

# Terminating and avoiding unfair termination / payout clauses in Embedded Network Contracts

During the construction phase of a building, a supplier of utilities and services (**Network Provider**) may reach out to the Developer with an offer to enter into an agreement for the installation of equipment and/or infrastructure for the supply of these utilities and services (known as an **Embedded Network**).

An Embedded Network can facilitate a wide range of utilities and services, such as electricity, solar, heating, gas, air conditioning, potable water, hot water, telephone, internet access, storm water or waste removal.

In the strata context, Developers will typically benefit from such an agreement with the Network Provider as the equipment and/or infrastructure will be installed at no cost to them on the condition that the Owners Corporation enter into an Embedded Network Contract (for the supply of those utilities and services) at the first AGM of the scheme – and in doing so, take on the associated costs.

Note that an Embedded Network Contract is separate to any agreement which may have been entered into between the Developer and Network Provider.

The initial concern with Embedded Network Contracts is that they are ordinarily submitted to an owners corporation by the Developer at time when the lot owners are disadvantaged by:

- complex arrangements they may not understand;
- lack of adequate disclosure, e.g. the Developer may not provide:
  - any Embedded Network side agreements (those between the Developer and Network Provider for the initial installation);
  - the building contract (including the price);
  - any depreciation schedules of lot and common property;
  - the initial maintenance schedule; and

- all occupation certificates.
- any undue influence from the developer, such as through unenforceable or invalid contract terms requiring lot owners to vote a particular way; and
- a perception that there is no practical alternative with the infrastructure already being in place and services being required urgently.

Of further concern, Embedded Network Contracts often contain clauses which may:

1. purport that the Network Provider owns the equipment and/or infrastructure installed to the common property of the building;
2. require the owners corporation to pay a 'buyout' fee in circumstances where they elect to terminate the Embedded Network Contract early (noting that the term on some of these agreements can be for 10+ years); and
3. otherwise be harsh, unconscionable or oppressive.

Each of these items is discussed below.

1. Where any equipment is affixed to common property during construction or otherwise before registration of the relevant plan or notice, upon such registration it generally vests in the owners corporation by virtue of clause 24(2) of the *Strata Schemes Development Act 2015*, extracted below:

*(2) On registration of the plan or notice, the common property—*

*(a) vests in the owners corporation of the strata scheme, and*

*(b) is freed and discharged from any mortgage, charge, covenant charge, writ or caveat affecting the land, and*

*(c) if the common property is land in a freehold strata scheme—is freed and discharged from any lease affecting the land immediately before registration of the plan or notice, other than a lease that is necessary for the purpose of providing a service to the scheme.*

As above, the ordinary exception to the vesting in the owners corporation is where any part is subject to a lease that “*is necessary for the purpose of providing a service to the scheme*”, though in our experience, such lease is rarely present.

What this means is that, in the absence of a lease entered into between the Developer and Network Provider before the registration of the scheme over the equipment and/or infrastructure, those items become the property of the owners corporation upon such registration.

Note however this does not extend to or capture ‘floating’ equipment (i.e. equipment not physically affixed to the building), which would remain the property of the Network Provider.

Notwithstanding the above, Network Providers will typically represent that the equipment or infrastructure is owned by them and impose a ‘buyout’ fee, as below.

2. Where the equipment and/or infrastructure of a Network Provider vests in the owners corporation, it would be improper for the Network Provider to suggest or require that the owners corporation pay any ‘buyout’ fee for their own equipment upon termination of the Embedded Network Contract (although there may be some unjust enrichment considerations for the owners corporation).

The relevant provisions often look similar to the following:

#### EXAMPLE

1. *You may terminate this Agreement by providing 3 months’ prior written notice, provided you have complied with clause 2.*
2. *As a condition to you terminating this Agreement in accordance with clause 1, you must purchase from us the Embedded Network Equipment at a price relative to the period since the Agreement was entered into as set out in Schedule 1.*

#### SCHEDULE 1

YEAR	EQUIPMENT PRICE
1	\$300,000
2	\$280,000
3	\$260,000
4	\$240,000
5	\$220,000
6	\$200,000
7	\$180,000
8	\$160,000
9	\$140,000
10	\$120,000

Further, to the extent that the 'buyout' provision can, by virtue of its character and the context, comprise a 'penalty', such provision will ordinarily be unenforceable or void.

3. Contract provisions which are 'harsh, unconscionable or oppressive' are likely to comprise 'unfair contract terms' as defined under the Australian Consumer Law. This legislation was recently the subject of reforms that commenced on 9 November 2023 and extended its application to standard form contracts made or renewed after that date, includes contracts made with small businesses, and introduces a pecuniary penalty regime for the inclusion of such terms.

In light of this, businesses should review their contracts to remove or amend any unfair terms, and owners corporations should be on the lookout for any such terms in new or renewed Contracts.

An owners corporation facing its first AGM at which an Embedded Network Contract is to be considered, or otherwise finding itself in the scenario where an Embedded Network Contract is already in place may be concerned as to the effect of such a Contract and its terms, and whether they have other options available.

Fortunately, those owners corporations may well have options, and would suggest at first instance they seek legal advice as to whether any of the following may assist:

- review of the provisions of the Embedded Network Contract;
- investigation of whether the developer has entered into an agreement with a Network Provider on terms which would conflict with requirements of fiduciary duties or legislative requirements; and
- application of Section 132A of the *Strata Schemes Management Act 2015* which provides in effect a maximum term for certain agreements.

We have considerable experience with these issues and can assist if you are having difficulties with them!

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