidered this issue and has not changed its position. This clause only applies where a customer is in breach, and provides additional incentives for the customer to remedy that breach.

Clause 7.1 (c) (Callide Valley)

Prices should be based on the incremental costs only (ie not overheads) for services that can only be provided by SunWater (eg searches). This would not apply to services where SunWater is in competition.

SunWater's response:

There is an obligation for the charges to be reasonable. It is normal practice to include overheads when pricing services. These charges are normally for searches and application fees.

Clause 7.5. (Callide Valley)

Customers should be given the choice of being paid the amount directly, or having it adjusted in the next invoice.

SunWater's response:

Agreed.

Clause 7.7. (Beaudesert Shire)

It is inequitable to charge interest backdated to the date of the invoice. Interest should be charged from the due date.

SunWater's response:

Prior to corporatisation, overdue accounts attracted interest backdated to the date of invoice. In the spirit of finalising this contract review, SunWater agrees to change the date from which interest is calculated. This will commence from the October quarterly invoicing.

Clause 7.8, 7.9, and 12.3. (Callide Valley)

These clauses should be pulled together as one clause for the sake of clarity.

SunWater's response:

SunWater agrees that the contract should be clear. This issue is therefore essentially one of drafting. The current drafting separates these clauses into charging and breach. SunWater proposes that this remains as the preferred drafting approach.

Clause 8. (Beaudesert Shire)

Under this clause SunWater can unilaterally vary the terms and conditions of the agreement. It is only required to consult with the customer. It does not require the agreement of the customer. The agreement is a binding agreement as between the parties and inclusion of such a clause as this enables any variation to any part of the agreement by SunWater simply by initiating a consultation with the customer. Further as SunWater can determine the agreement on the giving of three months notice it is fair comment that the whole of the agreement has a duration of some three months and one day certain.

SunWater's response:

SunWater cannot unilaterally vary the terms of the agreement. It can offer new terms to the customer at any time, but the customer is under no obligation to accept these new terms.

If the customer does not accept the terms, then two things can occur:

- *This agreement continues; or*
- *SunWater can terminate this agreement. It is in SunWater's interests to enter into negotiations for a new agreement in order to receive any revenue to cover its fixed costs.*

The purpose of this clause is to provide a mechanism to review the agreement from time to time if need be. Please note the proposed review date is five years.

Clause 8.4, 9.3, and 9.4 (Callide Valley)

These clauses require more explanation, including the frequency of the review date.

SunWater's response:

Agreed. The review date will be five years.

Clause 9. (Beaudesert Shire)

Again, the right to make a change to the SunWater rules may also have the effect of changing the terms of the agreement. If SunWater wishes to make or amend the rules then it should be done by agreement with the customer.

SunWater's response:

The rules and targets cannot change the terms of the agreement. Furthermore it is impractical for SunWater to try and reach agreement with each and every of its customers on scheme management issues such as shutdowns, water ordering or rosters. The process in the agreement, whereby SunWater must consult on these issues, is consistent with standard practise across the industry and in fact places a positive obligation on SunWater to consult – an improvement from past arrangements.

Clause 9.3. (Beaudesert Shire)

The purport of this clause is to allow SunWater to determine charges which are final and binding unless manifestly unreasonable. This obviously means that the charges may be unreasonable but they will be binding unless they are manifestly unreasonable. This and other powers which SunWater purports to give itself under the agreement should have a point of review by an independent authority if the customer wishes to challenge a SunWater determination. At the very least the word “manifestly” should be removed.

SunWater's response:

The Queensland Competition Authority has declared SunWater as a monopoly business activity. There is a clear process under the Queensland Competition Authority Act for an independent investigation of the proposed prices by the Authority. These are statutory provisions, which customers can use. SunWater does not want to mirror nor re-draft provisions that already occur in legislation.

Furthermore, this clause only has effect where the Government has not set prices for SunWater in relation to the customer's charges (eg the price path for rural irrigation water). Where a price path is in place, these charges apply in accordance with the Government's direction to SunWater.

Clause 10.6. (Beaudesert Shire)

It is considered that a further clause should be added after this clause providing that operation, maintenance and meter readings carried out by SunWater on a customer's property be at the risk of SunWater or its agents.

SunWater's response:

SunWater's employees enter the customer's land to read meters (in most instances). It is usual for the owner of the land to be responsible for people on their land – in fact the landholder can only insure this risk.

In other instances, SunWater holds easements or access agreements to enable it to access its infrastructure. In these instances, the responsibilities and liabilities of each party are contained in the easement or access agreement.

Clause 11.4 (Beaudesert Shire)

It is considered that there should be some limit as to the number of times whereby SunWater may direct a customer to take a water reading.

SunWater's response:

It is difficult to limit this as, for example, several waterharvesting events may occur during a year. It is not in SunWater's interests to gather any more meter readings than it has to – entering meter readings into its billing system incurs a cost.

Clause 11.4 (Callide Valley)

How does this clause relate to groundwater?

SunWater's response:

It is suggested that this clause remain for groundwater customers to cater for future situations or developments.

Clause 11.5. (Beaudesert Shire)

This clause should be amended by deleting the words “safe and” and insert after SunWater on the second line “at its own risk”

SunWater's response:

Similar comments to clause 10.6 above apply. SunWater believes that the customer has an obligation to ensure that water officers have safe access to the meter. SunWater wishes to protect its staff from any unsafe situations.

Clause 11.7 (b). (Callide Valley)

This clause needs to be made clearer, for example where the damage is not serious, then notice should be in a manner convenient to the customer.

SunWater's response:

Agreed. This can be re-drafted for clarity.

Clause 11.8. (Callide Valley)

This needs to be clarified in relation to groundwater.

SunWater's Response:

Agreed. In the context of bores taking groundwater and pumps in rivers, this should enable SunWater simply to remove the meter.

Clause 11.9. (Beaudesert Shire)

This clause again gives the right for SunWater to make arbitrary decisions. There should be some process whereby a customer may appeal to an independent authority to review the actions of SunWater.

SunWater's response:

SunWater cannot make an arbitrary decision. It must have reasonable grounds to believe the meter is not registering accurately. It must consult with the customer, and have regard to a range of things such as hours pumped or electricity consumption. Furthermore, the decision can be disputed under the resolution process.

Clause 12. (Beaudesert Shire)

The following clause should be added after this clause:

“Provided that should SunWater negligently suspend or restrict release of water from the works of SunWater and the customer suffers loss or damage as a result thereof SunWater shall pay to the customer the amount of such loss or damage as is determined pursuant to clause 21”.

It is considered that the introduction of this clause will reduce costs for SunWater and the customer in determining an event rather than forcing the customer to its common law rights and the associated costs.

SunWater's response:

SunWater considers that it is unnecessary to include common law rights in a contract.

Clause 12.2. (a) (ii) (Callide Valley)

This should only apply where there is no dispute.

SunWater's response:

Agreed. Clause 12.2 (vi) provides a process for the customer to object to the notice. Furthermore, the customer can dispute the invoice at any time under Clause 21. SunWater must be confident that the invoiced amounts were correct prior to taking action under 12.2. The contract places the onus on SunWater to establish that there is no dispute and the invoiced amounts are correct.

Clause 13. (Beaudesert Shire)

This clause assumes there will not be contamination of water whilst it is under the control of SunWater. Should an event occur, e.g. radiation or a previously unrecognised pollutant, then the customer is required to indemnify SunWater. The warranty containing the clause should be limited and the release removed.

SunWater's response:

SunWater is responsible for water quality to the extent that it cannot be negligent. As such, customers (or other affected people) have common law rights against SunWater for negligence.

The customer is only indemnifying SunWater where:

- *The customer has on-supplied to a third party, in which case SunWater cannot control what happens to the water prior to it reaching that third party; or*
- *Where the customer has affected the quality of the water in some way.*

Clause 14. (Beaudesert Shire)

It is considered that a customer should have a right to assign as well as SunWater. That right to assign should be on the current conditions of the agreement so that in the case of a sale of the property the intended purchaser knows what his rights and obligations are. By not having an assignment clause in the agreement it leaves it open to SunWater to arbitrarily fix a new agreement and new rates.

SunWater's response:

SunWater cannot arbitrarily fix a new agreement or new rates. The terms of the agreement must be agreeable to the new person, including the price. Furthermore, the price will be set by Government (eg as currently occurs for irrigators) or is subject to the processes under the Queensland Competition Authority Act.

It is not unusual for service contracts to not be assignable applies under the current agreement.

SunWater sends any new party of a copy of the proposed agreement in advance of any property sale (where it learns of the sale in advance), providing information on the proposed terms of the new contract.

Clause 15 (Beaudesert Shire)

This clause should be dealt with on terms acceptable to both SunWater and the customer, each party acting reasonably. If there is a dispute then it can be determined in accordance with clause 21.

SunWater's response:

Any terms requested by SunWater will have to be acceptable to the customer in order for the customer to proceed with the change. The customer has the choice to not proceed or negotiate the terms with SunWater.

Clause 16. (Beaudesert Shire)

This clause is clearly a charging clause. It has the same effect as a similar charging clause used in a mortgage. It is considered that this will produce complications with customer's mortgages. It may well give SunWater a priority in priority in bankruptcy or insolvency. It is further considered that a mechanism should be put in place whereby notice of any breach of the agreement must be given to the customer and the customer allowed a reasonable time to rectify that breach. It is considered that a reasonable time would be thirty days.

SunWater's response:

This clause is a charging clause and is designed to provide SunWater some priority for payment in the event the customer is in breach of the contract.

In the document provide for a notification processes.

This clause does not provide a mortgage over land – it only relates to the water allocation.

Clause 16.4. (Beaudesert Shire)

In relation to clause (e) it is considered that deferment of payment of the purchase price or part thereof could adversely affect the customer in view of clause 16.5 (e).

SunWater's response:

SunWater believes that for this situation occur there has been such a fundamental breach of the contract (in terms of obligation to pay charges) that recovery of the outstanding amount should be flexible for SunWater.

Furthermore, SunWater has already accepted additional obligations in relation to clause 16 to provide protections for the customer.

Clause 16.6. (Beaudesert Shire)

This clause creates a Power of Attorney. It has clearly been misunderstood on the discussion paper. It seems to have been read as having the same meaning as a lawyer. This should be clearly spelt out as the appointment is irrevocable. The Power of Attorney should be further conditioned that it only comes into place after a breach of the agreement which has not been remedied by the customer. It is agreed that the clause be changed so that liability does apply in the case of negligence.

SunWater's response:

A breach of the contract is the trigger for these provisions to apply. The current contract requires that a notice be made to the customer.

The Power of Attorney has to be irrevocable to be effective. The contract states that the appointment is irrevocable (Clause 16.6).

Clause 17. (Beaudesert Shire)

This clause should be amended to give the customer a right of appeal against determination to an independent authority.

SunWater's response:

The customer has rights under common law to claim that SunWater has wrongfully breached the contract. Furthermore insolvency or bankruptcy are clear-cut legal positions, which do not have any room for interpretation.

The obligation is on SunWater to ensure that it has been reasonable and provided a reasonable timeframe for the customer to remedy the breach. Customers have the opportunity to seek a court determination if they believe that SunWater has wrongfully terminated the agreement.

Clause 18. (Beaudesert Shire)

A customer should not be required to release SunWater under this clause unless SunWater releases the customer in a similar manner. It is considered that this clause should be removed.

SunWater's response:

The provisions in this clause are situations that are not relevant to the customer. That is, the customer is not responsible for storing, releasing or delivering water.

Clause 19. (Beaudesert Shire)

There appears no reason why the termination amount should be paid by the customer and certainly no reason why the customer should agree that the termination amount represents the matters set down in clause 19.3. Those matters should be determined on a case-by-case basis.

SunWater's response:

These items are listed to provide some certainty for all parties as to what the termination payment is based upon and the type of costs that would be claimed. The alternative is to remove any indication on the types of costs to be claimed. SunWater believes this would not be acceptable to its broader customer base given comments received on other clauses gave strong preference to providing examples and details as opposed to broad statements.

Clause 21. (Beaudesert Shire)

The dispute resolution clause should contain a further clause providing that all discussions had shall be without prejudice and cannot be used in any subsequent proceedings without the consent of the other party.

SunWater's response:

Agreed. However, this should be dealt with on a case-by-case basis and upon agreement with the customer when determining the arrangements for dispute resolution.

Clause 24.4. (Beaudesert Shire)

Clause (b) should be removed for reasons previously stated.

SunWater's response:

This is a standard clause in many contracts providing for a change in law. Any changes must be from a result of a change in law, must be reasonable and must occur following consultation with the customer. The customer has rights under the contract (through dispute resolution) and common law rights to contest any changes proposed by SunWater.

Clause 24.7. (Beaudesert Shire)

Clause 24.7 should be amended by including other "(penalties)" "(unless incurred by SunWater)".

SunWater's response:

This is a standard clause that deals with stamp duty. This is a normal clause in contracts that defines who is responsible for stamp duty, if it is in fact applicable.

Clause 24.1.1. (Beaudesert Shire)

This clause should be amended by adding to it "unless otherwise directed by the customer".

SunWater's response:



This has been the standard business practice for some years. If an invoice is in dispute, there is a process under dispute resolution to resolve the issue.