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OTHER CASE STUDIES APPENDICES

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Case Studies courtesy Tenants Union Victoria – open submission to ESC Small Scale Licencing Review 2006	Appendix 5
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Reproduced extract NSW Govt Tenants matter parks landlord prosecution *Fair Trading Act*	Appendix 8

[1] Updated from version submitted to Senate Economics Committee's Consumer Enquiry (TPA-ACL-Bill 2) (2010). Report completed. Bill passed. *Trade Practices Act 1974* to be renamed Competition and Consumer Law; and earlier version submitted to the NECF2 Package and published on the MCE website

EXTRACTS Of COPIES OF LEGAL INSTRUMENTS

EXTRACTS PERTINENT PROVISIONS

COPIES OF PERTINENT SUBMISSION(S)

[2] This instrument was intended as for short term transitory provision of electricity only embedded situations where actual flow of energy was effected to the party deemed to be receiving it, but where network ownership and/or operation changed hands and distribution was not effected by the original distributor. This raises liability issues and reinterpretation of the tripartite governance model. The AER will make piecemeal exemptions as requested

Appendix 1

CASE STUDY

2010

LEGAL DISPUTE

OWNERS' COPORATION

VS

SERVICE PROVIDER

and

DEVELOPER

I have with the consent of the owners of a particular Owners' Corporation provided some details of an ongoing dispute that has much relevance to this Issues Paper.

This case study illustrates some of the detrimental impacts of a group of owner-occupiers aiming to seek redress for years of unsatisfactory service arrangements through a service provider selected by the original Owner/Developer, in a BOOT system of operation that may be seen to directly contravene at least s47 of the Trade Practices Act 174 relating to exclusive dealing and third party line forcing. They appear also to contravene Owners' Corporation provisions (see s68) and other provisions.

Under current legal challenge by members of an Owners Corporation in Victoria the following matters have been raised:

1. The **legality of arrangements** for the sale of *"Hot Water and Internet Infrastructure;"*
2. The **signing of contracts** by the original Owners' Corporation Manager;
3. The **alleged contract**, allegedly signed by the OC;
4. The **possible excessiveness of the charges**, using the flawed Victorian algorithm conversion factors and employing hot water flow meters to pose as electricity meters;
5. **Challenge to operational and service design parameters** initiated by the Developer in consultation with the energy providers using hot water flow meters to pose as gas meters, and selection of hot water infrastructure leading to water wastage and inflated charges
6. **Operational design** – relating to flow rate of the hot water being greater than the cold water.
7. The **quality of supply and service** of all the above alleged supplies and services over a period of six years. (this last matter raises issues pertinent to proposed revisions to statutory and implied warranty considerations under the Australian Consumer Law (TPA).

The case study that I have cited relates to – Oasis Inkerman Developments at 33 Inkerman Street, St. Kilda is a case in point.

The service provider imposed unilaterally upon this Body Corporate entity was chosen by the original owner/developer Inkerman Developments was Service Link Australia Pty Ltd. All contracts and alleged agreements for plant and equipment services, including bundled services like Internet, security, community website (never provided) and combined water and heating services as served by a single gas meter which though marked with an MIRN number may not be part of the declared wholesale market for settlement purposes – no wonder there is so much unaccounted for gas.

The middleman **is not the Body Corporate**, but a Service Provider appointed the Original Owner and Developer

The Body Corporate entity does not wish to be locked into service or supply arrangements not selected by the Body Corporate. All agreements were signed by a Body Corporate "Guardian" appointed by the Developer whilst he was selling off the plan, and before any Owners' Corporation Committee or Agreement was approved by that Committee. The validity and legality of the service contract are amongst the issues in dispute.

The law requires that a supply of energy – described as either gas or electricity in current and proposed laws is either a licenced retailer or an exempt one – for electricity not gas..

The Service Provider, an unlicensed party who seems to have escaped the scrutiny of the ESC (Victoria) apparently obtained authority to operate in this manner appears through the Property Developer Inkerman Developments, associated with the activities of property spruiker Henry Kaye, during July 2010 banned by ASIC from managing corporations for five years) purports to be selling ENERGY (which is defined in the Victorian Energy Retail Code simply as either gas or electricity). It does not mean honey; milk; temperature; water; heat (calorific value, an attribute not a commodity).

The single gas for the property meter also provides gas for cooking purposes to 161 owner-occupiers and/or tenants in a multi-tenanted strata titled property housing several low-rise buildings; as well as gas for heating a single boiler tank from which heated water is reticulated in water pipes to hot taps in each apartment as well as to water heat panels for room hearing.

There was no provision made in the planning of the building to install a more appropriate, more cost-efficient or energy-saving systems.

Massive electricity bills are incurred for the three pumps that are kept occupied constantly in reticulating water to the water heat panels.

The single gas meter on the entire property marked with Multinet's name has been occluded so that the meter reading cannot be independently determined by the owners' corporation.

It took enormous effort to identify the gas retailer to the property, even after discussions with EWOV three years apart, who felt that the matter was one of *"privacy"* impacting on its member(s); ultimately this was provided – with reluctance.

It remains unclear who owns metering and other energy and water-and Internet infrastructure and what their liabilities are. The middleman involvement as *"service provider"* complicates and blurs boundaries of responsibilities.

No bills are issued by a gas retailer. The Service provider issues bills for alleged energy use based on a variation of the bizarre bulk hot water provisions contained within the Energy Retail Code.

However, instead of even attempting to measure the total amount of gas in megajoules, a creative means of determining how much gas is consumed involves a magic calculation using a device attached to a water panel in each room that is capable only of calculating temperature. The Provider believes that such a calculation, measured in KwH (a unit of measurement exclusive to electricity), coupled with a measurement of heated water volulme supplied can produce a reliable method of ascertaining how much gas is used to heat both the water for the hot taps and the water heat panel in each apartment.

A bundled bill issued by an unlicenced service provider apparently providing "*billing and other services"* (?an MDS category of provider with possible association with licenced energy providers and/or the Developer)

The Service Provider expects a massive *"pay-out"* for infrastructure claimed to be owned by them. This includes plant and services equipment normally an integral part of a Body Corporate entity common property including boiler tanks, pipes, embedded cabling and wiring.

See extract below taken from an agreement allegedly applicable to owners of a Body Corporate the subject of a case study outlined in Appendix 1. The essence of these arrangements is encapsulated in a document that until recently was transparently available online on the website of the relevant Service Provider. Seeking to promote the boot concept

and force through what appear to be *"third party line forcing"* strategies calculated to ensure that service arrangements and obligations deemed to exist through unilateral imposition of obligation in perpetuum not only expected to be encumbent on immediate prospective owners or occupiers, but all successive owners and/or assignees.

42. Heating and Hot Water Energy Services Agreement

The Purchaser acknowledges that the Body Corporate intends to enter into a long-term agreement with an appropriate service provider for the provision of hot water energy services to the owners of the lots for the supply of both heating and hot water. Under this arrangement members of the Body Corporate may be invoiced directly by the service provider or by the Body Corporate (depending on the final terms of the agreement). The initial estimated charge for the services is based on a figure of $33.00 per month with an energy fee of $0.06 per kilowatt-hour of hot water energy consumed plus GST. This figure was estimated as at June 2000 and will be reviewed both at time the Body Corporate enters into the agreement then annually to account for legislative changes and movements in CPI.

In that particular Contract of Sale an alleged provider of energy sought to lock in each and every owner under a **BOOT** Scheme (buy own operate transfer) that should be scrutinized under the exclusive dealings provisions (s47 for example) of the *Trade Practices Act 1974*. See extract below.

The Scheme in question appears to have sought to exploit ignorance and poor protection for unsuspecting purchasers of individual properties purchased off-the-plan" ASIC has shown a keen interest in such arrangements and has taken action in many such instances in several states. This is discussed in more detail shortly.

Contract of Sale

41.6 a reference to a statute or regulation, or to a provision of a statute or regulation, includes a reference to that statute, regulation or provision as amended, consolidated, replaced or re-enacted from time to time.

41.7 the obligations imposed and the benefits conferred under this Contract on each of the parties are binding upon and enure for the benefit of the respective parties and each of their respective successors in title, legal personal representatives and permitted assigns.

41.8 a reference to any party to this Contract includes that party's successors in title, legal personal representatives and permitted assigns.

41.9 a reference to "dollars" and "$" will be taken as referring to amounts in Australian currency.

41.10 where a party comprises two or more persons all covenants and agreements by that party bind such two or more persons jointly and severally unless expressed to be only several.

The above may be interpreted as meaning that all costs for the supply of electricity, water, telecommunications, monitored security alarms, high speed Internet access and community website (not supplied) belong to the Service Provider Service Link, and no separate bills should be issued for electricity or gas or water used for the boiler plant and supply of heated water for the water panels and for the hot taps in each apartment.

The wording of the standard form contract for the same property that was till; recently published online by the Service provider read as follows:

WATER HEATING SUPPLY AGREEMENT

(name of Service Provider)

BAGKGROUND

A The Owner/Occupier wishes to engage the Contractor to provide heated water and heating to the Premises ..... (the Premises) on the terms set out in this Agreement.

PARTIES' OBLIGATIONS

1. The Contractor agrees to provide heated water and heating to the Premises, based on the terms and conditions contained within t his Agreement, f on so long as the Contractor owns and operates the centralised hot water plant located at (address shown)

2The Owner/Occupier will pay the changes upon notification by the Contractor, as indicated in Schedule 1 to this Agreement (and as amended from time to time by the Contractor and as notified to the Owner/Occupier) for any heated water and heating provided to the Owner/Occupier.

The Contractor may suspend the supply of heated water or heating to the Premises at any time where the Owner/Occupier has failed to pay the charges as outlined in Schedule 1 to the Agreement

The Contractor use its reasonable endeavours to provide heated water and heating services to the Premises and to maintain those heated water and heating services to the Premises subject to the express condition that the Contractor shall not be obliged o perform or do any act or thing if such as beyond the reasonable control of the Contractor and in the absence of negligence or default on the part of the Contractor shall not be liable for any loss or damage which might be incurred as a consequence of the failure of such heated water and heating services. The Contractor will as soon as practicable take all reasonable steps to reinstate the heated water and heating services after a failure

The Owner/Occupier must assign its rights, interests and obligations under the Agreement to the purchaser of the Premises upon contracting for the sale of the Premises. In the event that the Owner/Occupier fails to assign its rights, interests and obligations under this Agreement to a purchaser, then they shall remain liable for all charges under this Agreement.

Water temperature 78 degrees celsius;

Billing cycle quarterly

Water use residential and

Service Charge Rates:

Energy consumed for hot water heating

$0.0651808 per kilowatt hour

Energy to heat hot water for domestic use $0.013277 per litre.:

Please note that the Contractor reserves the right to review all charge rates annually in accordance with CPI and any legislative changes, such new rates to be payable upon notification to the Owner/Occupier.

It does not take much to work out the implications of such a unilaterally imposed "*take-it-or-leave-it"* Contract for essential supplies (heated water and heating) to residential premises.

It does not take a genius to see how lucrative the energy, water, and telecommunications industry has become for emerge providers, metering data service providers, in-house or outsourced; property spruikers and others. See Arrow Management Precedent Case NSW 2007.

As observed by Gary Bugden, the Arrow Asset Management precedent case in NSW in 2007 has the potential to effect changes throughout Australia, but no-one has been willing to run with the ball yet.

Arrow Asset Management Decision NSW Supreme Court 2007

I quote from Gary Bugden's summary:

"A recent decision of the New South Wales Supreme Court potentially has far reaching repercussions for the residential real estate development industry in Australia.

The decision in Community Association DP No. 270180 v Arrow Asset Management Pty Ltd & Ors [2007] NSWSC 527 was handed down by McDougall J. on 30 May 2007.

*The case involved an attempt by the Association to avoid a Site Management Agreement ('**Agreement**') entered into by it on 2 December 1998 when the Association was under the control of the third defendant, Australand Consolidated Investments Pty Ltd (known at the time as Walker Consolidated Investments Pty Ltd) ('**Australand**')."*

Energy providers, their associates and others appear to be joining forces with developers to utilize such loopholes as exist to attempt to lock purchasers not only long-range unsolicited service-arrangements for a range of services unrelated to energy, but also to make demands for payments into millions to "buy them out" if they wish to change service providers or assume direct responsibility for service management (including alleged sale and supply of electricity, gas, water, Internet services and so on), for infrastructure allegedly owned by them, including embedded fixtures, pipes, plumbing, wiring and the like.

I am personally aware of some such arrangements in place with serious detrimental outcomes for all the owners on the unfinished property, promoted as of *"gold standard"* design by the local council, the original property spruiker Henry Kaye, and the ongoing Developer. If this is gold standard I'll eat my hat.

More accountability is required when gas or electricity is provided. In this case, the single gas meter providing heat to a single acting as a water sleeve to heat coils (heater exchange process) receiving water from the cold water mains (separately paid for to the water authority).

In the case study refereed to below has been reproduced in this Appendix with the view to illustrating how distorted discrepant interpretation of provisions and legal obligations have become an unlicensed provider with no exemptions for either gas or electricity on-selling has found a creative way of interpreting entitlement to bill in kilowatt hour in a cents per litre rate for heat supplied by a single gas meter on the property servicing not only to heat a single boiler tank, but reticulation of heated water to heat panels for room heating; and for the purposes of cooking.

There is no legally sustainable method of measuring the gas used individually by each apartment. The Body Corporate Owners deny the legality or validity of any contract with the service provider appointed by the Property Developer, under terms and conditions entered into by a *"Body Corporate Guardian"* signing himself inappropriately as *"Secretary"* for a Body Corporate Committee not yet formed.

For residential tenants the situation is even more unfair when it comes to heated water, which under some tenancy laws may only be charged at the cold water rate, and the Owners' Corporation receives a bill for that cold water.

Though for settlement purposes only a single gas meter exists and the retailer is charged by the distributor for gas (or electricity) distribution to that single meter, the former are endeavouring to impose both consumption and supply and other charges, including metering data services and billing charges on end-users who are not party to any contract (except as a figment of imagination that bears no relationship to contract law or sale of goods provisions at either federal or state level).

NSW and Queensland Strata owners are similar aggrieved by the provisions for different reasons as discussed elsewhere.

There are more class actions being initiated on the basis of contract, often by members of strata property in multi-tenanted dwelling. In one such litigious matter before the open courts the following issues are under challenge in the open courts:

Reliance on the flawed jurisdictional *"bulk hot water arrangements"* under energy laws (effectively using water meters to pose as gas meters for the purpose of calculating deemed gas usage), initiated by Victoria and adopted in two other States, albeit applied discrepantly in each.

At least three jurisdictions continue to apply these provisions discrepantly without due regard to numerous overlapping provisions, and complete disrespect for the spirit and intent of trade measurement provisions, notwithstanding that the utility exemptions from the NMA are yet to be lifted. These are Victoria, Queensland and South Australia. In the case of NSW I am unable to see how these provisions are different except for nominally recognizing in the *Gas Supply Act 1996* that choice of energy provider must exist. In this case we are speaking of water provided, of varying temperature that is centrally heated and supplied to individual apartments.

If Owners of each apartment obtain the consent of the OC to fit a separate gas meter and boiler system internally that is dedicated to that apartment, that is one thing.

To expect tenants to do so is absurd and normally hot permitted by the OC or Landlord in any case.

In the case of renting tenants the issue of inappropriate imposition of contractual status raises issues of inadequate and poorly conceived policies and practices that appear to un-monitored.

Such lack of assessment of impacts has led to decades of compromised consumer protection, which has apparently been justified on the grounds of enhancing competition apparently without robust understanding of the original intents of national competition (refer to Senate Select Committee of 2000, as referred to in my multipart submission to the Productivity C omissions Inquiry Into Australia's Consumer Policy Framework (subdr242parts 1-5 and Part 8, 2008) and other public consultation arenas.

I refer to enhanced unfair contract law and statutory and implied warranty provisions contained within revised generic laws, with further enhanced due to be included in relation to unconscionable conduct before the current Trade Practices Act 1974 has a name change to Competition and Consumer Law.

In addition I refer to the poor understanding that the Service Contractor appears to have of proper trade measurement practice.

Gas consumption is measured in these arrangements by fitting a temperature gauge device to a water heat panel used for room heating, on which basis consumption is measured in KwH (whereas gas is measured in joules, megajoules or multiples thereof), and charged in cents per litre.

This altogether novel interpretation of the bizarre and misguided Bulk Hot Water arrangements encapsulated in the ESC Energy Retail Code v7 (2010) as transferred from the Bulk Hot Water Guideline (20(1) (repealed in January 2009), wherein not even the pretence of measuring gas in megajoules whilst expressing in cents per litre (or water) is adopted.

It is clear what happens when Individual distortion of such provisions is undertaken, not the provisions in themselves make any sense or are consistent with energy laws and provisions anywhere else or with other laws current and proposed, including trade measurement laws, subject to imminent lifting of utility exemptions, starting with electricity towards the end of this year.

The *"bulk hot water provisions"* as discrepantly adopted in each State and Territory using them, create detriments for all classes of utility and water users, commercial and residential, small and large, but especially in relation to what service providers describe as "commercial arrangements" (implying that anything goes, unilaterally imposed or otherwise, consistent with laws or otherwise).

Whilst much focus is placed on the plight of residential tenants, and whilst I have actively supported and argued for their rights,, it is interesting that those deemed to have commercial arrangements,. Such as owners' corporations unilaterally imposed with conditions such as described have fewer recourses other than the open courts, unless relying on consistent enforcement of statutory provisions.

Thus it would seem that consider complaints and redress options are minimal if they exist at all in any meaningful way.

The specified conditions contained in the licenses of the three host retailers, AGLE, TRUenergy and Origin Energy in terms of what are known as the bulk hot water arrangements appear to permit practices that are questionable in terms of appalling trade measurement practices, which will become invalid as soon as remaining utility exemptions are lifted. These provisions need to be revisited and more appropriate arrangements made.

To my knowledge similar provisions are not contained in the licenses of second-tier retailers and other providers. Besides other considerations there are RoLR risks and many other potential breaches of other laws inherent in these provisions, to which the ESC and DPI have clung for dear life despite all attempts to point out the flaws and discrepancies within their own provisions, even with a single Code, and in relation to other energy provisions, including the Gas Industry Code 2001 (which is one with the *Gas Residual Provisions Act 1994*, the *Gas Distribution System Code*

The policies have led to widespread distortion of existing and proposed laws within and outside of energy.

Under the revised *Trade Measurement Act 1960* the following definitions apply

"utility" means gas, electricity or water.

"utility meter" means a measuring instrument that is:

(a) a gas meter; or

(b) an electricity meter; or

(c) a water meter;

Utility exemptions under the NMA Regulations will be lifted for electricity during 2010. Gas will follow. Meanwhile, under the proposed National Retail Energy Law, s513, form of energy is restricted to **electricity or gas**, and does not mean water, heated water (as a composite product passing through water service pipes, not gas transmission pipes or electrical conduits); milk honey, glue or any other substance being transmitted in some form of pipe or conduit.

Yet this is what the ESC has explicitly implied in its re-definition of meter and supply of energy under section 3 and 4 of the current Energy Retail Code (2010)

See Bulk Hot Water Charging Guidelines (REPEALED January 2009)

Note this link is still available

Energy Retail Code Victoria Feb2010 effective April 2010

Replaced with Energy Retail Code v7 2010, clause 3 and 4 and appendix

See *Madeleine Kingston Submission 2008 to ESC Review of Regulatory Instruments*

National Measurement Act 1960 revised:

PART V--GENERAL PROVISIONS ON USING MEASUREMENT IN TRADE

18H Overview

18HA When is an article packed in advance ready for sale?

18HB Certain articles must be sold by measurement--articles packed in advance ready for sale

18HC. Certain articles must be sold by measurement--other articles

18HD. Transactions based on measurement to be in prescribed units of measurement

18HE. Measuring instruments used in transactions to have prescribed scale intervals

18HF. Unreliable methods of measurement

18HG. Limiting use of certain measuring instruments

18HH. Measuring instruments and methods of measurement used in monitoring compliance with the Act

18HI. Articles sold by measurement to be sold by net measurement

The existing provisions within the Victorian Energy Retail Code with respect to practices for the measurement of energy supplying communal water tanks (bulk hot water provisions) (which are described within the ERC as either gas or electricity and nothing else) are inconsistent with all other energy provisions current and proposed; including the *Gas Distribution System Code (Vic);* National Metrology Procedures (AEMO); proposed *National Retail Energy Law and Rules*) with the intent and spirit of trade measurement provisions (and the letter pending lifting of remaining utility exemptions)

The ESC's decision to provide on Licence Agreements with the three host retailers sanction to effectively use hot water flow meters and cold water child meters (check meters) as gas or electricity meters (bulk hot water arrangements) have directly impacted on market distortions and detriments to all manner of end-users of utilities and water, including owners' corporations and tenants.

Some arrangements in place are likely breaches of Trade Practices provisions, especially s47 (exclusive dealings); misleading and deceptive conduct and other operational conduct issues and s68 oc. Here the question of BOOT systems (buy own operate and transfer) need to be closely questioned as to legality and validity, despite being common practice.

Just as soon as current utility exemptions are lifted, as is the intent under Trade Measurement laws, with electricity meters targeted for lifting of exemption during 2010, many current arrangements for "asset management" and "metering data and other services" will become invalid and illegal.

Whilst these matters come under other jurisdictions. Nevertheless those formulating energy policy and regulation should be careful not to adopt provisions and policies that have the unintended outcomes of facilitating such breaches.

See also the Arrow Asset Management precedent case law determination before the NSW Courts in 2007.

The MCE had accepted that exemptions for gas were inappropriate because of safety, technical and other reasons, but this policy stance appears to have been turned around, given the current parameters of the AER's issues paper and initial policy position.

Whether for *"conventional"* delivery of electricity (or gas) or unspecified or practices conveniently labelled as innovative bundled or unbundled product ranges vaguely seen to be associated with *"energy provision"* or *"energy services"* or *"hot water energy services"* (a nonsensical and meaningless term in the law, current and proposed, within and outside, as the bizarre terms contained within the Victorian *Energy Retail Code v7 2010* clauses 3 and 4, which contradicts within the same instrument such fundamental terms as *"meter."*

It is no wonder that energy providers and associated *"service providers"* such as *"metering data service providers",* a new category of service provider proposed by the AEMC (see the ERC0092 Draft Proposal to which I made a substantial submission on 1 and 3 July 2010), have found a way to distort definitions and interpretations within the law to gain commercial opportunities in the name of assisting commercial businesses.

I note with concern that the views and interpretation of the original General Licence Exemption of Victoria issued by the Victorian Minister of Energy and sanctioned by the Governor-General in 2002 as expressed online by the Body Corporate Managers' Institute on the website of Owners' Corporation Victoria[1]

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[1] See for instances the claims and interpretations made by Institute of Body Corporate Managers. http://www.ocv.org.au/pdfs/Guideline_ElectricityOnSelling.pdf

"Commercial business opportunities now exist for Bodies Corporate (BC) and Head Lessors through BCMs to take advantage of this electricity exemption regulation to generate new revenue streams, improve service levels and offer discounts to building owners and occupiers."

The Body Corporate Management Institute saw the opportunity for ongoing application in permanent dwellings and new property developments as an income generating stream.

I note that the Victorian General Order in Council May 2002 was specific to electricity and intended only to apply to transitional use of electricity in say caravan parks, nursing homes, educational institutions etc.

It was never intended and new legislation is specific that it is not meant to represent a profit-making scheme for anyone. Indeed profit-making is expressly forbidden. Yet the opportunities created by perverse and unintended interpretations and outcomes for exemption provisions (solely for electricity not for gas) as made possible by the ESC General Exemption Order, have for the most part done nothing whatsoever to benefit many owners' corporations. I can confidently claim this from direct knowledge and involvement in the affairs of owners' corporations.

One such matter is the subject of legal dispute on a number of grounds including the alleged inescapable service arrangements made by service providers claiming to be providing energy services, using an interpretation of energy discrepant to that contained within the law, using instruments, units and scales of measurement not defined within the law; and forcing owners current and future on the same development into arrangements purporting to be beneficial to them, but in fact over a period of some two decades (on the basis of challenged service agreements) actually costing the Owners' Corporation roughly double what they would otherwise be paying.

At the same time, the Service Provider, Service Link Australia Pty Ltd (previously known as Seecam (Australia) Pty Ltd and All-Lite Pty Ltd, they seek compensation for claimed ownership of infrastructure that they claimed is owned by them (such as boiler tanks, pipes, cables, water meters, hot water flow meters, Internet cabling and the like should the Owners' Corporation seek to choose another provider for either gas or *"metering data and other services."*

In fact in this case, the service provider undertakes alleged supply of energy and servicing of the boiler and heating systems. bit not individual billing. Only a single bill is issued for the heating of water – to the Body Corporate entity.

I am particularly concerned about policy intention to expand the exempt selling regime that will perpetuate and enhance weaknesses in public policy that continue to significantly contribute to marketplace distortion and compromised protection.

I was alarmed to find that the ESC, despite the specific provisions contained in the General Order in Council of May 2002 re Exempt Licensing, well over 150 such licences were randomly issued unjustifiably without due care to ascertain ownership, eligibility etc or any attempt to monitor the marketplace and outcomes of public policy.

Ministerial Order in Council May 2002 Electricity License Exemption Victoria

It is my considered view that the ESC has consistently over-stepped the boundaries of this Order, notwithstanding that at the request of the then Minister for Energy (Victoria) a Small Scale Licensing Issues Paper was floated and that the ESC made determinations and recommendations based on what I believe to be flawed assessment.

Ltr Minister for Energy Theophanous Victoria re Small Scale Licensing Exemptions March 2006

I am extremely concerned about the prospect of perpetuation of the ESC's reasoning and at national level, and especially given the preliminary indications of the current thinking of the AER.

The failure to consider comparative law considerations current and proposed, the pending lifting of utility exemptions, the conflict within and outside energy regulations remain issues of ongoing concerns.

The Paper has noted that transitional arrangements including, for example, the process for transitioning existing jurisdictional exemptions to the natural framework have not been covered in the current documents under consideration.

This I believe is an urgent matter since the enormous number of exemptions granted by the ESC has allowed perpetuation of distortions and profiteering of a large scale, predominantly in existing and new property developments.

Elsewhere I discuss in more detail the kinds of issues that have arisen through perceived lack of vigilance, scrutiny and monitoring, including for example checking that the applicant for license a exemption certificate meets the ESC's own guidelines, including proof of ownership and/or direct written consent of say a Body Corporate entity involved.

For example, simply because someone declares that they are entitled to on-sell because perhaps of status as an externally contracted Body Corporate Manager, does not mean that the exemption certification if granted should be in the name of the business entity providing such a service. I discuss this in more detail shortly.

Other concerns relate to facilitation of profiteering within the on-selling context and alleged breaches of trade practice provisions including under exclusive dealing provisions s47 of the *Trade Practices Act 1974*, to be re-named *Competition and Consumer Law 2010.*

The AER now proposes to expand the exempt licence market including three categories of exemption – deemed for certain classes (such as landlords and body corporate entities); registrable exemptions; and piecemeal exemptions. Light-handed regulation has got out of hand.

No-one quite knows the extent of the *"self-assessed exempt licence"* market, but my private efforts are beginning to uncover anecdotal evidence.

EWOV had refused to share outcomes from a feasibility study undertaken in 2006-2007, despite fulfilling a public role. This body appears to act more like an industry association than an objective complaints scheme and is confused about its conflicts of interest.

It is one thing supporting innovation and competition and quite another allowing industry participants, *"metering lobbyists"* and others to rule the marketplace, limit rather than enhance competition, breach multiple laws and best practice parameters and force private entities and individuals into the open courts – if they can afford to follow such a path.

It seems to be that attempts are made to distort contractual law and even to re-write this and the common law, as well as trade measurement protections current or proposed; and energy laws, wherein energy is clearly defined as either electricity or gas, not heat expressed in calorific value (for alleged hot water provision, using temperature measuring devices attached to water heat panels used to calculate deemed gas usage for both heated water provision, room heating provision (water heat panels) and cooking, wherein only a single gas meter may exist for an entire property.

Allegations that there is no room in multi-tenanted properties to install better systems with improved design are exaggerated. I have inspected many properties where there is ample room for provisions at least on each floor, improved service delivery, and greatly reduced costs not relying on creative interpretation of what "metering data service providers and others can deliver.

In addition to failing on alleged benefits and cost savings on many counts, property owners are frequently finding that they are being imposed with allegations that infrastructure normally considered to be part and parcel of body corporate property is claimed to be owned and operated by a third party not of their choosing, appointed by a property developer long before they purchase a property, demanding massive "payouts" if a group of owners decides to seek alternative provider.

How is this working for competition, fairness and freedom of choice, let alone the express provisions of exclusive dealing? (see for example s47 of the *Trade Practices Act 1974* and other provisions.

Choice denial for Purchasers of strata titled property

Developers erecting buildings make such decisions long before any sale of property takes place or there is a chance to form a Body Corporate Committee to make decisions. As to tenants it is prohibited under tenancy laws for structural changes to be made without landlord consent – which is extraordinarily rare. I discuss this further shortly

It is now common practice, but not necessarily legal for long-range **BOOT** schemes to exist (buy own operate and transfer – under duress and more), at the behest of developers making collusive arrangements with energy providers and/or service providers chosen by them on the basis of locking in unsuspecting future owners in strata titled property.

Proper examination of market practices will illustrate that far from opening up the market to competition the tacit sanctions in place allow the market to find ways to hamper competition through exclusive dealing practices that would not get past stringent assessment against trade practices exclusive dealing provisions or national competition policies.

My own investigations have uncovered practices that need to be exposed and challenged at all levels. These appear to have developed because of apparently poor understanding of the many loopholes that have developed and because of historical adoption of policies that were flawed in the first place.

Amongst these are the bulk hot water arrangements. The AER is actively participating in endorsing practices to on-sell heated water, in the full knowledge that these practices endeavour to re-write contractual, generic, tenancy and owners' corporation laws, as well as defying trade measurement best practice pending lifting of utility exemptions.

For those purchasing off-the plan and other properties classed as strata-titled lack of choice is also a significant concern.

As in the case study Illustrated in Appendix 1 and mentioned within the body of this submission,

As to perceptions of appalling quality of service, lack of transparency, clarity, informed consent or fairness, in arrangements and service contracts unilaterally imposed on purchasers and tenants alike expected to compulsorily *"pass on"* all perceived obligations.

One such contract blatantly requires Owners/Occupiers to

"assign its rights, interests and obligations under the Agreement to the purchaser of the Premises upon contacting for the sale of the Premises. In the event that the Owner/Occupier fails to assign its rights, interests and obligations under the Agreement to a purchaser, then they shall remain liable for all charges under the Agreement." [2]

Or so the alleged supplier of energy water, internet and security infrastructure, service arrangements.

The generic contract for the same property development (Developer Inkerman Developments; Service Supplier, unlicensed: Service Link Australia Pty Ltd.) also claims the right to suspend the supply of heated water or heating to the Premises at any time where the Owner/Occupier has failed to pay the charges as outlined in Schedule 1 to the (alleged) Agreement, which the members of the Owners' Corporation deny has any legal validity, though unilaterally signed under common seal by a party appointed by the property developer, without the knowledge of the members of the Owners' Corporation – who were not even in sight at the time, since the properties were purchased "off-the-plan"

Those living in multi-tenanted dwellings or occupying individual shops in shopping centres and the like, have absolutely no choice at all in terms of provider where embedded networks exist.

The decisions are made at the time that the developer erects buildings and long before any sale of property takes place or there is a chance to form a Body Corporate Committee to make decisions. It is now common practice, but not necessarily legal for long-range BOOT schemes to exist at the behest of developers making collusive arrangements with energy providers and/or service providers chosen by them on the basis of locking in unsuspecting future owners in strata titled property.

Proper examination of market practices will illustrate that far from opening up the market to competition the tacit sanctions in place allow the market to find ways to hamper competition through exclusive dealing practices that would not get past stringent assessment against trade practices exclusive dealing provisions or national competition policies.

My own investigations have uncovered practices that need to be exposed and challenged at all levels. These appear to have developed because of apparent poor understanding of the many loopholes that have developed and because of historical adoption of policies that were flawed in the first place.

Amongst these are the bulk hot water arrangements. The AER is actively participating in endorsing practices to on-sell heated water, in the full knowledge that these practices endeavour to re-write contractual, generic, tenancy and owners' corporation laws, as well as defying trade measurement best practice pending lifting of utility exemptions.

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[2] See Water Heating Supply Agreement Service Link Australia Pty Ltd of Victoria ACN 102 296 088, claiming to own infrastructure normally part of an Owners Corporation.
Refer to Official Website of the Owners' Corporation of 33 Inkerman Street (Oasis Developments)

The term embedded networks was intended to apply exclusively to electricity not gas. There are sound reasons for this including safety and technical issues. I am disappointed that for the sake of routinely homogenizing terms and ignoring the differences between the gas and electricity markets, plans are in place to develop an exempt selling regime applicable to both gas and electricity. Whereas it is possible for networks for electricity to change ownership and operation, this should never ever be the case for gas.

Gas is either directly delivered or it is not.

I have already referred to the huge number of exemptions provided by the ESC under the Ministerial Order of 2002 applying to exemption that appear to have been indiscriminately issued to numbers of parties – just for the asking, apparently sometimes without due care to make sure that the applicant had direct authority to do so or was using the correct name.

Body Corporate entities frequently appoint external Body Corporation Managers who are not part of the Body Corporate and who do not have voting or decision-making rights. I am not convinced that care is taken to either scrutinize applications even when the term *"embedded network can be legitimately applied in the sale of electricity, to check on ownership proof or to monitor outcomes of decisions."*

As to choice, I have much to say about this and have dedicated two chapters within the submission, similar to that already published in response to the AER's Jemena Gas Networks (NSW) Ltd Gas Access Determination (Draft Decision (27 April, 4 June 2010, plus 15 unpublished appendices and case studies); and to the AEMC's ERC0092 Provision of Metering Data Services and Clarification of Metrology Procedures (1 July 2010 with 15 appendices and 3 July as an addendum submission).

Retailer choice is generally determined on the basis of retailer supply remit, though Developers and OCs may have some choice at the outset over which retailer to choose to supply gas to fire up a single communal boiler tank.

The building, metering and utility infrastructure choices are normally determined at the time that a building is erected and is the subject of direct contractual dealings with developers or owners, not renting tenants.

In the case of retailer supply remit, the classes of consumers who received composite heated water whilst being unjustly imposed with obligations for alleged sale and supply of energy, and similar for those who are embedded end-consumers or electricity – there is no choice whatsoever or opportunity to participate in the competitive market.

Body Corporate entities frequently appoint external Body Corporation Managers who are not part of the Body Corporate and who do not have voting or decision-making rights. I am not convinced that care is taken to either scrutinize applications even when the term *"embedded network"* can be legitimately applied in the sale of electricity, to check on ownership proof or to monitor outcomes of decisions.

The AER, whether or not under the policy direction of other bodies such as the MCE, AEMC seems already endorsed practices that appear to defy best practice and conflict with other provisions and with jurisdictional boundaries and in my view seem to have already over-stepped the boundaries of its jurisdiction in certain areas, as I believe also have the AEMC, MCE and perhaps the AEMO without understanding the implications of the activities undertaken by *"metering data service providers"* and/or their associated companies amongst licensed energy providers, whether or not related bodies, *"at arms length"* or separate companies.

Such companies seem to enter into what may be termed collusive arrangements with energy providers, property spruikers; property developers and others, usually to the detriment of both tenants and owners' corporations who are quite literally forced into arrangements, contrary to the explicit provisions of for example s47 (exclusive dealing) of the *Trade Practices Act 1974* (to be further enhanced and re-named *Consumer and Competition Law 2010.*

For example Henry Kaye., property spruiker disqualified by ASIC from managing corporations for 5 years (see ASIC Media Release 20 July 2010.

Refer to ASIC's attempt to prosecute this property spruiker (associated with the Inker Development complex and many others within and outside Victoria, using in one publicized case Service Link as a service provider for alleged energy, water services, and other bundled services, locking in unsuspecting property purchases into long-range service agreements under a BOOT system (buy, purchase, operate and transfer)

See Inkerman Development website and Service Link website and Owners Corporation website 33 Inkerman Street, St Kilda. Note that property has a single gas meter owned by Multinet; presumably with a licensed gas retailer working closely with the *"service provider"* chosen and appointed by the Property Developer Inkerman Developments before any prospective purchaser was in sight, locking the purchasers into allegedly valid long-range *"asset management"* contracts.

See:

ASIC disqualifies Henry Kaye from managing corporations for five years 20Jul2010 MR

Henry Kaye victims win $3m relief

ASIC obtains undertakings from Henry Kaye and others 21Jul2003

Jenman News Story Henry Kaye

ABC News Business Report Stories Henry Kaye

ASIC Media release ASIC reveals latest host of disputes against property spruikers 14Dec2009

Extract:

December 14, 2009

Property developers around Australia have been at odds with the Australian Securities and Investments Commission (ASIC) recently. We will examine some of the disagreements which will be cautious reminders for developers to seek legal advice to help prevent a conflict with the powerful corporate watchdog.

Victoria: *In March of this year Victorian-based property spruiker Henry Kaye fought proceedings in court over an alleged $18 million fraud, following an investigation by ASIC. The proceedings included accusations against Kaye that he unlawfully obtained $17.7 million in finance from St George Bank for property developer, Inkerman Developments. Kaye is alleged to have failed to disclose a letter to GIO in a meeting with St George Bank in June 2000.*

According to ASIC:

"Kaye's company Oasis Investments bought 168 off-the-plan apartments to be built in St Kilda from Inkerman at a discounted price. Kaye then sold them at a mark-up to unsuspecting buyers. He used deposit bonds provided by an agent of GIO Australia called Deposit Bond Australia, instead of a cash deposit apartments".

He was charged with one count of obtaining financial advantage by deception and faces a committal hearing at the Melbourne Magistrates' Court on 7 March 2007.

Queensland: On 9 May 2007, ASIC announced that "the Supreme Court of Queensland ordered the winding up of a Brisbane-based company Property Developers Fund Ltd (PDFL) on "just and equitable grounds", following an application by the ASIC".

(see also:

Media Release 19Oct2006 ASIC stops Greenwood Property Development Fund Ltd Prospectus

The proceedings arose from PDFL raising capital from members of the public through offers of Cumulative and Participating Redeemable Preference Shares (CPRPS) and providing loans for property development. ASIC said it's winding up application "followed a Court ruling in March 2007 that the investors were shareholders, rather than creditors". The Court was informed that the investor shareholders stood to suffer a "substantial shortfall" on their investment.

NSW-based property developer Robert John Orehek, pleaded guilty in the Sydney District Court to two charges of fraudulent misappropriation amounting to $170,000, according to the NSW.

Mr Orehek, through a group of private companies he owned and controlled, raised mezzanine finance between February 2000 and November 2002 for prime residential property developments. According to ASIC, "Mr Orehek raised over $20 million by issuing Deeds of Loan to over 200 investors for his failed property development scheme" ASIC also reported that many of the investors were associated with the Hillsong Church in Castle Hill.

See also

None of the proposed developments were ever completed and all of the companies in the Orehek group are now in liquidation. Nearly all of the investors have lost their money, according to the ASIC.

The matter has been continued for sentencing on 12 July 2007 in the District Court of New South Wales. A third offence of fraudulent misappropriation of $20,000 may be taken into account for the purposes of sentencing.

See details of Inkerman Developments off-the-plan property development schemes, promoted by some as *"best practice"* in urban planning design. The designer's dreams appear not to have been realized, and there are ongoing disputes about the validity of the contracts entered into, including the asset management service contracts; building disputes; overcharging for alleged supply of electricity, gas, water, internet infrastructure and other bundled services allegedly the subject of contractual arrangements with the Body Corporate, whereas they did not exist at the time that documentation was signed by a *"Body Corporate Secretary/Guardian"* appointed by the Developer before the Owners' Corporation was formed or owners had formed an OC Committee.

It is no wonder that metering data service providers and/or asset management entities wish to proffer services to developers and perhaps unsuspecting Owners' Corporations to create the demand that will enable lucrative long-term service contracts fort services entirely unrelated to energy sale and supply. Though such parties benefit, it is questionable what benefits lie with either Owners' Corporations their owner-occupiers or any tenants

Increased awareness is likely to see more legal action, especially as statutory options are week and rarely enforced, and the perception of real protection under those arenas highly compromised.

What's wrong with this picture?

The existing arrangements for alleged either directly or through questionable practices on-selling of electricity and gas

The **Bulk Hot Water Arrangements** are illustrative of far more than poor policy since they appear to highlight flawed regulatory practices that appear to contain the following flaws:

1. Seem to fail to reflect consistency and within existing and proposed energy laws; and consistency with other regulatory schemes in both spirit and intent
2. Seem to fail to adopt best practice provisions in terms of consumer protection and trade measurement practice
3. Appear to include legally and technically unsound and unsustainable provisions which appear to be based on flawed reasoning and poor understanding of technicalities and other considerations;
4. Appear to include substantive clauses that are unjust and unreasonable;
5. Appear to include of provisions that appear to be facilitating conduct that could be interpreted as substantively or procedurally unconscionable
6. Appear to defy the fundamental and broader precepts of contractual law;
7. Appear to facilitate the provision of inaccurate and misleading online, oral and written information by policy-makers and economic regulators; by industry-specific complaints schemes
8. Appear to implement of practices that appear to defy the fundamental and broader precepts of contractual law, including under energy and other provisions in the written and unwritten law.
9. Appear to provide inaccurate information to consumers through policy makers, regulators and complaints schemes with implications for legal compliance
10. Appear to fail to target the right groups of consumers in terms of contractual liability**. (Targetting)**
11. Appear to have failed to address market failure in a timely or appropriate manner (Timeliness)
12. Appear to present risk management threats through risks through supplier liability under multiple generic laws (TPA, FPA, Unfair Trade Practices); and trade measurement provisions, conflict potential, expensive complaints handling **(Risk Management)**
13. Appear to fail the accountability test in ensuring absence of overlap and conflict with other regulatory schemes (unfair contracts; residential tenancy laws, trade measurement laws and intents **(Accountability)**

14. Present risk management threats through risks through supplier liability under multiple generic laws (TPA, FPA, Unfair Trade Practices); and trade measurement provisions, conflict potential, expensive complaints handling (**Risk Management)**

15. Appear from the outset to have failed to demonstrate transparent consultation processes **(Consultation test)**

16. Appear to provide non-existent consumer protection and enforcement by authorizing, even directing retailers to adopt practices that conflict with existing consumer protections under tenancy and unfair contract laws and defy the spirit and intent of trade practice provisions (**Consumer protection and enforcement test)**.

It is not the prerogative of regulators to attempt to re-write other laws, including enshrined common law protections.

The same meter also provides gas for cooking purposes.

The gas meter marked with Multinet's name has been occluded so that the meter reading cannot be independently determined by the owners' corporation. No bills are issued by a gas retailer.

A bundled bill issued by an unlicenced service provider apparently providing "*billing and other services"* (?an MDS category of provider with possible association with licenced energy providers and/or the Developer)

Some arrangements in place are likely breaches of Trade Practices provisions, especially s47 (exclusive dealings); misleading and deceptive conduct and other operational conduct issues and s68 oc. Here the question of BOOT systems (buy own operate and transfer) need to be closely questioned as to legality and validity, despite being common practice.

Just as soon as current utility exemptions are lifted, as is the intent under Trade Measurement laws, with electricity meters targeted for lifting of exemption during 2010, many current arrangements for "asset management" and "metering data and other services" will become invalid and illegal.

Whilst these matters come under other jurisdictions. Nevertheless those formulating energy policy and regulation should be careful not to adopt provisions and policies that have the unintended outcomes of facilitating such breaches.

See also the Arrow Asset Management precedent case law determination before the NSW Courts in 2007.

The MCE had accepted that exemptions for gas were inappropriate because of safety, technical and other reasons, but this policy stance appears to have been turned around, given the current parameters of the AER's issues paper and initial policy position.

Whether for *"conventional"* delivery of electricity (or gas) or unspecified or practices conveniently labelled as innovative bundled or unbundled product ranges vaguely seen to be associated with *"energy provision"* or *"energy services"* or *"hot water energy services"* (a nonsensical and meaningless term in the law, current and proposed, within and outside, as the bizarre terms contained within the Victorian *Energy Retail Code v7 2010* clauses 3 and 4, which contradicts within the same instrument such fundamental terms as *"meter."*

It is no wonder that energy providers and associated *"service providers"* such as *"metering data service providers",* a new category of service provider proposed by the AEMC (see the ERC0092 Draft Proposal to which I made a substantial submission on 1 and 3 July 2010),

have found a way to distort definitions and interpretations within the law to gain commercial opportunities in the name of assisting commercial businesses.

I note with concern that the views and interpretation of the original General Licence Exemption of Victoria issued by the Victorian Minister of Energy and sanctioned by the Governor-General in 2002 as expressed online by the Body Corporate Managers' Institute on the website of Owners' Corporation Victoria[3]

"Commercial business opportunities now exist for Bodies Corporate (BC) and Head Lessors through BCMs to take advantage of this electricity exemption regulation to generate new revenue streams, improve service levels and offer discounts to building owners and occupiers."

The Body Corporate Management Institute saw the opportunity for ongoing application in permanent dwellings and new property developments as an income generating stream.

I note that the Victorian General Order in Council May 2002 was specific to electricity and intended only to apply to transitional use of electricity in say caravan parks, nursing homes, educational institutions etc.

It was never intended and new legislation is specific that it is not meant to represent a profit-making scheme for anyone. Indeed profit-making is expressly forbidden. Yet the opportunities created by perverse and unintended interpretations and outcomes for exemption provisions (solely for electricity not for gas) as made possible by the ESC General Exemption Order, have for the most part done nothing whatsoever to benefit many owners' corporations. I can confidently claim this from direct knowledge and involvement in the affairs of owners' corporations.

One such matter is the subject of legal dispute on a number of grounds including the alleged inescapable service arrangements made by service providers claiming to be providing energy services, using an interpretation of energy discrepant to that contained within the law, using instruments, units and scales of measurement not defined within the law; and forcing owners current and future on the same development into arrangements purporting to be beneficial to them, but in fact over a period of some two decades (on the basis of challenged service agreements) actually costing the Owners' Corporation roughly double what they would otherwise be paying.

At the same time, the Service Provider, Service Link Australia Pty Ltd (previously known as Seecam (Australia) Pty Ltd and All-Lite Pty Ltd, they seek compensation for claimed ownership of infrastructure that they claimed is owned by them (such as boiler tanks, pipes, cables, water meters, hot water flow meters, Internet cabling and the like should the Owners' Corporation seek to choose another provider for either gas or *"metering data and other services."*

In fact in this case, the service provider undertakes alleged supply of energy and servicing of the boiler and heating systems. bit not individual billing. Only a single bill is issued for the heating of water – to the Body Corporate entity.

I am particularly concerned about policy intention to expand the exempt selling regime that will perpetuate and enhance weaknesses in public policy that continue to significantly contribute to marketplace distortion and compromised protection.

I was alarmed to find that the ESC, despite the specific provisions contained in the General

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[3] See for instances the claims and interpretations made by Institute of Body Corporate Managers. http://www.ocv.org.au/pdfs/Guideline_ElectricityOnSelling.pdf

Order in Council of May 2002 re Exempt Licensing, well over 150 such licences were randomly issued unjustifiably without due care to ascertain ownership, eligibility etc or any attempt to monitor the marketplace and outcomes of public policy.

Ministerial Order in Council May 2002 Electricity License Exemption Victoria

It is my considered view that the ESC has consistently over-stepped the boundaries of this Order, notwithstanding that at the request of the then Minister for Energy (Victoria) a Small Scale Licensing Issues Paper was floated and that the ESC made determinations and recommendations based on what I believe to be flawed assessment.

Ltr Minister for Energy Theophanous Victoria re Small Scale Licensing Exemptions March 2006

I am extremely concerned about the prospect of perpetuation of the ESC's reasoning and at national level, and especially given the preliminary indications of the current thinking of the AER.

The failure to consider comparative law considerations current and proposed, the pending lifting of utility exemptions, the conflict within and outside energy regulations remain issues of ongoing concerns.

The Paper has noted that transitional arrangements including, for example, the process for transitioning existing jurisdictional exemptions to the natural framework have not been covered in the current documents under consideration.

This I believe is an urgent matter since the enormous number of exemptions granted by the ESC has allowed perpetuation of distortions and profiteering of a large scale, predominantly in existing and new property developments.

Elsewhere I discuss in more detail the kinds of issues that have arisen through perceived lack of vigilance, scrutiny and monitoring, including for example checking that the applicant for license a exemption certificate meets the ESC's own guidelines, including proof of ownership and/or direct written consent of say a Body Corporate entity involved.

For example, simply because someone declares that they are entitled to on-sell because perhaps of status as an externally contracted Body Corporate Manager, does not mean that the exemption certification if granted should be in the name of the business entity providing such a service. I discuss this in more detail shortly.

Other concerns relate to facilitation of profiteering within the on-selling context and alleged breaches of trade practice provisions including under exclusive dealing provisions s47 of the *Trade Practices Act 1974*, to be re-named *Competition and Consumer Law 2010.*

The AER now proposes to expand the exempt licence market including three categories of exemption – deemed for certain classes (such as landlords and body corporate entities); registrable exemptions; and piecemeal exemptions. Light-handed regulation has got out of hand.

No-one quite knows the extent of the *"self-assessed exempt licence"* market, but my private efforts are beginning to uncover anecdotal evidence.

EWOV had refused to share outcomes from a feasibility study undertaken in 2006-2007, despite fulfilling a public role. This body appears to act more like an industry association than an objective complaints scheme and is confused about its conflicts of interest.

It is one thing supporting innovation and competition and quite another allowing industry participants, *"metering lobbyists"* and others to rule the marketplace, limit rather than

enhance competition, breach multiple laws and best practice parameters and force private entities and individuals into the open courts – if they can afford to follow such a path.

It seems to be that attempts are made to distort contractual law and even to re-write this and the common law, as well as trade measurement protections current or proposed; and energy laws, wherein energy is clearly defined as either electricity or gas, not heat expressed in calorific value (for alleged hot water provision, using temperature measuring devices attached to water heat panels used to calculate deemed gas usage for both heated water provision, room heating provision (water heat panels) and cooking, wherein only a single gas meter may exist for an entire property.

Allegations that there is no room in multi-tenanted properties to install better systems with improved design are exaggerated. I have inspected many properties where there is ample room for provisions at least on each floor, improved service delivery, and greatly reduced costs not relying on creative interpretation of what "metering data service providers and others can deliver.

In addition to failing on alleged benefits and cost savings on many counts, property owners are frequently finding that they are being imposed with allegations that infrastructure normally considered to be part and parcel of body corporate property is claimed to be owned and operated by a third party not of their choosing, appointed by a property developer long before they purchase a property, demanding massive "payouts" if a group of owners decides to seek alternative provider.

How is this working for competition, fairness and freedom of choice, let alone the express provisions of exclusive dealing (see for example s47 of the *Trade Practices Act 1974* and other provisions.

I could say so much more. Suffice it to say in this initial submission that things are not what they appear to be. The Exempt Selling Regime, especially as previously operated and overseen by the Essential Services Commission Victorians from the outset been full of holes. The parameters of the proposal and the initial policy stance of the AER, undoubtedly guided by the AEMC and/or MCE need to be further considered in the light of new case law and developments that ought to concern the entire community.

Again, is the tail wagging the dog? Who exactly is benefitting from the arrangements in place or proposed?

APPENDIX 2

DEIDENTIFIED CASE STUDY

TENANT

INDIVIDUAL VICTIM OF CURRENT REGULATORY PRACTICES –

BULK HOT WATER –

DISPUTE ALLEGED ENERGY CONTRACT WITH RETAILERS AND DISITRIBUTORS UNDER JURISDICITIONAL PROVISIONS

(see Energy Retail Code v7 (Victoria)

Appendix 2

DEIDENTIFIED CASE STUDY – INDIVIDUAL VICTIM OF CURRENT REGULATORY PRACTICES – BULK HOT WATER

CASE STUDY 1– COMPROMISED CONSUMER PROTECTION

Details of complaint lodgment, scope of complaint and management issues

The scenario examined here relates to the position of those who are unjustly imposed with a deemed contractual status or the future potential of pressure to form a direct market or standing offer contract, and who stand by their existing rights under conflicting and overlapping provisions in other regulatory schemes.

Such a case arose in the context of a particular case study cited in numerous submissions to many arenas, and mentioned herein by way of illustration.

In that case during early 2007 a young person, through a nominated representative brought a complaint before the industry-specific complaints scheme, Energy and Water Ombudsman (Victoria) Ltd (EWOV).[1] the industry-specific complaints scheme overseen by the VESC and more distantly by the DPI. EWOV has Reciprocal Memoranda of Understanding with VESC; DPI, CAV, ACCC, AER.

The Tenant is an inarticulate, vulnerable and disadvantaged consumer of utilities (the Tenant) as an end-consumer of bulk energy not contractually obligated to form any contract with the energy supplier in connection with hot water suppliers reticulated to his apartment from a communal water storage tank on common property infrastructure which is heated by a single supply point/supply address at the outlet of a single meter, which for VenCorp Distributor-Retailer settlement purposes is a single supply and billing point, consistent with existing legislation.

The Tenant (Complainant), has serious incurable psychiatric illness and a history of suicide attempts. His long psychiatric history includes past hospitalizations, the most recent of which was shortly before he took up tenancy at the property, a twin-block of rented apartments each block served by a single supply point bulk hot water meter.

He had signed up a residential tenancy lease weeks after being released from hospital after exacerbation of his illness, taking up occupation a few weeks after the lease agreement.

He had signed up a residential tenancy lease weeks after being released from hospital after exacerbation of his illness, taking up occupation a few weeks after the lease agreement was finalized.

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[1] Refer to EWOV, Constitution found at *http://www.ewov.com.au/pdfs/Organisation/Constitution%2030%20May%202006.pdf*

More recently the Tenant has developed other serious medical complications with a leg/wound/infection requiring ongoing medical treatment and continuity of hot water supplies, as outlined in privileged reports from his treating team through his case manager.

He has irreversible medical and psychiatric conditions with complex treatment challenges. His case manager has described his condition and mental state as delicate at best and likely to deteriorate and be undermined if subject to unnecessary external stressors, a fact that the case manager has urged should be borne in mind when any agency, organization or utility company seeks to communicate with him.

The Tenant had taken up occupancy of an apartment in a poorly maintained multi-tenanted dwelling having extended his low fixed income to his maximum limits, knowing that under the provisions of the *RTA* the cost of heated water was included in his rent. The previous tenants occupying the same apartment for three years had never paid any water bills for heated or cold water.

The Tenant had taken up residence in good faith, had all his utility connections confirmed in writing and orally by the utility connection provider and formed a direct duel fuel contract for domestic heating and cooking, for which he accepted full contractual responsibility.

The standard mandated terms of a tenancy lease under the provisions of the *Residential Tenancies Act 1997 (RTA)* (Victoria) provided that it was Landlord responsibility to meet all utility consumption and supply charges (other than bottled gas if that existed) that could not be measured separately with a meter designed for the purpose for each component of utility received.

The lease was a standard tenancy lease and did not conflict with existing provisions under the *Residential Tenancies Act 1997*

In particular under Clause 9 of the specific lease agreement applicable in this case, additional terms that do not detract from the rights and duties included in the *Residential Tenancies Act 1997* were set out to specify:

> *"The tenant shall pay all charges in respect of the connection and consumption of water, oil, and telephone where the rented premises are separately metered for these services."*[2]

[2] This term implies separate metering of gas. The Tenant in this real-life case study has a separate gas meter for the provision of domestic gas for cooking, and a separate meter for electricity for heating, and has entered into a legitimate duel fuel contract with a host supplier for these utilities.
However, in relation to bulk hot water, no separate meters or supply points exist for this purpose. There is a single gas bulk hot water meter with an allocated MIRN No. The meter is transparently available for reading.
Bills issued to other tenants on the block show a unique *"meter number"* for *"gas usage"* and a unique *"meter number"* for *"gas hot water"* for an identified billing period. In addition to charges for "gas hot water: an "deemed gas usage" that is based on algorithm formulae calculations evidently sanctioned by the regulator and/or policy-maker contained in policy and deliberative documents with no legal weight (see ESC Bulk Hot Water Charging Arrangements and Bills Based on Interval Meters, ESC Guideline 20 (1) 2005 (effective dated 1 March 2006) found at
http://www.esc.vic.gov.au/NR/rdonlyres/C0E6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf
See also all associated deliberative documents notably
Final Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (December) (23 pages) found at
http://www.esc.vic.gov.au/NR/rdonlyres/4554EA66-6F9E-49C8-934E-1E8232D989AC/0/FDP_EnergyRetailCodeAmendmentsFinalDec05.pdf
Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August)
http://www.esc.vic.gov.au/NR/rdonlyres/37078658-5212-4FA7-8A8E-AC42AB12BDDC/0/DDP_EnergyRetailCodeTechAmend20050810_CommissionPap_C_05_8007.pdf
ESC (2005) Final Report Review of Bulk Hot Water Billing Arrangements (September) found at
http://www.esc.vic.gov.au/NR/rdonlyres/20C3454F-0A47-428B-845B-1D7D85FBE572/0/FinalReviewBulkHotWaterBillingSept04.pdf
ESC (2004) Draft Report Review of Bulk Hot Water Billing Arrangements (July) found at
http://www.esc.vic.gov.au/NR/rdonlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf
Correspondence between February and August 2004 between Department of Primary Industries {DPI} (Victoria) and VESC February – August 2004, notably dated 13 May; 16 July; 11 August 2004 respectively from Richard Bolt, then Executive Director Energy and Security DPI expressing concerns about BHW billing arrangements Other DPI correspondence and replies from VESC same sources not available online as submissions and concerns from DPI on this matter.

Response to ESC re Draft Report Review BHW Billing dated 29 July 2004 from TRUenergy supporting non-site visit billing and supporting option 2, fixed conversion factor without site visits for meter reading CF historic level; 0.49724 MJ per litre in GTO would require retailers to annually gazette CF and cents per litre hot water rate plus appropriate BWH tariff, i.e. Tariff 10/11 all based on conceptual model of billing.

Site specific rejected as too expensive to measure and collect data from meters as input Bulk hot water meter; hot water consumed (satellite meters);

The term separate metering refers to each utility. Unless each such utility can be measured in a legally traceable manner with an instrument designed for the purpose, in this case a gas meter, no charges for energy can be applied under residential tenancy provisions. VCAT has repeatedly upheld that the existence of a hot water flow meter does not represent separate metering.

The Tenants Union Victoria (TUV) has testified to this and is aware that some Body Corporate entities, or else some utility providers endeavour to impose utility charges on end-users of heated water in the absence of any energy meter. This has been upheld by VCAT as an illegal practice. These practices have been facilitated by existing energy policies, allowing collusive arrangements to be made between Landlords and utility providers, metering agents or other parties in order to extort payment for the heating component of water in the absence of a supply point or meter that can individually measure gas or electricity consumption for each renting tenant.

Current methods rely on water meter readings if undertaken at all, and total hot water consumed by all the residences (thus turning the billing process into a water meter exercise contrary to the spirit and intent of trade measurement provisions). This has implications for conditions precedent and subsequent; regulatory overlap and conflict considerations; bill smoothing; under and over-charging parameters; contractual governance. found at

http://www.esc.vic.gov.au/NR/rdonlyres/CD7E8430-868E-4C42-A937-08E7082F57CA/0/Sub_TXU_BulkHotWaterJuly04.pdf

Response to ESC Draft Report Review BHW Billing dated 6 August 2004 from AGL ES&M re transparency of cents per litre rate; site number inconsistencies and off-peak rate for electric BHW (customers paying full general rate. Mentions site-specific billing too hard in projected FRC environment – a decision taken as read.

Response dated 19 September 2005 from EWOV on Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August).

Response to ESC from St Vincent de Paul (SVDP dated 27 July 2004. Confirms lack of transparency in arrangements especially re conversion factor; compliance enforcement forthwith of repayment of overcharging as specified in Retail Code and as previously applied to TXU (now TRUenergy); confirms desirability for site specific reading to counter-act price-shocks to individuals especially for those with poorly maintained residential premises including Office of Housing, DHS; suggests new and replacement installations be site specific.

http://www.esc.vic.gov.au/NR/rdonlyres/6BE152A1-1F27-47C2-B47A-0C32825670F3/0/Sub_StVincentDePaul_BulkHotWaterJul04.pdf

Option 1: adjustable conversion factor: rejected

Option 2 Fixed conversion factor (adopted) based on a conversion factor at a cents per litre hot water rate as gazetted

Option 3 – Site specific Option – a portion gas measured at the site-specific master meter to each individual customer based on their hot water use - REJECTED

No mention had been made in the lease about the liability of the Tenant for non-applicable water charges or bulk gas charges for the central heating of a communal water tank supplying heated water of varying temperature to a group of residential tenants in a twin block of apartments. Under the terms of a standard residential tenancy lease that was not inconsistent with the provisions of the *Residential Tenancies Act 1997*, the Tenant expected to be free of any and all charges for water, hot of cold.

Prior to signing the lease, the Tenant had been told by the outgoing tenants that they had never had to pay for water hot or cold during the three years of their tenancy in the same apartment because of the absence of separate gas meters for bulk energy supplying the boiler tank and because of the absence of water efficient devices.

The Tenant was not made aware by the agent of any separate water meters in existence The Tenancy lease was signed in good faith not expecting any additional utility charges save for the legitimate charges for gas for cooking and electricity for heating lighting and appliances, for which a dual fuel contract was entered into with an energy supplier other than the supplier acting as host supplier for bulk hot water.

Well before taking up tenancy, the Tenant received written notification from the utilities connecting middleman service that a dual fuel account had been set up with another energy provider (not the one providing the bulk energy) for domestic supply of gas for cooking and heating and nominating the water authority responsible for supply of water.

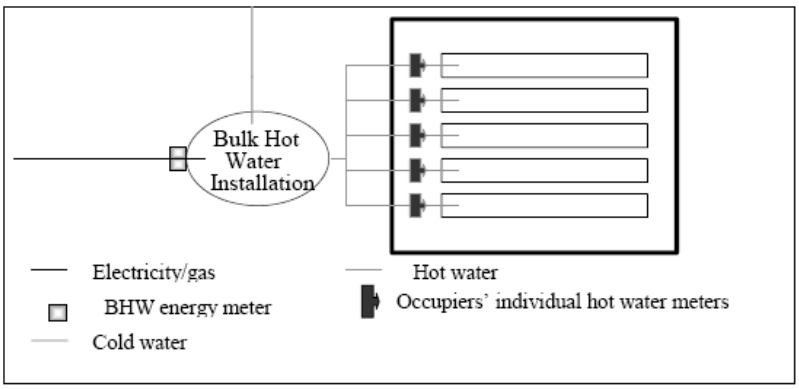
Subsequently upon direct enquiry (twice) that water authority had again confirmed that the landlord through the Owners' Corporation (previously Body Corporate) had accepted responsibility for water charges. No water efficient devices fitted at any of the apartments at the property supply address, so no water charges applicable to Tenant under *RTA*. The water authority was unaware of any licence arrangement, sanction for fitting of water meters or any other authority under water industry provisions.

In particular the Water Authority confirmed that they had no separate water meters installed and were not involved in bulk hot water. The same confirmation was obtained from the utility connection provider, who had organized utility connections and confirmation of all applicable utility charges prior to occupancy.

The Water Authority confirmed that they had not become involved in any arrangement or approval for additional water meters or licences, including hot water flow meters to be installed or water to be on-sold, nor did they see that as their role. They supplied water to the water mains and had the Landlord/Owners Corporation on record as contractually obligated. The Tenant was entirely unaware of the existence of any water meters, but as mentioned he had been informed by the previous occupants of his apartment that they never had to pay water bills. The Water Authority had confirmed that the Landlord had direct contractual responsibility for the supply of water hot and cold. The only meters that the Tenant had sighted were those gas meters individualized for each apartment supplying gas for cooking and electricity meters supplying energy to each apartment for heating and lighting and appliances. Other than that there was a single gas meter on the wall of each twin car park marked BWS supplying energy to a single water tank for each building that communally heated water that was supplied to each tenant's premises.

Configuration and meter details

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

The Tenant relied implicitly on protections and provisions the enshrined consumer protection provisions of the *Residential Tenancies Act 1997,* s53-55, 69 (Victoria); and associated water industry provisions; and under the provisions of Owners' Corporation (previously known as Body Corporate) deeming the Owners' Corporation liable for certain charges associated with common property infrastructure (which includes hot water services and air-conditioning).

It is an offence to deviate from standard form residential tenancy leases. His lease provisions have not attempted to deviate from those provisions.

Though the *RTA* was not created to identify liabilities between energy suppliers and tenant, the *RTA* provisions are relied upon as enshrined rights. The interpretation made of separate metering under the *RTA* is similar to that under the *Gas Industry Act 2001* and the *Electricity Industry Act 2000*. For gas these meters are described in the legislation and in the *Gas Code* as an instrument through which gas passes. The *Gas Code* has a slightly more elaborate definition, which is an instrument that measures the quantity of gas that passes through it to filter control and regulate the flow of gas that passes through it and its associated metering equipment. Water meters are not such instruments.

The VESC has apparently proposed inclusion within the VERC an alternative definition for meter, which is a device that measures and records consumption of bulk hot water consumed at the customer's supply address."

Without water dial readings it must be hard to measure and record consumption of water. Water is measured in litres. Hot water flow meters measure water volume only not gas or energy. Gas meters measure gas volume only not heat (energy). Bills are expressed in energy. For BHW purposes bills are expressed in cents/litre and also in MJ/litre. Gas is measured in megajoules (MJ). Electricity is measured in kilowatt-hr (KW-H).

The Tenant had taken on the tenancy in the belief that he would have to budget for rent and duel fuel gas and electricity for domestic cooking and heating only, not water, value-added water or "bulk energy. "

Had the Tenant known about complications with bulk hot water provisions none of these additional expenses would have been undertaken. In fact the Tenant would have sought alternative accommodation in the first place.

Fuel prices are about to go up with price deregulation, but in any case from 1 January 2008 a price hike of 17% for electricity costs had already been effected.

Managing his budget, his commercially rented premises, utility costs and other expenses on such a budget is a source of constant anxiety for the Tenant.

The Tenant's supporters had invested funds into making improvements to his apartment for his comfort expecting a long term tenancy. Had they known that these complications were likely to arise retrospectively with inappropriate imposition of contractual obligation for bulk energy supplies, alternative rental property choices would have been sought.

The Tenant took up delayed tenancy since the apartment was not ready to occupy because of works being done.

Some time after moving in, arrangements were made by the Tenant for fitting of new carpeting in apartment at own expense to replace worn and dangerously fitted carpeting in all rooms. Also fitted was new solid wooden front door for additional security.

Before taking up occupancy several weeks after signing the lease, the Tenant checked with the Utility Connection Provider and with the Water Authority, who both confirmed that the Owners' Corporation accepted water charges supplied to the mains.

It is not the prerogative of policy-makers, regulators or others to undermine those enshrined rights or other general and specific rights under the written and unwritten law.

Prior to accepting the lease and taking up tenancy, the previous tenants vacating the same residential apartment had confirmed that in the three years of their tenancy in that particular apartment, they had not had to pay any charges for water, hot or cold, since there were no water efficient devices fitted; and secondly since there were no separate energy meters for tenants receiving centrally heated water through a single bulk gas meter for each of the two twin-apartment buildings, with each such meter situated in the open car-park of each building and readily accessible for meter reading purposes.

Prior to taking up occupancy, though a utility connection company, he had signed up with a dual fuel account with an energy provider other than the one with an arrangement with the Landlord for provision of energy to a communal water storage tank on common property infrastructure.

At that time the Tenant was quite unaware of the existence, intent, or application of provisions endorsed as "Guidelines" for bulk hot water charging authored by the Victorian energy regulator, Essential Services Commission Victoria (ESC), and apparently also endorsed by the policy-maker Department of Primary Industries (DPI). It was months after lodgment of a complaint to EWOV that he received a copy of the existing BHW Guideline which had insufficient clarification.

The Tenant receives heated water reticulated in water pipes from a communally heated water tank (hot water service) on common property infrastructure supplied to multiple renting tenants residing in twin-buildings owned by the same Landlords/Owners.

The Tenant uses cold water for his washing machine and cooks very little, thus using minimal water for washing dishes. He had budgeted for these and for his rent, but not for additional charges for bulk hot water charges or the heating component which had not been specified under the terms of his lease under mandated lease provisions.

He was supplied with heated water to his premises reticulated in water pipes directly from a single hot water storage tank to which he had no direct access. The only energy meter that he was aware of associated with his apartment was the one supplying gas to his apartment for cooking and the one supplying electricity for heating lighting and appliances.

The Tenant rarely obtains a hot shower. He has no means of checking the heating value, ambience, efficiency of the regulator that is part of the single meter that supplies the water tank which supplies water to all tenants. Gas meters measure gas volume but not heat. Hot water flow meters measure water volume but not gas, electricity or heat.

Based on repeated VCAT decisions under similar circumstances (see Tenant's Union case studies cited elsewhere), and in accordance with the provisions of the *Gas Industry Act 2001,* which defines a meter as an instrument through which gas passes, no separate metering exists for gas.

As mentioned a single supply point/supply address receives at the outlet of a gas meter on common property energy that heats a communal water storage tank (BHW services). After being heated the water is reticulated in water pipes to each occupant's apartment in this multi-tenanted dwelling.

The building is well over 30 years old, and the single supply address/supply point has been in existence since the building was erected, as have the water meters that live in a locked boiler room on common property.

The only item therefore that was not his responsibility under *RTA* provisions was the cost of consumption, supply and any commodity charges along with consumption costs for composite product heated water that is communally heated.

Apparently though water meters had been installed several decades earlier at the time that the buildings were erected, the landlord had never charged for water or used the water meters for the purpose of apportioning water costs, nor to the Tenant's knowledge had he consulted the water authority about licence to install or on-sell water.

There were no water efficient devices fitted in each individual apartment. The water authority had never authorized the installation of water meters, but supply cold water to the outlet of the water mains.

This water is reticulated to the single water storage tank for each building where it is heated through a gas meter, No gas transmission pipes enter individual apartments facilitating gas flow to those premises. The heated water is carried in water transmission pipes to these premises.

The device used to calculate deemed gas consumption is a hot water flow meter that measures water volume only, not gas volume or heat. The bills provided to other tenants do not show water meter dial readings, so it is quite impossible to verify that the quantity

of water claimed to have been used, and upon which gas bills are based was actually used.

None of this information was accessible to the Tenant at the time.

The *GIA* refers to living space as premises, whereas the Victorian energy codes and guidelines use the term premises and supply address interchangeably thus causing confusion.

The term supply address has the same meaning as supply point or connection point. There is no such connection point or gas transmission pipe in any of the apartments that receive heated water that travels in water transmission pipes from the boiler room, up flights of stairs to each apartment.

Whilst the boiler room is kept locked and lives with the hot water flow meters access to the single gas meter for each building supplying heat to the water storage tank is readily accessible.

Many months after taking up tenancy, the Tenant discovered in his letter box an open letter addressed to The Occupier of his apartment, from an energy supplier with whom he had had no previous contact demanding that he provide identification details and contact details on the basis that his individual consumption of heated water was being *"individually monitored"* (without specifying how and which devices were used) and that their records showed to energy account had been set up for him associated with his hot water supplies. It was implied that it was therefore necessary for him to provide his details and set up an account for the supply of heated water if he wished his hot water supplies to continue.

This was the first letter of threat from the energy supply supplying bulk energy (gas) to the overall supply address at a single supply point on common property infrastructure.

The intent of the letter was to intimidate the Tenant into signing an explicit contract with the Supplier without justification beyond monitoring his hot water supplies. It came from the billing manager of an energy retailer previously unknown to the Complainant demanding personal identification and contact details for his landlord and agent by way of setting up an explicit contractual relationship with the energy supplier for hot water supplies.

The Tenant was very disturbed by this demand, and could see no justification for it. He had not long been out of hospital at the time and was not in a stable mind-set.

Upon discovery of an initial letter of threat the bulk gas energy supplier to disconnect *"hot water supplies"* within seven days of the date of the letter if the recipient did not comply with request to provide personal identification and other personal data by way of formalizing an explicit contract, the Tenant became worried and unsettled, particularly given his vulnerable condition. At the time it was very difficult to discuss the matter with him rationally.

Coercion, intimidation and harassment are covered under the criminal code in addition to the *Fair Trading Act 1999* and the *Trade Practices Act 1974*.

Though proffering belated apology, at the time that EWOV had undertaken initial enquiries, they had confirmed in writing that on the basis of interpretation of policies in

place, the supplier would continue to follow disconnection processes. They duly issued a second letter of threat whilst the file was still open, later claiming that this was an administrative error, but there was no doubt from early EWOV correspondence that their intent had been to continue with the disconnection process – of hot water services rather than energy.

The second threat arrived as a similar letter box drop at a time of great stress for the Tenant. This time the matter disturbed him greatly

A few weeks after receiving a second letter of coercive threat from a bulk energy supplier threatening disconnection of his water services, he evaluated the poor quality of his life and the burden of stressors before him, contemplated and planned a suicide attempted and found the means of executing this.

The attempt was narrowly averted, but he remains in a delicate state at best and his case manager has stated that any denial or disruption of hot water to his flat could prove to be seriously deleterious to his treatment and his physical health, in addition to representing further threat to his mental state.

At the time he was in the throes of dealing with other pressures and a particular phase of his illness for which he had recently been hospitalized.

Though the supplier would have been unaware of his peculiar vulnerabilities at the time that the first threat was issued, but the time of the second threat these had been made abundantly clear to the supplier by the complaints scheme. Nonetheless, the supplier had shamelessly stated that they would continue to issue *"vacant consumption letters"* in a disconnection process to which they felt entitled. There was no question of apology which was issued through the complaints scheme some 16 months later, and rejected.

Both the Complaints Scheme and the Regulator and finally the jurisdictional policy maker were made aware of further enhanced vulnerabilities impacting on the Tenant by way of correspondence from his treating team referring to his delicate condition at best; his long psychiatric history of suicide attempts; and further newer developments impacting on his medical and physical health and necessitating ongoing continuity of supply to hot water services.

Despite all parties being made aware of this, the threat of disconnection of heated water remains has been resumed following closure of the EWOV file at the 18-month with no issues at all resolved. No appropriate regulatory action has been taken.

Instead, there are moves to strengthen existing BHW provisions by transferring the terms from the BHW Guideline and deliberative documents associated with it to the *Energy Retail Code*.

Following file closure 18 months later, the letters of threat have been resumed along similar lines without correction of any of the process breaches previously identified, such as timelines, failure to direct to complaints scheme and the like.

The successive letters of threat in a letter box drop openly distributed to *"The Occupier"* of the Tenant's premises, threatened to cut off his water supplies within seven days if he failed to provide personal data and set up an account by way of acknowledging

unilaterally imposed deemed customer status as a recipient of the heating component of bulk hot water.

The use of the term *"individually monitored"* suggested the existence of a separate gas meter to measure consumption. The policy provisions were not referenced or referred to and neither was there any direction to complaints options or hardship policies should they be applicable in this case.

The letters of threat was issued out of the blue as a matter of standard policy, since the energy supplier is apparently the supplier chosen by the landlord to supply bulk energy to heat the communal water tank (boiler tank) that is part of common property infrastructure. The supplier must have been able to ascertain that a new tenant had taken up residence. The letter they sent was a standard one and issued to all new tenants on the block dating back to about mid-2006.

Many of those who received such demands had language or other barriers and could be termed as vulnerable in a general sense. They were intimidated by the threats.

The issue was never a direct complaint against the landlord, since it was not the landlord who threatened disconnection of essential services. Indeed the landlord may have been misled by the energy supplier as to provisions in place and right to engage third parties

The letters misleadingly implied that the bulk energy supplier had rights to supply hot water services. No mention was made as to the basis for these rights other than that the landlord had agreed to installation of meters and for bulk energy to be supplied – the first piece of evidence that a contractual relationship was formed between energy supplier and landlord (through Owners' Corporation, presumably).

The latest correspondence, as with the others fail to specify the legislative provisions which are presumed to relate to the claim of a contractual relationship. My analysis of the *Gas Industry Act 2001* elsewhere in this submission illustrates why the Tenant does not believe that he is "taking supply of gas" in relation to the deemed provisions; and why he believes that these provisions have been distorted to unjustly impose a contractual relationship.

Presumably the supplier's alleged ownership of the meters was a matter of collusive agreement between retailer and landlord with energy regulatory sanction. It is not the prerogative of an energy regulatory or policy-maker to over-ride residential tenancy provisions; to authorize a supplier to act as a billing agent for the Landlord, or to make inaccessible the enshrined rights of individuals. No sale or supply of gas can be demonstrated. No gas masses through the hot water flow meter.

No gas is transmitted to the Tenant's premises in any apparatus or gas transmission pipe that is associated with facilitation of the flow of gas to his premises in connection with the heated water. The water is reticulated to his apartment in water transmission pipes.

Ownership of the hot water flow meters or creative reinterpretations and redefinitions of the term meter as an instrument through which gas flows (GIA, definitions) does not create a contract

The first threat stated that the landlord had agreed for bulk hot water to be supplied to the property address – meaning the main supply at the outlet of the mains, since there is only

one bulk hot water meter for each of twin apartment buildings. Therefore the contract was formed directly between the supplier and the landlord or agent, and the satellite water meters were also fitted with landlord consent, but encouraged by existing policies for pricing and charging.

The threats were issued by a Tier 1 gas and electricity retailer, in this case supplying the heating only through a single bulk gas supply meter, situated on common property infrastructure within a block of rented apartments, after entering into an agreement with the landlord to install a metering installation (owned by the distributor) and to supply bulk gas to the property supply address with six apartments in Block 2 and four in block 1, each served by a single only bulk gas hot water system.

The Tenant has never received bills from the bulk energy supplier. His capacity to pay or other vulnerabilities were never established at all or discussed. Though the energy supplier apparently deems the Tenant to be contractually obligated, they are still required to ascertain certain specified personal details prior to formally setting any account, as a new tenant on the property. This is to follow ESC policies. Refer in particular to Product Disclosure Statement 19.

These provisions do not however require the kind of detail required in each the letters of threat issued. To that extent the content of the letter and demands made for disclosure of extraneous personal information was out of line, leaving aside the contractual issues and the nature of the threat.

There appear to be no guidelines as to how energy suppliers should go about setting up accounts for unilaterally deemed customers receiving bulk energy supplies. The deemed provisions in the first place, which expired on 31 December 2007 were put in place to protect consumers not render them more vulnerable.

Those provisions were intended to allow those left without market contracts at the time of the introduction of full retail competition with a fall-back position and continuity of supply where those supplies could be directly measured with an instrument designed for the purpose, viz an energy meter as specified in the legislation.

Though the guidelines on the one hand appeared to impose deemed contractual status on customers it is certainly not clear how those obligations are expected to be imposed. The guidelines contain neutral interchangeable terminology with plural taken to mean singular, gender meaning any gender, and customer not restricted to application to a natural person. Not that these guidelines or explanations are provided to those receiving demands to form an explicit contractual relation with a bulk energy supplier, licenced to sell energy not water products.

It cannot be have been the intent to allow coercive threat in order to force a contractual relationship.

It is commonplace for such warnings to be issued, and most residential tenants do give in. Others take the matter to the TUV for cost-recovery recourse without taking any action against the supplier. This neither addresses the conduct issues; the system problems; the triggering policy implications; or the numerous detriments associated with regular appearances with filing fee costs before VCAT to retrospectively recover charges that should be properly apportioned to the Owners' Corporation.

It also means an advance layout of funds to pay bills, a wait of 28 days to see if the landlord will agree to pay and then the creation of an artificial dispute with the landlord. None of these expectations appear to be reasonable. Equally, the expectation that the Tenant provides safe unhindered and convenient access to meters, whether or not suitable for the purpose designed (measuring energy) that are in the care control and custody of Owners' Corporations.

This letter of threat and subsequent letter some weeks later were confusing as to the basis on which the energy supplier had sought to impose contractual status on the Tenant. He had never heard of the supplier, his obligation to meet water or heated water charges were not mentioned in his standard residential tenancy lease or in the utility confirmation letter dated utilities connection middleman.

The first statement in Letter 1, taken from the actual wording of a letter received in a letter-box drop addressed to *"The Occupier"* of a residential apartment supplied with bulk hot water through a single bulk gas meter on the common property infrastructure of an Owners' Corporation entity.[3]

The second statement implies the right to disconnect if no action is taken to set up an account by providing personal details.

The actions of the supplier in issuing such threats without establishing the recipient's vulnerabilities were unconscionable; further threats equally so.

The supplier was informed of those vulnerabilities by EWOV. Despite that the supplier shamelessly stated that it would proceed with issuing disconnection notices and impliedly effect disconnection (of hot water services) believed to be sanctioned by energy policies in place.

There was no redirection on either of the letters of coercive threat to any complaints recourse or assistance, or financial hardship program if applicable.

This is not a matter of overdue bills. There are none yet. This is a matter of use of improper coercive threat to a vulnerable individual without establishing those vulnerabilities at a time when the threats could have represented a last straw in ability to cope. In this case the recipient had a past suicide history and ongoing suicidality, with a serious incurable mental illness.

In one case of disconnection, the victim paid the ultimate price of death since the disconnection had affected someone on life support. Though this had occurred in New Zealand, it illustrates what can happen to a vulnerable individual when threats are issued of the nature described and provided.

The Supplier has been alerted to the Tenant's peculiar vulnerabilities. The Regulator has been provided with documentary evidence of the Tenant's irreversible medical and mental health conditions, past history of suicide attempts; reactions to previous similar

[3] Refer to *Owners Corporation Act 2006* and responsibilities of such entities
Refer also to the specific terms of the revised Memorandum of Understanding (MOU) dated 21 October 2007 between the Essential Services Commission (Victoria) (ESC) and Consumer Affairs Victoria (CAV)

letters of threats of disconnection of heated water; his medical condition requiring ongoing access to heated water.

The Complaints Scheme EWOV has also been alerted to these matters and the messages relayed to the supplier.

The Regulator has not exercised power to restrain the supplier from disconnection, and in particular has failed to recognize that disconnection within all energy provisions relates to gas or electricity but does not include water products.

The social and moral obligations of the regulatory, complaints scheme and the supplier appear not to have been considered at all.

Resumption of threat of disconnection of heated water, repeating all of the previous breaches with timelines, process and other issues. The matter has again been taken up with the complaints scheme, who were adamant that all breaches had been addressed and processes corrected.

As to interpretation of the deemed provisions under the Gas Act; and of disconnection allowable disconnection processes and practices, these remain central issues of dispute and appear to be irresolvable.

The existing provisions appear to have continued to facilitate unacceptable business practices; unjust trade measurement and calculation practices; and inappropriate imposition of deemed contractual status on end users of heated water products receiving that heated water under the terms of their leases under tenancy provisions.

The tenant takes the position that he is already paying for his heated water as part of his rent and that it is not the business of the retailer, despite all instructions to interfere with his enshrined rights as a Tenant and his direct relationship with the Landlord.

This case history illustrates existing injustices in he BWH provisions, failure of policy makers, regulators and complaints schemes to acknowledge or address the regulatory overlap issues or to accurately interpret and inform consumers of their existing rights. The focus is on facilitating allocative efficiency and weighted interpretations of competition goals to the sacrifice of other market outcomes and proper consumer protection.

The market power imbalances are significant and enhanced by current policies. There is no chance of participation in the market for consumers receiving communally heated water deemed to be contractually obligated to energy suppliers, or for those receiving energy from embedded networks for direct use for domestic dual fuel purposes, other than hot water services.

These provisions (BHW) are adopted in three jurisdictions and are at risk of being carried into the new Laws and Rules if not arrested and reassessed.

Historical details

The matter was taken up directly with EWOV after the Owners' Corporation and Tenant's Representative had made abortive attempts to communicate directly with the supplier. Despite being informed of the complainant's vulnerabilities at the time, the supplier persisted in claiming that disconnection processes would be continued.

There was no administrative error as later claimed by the supplier. Re-issue of the threat of disconnection occurred during the time that the complaint was still open before EWOV.

This is a breach of both the *Fair Trading Act 1999* and of the *Energy Retail Code*. EWOV denied that any breaches had occurred, ultimately admitting to some breaches of prescribed process and including the issue of a letter of threat whilst the file remained open, failure to follow timelines; or direct to complaints scheme.

No action has been taken by the complaints scheme or the regulator over this, claiming and error and supporting the supplier's viewpoint.

The Tenant was threatened coercively with disconnection of his hot water supplies within seven days as a first line approach in contacting him as an unnamed Occupier of a rented apartment in a multi-tenanted block of flats supplied through a single energization point with bulk gas to the outlet of a meter on common property infrastructure under the care custody and control of a Landlord and/or Owners' Corporation (PC).

The correspondence, repeated in one form or another several times, required him to provide his personal details and those of his landlord to a bulk energy provider in order that an account could be sent up for him by way of forming an explicit contract with the energy provider.

The energy provider more recently has referred to ownership of water meters as if this created a right to an energy contract. No mention was made in the correspondence of the existence at all of a Bulk Hot Water Guideline, licence provisions, water authority approval; instructions from an energy regulator or any legal justification for deeming a contract to exist.

As mentioned, the letters of coercive threat energy inappropriately requested personal details beyond those required under the ESC Guideline *Product Disclosure Statement (19).*

Apparently the required timelines are ten days for disconnection of energy not water. Three successive letters have all mentioned seven days. Two were issued during 2007 the third after file closure by EWOV. A fourth alleged to have been sent was not discovered at all.

Immediately upon discovery of the first letter of threat, the matter was originally taken up with the Owners' Corporation who denied any knowledge of the arrangements.

They made direct enquiries the supplier through their enquiry line and provided with the name of a supervisor who claimed that the first letter had been sent in error.

When the Tenant's representative tried to locate the same staff member, no one knew of her by the name provided.

When the complainant's representatives endeavoured to discuss the matter with the supplier, an account was set up after identifying the property and alleged recipient of energy (the Tenant).

The supplier later denied that this had occurred, but after the second call demanding that the account was cancelled, the name was removed.

The sole reason given is that the hot water consumption is being individually monitored and that their records show that no account has been set up.

Similar letters were issued to all new tenants around that time, without care to discover who had moved in or out or their respective apartments. The process represented standard policy adopted by the supplier with standard wording issued on such issued letters normally addressed to *"The Occupier."*

It was entirely unclear how the retailer had *"discovered"* new tenant movement and what implications this had for privacy considerations. Perhaps it was through the utility connection company.

Since March 2006 other ex tenants at the same apartment block had apparently been similarly threatened and intimidated by coercive demands to form a contractual obligation to the energy supplier.

Though the matter had been taken up for him with the industry-specific complaints scheme EWOV, some weeks later, during the course of an unresolved complaint which spanned 18 months and remained unresolved at the time of file closure, a second letter of coercive threat of was issued as a "letter box drop" also addressed to the Occupier of his apartment.

As mentioned, the second coercive letter of threat, dignified by the energy-specific complaints scheme EWOV as *"a vacant consumption letter"* was issued whilst a complaint file was still open before EWOV.

The Tenant had no perception of any contract with the supplier but was intimidated by the letter, which threatened to disconnect hot water supplies within seven days if he failed to set up an account and provide personal identification to the supplier.

The original letter of coercive threat had mentioned a direct arrangement with the Body Corporate who had allegedly "chosen" the bulk energy supplier to provide such energy to the overall property supply address, being a twin block of rented apartments housing in Building 1 (served by a single bulk gas meter) four groups of tenants; and in Building 2 six groups of tenants.

There had been no previous attempts to explain the basis on which such a demand could legitimately be made, the legislative or other instruments relied upon; why he should accept those provisions above the sacred provisions of his tenancy lease; how the heated water consumption was measured; why he should pay for the heated component of water when no separate energization point existed through which his consumption of energy for the purpose of providing his share of heated water could be calculated.

Nor was there any direction to complaints redress options or hardship options, or informed consent in any other context concerning the supplier's unreasonable and unjust demands.

It was not until the Complainant through his nominated Representative(s) had lodged a Complaint with the industry-specific complaints scheme Energy and Water Ombudsman (Victoria) Ltd. that the Complainant's representative became aware some weeks ;later through that complaints scheme of the existence of the ESC Bulk Hot Water Guideline 20(1) (2005) (effective date 2006).

The Complainant's Representative endeavoured to locate other explanatory documents from the energy regulator, but was blocked from obtaining these for unexplained reasons. The documents were not at the time available online. Ultimately, over two months after making the initial enquiry, the Complainant's representative received a single document being a document styled Final Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (December) (23 pages).[4]

Subsequently later in the same year many of the other deliberative documents became available online and the Complainant's Representative was able to obtain most of these to obtain further detail as to how the deliberative thinking and algebraic formulae that had been adopted for Bulk Hot Water Pricing and Charging Arrangements and Bills Based on (projected) Interval Meters.

There is no doubt of the systemic nature of this problem or that regulatory policies are seen to be driving unacceptable market conduct. Copies of the letters of threat have been supplied to the Productivity Commission as privileged evidentiary material since the correspondence identifies the personal details of individuals. However, deidentified versions of such letters are reproduced here to illustrate and support the points made.

The Tenant was entirely unaware of the existence of hot water flow meters or their usage till he received a demand to form an explicit account with the supplier of energy to the water tank by arrangement with the Landlord/Owners' Corporation..

Though his representative had endeavoured through EWOV over several months to identify what sort of meters were in use and where they resided this information was not confirmed till the tenant had himself discovered the existence of the water meters in the boiler room.

The Tenant is now aware that the water in the boiler tank supplied with gas from the single energization point is heated from cold start and travels up from the car park area on the ground floor up a flight of starts to his apartment. It can take over 200 litres of water to pass before any real heating is achieved.

Other tenants have also complained about erratic water quality. The services provided are not fit for the purpose designed. Not all these problems are associated with the system itself or pipe lagging, though it is likely that the age of the tank and heating system may make for inefficiency.

There are many factors that affect water quality and some of these are distributor responsibility. Though heating value for gas supplied to businesses is monitored by the Distributor, there is no such arrangement for residential supplies.

Quality of water provision issues remain unaddressed, so setting aside the contractual issues,, the services provided are not fit the purpose designed and nor is the instrument

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[4] ESC Final Decision 2005 *FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (December)* (23 pages) found at *http://www.esc.vic.gov.au/NR/rdonlyres/4554EA66-6F9E-49C8-934E-1E8232D989AC/0/FDP_EnergyRetailCodeAmendmentsFinalDec05.pdf*

used to measure deemed individual consumption designed for the purpose intended since no gas passes through a water meter.

No agreement was possible to reach about the justification for imposition of a deemed contractual status. The matter remains unresolved and the potential threat of further disconnection is again an issue. This is despite the statements made by the OC that the Landlord expected to hear directly from the supplier to discuss any perception of overdue bills. None had been issued, and perceptions of over dues waived.

After four months of abortive complaints handling, and following the issue of a letter of *"legal stancing"* by EWOV, the CAV was asked to become involved, which they did by requiring both EWOV and ESC to explain their policy stances No prompt responses were received to several written enquiries.

Ultimately the CAV arrangement for a revised Memorandum to be signed between CAV and ESC remaining them of their obligations under s15 and s16 of the *Essential Services Commission Act* to avoid regulatory overlap and conflict with other schemes.

The CAV had also advised both bodies during mid-2007 that the tenant was not the relevant contractual party referred to under s46 of the *Gas Industry Act 2001*. That advice was ignored by both bodies, who continued take the stance that a contract existed.

More recently, before file closure the Owners' Corporation (OC) advised the Tenant to ignore further threats and felt that the supplier should be directed to contact the Landlord directly, with whom the supplier had had previous contact, had full contact details, and with whom direct arrangements had been made to supply bulk energy to the property. Residential tenants do not normally have access to Landlord contact details. However, the OC details are normally transparently displayed on the buildings offering rented apartments and flats to residential tenants, and it is always possible for a supplier to reach a Landlord through that source.

If any supplier believes he has a right to payment for services, it is normally the supplier who initiates contact.

Whilst the ESC was handling some enquiries, the OC had provided written advice to ignore further threats of disconnection of heated water or to return the letters of threat unopened to the supplier. The OC was adamant that the tenants should not be bothered and that the arrangement was a direct one between Landlord and supplier. This information and the contact details for the owners' Corporation were provided to both EWOV and the ESC to pass on and invite the supplier to make direct arrangements with the Landlord.

For distributor-retailer settlement purposes VENCorp regards bulk gas meters as a single supply point only. Therefore a single supply charge should be applicable payable by the Landlord or nominated OC.

The Managing Agent/OC confirmed that historically all accounts have been paid by the Landlord/Owner and also that all accounts submitted to the Landlord have been paid. They also confirmed in writing that the Supplier has the Landlord contact details; that this Supplier had been in touch with the Landlord before; and that the Supplier should contact the Landlord directly, not the OC or the Tenants.

Further the OC advised in writing that the Tenant should ignore any further demands for payment for bulk energy or hot water supplies; return unopened any mail relating to this; and convey to the supplier that the Landlord should be contacted directly regarding any perception of unpaid bills in this regard.

The Supplier had confirmed in its original letter of coercive threat dated that the body corporate had chosen the supplier to provide bulk energy to the property. The OC denied this. The arrangement was made directly with the Landlord/Owner.

The supplier has access to the Landlord contact details as confirmed by the OC On the other hand, the tenants do not have this information, but undertake all dealings with the OC direct.

The OC has confirmed that the supplier has never approached the OC direct about any arrangements but made all arrangements direct with the Landlord/Owner.

The Landlord/Owner made these arrangements, and commenced to take supply when the infrastructure was in place to provide bulk energy to the outlet of the meter on common property infrastructure of a twin block of apartments. There has been ownership change since the building was originally built, but the supplier has confirmed that it took over supply of bulk gas to the property in 1998, and judging from the date on which the supplier entered the meter on their data base, may have made these arrangements with the Owner in 2002. This is subject to confirmation with the supplier.

The drawback in contacting the supplier directly is that upon identification of the Tenant's name and address, an account is automatically set up, even when the enquiry is about denying contractual obligation.

The Landlord, through the OC has clearly invited direct contact by the supplier and has not refused to pay the bulk energy bills. Therefore he has not breached the provisions of the *Residential Tenancies Act 1997*, and creation of an artificial dispute with the landlord is unwarranted. In any case cost-recovery for bills that are landlord responsibility carry a price in terms of filing fees, stress and time and do not solve the issue of supplier conduct; other unreasonable and unfair contractual obligations to provide safe, convenient and unhindered access to any meters.

In this case such access this refers to water meters apparently owned by the supplier, but not recognized within energy legislation as meters that can measure gas volume or heat and therefore not covered under the legislative provisions to provide safe convenient and unhindered access to meters.

The ESC had been provided with written copies of the emailed correspondence cited above from the Managing Agent/OC

Threat, coercion, intimidation and harassment represent breaches of Fair trading provisions as well as criminal provisions. Extortion is a criminal offence if shown to exist.

The Tenant's representative takes the position on his behalf that if any deemed to explicit contract exists, it exists with the Landlord/Owner, with whom the supplier has had direct contact.

Despite being informed of the Landlord is willing to hear directly from the supplier, and indeed has had previous contact with the supplier on billing matters, the supplier has chosen to capitalize on the provisions contained in deliberative documents and a Guideline, purporting to over-ride legislative provisions and definitions, including what constitutes the sale and supply of energy.

In this case the option of redress through the *Residential Tenancies Act 1997* (RTA) was not viable or appropriate because of the Tenant's condition; the unfairness of having to outlay funds upfront, accept all other contractual responsibilities, wait 28 days; produce filing fees likely to offset recovery costs and face unnecessary stresses.

It was not the landlord who made the threats or refused to pay bills. The Supplier simply chose not to bill the Landlord and relied on the provisions of existing BHW Pricing and Charging.

The ESC and EWOV were advised of the Tenant's position that he did not accept the validity of any argument that he ever was or should be a deemed customer; or that it rested with him to secure an explicit contract between landlord and supplier. That arrangement was between them. It was obvious that they must have had some arrangement, implicit or explicit. The supplier even claims ownership of the hot water flow meters, so clearly the contact details of the Landlord are known to the supplier.

In any case, the details of the Owners' Corporation are transparently displayed on the wall of the building, readily accessible. The Landlord can be contacted through the OC if need be.

In this case, encouraged by the unjust provisions of the Bulk Hot Water Charging Arrangements, the supplier had endeavoured to imposed deemed contractual status on a Tenant instead of the Landlord or OC. The Regulator finally confirmed after 18 months of debate that the supplier had been instructed under licence provisions to bill individual tenants, effectively using water meters as substitute energization points and making deemed calculations of heated water consumption.

The implications of breaches of fair trading and alleged breaches or potential breaches of the trade practices provisions are not discussed here, save to say that those who are most vulnerable have continuity of supply threatened not simply on the basis of hardship, but also because of seemingly irresolvable contractual debates, that will never be resolved whilst regulatory overlap exists between schemes and consumer rights are eroded in such a way as to render their enshrined rights largely inaccessible.

Though low fixed income was certainly a factor, the crux of the debate was over whether the regulatory framework should apply to those in his position where no energization point existed through which his alleged consumption of gas to heat a communal water tank could be fairly calculated and apportioned using an instrument designed for the purpose. A hot water flow meter is not such an instrument.

The OC had been contacted immediately upon discovery of the first letter and subsequently. They denied involvement in the matter but accepted that the tenant would not accept any contractual liability to the energy supplier, given the terms of the standard tenancy lease and the provisions of the *RTA*.

The OC, upon making direct enquiry with the energy supplier was informed that the initial letter of threat had been issued by the energy supplier in error. Nonetheless a second letter of threat arrived some weeks later also threatening disconnection of hot water services if the tenant did not form an explicit contract with the supplier.

The supplier had been consistently inconsistent about the location of the meters, type of meters, whether access to meters had been achieved implied denied access to meters, with unjust expectations that the tenant, could and should provide safe, unhindered access to meters (subsequently found to be water meters), though these resided in a locked room with the boiler tank with keys and meters in the care, custody and control of the Owners' Corporation on common property infrastructure.

A complaint was lodged with EWOV which remains unresolved and unreported in its Annual Report on reportable incidents.

It was later independently discovered by the tenant that the meters relied upon for estimated calculation of gas consumption through the bulk gas meter were in fact water meters posing as gas meters. This matter was taken up with EWOV, without resolution, with stalling as to whether there was any obligation to identify the type of meters relied upon. Ultimately it was confirmed that the water meters were owned by the energy supplier.

Despite the fact that the water is not owned by the energy supplier, who is licenced to sell gas and electricity not water, water products or value-added products, and notwithstanding the absence of any contract to supply *"heated water"* or obligation to pay for the *"heated"* component of the water, the supplier persisted in its perception, driven by existing policies that the Tenant was liable and contractually obligated not only for the cost of the heating component of the heated water supplied, but also for the unfair and unjust implied contract provisions requiring provision of safe, convenient and unhindered access to meters.

Despite the absence of any requirement to undertake site-specific readings (an option rejected during the deliberative processes in the formation of the flawed energy guidelines for pricing and charging of *"bulk hot water"* it can be presumed that the water meters had been installed for the express purpose of reading water volume consumed by individual tenants, so that conversion factor algorithms could be made to calculate deemed gas usage. Energy does not pass through water meters. This is discussed in detail elsewhere.

Bills issued by the same energy supplier (Tier 1) to other tenants imply that separate gas meters exist as under gas usage separate numbers are allocated besides the MRIN for the bulk gas meter. This is misleading.

No bills have been issued yet to the tenant in this case study but that will be the intent when the complaint file before EWOV is closed.

The industry-specific complaints scheme EWOV had misleadingly implied by the use of the term *"the meter"* that this had been located through contact between the bulk energy supplier and the Body Corporate, that it was located behind locked doors with the boiler tank, and that once keys were obtained an accurate reading would be obtained.

On the one hand the supplier indicated that access to *"the meter"* had been denied; on the other confirmed through the complaints scheme that no gas had been consumed for water heating purposes by the Tenant in question for several months.

The requirement to provide safe convenient and unhindered access to meters (whether or not meters suitable for measuring gas) is an unfair trade term even if any contract is shown to exist, since the tenants do not have key access to the boiler room, which is on common property infrastructure and in the care custody and control of the body corporate.

The energy supplier had been consistently inconsistent about the type of meters, the location of meters; when read; whether read, how the calculations were made. In fact none of the questions posed has yet been answered.

In this regard the conduct of the energy supplier appears to have been misleading and deceptive.

There are issues also about the application of supply charges imposed on individual tenants. There is one bulk meter for gas; one supply charge is applicable and the liable party is the landlord. It seems that hidden charges for meter reading of both water meters and gas meters may be causing unwarranted supply charges to be imposed on tenants.

- For the purposes of considering disconnection matters these issues are pertinent. The end-user Tenant did not take illegal supply of gas
- The provision of bulk gas to a single gas meter (the only type of meter referred to in all energy legislation and codes) is not directly supplied to any meter in the resident's apartment, which is not the supply address or the supply point for that reason
- The bulk gas is connected to the communal boiler tank on common property infrastructure, and therefore the gas is being supplied to the Landlord or OC by direct arrangement with the landlord in this case, thus making the Owner the relevant customer
- The Tenant formed a direct contractual relationship with the Landlord/Owner through the OC under a standard tenancy lease consistent with residential tenancy legislation that provided for Landlord responsibility for all utility supplies not individually metered by a separate utility meter (other than for bottled gas).
- The existence of separate water meters do not represent meters under any of the definitional terms within the *Gas Industry Act 2001* (GIA); the *Gas (Residual Provisions) Act 1994* (which is taken as one with the GIA); the *Gas Distribution System Code*; the *VenCorp Gas Market Retail Rules*; or the Energy Retail Code

Disconnection

Distortion of the intent of disconnection processes, regardless of correctness with timelines is a violation of the legislative and code provisions, notwithstanding the existence of the bulk hot water charging guidelines.

The threat of disconnection of hot water services appears to have been used as improper leverage through which to coercive an explicit and unwarranted contract with the supplier

I have repeatedly discussed these perceptions and have also supported my views with reference to existing legislative and energy code provisions.

4.1 (iv) Disconnection

Interested (or affected) party, in relation to a gas meter, means:

> *(a) a person (including an end user customer and a supplier) to whom gas is conveyed through the gas meter, or*
>
> *(b) a supplier who supplies gas to other persons (including end user customers and other suppliers) through the gas meter, or*
>
> *(c) a network operator from whose distribution system gas is conveyed through the gas meter.*

Under the approved VENCorp Gas Market Retail Rules (VGMRR) dated the definition of *decommission* in relation to a *distribution supply point*, is to take action to preclude gas being supplied at that *distribution supply point* (e. g. by plugging or removing the *meter* relating to that *distribution supply point*).

Disconnection in the *Energy Retail Code* refers to disconnection of gas as follows:

> *(b) for gas*
>
> *the separation of a **natural gas installation** from a distribution system to prevent the flow of gas.*

Disconnection of hot water does not fit that description, An energy retailer is licenced to sell gas or electricity but has threatened to disconnect hot water services as a composite product that it has no licence to sell.

The VGMRR define a *retail licence* as:

> *"A licence to sell gas granted by the ORG under section 48E of the GIA."*

Such a licence is not for the sale of water products, value added products, composite products or other products or services. Specifically heated water is not part of the licence.

Notwithstanding current policy and the content of deliberative documents of no legal weight, endeavours to sell the heating component of heated water without being able to show legally traceable measurements beings into question whether any contract at all exists for the provision of such a product

The distribution system referred to in the legislation and Energy Codes does not include water meters. Disconnection of water meters therefore is inappropriate and is not an intended part of the disconnection processes. If gas were to be disconnection in these circumstances, leaving aside the contractual debate all the tenants on the block would be effected. In any case it is inappropriate to rely of coercive threat of disconnection of essential services were a legitimate dispute remains unresolved as to the existence at all of any contract as intended by the legislation.

The energy is supplied to a single supply point on common property infrastructure supplying heat to a communal water tank reticulating in water pipes heated water to multiple tenants

For VENCorp Distributor-Retailer purposes supply points providing energy to hot water storage tanks in multi-tenanted dwellings are considered to be a single supply and billing point, as upheld within the legislation. For the most part older buildings with these systems are 30-40 years old.

The legislation holds that all supply points in existence as single supply points and regarded so for billing purposes prior to 1 July 2007 remain single billing points.

The BHW arrangements fail to acknowledge this legislative requirement.

The arrangements also represent gross regulatory overlap with other schemes, as is expressly disallowed under s15 of the *Essential Services Commission Act 2001*. The BHW arrangements fail to recognize this.

The policy practices in place, which retailers are apparently required to adopt under licence provisions generally – requiring them to adopt all Codes and Guidelines, and under 3.3 of the *Energy Retail Code* bill in accordance with the VESC Guideline 20(1) BHW Charging. Similar arrangements exist in two other jurisdictions, South Australia and Queensland.

These facts were not known to the Complainant or his representative at the time. Most of the information was deliberately concealed by regulatory staff upon instruction when the matter was first raised and after EWV had identified the BHW Guideline but no historical or explanatory information to clarify the contractual and charging arrangements

Though the provisions were adopted on 1 March 2006 following deliberations and consultative processes during 2004 and 2005, the material was not transparently made available online till mid-July during th4e course of protracted and persisted enquiry seeking clarification of the arrangements in place.

It is the plan of the VESC to go through the motions of making a cosmetic repeal of the Guideline, which will theoretically facilitate concealment of what may be seen as obsolete material. The repeal process will altogether remove the introduction, purpose and authority details, all explanatory information about charging formulae adopted as fixed conversion factors relying on readings of hot water flow meters, effectively being allowed to pose as gas meters.

Retailers believe that ownership of the hot water flow meters that read water volume only not gas or energy, represents sufficient grounds for deeming end-users of heated water contractually obligated for the supply of energy.

No energy enters the flats or apartments as the premises occupied by these end-users. They receive heated water of varying quality delivered in water transmission pipes. No energization point or supply point exists in their apartments to facilitate the flow of energy to those premises.

The term supply address is being mistakenly used to imply premises. It is however, a technical term synonymous with supply point, meaning energy connection.

In Victoria some 26,000 individuals are impacted by the current arrangements, discussed in detail elsewhere. Of these a proportion are in public house, where the Owners Corporation, being the Department of Human services or delegate is recognized as the proper contractual party. The billing arrangements are different and do not depend on any meter reading, but rather a fixed rate.

The discussion within the submission is principally centered around those who are in the private rental market with private Landlords or owners Corporations arranging for delivery of heated water as part of their rental package, with the cost of consumption and supply being included within the rent under terms that are mandated under residential tenancy leases.

However, it seems that some collusive arrangements between Landlords and energy suppliers or other metering companies exist whereby it is possible for energy providers to claim contractual relationship with end tenants, thereby acting as billing agents for the landlord to relieve the Landlord of obligations under tenancy provisions, whilst making a profit as well.

All the same, these supply points, which supply heat to a hot water tank is regarded as a single supply and billing point for Distributor-Retailer settlement purposes.

The arrangements cause detriment to consumers who are already paying for their heated water within their rent. The arrangements have not prevented landlords from increasing rents twice a year. They have not prevent price shock to consumers, who are in fact paying far more than they need to and who are theoretically protected under enshrined residential tenancy provisions.

However, access to those provisions is rendered impossible through the current arrangements, except through cumbersome, expensive retrospective cost-recovery claims against the Landlord by creative an artificial dispute with the Landlords. This means paying up front, waiting 28 days, and if not recovered from landlord, repeated visits to VCAT, incurring filing fee costs which could outweigh the cost of recovery, besides incurring other non-monetary costs such as time, stress, aggravation, strain on budget up front; and additional problems for those ill-equipped to face stresses; deal with courts or tribunals even when represented by third parties; or for other reasons of disadvantage, illness or impediment unable to pursue such recourse.

These arrangements would not be possible sere it not for open regulatory and policy-maker sanction of policies that are not legally or technically sustainable, that will become formally illegally when remaining utility exemptions are lifted under National Measurement provisions; which do not represent best practice; and which directly infringe on the specific rights and entitlements of individuals under other schemes and under the common law, including the rights of natural, social and moral justice.

Residential tenants are seen as soft targets and are being coerced into accepted deemed contractual status where this properly belongs to a Landlord or OC.

Guidelines to justify inexcusable conduct.

Current and proposed jurisdictional rules relating to BHW pricing and charging for residential tenant usage include connection arrangements and definitions of *"customer"* that distort the original parliamentary intent of deemed provisions under existing legislation in relation to bulk hot water arrangements; defy national trade measurement provisions in spirit and intent and will become formally illegal when remaining utility exemptions are lifted.

Therefore the provision that:

> *Where small customers take energy supply and no contract exists deemed supply arrangements will apply.*

needs further clarification, lest the same anomalies and compromised consumer protections and rights are carried forward into the finalized NECF template energy Law.

The deemed provisions under the *Gas Industry Act 2001* (Victoria) expired on 31 December 2007, but were apparently renewed for a further year till 31 December 2008, the date on which handover to the AER had been expected. If the timelines have now slid a further 12 months, these may be renewed again, or else retailers may rely on an option to withdraw services unless a market contract or standing offer exists.

In the case of those receiving bulk hot water supplies in apartment blocks, severance of gas supply to the single energization point on common property infrastructure would affect all tenants who are unjustly imposed with deemed contractual status with most coerced into capitulation ultimately for fear or loss of heated water.

Severance of heated water would represent direct interference of the direct contractual relationship and agreement between landlord and tenant and would cause in those circumstances material detriment (as in the case of the case study cited).

Distortion of the terms *"commence to take supply"* and of the disconnection processes, has led to unjust and unfair practices that appear to be endorsed by policy-makers and regulators alike and supported by complaints schemes relying on policy and legislative interpretation from the overseeing bodies.

The Victorian Regulator has proposed in relation to a Retailers Obligation to connect[5] that the clause relating to connection will be retained in the ERC with *"minor re-drafting"* but no precise wording.

[5] See Victorian Essential Services Commission Regulatory Review Appendix B p27 Retailers Obligation to Connect

The proposed change is that the Commission will clarify that:

> *"the obligation to connect only applies if the retailer has agreed to offer a market contract or the obligation to supply applies. That is "If the retailer has an obligation to connect."*

SCO considers that energy is an essential service and small customers should be able to access a basic supply to meet their needs.

SCO has considered that it is important to differentiate the obligation to offer supply to the higher consumption end of the small customer definition in electricity in order to recognize the potential for innovation and diversity in the price and non-price terms and conditions of supply. This is reflected in the two 'tiers' of electricity customer that benefit differently under the obligation to supply.

Further details with respect to the two tiered obligation to offer supply to certain small customers is discussed in the Policy Paper, and will be developed in the drafting of the exposure draft instruments.

Small business also need to be protected and guaranteed supply

The regulator is specifically required under s15 of the Essential Services Commission Act 2001 to avoid regulatory overlap with other schemes. This was reinforced by Consumer Affairs Victoria through a Memorandum of Understanding dated 18 October 2007 with the Essential Services Commission reminding the VESC of its obligations. This came about as a direct consequence of the CAV being alerted to the VESC failure to comply with its legislated obligations under s15 of the ESC Act. The Act binds the Crown.

The DPI now has policy control over the BWH provisions

It would seem that unless these matters are further clarified within the Law, these anomalies and expensive conflicts with the potential for litigation will continue.

In the case study cited the supplier claims ownership of the hot water flow meters that are theoretically used to calculate water volume usage. This is the sole reason provided for the implied claim to a deemed contractual relationship between the energy supplier with the end-user of composite water products.

As mentioned elsewhere, the heated water is reticulated in water transmission pipes to individual premises. The water authority supplies the water at the water mains. From there it is reticulated in water pipes to a single communal water tank.

The energy supplied to the landlord at a single energization point on common property infrastructure is transmitted in a gas transmission pipe to a communal water tank where the water is heated. No gas passes through the water meter. It is a device that simply measures the volume of water used, not gas or heat. The water meters if read at all area read at least two months apart from readings of the single bulk gas meter readily accessible.

There is no possible legally traceable way to correlate water volume usage with the amount of gas used.

Though the retailer's licence requires him to comply with all Codes and Guidelines and all legislation, a clear conflict exists between the provisions of the *Gas Industry Act 2001,* taken as one with the *Gas Residual Provisions Act 1994* and the BHW provisions regarding imposition of deemed status on end users of heated water.

The Victorian Policy-Maker and Regulator propose to somehow attempt to validate the BHW provisions by transferring contractual perceptions from deliberative documents and the BHW Charging Guideline VESC (2)1) to the *Energy Retail Code*. This submission vociferously protests over such a move, and denies that such a transfer could possible make the arrangements more valid or over-ride the existing laws or be permitted to conflict and overlap with other regulatory schemes.

The Residential Tenancies provisions are clear enough.

The Bulk Hot Water Pricing and Charging Guidelines authored by the Essential Services Commission dated December 2005 became effective on 1 March 2006, since which time some 26,000 Victorian end-consumers of bulk energy have been adversely affected by dilution of their enshrined rights and protections until multiple provisions in the written and unwritten law. The same applies to those in similar circumstances in South Australia and Queensland.

The Essential Services Commission Victoria (ESC) has a particular enhanced duty towards those who are vulnerable and disadvantaged, with financial hardship not being the only criteria, though in this case that is also a factor because of low fixed income and disability.

Despite the bulk hot water provisions and practices being common and impliedly acceptable, legally enforceable or consistent with consumer rights entitlements and protections.

The claim has been made that the arrangements were in place to help avoid *"price shock"* to individuals. This is a weak and invalid argument since the proper contractual party is the Owners' Corporation under existing legislative provisions. Landlords are continue to raise rents and fail to take responsibility for consumption and supply charges for bulk hot water as part of common property infrastructure. Unless gas can be measured with an instrument designed for the purpose, and excepting bottled gas, all gas charges belong to the Owners Corporation.

The arrangements in place appear to be a collusive arrangement between policy-makers, regulators, energy suppliers, landlords (Owners' Corporations) and complaints schemes. No-one is willing to admit that these arrangements infringe existing consumer rights and entitlements.

However, end-consumers of bulk energy should not be contractually obligated but rather the landlord. This excuse surely cannot excuse appalling trade measurement practices wherein water meters are allowed to pose as gas meters, magical algorithm conversion factors used to calculate deemed gas usage; site specific reading is rejected; and parties who have no previous knowledge of any contractual obligation are badgered and coerced

into explicit contracts by energy suppliers licenced to sell gas and electricity not water products or value added products. The water is owned by the Water Authority.

Current review of regulatory provision which will soon revert to federal jurisdiction is likely to allow price deregulation and cancellation of standing offers and deemed contracts. This will force the market into market contracts.

Energy suppliers will then use the new powers to refuse to connect or continue connection to recipients of bulk hot water including the Tenant, unless he explicitly forms a contract. There are concerns also about the position of embedded consumers. These consumers receive reticulated supplies through middlemen who purchase gas and redirect to an alternative network.

Often embedded network distributors are provided with exemption form obtaining licences and act as billing agents or asset management parties who are exempt from current energy regulation. This means that there are no complaints recourses except the more expensive generic ones. On-selling occurs sometimes up to ten times the value of the gas consumed.

For the record there is no such thing as a gas network and this term is incorrectly applied. Therefore there cannot be an embedded customer of gas – either the gas is received through flow of energy – or it is not.

For electricity this can change network operations and ownership.

The Victorian OIC for exempt selling refers exclusively to electricity.

The TUV has recommended a proper framework for the BHW groups

Allegations in this case

Allegation 1 unconscionable conduct

In this case the Tenant has alleged **unconscionable conduct**, by virtue of issuing unwarranted coercive threat of disconnection of hot water services by an energy supplier licenced only to sell gas and electricity in circumstances where no contract existed and without identifying the vulnerabilities of the subject of threat, who in this case is an exceptionally vulnerable and disadvantaged individual with permanent psychiatric disability, a history of parasuicide; ongoing suicidality; social phobia; recently hospitalized and discharged on community treatment orders to aid in compliance with psychiatric treatment.

No redirection was offered in the content of the letters of threat to any Complaints Scheme; and in the personal details sought by way of forcing the Tenant into an explicit contract were in contravention of the Product Disclosure Statement (ESC 19); the provisions of the *Energy Retail Code 2006 v2* and now 2007 v3 and of the *Fair Trading Act 1999*, including the issue of further threat during the course of an as yet incomplete investigation of the complaint by EWOV, whose conduct has been the subject of separate concern.

In the circumstances during a particularly low mood instability bout, the fear of losing essential services could have had a disastrous effect and has similar potential in the future. The conduct of the provider appeared unconscionable because no due care was taken to assess the risk imposed and the threat was issued as a deliberate coercive attempt to secure an unwarranted contractual relationship. Even after the supplier became aware of the Tenant's vulnerabilities, further threat was issued to him as "The Occupier" in a letter-box drop whilst the complaint remained open before EWOV.

No attempt was made to redirect to complaint or redress recourses. Instead the supplier shamelessly advised EWOV that it would continue to rely on its perceived rights under sanction policies (seen to be the drivers for unacceptable market conduct and in Victoria impacting on some 26,000 Victorians, many vulnerable and disadvantaged.

The Tenant has a serious incurable psychiatric illness and vulnerability to stress besides financial hardship and difficulty managing bills. Any future contractual relationship with the supplier or imposed contractual obligation will impose further difficulties and stresses on him in dealing with a provider imposed on him without choice who has already demonstrated inappropriate market conduct.

The contract under residential tenancy, owners corporation and common law provisions lies with the body corporate who invited the supplier to fit the metering installation on the common property infrastructure of an Owners' Corporation property supply address, commenced to take supply when that agreement was formed, and became the relevant customer as one who consumers *"no more than 10, 000 GJ per annum."* This consumption threshold applies to some 1.6 million Victorians and not restricted to a natural person.

The distribution point is the point at which the gas leaves the point distribution infrastructure at the double custody changeover point – the outlet of the meter. Gas is not measurable through water volume calculations and does not pass through water meters.

The Tenant and his supporters have been most anxious about the prospect of further badgering coercive behaviour and potential loss of essential services (water) that the provider is not even licenced to sell.

In the circumstances this has promoted fear and dissonance about accepting premises that have unexpectedly come with so much baggage notably lack of choice in changing a provider of essential services with a contract more properly belonging to the Owners' Corporation where that provider's conduct has been unacceptable, reflects business practices that are unfair and inappropriate and appears to reflect predatory market conduct in a clear-cut case of power imbalance. This is a detrimental outcome from the practices alleged.

This does not excuse the manner in which threats were issued to the vulnerable tenant, one of them during the course of an as yet unresolved complaint before EWOV. This was in contradiction of the provisions of both the *Energy Retail Code* and the *Fair Trading Act*.

The issuer of those threats, the Tier 1 bulk energy supplier, has no contract with the Tenant; is not licenced to sell the water that the supplier intended to disconnect; and was using instruments to measure energy that were not designed to measure such a commodity.

That the threats were issued at all is a problem. There is never any justification for the issue of threats. This is a complex contractual issue.

There are issues of the absence of implied contract; unfair and inappropriate practices; the nature of the threats and the pretext and purpose of issuing such threats – by way of endeavouring to force a contract that should not exist at all.

There are further health complications that have been explained. There is a requirement for ongoing supply of hot water.

Allegation 3 Threats, intimidation and coercion

There was justification exists for disconnection warning or threat.[6] The Energy Code was breached on a number of counts. Whether or not *FTA* provisions are included in the ERC, utility providers are required to abide by all laws. Provisions should not make it difficult to choose which to uphold.

Threats, coercion and intimidation are covered under the criminal code also. These may be politely phrased, but still constitute threat if undue power and pressure is used to obtain an outcome. In this case threat of disconnection of an essential service is being unjustly used as leveraged through which to obtain an explicit contract with a utility provider not licenced to sell the product the subject of disconnection threat.

Neither is he permitted to disconnect that composite water product. No energy is involved. The threats are improper and tacitly upheld by regulators, policy-makers and complaints schemes.

[6] These threats were dignified by EWOV as "vacant consumption letters" with the finding in the letter dated 7 May 2008 that the supplier's conduct was in line with obligations.

EWOV has endeavoured to dignify the letters (referred to as a single letter) as a legitimate *"vacant consumption letter"* in line with supplier obligation.

Notwithstanding these considerations, the supplier in this case and others similar, persist in the belief that a contract exists and even that provisions exist to allow disconnection under these circumstances. This is the central matter in dispute as a question of contract law.

Quite simply, given that the Distribution Supply Point under the Gas Distribution System Code 2007, v 8.1 and previous versions (Victoria) is defined as follows:

The **distribution supply point** is a **point of a distribution system** at which gas is withdrawn from the point distribution system for delivery to a customer which is normally located at:

- The inlet of a gas installation of a customer;
- The outlet of a meter; or
- The end of a main

and includes a **"supply point"** and an **"ancillary supply point"** as defined in the *Gas Industry Act 2001* in relation to a distribution system

The **Body Corporate** by the admission of the supplier of bulk energy to the property supply address "chose" the supplier to supply bulk gas to the outlet of a single meter for each of two twin buildings supplying multiple tenants; and given that hot water system and air-conditioning systems are situated on common property infrastructure in the care custody and control of Owners Corporation

The Gas Retail Licence issued to the host supplier (and the other two host suppliers) make it quite plain that the customer is the Owners Corporation

No contract exists between the supplier and the end-user of bulk energy in this case and others similar despite the manner in which numerous parties have interpreted existing provisions.

No obligation exists to form such a contract, deemed or otherwise. No market contract exists.

Deemed contract terminology was only meant to refer to those who had the right to stay on standing offers at the outset of full retail competition, not those receiving bulk hot water as EWOV has chosen to interpret

Supply Point Gas *(Residual Provisions) Act 1994)*

Ancillary Supply Point *(Order in Council Victorian Government Gazette s197 29 October 2002 pursuant to s42* of the *Gas Industry Act 2001;* and **Ancillary Supply Point** within the *Gas Industry (Residual Provisions) Act 1994)*

These provisions which over-ride "guidelines" are specific about interpretation, and allow for a **single supply point** for billing purposes under certain conditions, in case there is interpretative discrepancy over other points.

VENCorp has confirmed that for settlement purposes a single supply point exists. In addition there is a cut off date where if a single point was operational for billing purposes that continues.

There is no ancillary supply point.

In any case, the Gas Distribution System Code regards supply point and ancillary supply point as one and the same.

In every case the use of the term supply point refers to supply of gas not water and refers to the distribution point where the gas leaves the gas infrastructure and enters the outlet of the meter on common property infrastructure when bulk energy meters are under discussion.

A Landlord or Owners' Corporation entity is the **relevant customer** in this case and those similar.

The term **"commences to take supply"** when, the at the point at which **double-custody changeover of energy** occurs, from distributor to retailer, and then from retailer to Owners Corporation whether or not it (that energy) passes through facilities owned or operated by another person after that point and before being so supplied.

(This refers to s 46 of the Gas Industry Act 2001 and 42, 43, 44, plus Gas (Residual Provisions) Act 1994; Order in Council 29 October 2002 under s 43, pursuant to s197 Victorian Govt Gazette).

Allegation 4 Breach of Fair Trading Act 1999

Includes issue of further threats of disconnection within seven days (not 10) whilst a matter remained open before a complaints body, use of misleading and deceptive terminology, causing material detriment

Failing to redirect to complaints scheme

Failure to direct to any applicable hardship policies

Allegation 2 Breach of implied contract

The supplier has alleged a contract with the Tenant for the supply of energy used to heat a bulk hot water tank centrally heating water supplied to several groups of tenants (four in one building and six in another, each supplied through a single supply point bulk meter residing in each of two car parks. The Tenant denies the existence of such a contract or requirement to form one.

The implied contract is an issue of debate between the parties. No contract exists except in the mind of the retailer; in faulty interpretation; or else in the intent behind the deliberative documents, final decisions, and bulk hot water charging guidelines.

The deemed provisions of the *Gas Industry Act 2001, ss42-46* were never designed to be interpreted in the way that they have in terms of the bulk hot water charging provisions.

No provisions exist as to how such a unilaterally perceived contract should be formalized and enforced, but surely the intent could not have been coercive threat without informed consent and chance to refute through proper channels.

The landlord invited the supplier onto the premises to fit the metering installation; the distribution supply point is the point at which gas leaves the distribution system pipe and enters the outlet of the meter on OC infrastructure. The Body Corporate and *"commences to take supply"* when the gas leaves the distribution pipe and enters the outlet of the meter on Body Corporate infrastructure.

Deemed contract terms as provided for in the *Gas Industry Act 2001* were intended to apply to those who were without market contracts at the time of full retail competition (FRC) taking effect in Victoria and other states where franchise arrangements were in place for certain customers and standing offers became applicable. This term was not intended to apply to those who became end-users after FRC was effected.

The decision by this supplier and others to creatively apply this term to those after FRC who were supplied by bulk gas energy through a single meter following either an implicit or explicit arrangement with the OC, does not impose a legal contract with the end-user of bulk energy.

These complexities and nuances are legal and technical matters not as clearly understood even by those making the rules. I venture to say that poor understanding of the niceties of contract law have given rise to interpretative flaws.

The Complainant has not undertaken illegal supply of water or energy. He pays for his domestic supply of gas for cooking and domestic supply of electricity for other fuel needs including heating and appliances through another provider.

He has a legitimate lease under standard residential tenancy terms which cover consumption of water, hot and cold. The water authority has confirmed that the landlord has accepted responsibility for all water supplied. The rent includes water charges. In a addition a recent rent increase has occurred.

It is the OC's responsibility to accept all charges for bulk energy, supply charges, meter reading charges. There is only one supply point applicable for bulk energy on common property infrastructure. VENCorp records that supply point as a single supply point. There is a supply charge before any tap is turned on, and commencement to take supply began when the landlord agreed to have the bulk meter installed. The supplier alluded to that agreement in the first letter of threat.

The Complainant did not agree to accept supply. s46 of the *Gas Industry Act 2001* specifically refers to agreement to take supply of energy to the premises and then failure to meet contractual and responsibilities or follow identification processes. This is not the case here. No supply of energy enters the apartment by any means in relation to the heating of the bulk hot water. Supply is taken of a composite water product in water pipes. Disconnection of heated water is being relied upon in interpreting the deemed provisions under an energy law. Water and energy are not interchangeable.

They are quite different delivery systems. Gas consumption cannot be legally measured with a water meter.

Notwithstanding that the Tenant continues to deny any contract at all or any requirement to form one with the energy supplier, given the energy supplier's perception of a contract, there is an implied breach of such a contract through failure by one of the parties to the contract (real or imagined) to satisfactorily perform the service or action agreed to in the contract.

The water quality is not consistently hot. There are variations in ambience, temperature and heating value, none of which can be measured through water meters. The composite product is not fit for the purpose intended on a consistent basis. The cold-start water is supplied through pipes that have to travel up a flight of stairs. It takes many litres before the water begins to show signs of being adequately heated.

The intended charges, based on the bills received by other tenants on the same block do not appear to be supplied at off-peak rates or rates that reflect the nature of supply and sub-standard quality. Unfair supply charges and meter reading charges may be hidden in the *"commodity charge"* intended

The energy supplied purporting to be covered by a contract with the Tenant is not achieving its goal and not fit for the purpose designed.

The trade measurement practices used, albeit seen to have been sanctioned by the regulator in deliberative and policy documents that appear to have no legal weight are contrary to the intent and spirit of national trade measurement laws applicable as the default laws in Victoria *National Trade Measurement Act 1960* and will soon become illegal and invalid

The bulk hot water pricing and charging provisions and the interpretations made by policy-makers, regulators, complaints schemes and energy suppliers seem to be representing attempts to re-write contract law.

Energy suppliers may have seen a loophole through which inarticulate vulnerable, and disadvantaged end-consumers of bulk energy not contractually liable can be imposed with financial and other obligations, including unjust requirements to provide safe, convenient and unhindered access to meters (whether or not appropriate instruments through which gas can be measured) behind locked doors and in the care, custody and control of Owners Corporation entities.

The provisions of the *Essential Services Act 2001* require that there is regulatory overlap between schemes.

This has been reinforced by way of a revised Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria and Essential Services Commission specifically requiring

> *"overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries*

The MOU also requires adoption of best practice.

Besides conflict with regulatory schemes there is the issue of conflict with rights enshrined within common law contract provisions.

The absence of a contract being central to the complaint, and endeavours to improperly coerce the Tenant into accepting such a contract under pain of disconnection of essential services.

The general perception that existing interpretations apply simply because of pragmatic arrangements that do not even uphold the intent and spirit of trade measurement provisions has given rise to apparent exploitation of those least able to fight back – the soft targets who have faced detriment from the outset.

These anomalies will continue to impose detriment on such end-consumers unless the future regulatory design rights these wrongs.

Allegation 3 Unfair business practices (Fair Trading Act 1999;

Unfair Contract provisions

Victoria's regime

Part 2B of Victoria's *Fair Trading Act 1999* prohibits 'unfair terms' in consumer contracts. A term is 'unfair' if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. Examples of unfair terms might include those which allow a supplier to unilaterally vary a contract, or those which allow the supplier, but not the consumer, to terminate the contract.

The supplier and Complainant (and others like him) do not have equal responsibilities and rights.

The Complainant is penalized if the implied contract (which the complainant denies exists or ought to exist is terminated. Nevertheless he stands to lose water or heated water though the supply and cost of these are already included in his rental agreement directly with the landlord.

The supplier can apparently vary the contract terms, price and goods without involvement of the deemed recipient under an implied and unjustly imposed contract.

The supplier and others appear to have assumed sole right to interpret the meaning of the deemed contract, notwithstanding that there are many discrepancies within the legislation and many overlaps with other schemes, with common law provisions and contractual provisions and the rights of social and natural justice.

The supplier appears to have sole rights to determine whether the contract has been breached.

The contract contains confusing terms and inappropriately implies through wording that either a licence exists for supply of composite products; or alternatively that the energy can be separately measured; or alternatively that the practices are legitimate.

Includes the expectation that the end-consumer, who has no obligation to form a contract and is not the ***'relevant customer'*** in this case, assumes all contractual responsibility and then battles to address merely the cost-recovery component.

Cost recovery through VCAT requires 28 days notice to the landlord; repeated trips and filing fees; inconvenience and stress and acceptance of unfair contractual terms and legal responsibility for bills that should be sent directly to the proper contractual party.

The repeated cost of filing fees would outweigh any benefit from cost recovery.

Such a process would not deal with the root problem, the policy provisions; the conduct of the supplier

In this case the Complainant is a most unsuitable candidate for repeated tribunal or court appearances for such a purpose and this would place an undue and unfair burden on him.

One of the unreasonable contractual terms of the contract that the supplier wished unilaterally to impose was provision of safe, convenient unhindered access to meters behind locked doors in the care custody and control of the Owners Corporation.

Those meters are satellite water meters owned by the bulk energy supplier and installed for the express purpose off using them as substitute gas meter.

Such practices appear to have been endorsed by existing provisions.

Gas does not pass through water meters.

Electricity does not pass through water meters.

Water meters are unsuitable instruments for measurement of energy.

Gas is measured in megajoules (MJ).

Electricity is measured in KW-h.

Any measurement that allows for water volume calculations or some other bizarre equivalent, to be part of the equation that calculates energy consumption is fundamentally flawed. These provisions to not uphold public interest, best practice standards or the spirit and intent of existing provisions. The provisions are as good as relying on an oil funnel to measure the weight of a bag of apples.

Energy retailers are licenced to sell gas and electricity not water products or heated water. In some cases where exemption granted non-licenced embedded network distributors are using similar methods without accountability through energy regulations (see for example *Winters v Buttigeig* VCAT 2004).

There is an imbalance of power; the end-consumer has no provider choice; contractual status has been unilaterally and inappropriately imposed through misinterpretation of the intent of existing legislation regarding relevant customer and deemed contracts; demands were made to form an explicit contract under pain of threat of disconnection of hot water; the cost-recovery mechanism through s55 of the *RTA* imposes additional and unnecessary burdens on the end-consumer including filing fees through VCAT which would offset cost recovery, and in this case not readily achievable since the Complainant is unable to participant in legal proceedings without detriment.

The misleading and deceptive conduct referred to elsewhere includes behaviour that leads another person into error, and thus unfair.

Examples include the use of terminology, for example reference to meters implying gas meters, allegations of denial to meters, meaning water meters; intended use of an identifying number of the bills other than the MIRN.

The implied and unilaterally imposed contract requires the end-consumer as a renting tenant to provide safe, unhindered and convenient access to meters where such meters may be in the care custody and control of the Owners Corporation, who are under the law responsible for supply and consumption charges of energy or other utilities unless separately metered.

The energy supplier is endeavouring to charge for gas, gas meter reading and gas supply for the heating component of the water. A meter is described under the *Energy Retail Code* and the *Gas Distribution System Code* as an instrument that measures the quantity of gas that passes through it and its associated metering equipment to filter, control and regulate the flow of gas. Water meters do not represent such instruments, though they appear to be posing as gas meters.

Though the water meters are owned by the energy supplier, and though these are behind locked doors; these instruments are not the type of instrument referred to in the energy provisions and were not designed for the purposes intended. Therefore notwithstanding allegations of denial of access to meters, the Tenant continues to deny that allegation, and in any case is unable to deliver unfair contract provisions concerning safe convenient and unhindered access to meters that are not in his care custody and control, leaving aside for the moment the ongoing contractual debate, which is really a matter for the policy maker(s) and/or responsible regulators to address rather than EWOV as a conciliatory complaints scheme with no jurisdictional powers to address policy, legislative and tariff matters. However, EWOV is capable of gathering and clarifying factual matters.

As to denial of access of meters relied upon in previous EWOV correspondence under Clause 13 of the *Energy Retail Code* , there has been no such denial of access to meters as defined in the legislation and codes, namely a single gas meter on each of twin-buildings. These bulk gas meters are considered by VENCorp to be single supply points for the purposes of settlement between distributor and retailer.

The law requires a retailer to be licenced. Those licences are for the selling of energy not water. If retailers or their servants/contractors or agents are behaving as billing agents for the landlord for water products; value added products, heating components of composite products that cannot be separated from the product, this is an anomaly that may need to be reconsidered by the policy-makers and regulators. Meanwhile, EWOV should be cautious about making determinations outside of their jurisdiction.

The licences appear to be referring to a business customer to whom the metering and billing seri9ces apply and any choice that that party may have to change to another retailer, notwithstanding that distributors are most reluctant to see changes from original host retailer arrangements, and this may make such a choice expensive. In any case it is not the end-user of heated water communally heated who has any choice with provider for either water or energy.

Allegation 4 Unfair and inappropriate trade measurement

Adversely impacting on the consumer, even if a contract is somehow shown to exist yet this issue has not been mentioned. At least the intent of existing provisions appears to have been breached.

Finally there is the question of risk of a rise in rent following negotiations with the landlord. The premises were accepted in the expectation that all water charges would be met by the landlord in the absence of separate gas meters for bulk hot water *(especially as the previous tenants had confirmed that they never had to pay during their three years of tenancy)*; and that the rent incorporated all utility charges other than dual fuel for domestic cooking and heating.

There is nothing in the energy legislation that deems the Tenant to be contractually obligated. Neither EWOV nor ESC has been able to substantiate that claim with reference to the legislation but have referred instead to deliberative documents and guidelines considered to be flawed and inappropriate using trade measurement practices that are unacceptable, interpretation of “relevant customer” that are not consistent with broader definitions within legislation.

Again, the previous deemed clauses under s42-46 of the *Gas Industry Act 2001* refer to those on standing contracts at the time that Full Retail Contestability became operational. Those deemed clauses were extended to 31 December 2008.

The unacceptable market conduct has been made possible by existing statutory public policy provisions under guidelines authored by the Essential Services Commission.

Allegations that these bizarre policies were adopted to prevent *“price shock”* to end-consumers appear to be weak and invalid since they are not the proper contractual parties.

These issues remain in contention and cannot be resolved with creative interpretation of the *Gas Industry Act 2001*

The deemed provisions had never been intended to not to residential tenants, legally taking occupation of premises with stand lease provisions implicitly deeming the supply of water and other utilities to be the responsibility of the OC, unless water efficient devices were fitted; and secondly unless each utility could be individually metered.

In Victoria these represent some 26,000 end consumers of bulk energy that cannot be measured using an instrument designed for the purpose, who are not properly the contractual parties, yet being held responsible, in breach of their several rights under multiple jurisdictions not only for the costs of energy calculated in cents per litre using bizarre algorithm conversion formula, without the benefit of site reading, and using water meters posing as gas meters. This contravenes the spirit and intent of trade measurement regulations.

After some three months delay, some clarification was ultimately provided directly by ESC by way of provision by e-mail of a single deliberative document Final Decision dated December 2005.[7] Subsequently through independent efforts access to all available deliberative documents was obtained, most of which are now published online on the ESC website, so far more accessible than at the time of lodgment of complaint 20 months ago.

The bulk hot water pricing and charging provisions were adopted on 1 March 2006 and were intended also to apply to interval meters.

These provisions have been seen as drivers for unacceptable market conduct and practices. The consequences impacts on some 26,000 Victorian consumed based on figures published in ESC documentation dated 2004. Many end-consumers unaware of their rights and entitlements have been coercively intimidated into accepting contractual status.

Though seemingly adopted with the goal of preventing price shock to end-consumers, this argument does not stand up to scrutiny since the contractual party under the law is the Landlord or OC. The goals of preventing price shock have not been met. Landlords continue to impose rent increases every six months as allowed by law, and as has occurred in this case.

The original rental lease included the supply of heated and cold water. Charges for consumption, supply and any meter reading charges belong properly to the Owners Corporation.

Allegation 5 Failure to follow appropriate disconnection notice procedures

Notwithstanding that the Complainant denies any contract existed or ought to exist, the supplier failed to follow prescribed disconnection processes.

The two letters of coercive threat of disconnection from the energy supplier dignified by EWOV staff by referring to a single *"vacant consumption letter."* These were considered to be junk mail addressed to the Occupier of the Tenant's address and no considered to be relevant to him.

[7] ESC Final Decision Bulk Hot Water Arrangements and Bill Based on Interval Meters

One of these letters was issued during the course of an unresolved complaint before EWOV which remains unresolved. This is a breach of both the Energy Retail Code and fair trading provisions.

Pre-disconnection practices were not followed including failure to provide at least 10 days notice of intent to disconnect, at least twice over by the supplier's own admission, once during the course of an open complaint before a complaints body, and use of wording that has already caused considerable material detriment given the Complainant's vulnerabilities.

The wording of the letters were not in accordance with provisions

No informed consent was provided. No clarification was provided. Misleading terminology was used.

Ownership of the meters does not allow the supplier to disconnect hot water supplies. Disconnection in the *Energy Retail Code* refers to disconnection of gas as follows:

> *(b) for gas*
>
> *the separation of a **natural gas installation** from a distribution system to prevent the flow of gas.*

Disconnection of hot water does not fit that description.

It was unclear whether the intended disconnection was of hot water suppliers or energy. If energy presumably this meant cutting off the supply to all other residential tenants on the block supplied by that single bulk gas meter as the single supply point on common property infrastructure of the OC.

Until all of these issues are addressed at all possible levels of redress, including by the statutory authorities responsible under the *Gas Industry Act 2001* this issue remains unresolved and the subject of complaint and enquiry that has been delayed. Under s14 of the *Energy Retail Code,* and despite clause 13, a retailer must not disconnect a customer:

> *If the **customer** has made a complaint directly related to the non- payment of the bill, to the Energy and Water Ombudsman Victoria or another external dispute resolution body and the complaint remains unresolved;*

Though a final decision from EWOV is imminent, the complaints processes are not exhausted, the Internal EWOV Review process allows 60 days for lodgment.

Advice has been sought from the ESC and DPI as to the most appropriate next steps, with reservations being expressed about the value of a Merits process in these circumstances. Nonetheless this remains a theoretical option and other complaints avenues are being considered with regulator, policy-maker and Ministerial advice sought and awaited.

Unconscionable conduct is already on the list of allegations, whether or not EWOV, DPI or VESC choose to accept this.

All parties should consider the trade practice considerations.

Given the Tenant's previously identified vulnerabilities and new considerations with further illness complications resulting from a rare auto-immune arterial disease, a leg ulcer requiring wound care and access to hot water, ongoing permanent psychiatric illness and history of parasuicide, it would be considered unconscionable for the supplier to effect disconnection under the circumstances.

There is an enhanced obligation of the regulator and policy-maker to embrace social and natural justice principles and to protect the rights of vulnerable end-consumers of energy as an essential service.

The energy supplier has no direct right to effect disconnection, as discussed below citing Sec 36.1 of the *Energy Retail Code*.

Under s36 of the *Energy Retail Code* v4 October 2007, a retailer is not in a position to connect, disconnect or reconnect the electrical system or natural gas installation at a customer's[8] supply address to a distributor's distribution system. The Code unless otherwise stated requires in this context interpretation to is a reference to procure disconnection through the distributor.

I will endeavour to collate these when time permits, though I should not have to repeat any of this time and again.

Meanwhile I mention stress again that the proper interpretation of supply address; ancillary supply address; customer; relevant customer; meter; metering installation and the like needs to take account multiple references within the legislation or expired legislation (for assessing past matters) and any associated Orders in Council past,[9] current or proposed as well as the *Gas Distribution System Code* and *Energy Retail Code* wherein there are some noticeable discrepancies, on the one hand indirectly sanctioning the use of water meters posing as gas meters, and on the other clearly defining meter with reference to the legislation as an instrument designed for measuring the quantity of gas that passes through it and its associated metering equipment to filter control and regulate the flow of gas. Such a process does not occur with hot water flow meters.

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[8] However the terms customer; supply address; meter; metering installation; distribution supply point; ancillary supply point and other definitions are applied, and remembering that the deemed provisions when they did apply in these circumstances referred to "relevant customer" not just customer, with that definition under an expired OIC associated with the expired deemed provisions referring merely to annual consumption levels, and applying equally in the law to some 1.4-1.6 million customers not necessarily of natural person status. The discussion referred to in deliberative documents about BHW arrangements are not legally enforceable as these documents have no legal status, and in any case represent regulatory overlap with other schemes, common law, trade measurement and other considerations.

[9] The Order in Council that I brought to EWOV's attention in the first place is now obsolete since it was associated with the now expired deemed provisions under s42-46 of the *Gas Industry Act 2001*.

ENERGY RETAIL CODE V4 October 2007

36. INTERPRETATION

36.1 Connection, disconnection and reconnection

*A **retailer** is not in a position to **connect**, **disconnect** or **reconnect** the electrical system or **natural gas installation** at a **customer's supply address** to a **distributor's** distribution system. In this Code unless the context otherwise requires, a reference in a term or condition to a **retailer**:*

*(a) having a right or not having a right to **disconnect** a **customer** is to be construed as a reference to the **retailer** having a right or not having a right to procure the **distributor** to **disconnect**; or*

*(b) being obliged to **connect**, **disconnect** or **reconnect** a **customer** is to be construed as a reference to the **retailer** being obliged to use its **best endeavours** to procure the **distributor** to **connect**, **disconnect** or **reconnect**, the electrical system or **natural gas installation** at the **customer's supply address** to the **distributor's** distribution system.*

If it is the case that the wrongful disconnection payment has had the effect of deterring disconnection in hardship cases, the plight of those whose central issue not hardship or over-due payment of bills, but rather dispute over the existence at all of any contract or requirement for there to be a contract.

Allegation 6 Breach of Gas Distribution Code

All definitions, including meter, metering installation; distribution supply point which includes ancillary supply points as energy (not water meters); VENCorp rules and policies wherein bulk energy meters are considered as single supply points; other legislative energy-specific provisions and definitions, defining supply point, ancillary supply point, supply address and other such pertinent definitions

Allegation 7 Breach of ESC Product Disclosure Statement Guideline 19

The letters of threat required personal data beyond that required by these provisions, leaving aside the contractual debate and denial that any contract exists or ought to exist

Allegation 8 Breach of Informed Consent

For example failing to properly clarify directly in the letters of coercive threat and subsequently through EWOV a range of enquiries or explain adequately the unjust imposition of deemed contractual status, method of calculation, now energy was monitored, the meaning of the term *"hot water services"* when the supplier is licenced to sell gas or electricity not hot water products or composite products

It was unclear from the threats of disconnection whether the intent was to disconnect hot water suppliers or energy. If energy presumably this meant cutting off the supply to all

other residential tenants on the block supplied by that single bulk gas meter as the single supply point on common property infrastructure of the Owners Corporation.

Perhaps this more extended paraphrased version of the implicit messages contained in the two intercepted threats of disconnection of essential services

It is unclear whether the threat of disconnection of essential services relates to water, heated water as a composite product; energy used to heat that water – this has not been clarified yet by anyone despite repeated enquiry for clarification will serve to clarify how these coercive threats have been conveyed by the energy supplier will convey a more honest transparent disclosure of the implicit message intended.

The two known threats of disconnection on seven days notice, without informed consent for an explicit contract with an end-user of bulk energy not legally the contractual party, and not bound to accept such a contract, could be undertaken:

On the other side of the coin there is the disclosure that providers of goods and services can or do demand whether or not the guidelines allow this.

The information required by the energy supplier, leaving aside misconceptions about where the contractual obligation lay, required disclosure of information far in excess of that allowed under the Product Disclosure Statement. Retailers have argued that they need this information so that if the imposed contract on the tenant reneges, the landlord can be held accountable. All of this does seem rather bizarre application of contract law.

Allegation 9 Misleading and deceptive conduct

This is alleged on the part of the supplier the subject of complaint

For example inconsistent and misleading statements as to the basis for assuming that a contract existed; use of terminology implying the existence of gas meters; allocation of a meter number implying a separate gas meter, other than the MIRN.

Allegation 10 Misleading details in bills issued to other tenants on same block

For example using terminology and meter identification numbering that implies separate gas meters. Massive supply charges are being apportioned to individual tenants, though only one common property supply point exists with a meter supplying heat to a communal water tank.

Allegation 11 Similar inappropriate and unacceptable business conduct

Alleged towards the tenant and other tenants living on the same block

Other tenants on the same block have complained about inappropriate conduct and have supplied me with some of the bills issued. One tenant received an absurd estimated bill for $500 from the same bulk energy supplier. There had been a burst water pipe in one tenant's apartment. Perhaps the endeavours were made to apportion equal responsibility amongst the tenants for any hot water wastage activated by that incident.

Whatever the reasons for bills of this nature, something needs to be done about giving leave to suppliers to charge what they will; except high costs of challenge with accuracy of meter readings, notwithstanding the maters relied upon are not energy meters, but instead water meters through which no gas passes, thus being unsuitable instruments for

the purpose. The range of conduct issues are applied as a matter of policy by the supplier in more than one state.

Allegation 12 Use of trade measurement practices that are against the intent and spirit of national and state trade and utility measurement provisions [10]

The current trade measurement practices will become invalid and illegal once existing utility exemptions are lifted, as is the intent and as has already commenced (using water meters posing as gas meters to calculate estimated and actual gas consumption for gas used to heat water centrally heated water.

Meanwhile the provisions and use of these practices breach trade measurement provisions with regard to spirit, intent and best practice approaches, and notwithstanding any instruction or perceived instruction from the regulator or the documentation relied upon in these assertions.[11]

It was recognized and noted in the Deliberative Document Review of Bulk Hot Water dated July 2004 that these practices were breaching the intent of trade measurement law and fair trading provisions.

Allegation 13 Contravention of the intent of trade measurement and utility provisions

Notwithstanding existing policy provisions which appear to have been the drivers for inappropriate market conduct, the spirit and intent of existing national trade measurement and utility provisions have been violated. In Victoria the default provisions are the *National Trade Measurement Act 1960* and accompanying provisions.

Allegation 14 Probable intent to apply inappropriate supply and possibly meter reading charges (?rolled over into a commodity charge)

Inappropriately applied to end-consumers, including additional hidden charges that may also be incorporating water meter reading charges as well as gas meter reading, if meters are read at all, since site-specific reading was rejected as an option.

This is notwithstanding the claims of absence of any contract with the end-consumer (Complainant) or obligation to form one.

No bills were ever issued. The circumstances were associated with coercive attempts to force an explicit market contract at what was believed to be expiry of the deemed contract for sale and supply of energy. The Tenant denied the existence of such a contract and

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[10] Note as reported in the CAV Annual Report 2006/2007, Director's Report, p9 *"A major historic development…during the past year was the agreement that the Commonwealth will assume its full constitutional responsibility for trade measurement (weights and measures). In 2010 the Commonwealth will take over functions relating to weights and measures, which the State has performed since the mid-nineteenth century."*
The default provisions are under the *National Measurement Act 1960 Act No 64 of 1960 (with amendments to Act No 27 of 2004* Transactions by utility meters to be in prescribed units of measurement

[11] Refer to *National Trade Measurement Act 1960* and corollary provisions; refer also to Memorandum of Understanding between Consumer Affairs Victoria and Essential Services Commission dated 18 October 2007 both available online

through a representative endeavoured to retain his enshrined rights under multiple provisions and the common law

However, at the end of 21 months of abortive complaints handling by EWOV, the intervention of the energy regulator (ESC) (who upheld the retailer's position) and the DPI (who claimed no power over EWPOV or the Regulator despite both bodies being set up under statutory enactments under DPI control), disconnection of heated water supplies was effected by clamping of hot water flow meters recording water volume usage to the Tenant's individual residential premises in a multi-tenanted block of apartments poorly maintained.

The grey areas of water quality, consistency of temperature etc were never addressed, yet the Tenant was alleged to have a contract for the heating component of communally heated water the quality of which no-one seemed interested in taking responsibility for.

The collusive arrangement between the Landlord/Owner's Corporation and the energy supplier was facilitated by flawed policy and philosophical beliefs held by the DPI and ESC regarding perceived deemed contract and confusion over water and energy provisions, generic laws, contractual provision under the common, residential tenancies acts and Owners' Corporations provisions.

Allegation 16 Inaccuracy of deemed consumption of gas and charges applied

Apparently there are previous issues of over-charging by a Tier 1 supplier wherein the Department of Infrastructure (DOI) at that time with the energy portfolio demanded prepayment of overcharges to consumers to the tune of some $800,000.

Allegation 17 Compromised protections and adequate access to appropriate recourses

This allegation is leveled at the policy-makers and regulators and the inadequately resourced and informed industry-specific complaints scheme.

There are concerns about the impacts on some 26,000+ Victorians using bulk gas energy centrally heated; and some 200+ of bulk energy used to heat single boiler tanks with a single bulk meter at the property of the oc.

Existing policy arrangements affect those in embedded networks, caravan parks, rooming houses, nursing homes. Embedded networks are those where unlicenced distributors not covered by Energy Codes and legislation can purchase gas or electricity from the original network, transfer to another network and on-sell at inflated prices without recourses available to consumers other than through common law provisions.

Despite the intent of provisions under the *National Measurement Act 1960 18R,* delays with the lifting of certain utility exemptions have left loopholes in legislation that allow unacceptable market conduct. The default provisions are under this Act, since the mirrored provisions under the Victorian *Utilities (Metrological Controls) Act 2002* remains impotent without regulations to accompany it. This has been the case for some four years. Delays will now be perpetuated till around 2011 when National trade measurement provisions will be adopted for all states and territories.

If apportioning amongst Owners is deemed appropriate, the current arrangements are not appropriate for rented apartments and those tenants in an *"embedded situation"* even if the term embedded network is not strictly applicable.

The only recourse suggested by EWOV after sixteen months of handling the matter as a predominantly policy issues was a cost-recovery mechanism retrospectively against the landlord through s55 of the *Residential Tenancies Act 1997.*

This does not address the contractual issues, conduct of the supplier of inadequate policies and leaves a vulnerable end-user not contractually obligated to carry contractual status, outlay funds to pay bills that are not the Tenant's responsibility, and endeavour to either negotiate with his landlord or make repeated appearances before VCAT to recover costs, thus offsetting any cost recovery benefits.

It also leaves the Tenant liable for provision of safe convenient and unhindered access to meters which are not in his care custody and control, since the water meters theoretically relied upon for meter reading of energy consumption reside behind locked doors in the boiler room, These meters are owned by the energy supplier, but the water is supplied by the water authority, who has confirmed that the OC accepts all responsibility for water charges and supply costs.

Without policy change these issues will continue to compromise consumer protection, already at low ebbs.

Existing policy arrangements affect those in embedded networks, caravan parks, rooming houses, nursing homes. Embedded networks are those where unlicenced distributors not covered by Energy Codes and legislation can purchase gas or electricity from the original network, transfer to another network and on-sell at inflated prices without recourses available to consumers other than through common law provisions.

Despite pressure from community organizations such as Consumer Utilities Advocacy Centre (see for instance reference to *Winter v Buttigeig* before VCAT December 2004, article in Spring Quarterly September 2005 CUAC – *"Embedded Networks – Disconnected Consumers";* these practices continue and appear to be endorsed by statutory policy deemed to be flawed and detrimental to community interests.

Revised Body Corporate provisions under the *Owners' Corporation Act 2006* effective from 31 December 2007 do not address tenant issues but rather owner and administration issues and the complexities of the many issues raised regarding bulk hot water arrangements are not addressed at all. I disagree with any perception that these arrangements are appropriate in multi-tenanted dwellings or that consumer protections are adequate.

Note the *Owners' Corporation Act 2006* is another example of legislation not echoed in other states, but nevertheless lends important clarity and protection that should be echoed in similar provisions elsewhere instead of repealed because other states have not adopted the provisions

Despite the intent of provisions under the *National Measurement Act 1960 18R,* delays with the lifting of certain utility exemptions have left loopholes in legislation that allow unacceptable market conduct. The default provisions are under this Act, since the

mirrored provisions under the Victorian *Utilities (Metrological Controls) Act 2002* remains impotent without regulations to accompany it.

This has been the case for some four years. Delays will now be perpetuated till around 2010 or 2011 when National Trade Measurement provisions will be adopted for all states and territories.

If apportioning amongst Owners' Corporation is deemed appropriate, the current arrangements are not appropriate for rented apartments and those tenants in an *"embedded situation"* even if the term embedded network is not strictly applicable.

Energy retailers are licenced to sell gas and electricity not water products or heated water. In some cases where exemption granted non-licenced embedded network distributors are using similar methods without accountability through energy regulations (see for example *Winters v Buttigeig* VCAT 2004).[12]

There is an imbalance of power; the end-consumer has no provider choice; contractual status has been unilaterally and inappropriately imposed through misinterpretation of the intent of existing legislation regarding relevant customer and deemed contracts; demands were made to form an explicit contract under pain of threat of disconnection of hot water; the cost-recovery mechanism through s55 of the *RTA* imposes additional and unnecessary burdens on the end-consumer including filing fees through VCAT which would offset cost recovery, and in this case not readily achievable because of the complainant's condition.

The last allegation of inadequate and compromised protections and adequate access to appropriate recourses is leveled at policy-makers and regulators and the inadequately resourced and informed industry-specific complaints scheme.

I refer to the *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* as approved by the Federal Government in 1997[13] which include:

Accessibility; Independence; Fairness; Accountability; Efficiency and Effectiveness. As noted by Denis Nelthorpe, Solicitor and Consumer Advocate:

> *these benchmarks were drafted by a national committee made up of government, regulatory, industry and consumer representatives as a guide to an increasing number of industries looking to establish industry based complaint schemes (IS ECS) as opposed to internal complaints handling mechanisms (IS- ICS)*

The values embraced by those benchmarks are similar to those identified as core values of the Attorney-General's Justice Statement (May 2004).

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12 CUAC September 2550 Quarterly *"Embedded Networks – Disconnected Consumers"*. Article by Tim Brook, pp11-12

13 Federal Government (1997) *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*

There are many myths about ADR provision. Industry specific complaints schemes do not mediate. They are essentially complaints schemes who investigate facts and perspectives without assuming a mediation role, a central component of true ADR. The structure of these schemes has the potential to introduce perceptions of bias. When independent legal advice is sought by the complaints scheme, the power imbalances are further increased.

It cannot be procedurally fair, for example to tip the market power imbalance scales by taking independent legal advice without even consultation with the regulator to seek creative ways in which to interpret the legislation or policy in support of the complaints scheme member, or to issue threats of premature closure of a complaints fails before investigation of the substantial issues of complaint, relating say to conduct or procedural breach by way of endeavouring to force a conciliatory outcome.

It cannot be procedurally fair to without clarification of policy information or to make direct referral to the regulator(s) involved if these issues are out of jurisdiction. It cannot be procedurally fair to fail to report an outstanding matter in the complaints reports or annual reports if a complaint is carried forward to the following year, or to delay direct external referral unduly.

Whilst a Merits Review process does exist within complaints schemes such as EWOV, this is an internal one. It remains unclear how a matter is dealt with when there is dissatisfaction with complaints handling and perceptions of bias or undue delay in dealing with a matter warrants external input. These matters are discussed in considerable detail in subdr242part4.

Within that submission a full account of a case study example of unsatisfactory case handling is cited as well as a full case study the subject of complaint against the energy supplier involved (supplying bulk *"hot water services"* through licenced to sell only energy) and also about the policies seen to be driving unacceptable conduct.

In this case, it was appropriate to make timely external referrals since many matters were out of jurisdiction, such as policies, tariffs, legal interpretation of policies and legislative enactments. That was a matter in which clear cut debtor issues or hardship policies were not in issue in the substantive components of the complaint which were essentially about a dispute over the legitimate existence at all of any contract, despite the existence of policies. Thus there were many matters entirely out of jurisdiction that ought to have been referred. There was no doubt that these issues were systemic, even by the admission of the subject of complaint, who expected to continue unacceptable conduct unless restrained by the regulator.

Therefore, at least this example was one of perceived procedural unfairness unlikely to be resolved internally, since the decision to seek legal advice and use flawed legal argument to bring the complaint to a close must have been a policy one. Further explanations concerning this case example are provided in ssubdr242part4.

Consistency of the quality of service provisions and in decision-making varies enormously between schemes, despite any efforts to minimize this. Peter Mair's

submission 112 and Professor Luke Nottage's submission 114 to the PC highlight some concerns and these are further discussed in considerable detail in subdr242part4.

Investigations of complaints by industry-specific complaints schemes do not involve direct mediation with face to face contact between disputing parties, or any mediation or advocacy at all, and therefore the procedures are more about complaints handling than anything else with conciliatory powers; weak binding powers only if the scheme member is agreeable; and limited jurisdiction. These issues are a significant focus of Part 4, as well as examination of the ADR scenario and the extent to which most of the schemes so labeled can be appropriately included under that heading

There have been no binding decisions made by EWOV in the last four years. At the time of the FOI examination of records by EAG and their disturbing report, only two binding decisions had been made by EWOV between 1998 and 2004.

I refer to the views expressed by Professor Luke Nottage[14] about the remarkable uncertainties surround industry-specific complaints scheme, and in particular the issue of governance under administrative law or contract law in binding decisions.

I also refer to the views expressed by Peter Mair[15] in relation to industry-specific schemes as submitted to the Productivity Commission's now completed Review of Australia's Consumer Policy Framework.

There is also the report by Andrea Sharam (2004),[16] it had been reported that:

> ***"……taking complaints to the EWOV frequently leaves the customer in the position of having an unaffordable instalment plan.***

Complaints figures on their own mean very little without looking at the seriousness of the complaint, how indicative this may be of systemic problems and the generally low figures amongst those who don't complain at all, but silently suffer. That is why EWOV took the step of expressing discomfort in their submission to the AEMC's First Draft Report concerning the use made of relatively low numbers of complaints.

These details are provided to illustrate what has been happening through the existing jurisdiction BHW arrangements in three jurisdictions, Victoria, South Australia and Queensland.

The Complainant's current position is that no contract with the energy supplier existed, ought to have existed or should exist.

The letters of threat have resumed. EWOV has been informed. Further correspondence with the DPI is pending.

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14 Nottage, Luke (Prof) (2008) Response to Productivity Commission's Draft Report subdr114

15 Mair, Peter (2008) Response to Productivity Commission's Draft Report sub 112

16 Sharam A (2004) *"Power Markets and Exclusions"* Financial and Consumer Rights Council, Melbourne Found at *http://www.vcoss.org.au/images/reports/Full%20Report.pdf*

I cite below the deidentified contents of the letters of coercive threat issued addressed to *"The Occupier"* of t the Tenant's premises, being his apartment. There is no energy of any kind associated with hot water provision supplied to his premises facilitating the flow of gas to his premises. Yet he is being held contractually liable for sale and supply of energy and threatened with disconnection of his heated water unless he accepts an explicit contract with the supplier.

He is not prepared to undertake this and believes that the supplier should contact the Landlord directly.

That this was clear evidence of a systemic problem is unquestionable. It was a photocopied letter-box drop and issued to all new tenants taking over tenancy who had not already been coerced in a similar way into forming an explicit contract under pain of disconnection of essential services.

The letters of threat have been resumed.

Both VESC and EWOV refused to deal with the matter as a systemic issue from a statutory policy perspective or from the perspective of supplier conduct.

The first statement of Letter No. 1,[17] taken from the actual wording of a letter received in a letter-box drop addressed to *"The Occupier"* of a residential apartment supplied with bulk hot water through a single bulk gas meter on the common property infrastructure of an OC entity[18] is misleading where gas or electricity provided is not individually measured on site using meter as an instrument that measures the quantity of gas passing through it and associated equipment attachment to that meter. Gas does not pass through water, and neither do individual tenants have separate gas meters to measure actual consumption.

The quoted deidentified letters of coercive threat from a bulk energy supplier is taken from an actual letters of threat received in a letter box drop by an inarticulate, vulnerable and disadvantaged end-consumer of bulk energy with a serious incurable mental illness and a parasuicide history at an exceptionally vulnerable point in his medical history who had no previous knowledge of the existence or the bulk energy supplier; nor any perception of any contractual obligation to that supplier; nor indeed any legal obligation under common law contractual provisions and the specific terms of his residential tenancy lease to form any contractual relationship with that supplier, but was nevertheless the victim of more than one unconscionable letter of coercive threat of disconnection

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[17] Though listed as Letter No. 1 may have been the second such letter, with the first being inadvertently discarded as junk mail, being addressed to the new "The Occupier" of rented premises. The previous tenants had explicitly confirmed that no water charges hot or cold were applicable in the absence of water efficient devices, and secondly, in the absence of individual gas meters measuring the heating component of bulk hot water. The residential tenancy lease made no mention of additional charges water, hot or cold, or for the heated component of water provided.

[18] Refer to *Owners Corporation Act 2006* and responsibilities of such entities
Refer also to the specific terms of the revised Memorandum of Understanding dated 21 October 2007 between the Essential Services Commission (Victoria) and Consumer Affairs Victoria, the peak Victorian consumer body with regulatory responsibility for the Owners Corporation Act, 2006, the *Residential Tenancies Act 1997;* the *Fair Trading Act 1999,* and some 47 other enactments.

within seven days of essential services (hot water supplies) already included under the terms of his rental lease.

Even after establishing from the energy-specific complaints scheme that the recipient had such a history and peculiar vulnerabilities, the retail energy supplier of bulk energy to a multi-tenanted property shamelessly stated that the same conduct would be perpetuated anyway, on the basis that current regulatory policy sanctioned it. If that is the interpretation made of policy, or indeed the intent of the policy, something is wrong, and needs to be urgently corrected in the public interest.

Letter 1

Reproduced deidentified contents of coercive letter of threat delivered as a photocopied letter-box drop to a real-life residential tenant, in this case an inarticulate vulnerable and disadvantaged end-consumer of bulk energy whose energy consumption could not possibly be accurately measured through the methodologies sanctioned by policy-makers and energy regulators, being such methodologies as contravene the intent and spirit of trade measurement practice and equivalent to measuring a bag of apples with an oil funnel.

Date

"As you may be aware your hot water supply is provided through a communal or 'bulk' service and its body corporate. We are writing to advise that the body corporate has chosen (name of company) to supply the gas for this service.[19]

This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment[20]*. In order to do this we need to set up an account for you.*[21]

[19] This first sentence implies a contract with the Body Corporate who chose the supplier. A supply charge applies before any tap is turned on simply because of the provisions for the gas to be supplied to the metering infrastructure. The landlord commences to take supply from the moment of accepting the arrangements and allowing the metering equipment to be installed. The single bulk gas meter for each building is readily accessible and situated on common property infrastructure. Under the law the Landlord or OC is responsible for common property infrastructure. The landlord cannot charge for gas that cannot be measured with an instrument designed for the purpose that can be accurately apportioned to the end-user.

[20] This statement is misleading and does not explain what is meant by individual monitoring. Some would take it to mean that separate gas meters existed

[21] This statement does not in any way explain the implications of a deemed contract unilaterally imposed, the basis for calculation of contractual imposition or the obligations expected under the implied contract.

Please contact us on (telephone number provided) to set up your account or alternatively complete the form below and return it in the reply paid envelope provided (no stamp required).

If we don't hear from you within seven (7) days from the date of this letter, your apartment's hot water supply may be disconnected until were receive your details.[22] *Please note that any of the information you give to us is treated confidentially, in line with privacy laws.*

As a gas and electricity retailer, we can also supply your other household energy needs. If you would like more information on this, please mention it when calling and we'll be happy to help.[23]

We'd like to thank you in advance for your assistance and take this opportunity to welcome you to (name of energy supplier)"

Signed: Billing Manager

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title_____ 2. First name_____ 3. Surname_____
4. Supply address **<<street>>, <<suburb>><<state>><<postcode>>**
5. Supply address (if different from above)_____
6. Postal address (if different from above)_____
7. Telephone number (B/H)_____ 8. Telephone number (A/H)_____
9. What date did you take possession of the property_____
10. Do you own or rent the property? (please tick) Owner □ (if owner, go to question 14) Tenant □
11. If tenant – Landlord/Agent name_____
12. Landlord/Agent address_____
13. Landlord/Agent telephone number_____
14. Your Date of Birth_____ 15. Drivers Licence number_____
16. Do you qualify for a Concession? (please tick) Yes □ (if yes, go to question 17) No □
17. Concession type_____ Card number_____ Expiry date_____

[22] This is where the threat lies. It is an unwarranted and unjust demand to form a contractual relationship with the wrong party. The notice time is 7 days not 10 and is an unjustified coercive demand to set up an explicit contract without explanation as to why a deemed contract is assumed

[23] Following on form a coercive threat to disconnect without showing just cause this is an insult. The 7letter does not specify whether the intent was to disconnect water or gas

Letter 2

Further Deidentified coercive letter of threat send to a real-life residential tenant:

(this was taken to be the second such letter, but on reflection and looking at the dates again there may have been one that was missed altogether as junk mail addressed to "The Occupier" of rented premises who had recently assumed tenancy

Issued during the course of an unresolved complaint before the industry-specific complaints body in contravention of the provisions of the *Fair Trading Act 1997* and the applicable *Energy Retail Code,* besides being an unconscionable letter of threat after being notified of the peculiar vulnerabilities of the recipient of coercive threat. That the breaches occurred is unquestionable

"Your hot water supply is provided through a communal bulk service by your building or body corporate. (Name of energy supplier) owns the water meters and supplies the gas for this service.[24] *The hot water is individually monitored and the quantity used by each apartment is billed directly to each apartment."*[25]

"This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment. In order to do this we need to set up an account for you."[26]

"Our records show that hot water is being consumed through your meter[27] *but an account has not yet been established for you. Please contact us on (telephone number given of energy supplier) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required)."*

[24] Ownership of the water meters does not impose any contractual relationship. The supplier is licenced to sell gas not water.

[25] The phrase individually monitored is misleading

[26] No gas passes through water meters. Individual consumption of the energy used to heat each tenant's actual share of energy cannot be calculated using the practices in place. These will in any case become invalid and illegal when the remaining utility restrictions are lifted under national trade measurement laws and meanwhile contravene the spirit and intent of those laws and best practice.

[27] The use of the term meter misleadingly implies a gas meter that is individual to the tenant. Retailers are licenced to sell gas or electricity not composite products. The water is supplied by the water authority and paid for by the Owners Corporation. The cost of water hot and cold is included in the rent.

"If we don't hear from you within seven days from the date on this letter[28] we may need to initiate steps for disconnection of your apartment's hot water supply.[29] If this occurs we will not be able to connect this service until we receive your details.[30] Please note that any of the information you give us is treated confidentially in line with privacy laws."

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title_____ 2. First name_____ 3. Surname_____

4. Supply address **<<street>>, <<suburb>><<state>><<postcode>>**

5. Supply address (if different from above)_____

6. Postal address (if different from above)_____

7. Telephone number (B/H)_____ 8. Telephone number (A/H)_____

9. What date did you take possession of the property_____

10. Do you own or rent the property? (please tick) Owner □ (if owner, go to question 14) Tenant □

11. If tenant – Landlord/Agent name_____

12. Landlord/Agent address_____

13. Landlord/Agent telephone number_____

14. Your Date of Birth_____ 15. Drivers Licence number_____

16. Do you qualify for a Concession? (please tick) Yes □ (if yes, go to question 17) No □

17. Concession type_____ Card number_____ Expiry date_____

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[28] This was a junk mail letter that was placed in the letter box of the Tenant. It had a most detrimental impact on the consumer at a time of instability and stress. Again it was an unjustified and coercive threat of disconnection of essential services, with reconnection only possible after formation of a contract by identifying. Such a communication assumes that the complaint has seen and understood it. There was no follow up or further explanation. This communication was issued whilst a complaint was still open before the Complaints Scheme and therefore in contravention of the provisions.

[29] This is a further threat of disconnection that is coercive, unwarranted and unjust. This time it is clearly that the intent is to disconnect hot water supplies. Again the licence covers gas not hot water supplies.

[30] This is a further threatening an coercive statement that is unjustified

Letter 3

Further Deidentified coercive letter of threat send to a real-life residential tenant:

This third letter was received by post some weeks after closure of a file that had remained open before EWOV, the industry-specific complaints scheme for 18 months. Despite regulator and policy-maker involvement (VESC and DPI) the matter remains unresolved and contested as to the existence of any contractual relationship with the supplier, necessity to form one, or to facilitate one

This letter refers to a previous letter of a month earlier which appears to have been either missed, not sent or discarded as junk mail

Dear Sir/Madam

Your Hot Water Supply

Further to our recent letter dated (date given) we are writing to request your assistance once again.

Your hot water supply is provided through a communal to 'bulk service" by your building and/or its body corporate. (Supplier's name) owns the hot water meters and supplies the gas for this service. The hot water is individually monitored and the quantity used by each apartment is billed directly to the respective apartment

Our records show that hot water is being consumer through your meter but an account has not yet been established for you. Please contact us on (Telephone number provided) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required)

If we don't hear from you within (7) days from the date on this letter, we may need to initiate the steps for disconnection of your apartment's hot water supply. If this occurs, we will not be able to reconnect this service till we receive your details. Please note that any of the information you give to us is treated confidentially, in line with privacy laws

As a supplier of gas and electricity, we can also assist you with your other household energy needs. If you would like more information on this, please mention it when calling and we'll be happy to help.

Thank you for your corporation

Yours sincerely

(name) Billing Manager (host energy retailer)

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title_____ 2. First name_____ 3. Surname_____

4: Supply address[31] (apartment no and street address inserted)

5. Supply address (if different from above)_____

6. Postal address (if different from above)_____

7. Telephone number (B/H)_____ 8. Telephone number (A/H)_____

9. What date did you take possession of the property_____

10. Do you own or rent the property? (please tick) Owner (if owner, go to question 14) Tenant

11. If tenant – Landlord/Agent name_____

12. Landlord/Agent address_____

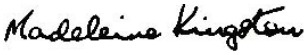
13. Landlord/Agent telephone number_____

14. Your Date of Birth_____ 15. Drivers Licence number_____

16. Do you qualify for a Concession? (please tick) Yes (if yes, go to question 17) No

17. Concession type_____ Card number_____ Expiry date_____

[31] Supply address and supply point are synonymous terms meaning gas connection facilitating the flow of energy to identified premises. These terms do not have postal connotations and do not refer to living space. They are very specific in the legislation and the Gas Code in relating to an energy connection point. No such connection point in relation to the hot water supplied exists. The heated water is reticulated in water pipes to the individual apartments after being heated in a communal water tank on common property infrastructure. There is no authority within current provisions to disconnect water. The provisions relate to gas or electricity.
Ownership of the hot water flow meters does not create a contractual relationship. There is no evidence that the meters were fitted in accordance with water authority regulations or licencing. Even if they had, the supplier is endeavouring to charge for energy, which cannot be measured with a water meter, and notwithstanding policies in place.



Prepared by Madeleine Kingston

ATTACHMENT [32]

LETTERS OF COERCIVE THREAT BY A HOST ENERGY SUPPLIER (actual wording)

PARODIED VERSION ANALYSIS

DISCUSSION OF IMPLICATIONS OF UNJUST DEEMED CONTRACTUAL STATUS FOR RECIPIENTS OF COMMUNALLY HEATED WATER RECEIVING NO FLOW OF ENERGY

[32] Attachment 10 Deidentified Case Study refers. See also other case studies as attachments and main submission

PARODIED PARAPHRASED VERSION OF LETTERS OF THREAT

Providing modified informed consent under threat

See legal metrology and contractual implications, as well as conflict and overlap with other schemes, including residential tenancy; owners' corporation and the spirit and intent of national trade measurement regulations current and proposed Perhaps this more extended paraphrased version of the implicit messages contained in the two intercepted threats of disconnection of essential services.

"The Policy-Maker and Regulator have allowed retailers directly or through various 'metering services' and 'billing services' to use water meters to pose as gas meters.[33]

It would take too long to explain to you the confusing practically unintelligible algorithm formula used to calculate the deemed heating component of your heated water consumption. The use of such formulae means that we don't have to bother about any of those issues which saves processing time and means we can outsource metering and billing issues, factor in the add-on costs and still make a profit – at your expense.

I don't understand the Guidelines myself, which will soon be transferred to the Energy Retail Code, which will make it look more formal[34] *.*

I don't have any copies with me but the Regulator will confirm that this practice is fine.

We just do the best we can with estimates and deemed consumption and notify you of your deemed status just as soon as we are able. It is no use talking to me about contract law or legal traceability as that is too complicated for me to go into.

Though we are licenced only to sell energy, we arranged to purchase satellite water meters so that we could claim that we are monitoring your "hot water consumption" for the water used and if necessary force you into a contract by threatening disconnection of your hot water.

These hot water flow meters are theoretically used to calculate your gas usage for the heated component of the water you actually use. We know you don't have keys to the boiler room and probably don't feel very comfortable about a contract which forces you to recognize the gas meter as an appropriate instrument through which gas can be measured for your individual consumption of the heated component of your water.

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[33] Policy guidelines and deliberative documents do exist. These carry no weight in law. Transfer from deliberative documents and Guidelines to an Energy Code will not help to validate them any further. The energy legislation refers to a meters as instrument that measure the quantity of gas that pass through that instrument and its associated metering installation to filter control and regulate the flow of gas through that equipment. Water meters are not such instruments, but they pose well as ancillary gas meters and they are allocated them proper meter numbers under the *"gas usage"* column of the bill so everything looks to be in order. The actual energy meter is given a number with an MIRN prefix, and there is normally only one of these in a bulk hot water gas installation. However, many apply supply charges just the same; and some apply commodity and water meter reading charges as well, which escalate the costs

[34] This occurred following the 2008 ESC Review of Regulator Instruments, creating v6 of the Energy Retail Code. Further amendments were made in February 20010, effective from April 2010. The entire interpretation section is included as an Appendix elsewhere.

We just divide amount of water used by the number of tenants on the block and that is how we can make estimates how much deemed gas was actually used to heat the water you actually receive.

The hot water flow meters (or in some cases just a master cold water meter) are there mostly for looks because we are not actually required to read any meters on site. This was thought to be too expensive an exercise and time-consuming and may lead to price shock to end-consumers.

Many claim that they are not legally contractually obligated in any case, and the bills should go to the Landlord or Owners Corporation, but that is beside the point.

When smart meters go in remote disconnection can occur, but for water meters effectively used as gas or electricity meters this presents a problem for us since for multi-tenanted dwellings we are disconnecting hot water flow meters instead of gas and electricity meters.

In Victoria the calculation formulae policy used is subject to change by the policy maker Department of Primary Industries or the Essential Services Commission, whichever of the two is holding the ball at the time. The repeal of the Guideline may mean that the some of the crucial documents providing information about how calculations are made may not be as available as before online. Whilst I cannot predict precisely how the formulae will work, I know a little about the rationale that was adopted without altogether understanding the finer details.

Algebra was never by strong point at school so no use asking me how to interpret it all. In any case I am only the messenger as the energy supplier has offloaded these unattractive duties to third parties. As far as I can recall, the formulae goes something like this, but don't ask me to explain what each of the letters mean, I couldn't tell you and I am no good at maths as I said

Definition

*Cost of supply (Charge) 'theoretical' revenue = (B) = (L * X) + (M * Y) + (N * Z)*

No site readings necessary but we can charge supply and other commodity charges to everyone and perhaps even water meter readings. We do not have to declare each component of non-energy charges.

Where L = megajoules recorded as master meters (supplied by retailers)

X – Tariff 10 commodity charge (as per government gazette)

M= Tariff 10 commodity charge (as per government gazette)

Y = Tariff 10 per site supply charge (as per government gazette)

I don't understand the Guideline or Code myself and I don't have any copies to provide you or the deliberative documents that explain it further but the Regulator will confirm that this practice is just fine. They will stand by us on this so we have every confidence that you will eventually be forced to accept this deemed contract.

Even though gas does not pass through water meters we have been allowed to make a magical calculation by dividing this number by that in a process of complicated algebraic algorithm formulae. This helps us to can figure out with some creative

guesswork how much heat is used in your portion of the heated water supplied from the communal water tank.

We were even told that we don't need to read the meters, but we've installed water meters just in case. These are either leased or purchased outright by retailers. We can apply a water meter reading charge, and meter maintenance charges, either bundled or unbundled (for example supply charges, commodity charges, hidden FRC charges, other cost-recovery for unrelated costs incurred) directly or through our contracted metering and billing service every two months. These services are known as backroom tasks and are generally arranged through Distributors. The retailers' job is just to sell energy.

The charges will be in cents per litre even though gas does not pass through water meters and gas is normally measured in megajoules. But in Victoria and South Australia we will place MJ/litre also on the bill so if looks as if gas is involved in the calculation. In Queensland we only have to show cents/litre. Either way we use water volume to calculate actual gas usage by each individual in separate residential premises in multi-tenanted dwellings. However, all we are required to do theoretically is to read the water meters. Site reading is not essential.

Even though we don't have to take a meter reading, we are entitled to charge each tenant on the block for water meter reading. This is because the gas (or electricity) distributor charges us. The charge for manual reading is much lower than for remote reading, but we only have to worry about manual reading if your meter was installed before July 2003. Eventually for those using electricity and hopefully also gas they will be able to make a remote disconnection so it saves us all this walking around and extra costs.

You will be charged according to how many litres of hot water is registered on your hot water flow meter, that is water volume, (or as calculated from a master cold water meter) even though we cannot precisely measure the amount of gas used or how hot or satisfactory it is, or whether you were actually residing in the apartment during part of all of the billing period. We also cannot know how many residential tenants or visitors may be using heated water, and this does not matter since we are just required to divide the total usage of gas by the number of residential premises involved to calculate each party's share or deemed gas or electricity usage.

Billing cycles that fall between move –in and move-out events cannot take account of these movements, since because of the method used to calculate cost, whoever is in tenancy at the time the bill must pay for "hot water services" according to the billing cycle. This means some new tenants may finish up paying for part of someone's bill. Unfortunately there are no provisions to lodge complaints to energy and water ombudsmen on issues such as this.

Supply charges will be calculated by reading a single bulk gas meter and dividing the supply costs to a single energization point by the number of tenants(or other occupiers) residing in the apartment block. If someone leaves during a billing cycle the next person inherits the bill. If someone is staying elsewhere for the whole billing period, the simple calculations permitted mean that everyone has to take equal share.

If there are several parties living in one apartment and only one occupier in another, the deemed share of energy is evenly divided.

Some retailers charge for a water meter reading fee because the distributor charges for that so they have to make a cost-recovery, even though we are not licenced to sell water and do not own the water in any case. We are entitled to charge each tenant on the block for water meter reading, but sometimes it is just call it a supply charge, rolled over charge or commodity charge.

There is really only one master gas meter (or electricity meter) with a single number called an MIRN. For settlement purposes through VENCorp[35] *regards the gas meter as a single supply point. In addition, as far as I know the Gas (Residual Provisions) Act 1994 regards supply points used to heat communal water tanks as single supply and billing points, but these new rules mean we don't have to bother about those things. We can make cost-recovery many times over by charging each individual tenant for services supplied to a single gas master meter for which the landlord contracted, all the better.*

For our purposes we regard your apartment as being the supply address. Some people say that supply address/supply point are technical terms meaning energy connection energization or re-energization point, we prefer to use it as a postal term referring to your premises. It is no use talking to me about "flow of energy" as I am only the messenger instructed to issue you with disconnection warnings if you don't sign up.

We know you do not have a supply (re-energization) point in your apartment associated with your bulk hot water supplies, and that the water is reticulated to your residential premises in water pipes through which no gas can pass.

In any case the water meter does a pretty good job as a substitute ancillary meter so we just measure the quantity of hot water you consume and work out by a deemed guess how much gas it took to heat it.

However, we can't vouch for water temperature or quality or anything else and there seem to be no real rules about water meter maintenance.

Ambient pressure and temperature also affect the relationship between volume and heating value supplied. For example, a 2.7 degree Celsius change in air temperature will result in a 1% change in accuracy of gas supplied.

However, these are not matters that can be addressed when considering water quality and temperature, since our focus is on water volume only.

The regulator told us this would be a fair and reasonable way so we can just determine how much water in total everyone has used and then make a guess as to how much gas was used to heat that water and then determine how much deemed hot water you actually received.

As mentioned, we just divide volume of water used by the number of tenants on the block and that is how we calculate how much gas was actually used to heat the water you are using.

We don't concern ourselves too much about heating value, ambience or any of the other technical details since the focus of our trade measurement practices is simply water volume and guestimates about individual usage by tenants in apartment blocks and flats

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[35] Now incorporated under the Australian Energy Market Operator

Some say that there is an important relationship between the energy supplied to a customer versus the volume supplied to a customer. The gas meter records gas volume. The gas bill normally is based on energy supplied. The hot water flow meter can only calculate water volume not heat or energy.

The Code that the Regulator provides says we don't have to actually do any meter reading because site visits are too expensive for us and mean two trips to read the gas meter on the wall of the car park and also the water meters in the boiler room. We need the water meters so that if we find that a tenant is not really cooperative about signing up we can threaten to disconnect his hot water supplies. That is a strategy that normally works.

Sometimes we go ahead with the disconnection of heated water by clamping the hot water flow meters. In those cases unless a tenant signs up and pays a reconnection fee, hot water services are permanently suspended. I read about a case like that not so long ago, but can't remember where I saw it.

The energy laws say disconnection refers to gas or electricity, but it is overlooked if we choose to suspend the heated water supplies instead. It is not practical to cut off the gas or electricity in these cases as there is only one master gas meter and it would affect all the other tenants.

You probably would not buy a bag of apples if someone tried to weigh them in an oil funnel but this is just hot water and there are many ways to find out how much as you use that don't rely on a separate gas meter for you or any party uses in multi-tented dwellings. We are using one of those ways and we need you to agree to a contract if you want your hot water supply to be continued.

We have concluded that as there are ten apartments on this block. We arranged to purchase satellite hot water flow meters so that we could claim that we are monitoring your gas consumption for the water volume used. These arrangements were adopted prevent price shock to you. They won't guarantee prevention of rent hikes, and there is the question of additional charges for water meter reading fees, commodity and other supply costs and water meter maintenance costs which will bump up your bill. It must be confusing for you to figure out whether this is a water or energy market but those are the Rule or Codes.

Just for our protection we need you to take contractual responsibility for paying all gas consumption charges that we can individually monitor through your water meter theoretically reading the single master gas meter on the wall of the car park and the satellite water meters in the locked boiler room. We calculate volume of water used in total and how much gas in total was used to heat the boiler tank.

The main thing is that we can individually monitor your consumption through your water meter.

Even if you have an arrangement with the landlord and your mandated lease arrangement indicates that hot and cold water are included in your rent, those are matters for your and your landlord.

We just act as metering and billing agents and have the Landlord's or Owners' Corporation blessing to bill you directly under pain of disconnection of your heated

water services. The energy retailer and distributor believe that if they own or lease the water infrastructure hot water or cold flow meters), a contact with you is immediately determined even if you receive no flow of energy to your apartment.

The energy regulator says it is OK for us to bill you a second time for water because the Tenancy Act does not cover it, so we are in the clear with that.

Metering services have become a new and mushrooming industry, and does not carry as much risk as the hedging arrangements that retailers are obliged to cover.

The distributors set the price; retailers carry the risk and arrange for the marketing of energy, metering services can focus on issues that carry minimal risk.

In outsourcing metering, backroom and IT tasks to others we have to up the costs to cover middlemen expenses, but we just add this to your end-user costs and don't have to bear this cost personally as a commercial company. We have enough to worry about with hedging arrangements so can't take on all price shocks and feel these should be equally shared.

Even if you have an arrangement with the landlord and your lease indicates that heated water is included in your rent because of the standard lease protections in the Tenancy Act and the absence of a separate gas meter for the heating component, that is a matter for your and your landlord.

The Water Authority sells the water to the Owners Corporation at the outlet of the mains meter and after that it is a free for all. The commercial opportunities are huge.

I don't know anything much about the Residential Tenancies Act, but someone mentioned that if you think these arrangements are unfair you can always pay us upfront, give the bill to your landlord, allow him 28 days to pay and if he does not agree to reimburse you can pay filing fees to VCAT every three months to reclaim the money. We know it's inconvenient and costly and your filing fees over several visits might diminish or even cancel out the value of reimbursement. But that's the best we can suggest for you. Life is full of things that are unfair and VCAT understands that. That is what s55 is for.

It's just that we don't have the time to chase up the landlord and he is never around when we need to get to the meter, so we need to hold someone responsible.

If you have a problem with this you can always ask you landlord to refund you, but if he does not agree you can reclaim costs through VCAT after paying a filing fee. You need to give your landlord 28 days to decide whether he will reimburse you before you can go to VACT to reclaim the money, so we know it's inconvenient and costly and your filing fees over several visits might diminish the value of reimbursement. Sometimes even VCAT Orders for reimbursement don't work out as the Landlord refuses to pay.

It's just that we don't have the time to chase up the landlord and he is never around when we require to get to the meter, so we need to hold someone responsible. Therefore once you sign up with us and provide your details, we will hold you responsible to provide us with safe unhindered and convenient access to the water meters, even if they are locked up and you don't have the key. The energy laws call this a "condition precedent."

These hot water flow meters are theoretically used to calculate your gas usage for the heated component of the water you actually use. We know you don't have keys to the boiler room and probably don't feel very comfortable about a contract which forces you

to recognize the gas meter as an appropriate instrument through which gas can be measured for your individual consumption of the heated component of your water.

Even though we don't have to take a meter reading, we are entitled to charge each tenant on the block for water meter reading. This is because the gas (or electricity) distributor charges us. The charge for manual reading is much lower than for remote reading, but we only have to worry about manual reading if your meter was installed before July 2003.

Even though there is only one gas bulk meter supplying the single boiler tank that sends water to each tenant on the block, we can charge for water meter reading costs we can charge each tenant for calculating their gas consumption. That is part of the deal.

No-one has taught us much about contract law, substantive unfair terms or principles of legal traceability in calculating consumption of measurable commodities, but if you need a lawyer I am sure Legal Aid or one of the community agencies can get you the advice you need about that. Poor funding may mean a long wait or no assistance at all, so I urge you to sign up if you want your heated water supplies to continue.

The reason that we prefer also to have landlord details is that if anything goes wrong and you are unable to pay up for energy that you don't receive in the first place, we can always shift the contract back to the Owners' Corporation who permitted us to install the water meters and requested the installation of the single gas meter used to heat the single boiler tank at the time that the building was erected.

These letters are addressed to "The Occupier" until we can get someone to sign an explicit contract. Most people feel a bit intimidated by the prospect of losing their hot water within a week to ten days, so they give in without a fuss. After that it is plain sailing because we can quickly set up an account for you and make you contractually responsible.

The quickest way for us to let everyone know what we expect is to send a "vacant consumption letter" like this to everyone by making a letter box drop. It may sound like a threat to you but its all part of a normal day for us. It's not intended personally so you should not let if upset you. You have 7 days to pay up but we can stretch it to 10 to meet the regulatory requirements, but that is all. Sign up or lose your hot water services altogether. Our excuse is that you have not provided your personal identification details or provided access to the water meters that we use to calculate your gas consumption.

Therefore once you sign up with us and provide your personal identification details and those of your landlord, we will hold you responsible to provide us with safe unhindered and convenient access to the water meters that are theoretically used to calculate your gas usage for the heated component of the water you actually use. These are called conditions precedent and subsequent.

The Guideline that the Regulator provides says we don't have to actually do any meter reading because site visits are too expensive for us and mean two trips to read the gas meter on the wall of the car park and also the water meters in the boiler room. These readings are often taken two or three months apart so very difficult to match up dates and actual consumption and does not take account of any tenant movement or absence from

the property. We knew there would be some inequities built in to the scheme but we can't please everyone.

Some of the information required is beyond what the Energy Code actually requires but we need this for our own records.

We know you don't have keys to the boiler room and probably don't feel very comfortable about a contract which forces you to recognize the water meter as an appropriate instrument through which gas can be measured for your individual consumption of the heated component of your water.

It's just that we don't have the time to chase up the landlord and he is never around when we need to get to the meter, so we need to hold someone responsible. Therefore once you sign up with us and provide your details, we will hold you responsible to provide us with safe unhindered and convenient access to the water meters, even if they are locked up and you don't have the key. The energy laws call this a "condition precedent."

Sometimes we go ahead with the disconnection of heated water by clamping the hot water flow meters. In those cases unless a tenant signs up and pays a reconnection fee, hot water services are permanently suspended. I read about a case like that not so long ago, but can't remember where I saw it.

The laws say disconnection refers to gas or electricity under the energy laws, but it is overlooked if we choose to suspend the heated water supplies instead. It is not practical to cut off the gas or electricity in these cases as there is only one master gas meter and it would affect all the other tenants.

The reason that we prefer also to have landlord details is that if anything goes wrong and you are unable to pay up for energy that you don't receive in the first place, we can always shift the contract back to the Owners' Corporation who permitted us to install the water meters and requested the installation of the single gas meter used to heat the single boiler tank at the time that the building was erected.

We need the water meters so that if we find that a tenant is not really cooperative about signing up we can threaten to disconnect his or her hot water supplies. That is a strategy that normally works but you are not meant to take it personally; it's just part of the process. You will have to be a bit more diligent about protecting your rights when the remote control options for disconnection become available.

You will find these definitions in the Energy Retail Code as transferred from the existing Bulk Hot Water Charging Guideline 20(1). One revision of the Energy Retail Code (Vict) became effective on 1 January 2009

***gas bill** means a bill or account issued by a licensee to a customer for the supply or sale of gas;*[36]

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[36] Gas cannot be said to be sold or supplied unless there is a) an actual connection facilitating the flow of gas; the gas is transmitted in gas service pipes directly to the alleged recipient of that gas. Neither is the case when end-users of heated water receive a composite water product that contains no gas at all. The water meters measuring water consumption cannot measure either heat or gas. No gas pipes lead from the water tank, misleadingly referred to as a bulk gas hot water system, which implies that it is gas that is reticulated in gas service pipes. No such thing occurs. Water is transmitted in water service pipes not gas pipes or electrical conduits. No gas passes through hot water flow meters. No energy at all is

gas bulk hot water *means water centrally heated by gas and delivered to a number of* ***customer supply addresses***[37] *where the* ***customer's*** *consumption of hot water is measured with a* ***meter***[38] *and where an* ***energy*** *bill is issued by a* ***retailer****.*

gas bulk hot water rate *means the gas price in cents per litre*[39] *that is used by a* ***retailer*** *to charge* ***customers*** *for* ***energy*** *in delivering* ***gas bulk hot water****.*

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received by end-users of "bulk hot water" and no legally traceable measures are available through which alleged gas or electricity consumption can be achieved within the existing BHW arrangements in three jurisdictions.

37 The term supply address is mistakenly used within the *Energy Retail Code* as implying the residential premises of an end-user of utilities. In fact for energy it is a technical term meaning supply or connection point in which a flow of energy is facilitated directly to the premises deemed to be receiving the energy. In the case of heated water, the energy is not so supplied and there is no flow of energy except to a single supply point/supply address on common property infrastructure supplying heat to a single communal water tank from which water as a composite product is reticulated to individual residential premises within multi-tenanted dwellings

38 The volume of water consumed can indeed be measured with a hot water flow meter. This device cannot measure heat or gas volume or electricity. It simply measures water volume. The BHW arrangements endorse the application of conversion factors that cannot possibly calculate or approximate the amount of gas used. Though bills issued show a column marked "gas usage" with precise figures in this column, as well as entries against heating value, which also cannot be calculated; and a meter identifying number other than an MIRN, all implying the existence of a gas meter, there is in fact no question of being able to calculate gas usage by using a hot water flow meter. By referring simply to meter and not clarifying this on communications or on the bills, a misleading impression as to the validity of the calculation is gained.

Energy providers are licenced to sell gas or electricity not heated water supplies. Disconnection notices not blatantly refer to disconnection of hot water services, though and energy provider has no licence from the economic regulator or water provider to sell, supply or disconnect this.

Disconnection under the *Gas Distribution System Code* has a particular meaning "*the separation of a natural gas installation from a distribution system to prevent the flow of gas."*

Alternatively *decommissioning* in relation to a *distribution supply point*, is to take action to preclude gas being supplied at that *distribution supply point* (e. g. by plugging or removing the *meter* relating to that *distribution supply point"*

39 This represents appalling trade measurement practice and against the spirit and intent of trade measurement laws. When remaining utility exemptions are lifted this will be an invalid calculation and will show inaccurate measurements of the commodity being supplied – i.e. energy. Yet retailers see fit to disconnect water supplies if an alleged energy bill is not paid or contractual relationship formed.

*Regarding billing, there were to be new additions to the Victorian Energy Retail Code which became effective on 1 January 2009. The changes represented mostly transfer from the Bulk Hot Water Charging Guideline 20(1) which is to be repealed This apparently means that where a **retailer** charges for **energy**[40] in delivering either **gas bulk hot water** or **electric bulk hot water** to a **relevant customer**, the **retailer** must include at least the following information (as applicable) in the **relevant customer's** bill:*

*the relevant **gas bulk hot water rate** applicable to the **relevant customer** in cents per litre*

- *the relevant **electric bulk hot water conversion factor** for **electric bulk hot water** in kWh/kilolitre;*
- *the relevant electricity rate(s) being charged to the **relevant customer**[41] for the electricity consumed in the **electric bulk hot water** unit in cents per kWh;*
- *the relevant **electric bulk hot water conversion factor** for **electric bulk hot water** in kWh/kilolitre*

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[40] The retailer does not deliver energy at all to the end-user of heated water products. The water received is a composite product delivered in water pipes. The energy is supplied to a single gas meter (or electricity meter) on common property infrastructure and is used to heat a communal water tank belonging to the Landlord. The heated water is a mandated part of residential tenancy leases in the absence of a gas meter (or electricity meter) and an integral part of the tenancy arrangements. The energy regulator and policy-maker have made arrangements that could be construed as 3-way cartel arrangements, encouraging landlords to dishonour their residential tenancy obligations; forcing retailers to use methods that are legally and technically unsustainable and unsound; that violate best practice trade measurement practice; that conflict and overlap with other regulatory schemes and with the enshrined rights of individuals under multiple provisions in the written and unwritten laws.

[41] A relevant customer under the legislation is one who consumes no more than 10,000 GJ of gas per annum, and is not restricted to a natural person. The ERC has endeavoured to re-define legislated definitions such as meter (*Gas Industry Act 2001*) which in the legislation and the Gas Distribution System Code is defined as an instrument through which gas flows, instead of the new creative definition for BWH provisions as a meter as a device that measures the volume of water consumed.
In the context of the deemed provisions under s46 of the *GIA*, the sale and supply of gas it is not my view that the express use of the term relevant can be at will substituted for simply the term *"customer"* within the more general provisions of the GIA without distorting the intent of the deemed provisions.
Such a substitution which extends the definition of the term "customer" to include "a person to whom a gas company transmits, distributes or supplies gas or provides goods or services" (s3) disregards that the unqualified term "customer" (rather than "relevant customer" is intended to include services such as metering services provided to Landlords and owners/Corporations. These are not the type of goods and services referred to where gas is supplied to end-users of heated water, where no direct connection point exists (supply point or supply address; where no gas of any description enters the residential premises of such an end user of composite water products and where no gas infrastructure
In any case if the term relevant customer can be taken to mean both a Landlord and/or Body Corporate and a residential tenant, for example a user of heated water services

- *the total amount of **gas bulk hot water**[42] or **electric bulk hot water** in kilolitres or litres consumed in each period or class of period in respect of which the relevant **gas bulk hot water rate** or electricity tariffs apply to the **relevant customer** and, if the **customer's meter** measures and records consumption data only on the accumulation basis, the dates and total amounts of the immediately previous and current **meter** readings or estimates;*
- *the deemed **energy** used for **electric bulk hot water** (in kWh); and*
- *separately identified charges for **gas bulk hot water** or **electric bulk hot water** on the **customer's** bill.*

*CF = the **gas bulk hot water conversion factor** = 0.49724 MJ per litre*

***gas bulk hot water tariff** = the market tariff applicable to the **bulk hot water** unit B. **Retailer** provided **gas bulk hot water** per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant **gas bulk hot water** unit divided by the number of **customers** supplied by the relevant **gas bulk hot water** unit.*

***Retailers** may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.*

*C. **Customer gas bulk hot water** charge (cents) = the **customer's** metered consumption of hot water (litres*
** **gas bulk hot water** price (cents per litre)*
*+ **customer's** supply charge (cents)*
*A. Where **customers** are charged for **energy** in delivering **electric bulk hot water** either by their local **retailer** or pursuant to a **market contract** the **Customer electricity bulk hot water** charge (cents) = the **customer's** metered consumption of hot water (kilolitres)*

A further revision to the Energy Retail Code, v 7 (February 2010) becomes effective in April 2010

This is how we have been asked to charge from April 2010:

Gas Bulk Hot Water Pricing Formulae

A. Gas bulk hot water rate (cents per litre) = CF (MJ per litre)

** gas bulk hot water tariff (cents per MJ)*

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[42] The term hot is almost extraneous. The hot water flow meter can withstand heat but cannot possibly measure the amount of heat used by individual end-recipients of heated water a composite product from which the heat cannot be separated.
These devices cannot measure gas volume or electricity or heat (energy). Even a gas meter cannot measure heat. (energy) It can only measure gas volume. Bills are expressed in energy. When water meters are used to calculate heat by conversion factor the result is a rule-of-thumb, imprecise and inaccurate and invalid measurement using an instrument not designed for the purpose. Differentiated between heated and cold water is impermissible if a water meter is being used as the device to measure heat. Even where water meters do exist, a licence to on-sell exists to sell that water, it must be at the cold water rate. No utility that does not have a separate meter is the contractual responsibility of the Landlord under tenancy provisions. The existing energy provisions under codes, guidelines and deliberative documents attempt to re-write contractual law, tenancy and owners' corporation laws and trade measurement laws in spirit and intent.

Where customers are charged by their retailer for energy in delivering gas bulk hot water:

*CF = the **gas bulk hot water conversion factor** = 0.49724 MJ per litre*

***gas bulk hot water tariff** = the **standing offer** tariff applicable to the **gas bulk hot water** unit (gas tariff 10/11)*

*Where **customers** are charged for **energy** in delivering **gas bulk hot water** pursuant to a **market contract**:*

*CF = the **gas bulk hot water conversion factor** = 0.49724 MJ per litre **gas bulk hot water tariff** = the market tariff applicable to the **bulk hot water** unit B.*

***Retailer** provided **gas bulk hot water** per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant **gas bulk hot water** unit divided by the number of **customers** supplied by the relevant **gas bulk hot water** unit.*

***Retailers** may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.*

*C. **Customer gas bulk hot water** charge (cents) = the **customer's** metered consumption of hot water (litres)*

** **gas bulk hot water** price (cents per litre)*

*+ **customer's** supply charge (cents)*

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No-one has taught us much about contract law or informed consent or your common law rights, human rights issues, of regulatory overlap matters but if you need a lawyer I am sure Legal Aid or one of the community agencies can get you the advice you need about that.

*C. **Customer gas bulk hot water** charge (cents) = the **customer's** metered consumption of hot water (litres*

** **gas bulk hot water** price (cents per litre)*

*+ **customer's** supply charge (cents)*

*A. Where **customers** are charged for **energy** in delivering **electric bulk hot water** either by their local **retailer** or pursuant to a **market contract** the*

***Customer electricity bulk hot water** charge (cents) = the **customer's** metered consumption of hot water (kilolitres)*

** electricity tariff rate(s) applicable to the **customer** for the applicable **electric bulk hot water** unit (cents per kWh)*

** CF (kWh per kilolitre*

Where:

*CF = **electric bulk hot water conversion factor** used by **retailers** to bill **electric bulk hot water** customers. The **electric bulk hot water conversion factor** will have a maximum value of 89 kWh per kilolitre. Where **customers** are currently billed using a lower **electric***

bulk hot water conversion factor**, or a lower **electric bulk hot water conversion factor** for the site is assessed, **retailers** must bill **customers** using the lower **electric bulk hot water conversion factor

*The **customer's** electricity tariff must be an off-peak tariff if supplied from an off-peak **electric bulk hot water** unit.*

I shouldn't be saying this but you won't get far with any complaints made as the industry complaints scheme and regulator usually take no action over these matters or have no power to do so, or believe that the policy matters belong somewhere else. The main thing is that competition goals are properly met.

The disconnection part is tricky. If we cut off the gas everyone on the block is affected. If we cut of heated water, we can target just the one tenant but it does mean cold showers and very few comforts. No-one is game to face that especially in winter.

The good thing about deregulation and cost-recovery policies is that we just cannot lose, especially in areas where retail choice is denied to individuals, they are a captured market, live in poorly maintained facilities, have few options for alternative rental property, and find the redress options, if they exist at all intimidating, expensive and stressful.

So the bottom line is that you need to form a contract with us or risk having your water cut off. I shouldn't be saying this but you won't get far with any complaints made and the Regulator usually takes no action over these matters because we are following guidelines codes or Rules made.

If you don't sign up and don't pay then we will consider you to be a bad debtor under a deemed contract. At least that is what I believe the regulations will allow, but no-one is clear enough about the contract law part. I am just doing as instructed because of the guidelines. As far as I know the deemed contract expires after two bills, so after that we have an entitlement to disconnect your water supplies under energy Codes and you will in any case be forced to sign a market contract and a re-connection fee to have your water supply reinstated.

Are there any other services that we can offer you today whilst we are discussing your deemed contract with us for deemed use of gas for heating the apartment block's bulk hot water?"

Letter 1 (actual wording)

Reproduced deidentified contents of coercive letter of threat delivered as a photocopied letter-box drop to a real-life residential tenant, in this case an inarticulate vulnerable and disadvantaged end-consumer of bulk energy whose energy consumption could not possibly be accurately measured through the methodologies sanctioned by policy-makers and energy regulators, being such methodologies as contravene the intent and spirit of trade measurement practice and equivalent to measuring a bag of apples with an oil funnel.

Date

"As you may be aware your hot water supply is provided through a communal or 'bulk' service and its body corporate. We are writing to advise that the body corporate has chosen (name of company) to supply the gas for this service.[43]

This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment[44]*. In order to do this we need to set up an account for you.*[45]

Please contact us on (telephone number provided) to set up your account or alternatively complete the form below and return it in the reply paid envelope provided (no stamp required).

If we don't hear from you within seven (7) days from the date of this letter, your apartment's hot water supply may be disconnected until were receive your details.[46] *Please note that any of the information you give to us is treated confidentially, in line with privacy laws.*

As a gas and electricity retailer, we can also supply your other household energy needs. If you would like more information on this, please mention it when calling and we'll be happy to help.[47]

We'd like to thank you in advance for your assistance and take this opportunity to welcome you to (name of energy supplier)"

Signed: Billing Manager

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43 This first sentence implies a contract with the Body Corporate who chose the supplier. A supply charge applies before any tap is turned on simply because of the provisions for the gas to be supplied to the metering infrastructure. The landlord commences to take supply from the moment of accepting the arrangements and allowing the metering equipment to be installed. The single bulk gas meter for each building is readily accessible and situated on common property infrastructure. Under the law the Landlord or OC is responsible for common property infrastructure. The landlord cannot charge for gas that cannot be measured with an instrument designed for the purpose that can be accurately apportioned to the end-user.

44 This statement is misleading and does not explain what is meant by individual monitoring. Some would take it to mean that separate gas meters existed

45 This statement does not in any way explain the implications of a deemed contract unilaterally imposed, the basis for calculation of contractual imposition or the obligations expected under the implied contract.

46 This is where the threat lies. It is an unwarranted and unjust demand to form a contractual relationship with the wrong party. The notice time is 7 days not 10 and is an unjustified coercive demand to set up an explicit contract without explanation as to why a deemed contract is assumed

47 Following on form a coercive threat to disconnect without showing just cause this is an insult. The letter does not specify whether the intent was to disconnect water or gas

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Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title_____ 2. First name_____ 3. Surname_____

4. Supply address **<<street>>, <<suburb>><<state>><<postcode>>**

5. Supply address (if different from above)_____

6. Postal address (if different from above)_____

7. Telephone number (B/H)_____ 8. Telephone number (A/H)_____

9. What date did you take possession of the property_____

10. Do you own or rent the property? (please tick) Owner □ (if owner, go to question 14) Tenant □

11. If tenant – Landlord/Agent name_____

12. Landlord/Agent address_____

13. Landlord/Agent telephone number_____

14. Your Date of Birth_____ 15. Drivers Licence number_____

16. Do you qualify for a Concession? (please tick) Yes □ (if yes, go to question 17) No □

17. Concession type_____ Card number_____ Expiry date_____

Letter 2 (actual wording)

Further Deidentified coercive letter of threat send to a real-life residential tenant:

(this was taken to be the second such letter, but on reflection and looking at the dates again there may have been one that was missed altogether as junk mail

addressed to "The Occupier" of rented premises who had recently assumed tenancy Issued during the course of an unresolved complaint before the industry-specific complaints body in contravention of the provisions of the *Fair Trading Act 1997* and the applicable *Energy Retail Code,* besides being an unconscionable letter of threat after being notified of the peculiar vulnerabilities of the recipient of coercive threat. That the breaches occurred is unquestionable

"Your hot water supply is provided through a communal bulk service by your building or body corporate. (Name of energy supplier) owns the water meters and supplies the gas for this service.[48] *The hot water is individually monitored and the quantity used by each apartment is billed directly to each apartment."*[49]

"This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment. In order to do this we need to set up an account for you."[50]

"Our records show that hot water is being consumed through your meter[51] *but an account has not yet been established for you. Please contact us on (telephone number given of energy supplier) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required)."*

"If we don't hear from you within seven days from the date on this letter[52] *we may need to initiate steps for disconnection of your apartment's hot water supply.*[53]

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48 Ownership of the water meters does not impose any contractual relationship. The supplier is licenced to sell gas not water.

49 The phrase individually monitored is misleading

50 No gas passes through water meters. Individual consumption of the energy used to heat each tenant's actual share of energy cannot be calculated using the practices in place. These will in any case become invalid and illegal when the remaining utility restrictions are lifted under national trade measurement laws and meanwhile contravene the spirit and intent of those laws and best practice.

51 The use of the term meter misleadingly implies a gas meter that is individual to the tenant.
Retailers are licenced to sell gas or electricity not composite products. The water is supplied by the water authority and paid for by the Owners Corporation. The cost of water hot and cold is included in the rent.

52 This was a junk mail letter that was placed in the letter box of the Tenant. It had a most detrimental impact on the consumer at a time of instability and stress. Again it was an unjustified and coercive threat of disconnection of essential services, with reconnection only possible after formation of a contract by identifying. Such a communication assumes that the complaint has seen and understood it. There was no follow up or further explanation. This communication was issued whilst a complaint was still open before the Complaints Scheme and therefore in contravention of the provisions.

53 This is a further threat of disconnection that is coercive, unwarranted and unjust. This time it is clearly that the intent is to disconnect hot water supplies. Again the licence covers gas not hot water supplies.

If this occurs we will not be able to connect this service until we receive your details.[54] *Please note that any of the information you give us is treated confidentially in line with privacy laws."*

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title_____ 2. First name_____ 3. Surname_____

4. Supply address **<<street>>, <<suburb>><<state>><<postcode>>**

5. Supply address (if different from above)_____

6. Postal address (if different from above)_____

7. Telephone number (B/H)_____ 8. Telephone number (A/H)_____

9. What date did you take possession of the property_____

10. Do you own or rent the property? (please tick) Owner □ (if owner, go to question 14) Tenant □

11. If tenant – Landlord/Agent name_____

12. Landlord/Agent address_____

13. Landlord/Agent telephone number_____

14. Your Date of Birth_____ 15. Drivers Licence number_____

16. Do you qualify for a Concession? (please tick) Yes □ (if yes, go to question 17) No □

17. Concession type_____ Card number_____ Expiry date_____

Letter 3 (actual wording)

Further Deidentified coercive letter of threat send to a real-life residential tenant:

This third letter was received by post some weeks after closure of a file that had remained open before EWOV, the industry-specific complaints scheme for 18 months. Despite regulator and policy-maker involvement (VESC and DPI) the matter remains unresolved and contested as to the existence of any contractual relationship with the supplier, necessity to form one, or to facilitate one This letter refers to a previous letter of a month earlier which appears to have been either missed, not sent or discarded as junk mail Dear Sir/Madam

Your Hot Water Supply

Further to our recent letter dated (date given) we are writing to request your assistance once again.

Your hot water supply is provided through a communal to 'bulk service" by your building and/or its body corporate. (Supplier's name) owns the hot water meters and supplies the gas for this service. The hot water is individually monitored and the quantity used by each apartment is billed directly to the respective apartment.

Our records show that hot water is being consumer through your meter but an account has not yet been established for you. Please contact us on (Telephone number provided) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required) If we don't hear from you within (7)

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[54] This is a further threatening an coercive statement that is unjustified

days from the date on this letter, we may need to initiate the steps for disconnection of your apartment's hot water supply.

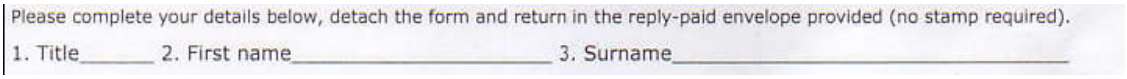
If this occurs, we will not be able to reconnect this service till we receive your details. Please note that any of the information you give to us is treated confidentially, in line with privacy laws.

As a supplier of gas and electricity, we can also assist you with your other household energy needs. If you would like more information on this, please mention it when calling and we'll be happy to help.

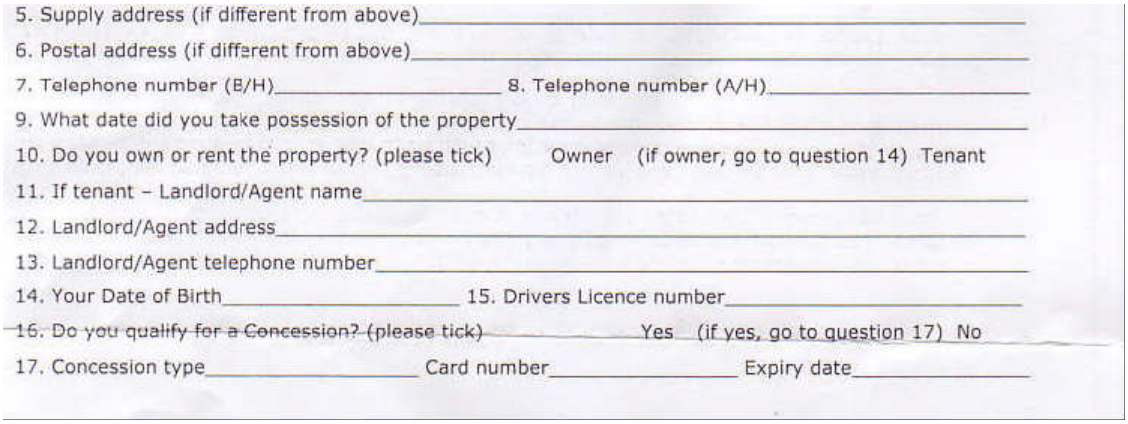
Thank you for your corporation

Yours sincerely

(name) Billing Manager (host energy retailer)


Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).
1. Title_____ 2. First name_____ 3. Surname_____

4: Supply address[55] (apartment no and street address inserted)


5. Supply address (if different from above)_____
6. Postal address (if different from above)_____
7. Telephone number (B/H)_____ 8. Telephone number (A/H)_____
9. What date did you take possession of the property_____
10. Do you own or rent the property? (please tick) Owner (if owner, go to question 14) Tenant
11. If tenant – Landlord/Agent name_____
12. Landlord/Agent address_____
13. Landlord/Agent telephone number_____
14. Your Date of Birth_____ 15. Drivers Licence number_____
16. Do you qualify for a Concession? (please tick) Yes (if yes, go to question 17) No
17. Concession type_____ Card number_____ Expiry date_____

Letter 4 and 5 (similar)

Further Deidentified coercive letter of threat send to a real-life residential tenant:

This fourth letter was received by post some weeks after closure of a file that had remained open before EWOV, the industry-specific complaints scheme for 18 months.

This letter refers to a previous letter of a month earlier which appears to have been either missed, not sent or discarded as junk mail Despite regulator and policy-maker involvement (VESC and DPI) the issue of debate over contract remained unresolved Resumption of letters of threat occurred following closure of the file, till ultimate disconnection was effected, not of energy as the only commodity authorized for energy, but of heated water supplies to the tenant's residential premises (abode).

The energy supplied is not to the apartment through facilitation of the flow of gas, but rather to a single supply point on common property infrastructure which supplies a single communal water tank also on common property infrastructure from which heated water is reticulated to individual apartments. Residential tenancies provisions hold landlords

[55] Supply address and supply point are synonymous terms meaning gas connection facilitating the flow of energy to identified premises. These terms do not have postal connotations and do not refer to living space. They are very specific in the legislation and the Gas Code in relating to an energy connection point. No such connection point in relation to the hot water supplied exists. The heated water is reticulated in water pipes to the individual apartments after being heated in a communal water tank on common property infrastructure. There is no authority within current provisions to disconnect water. The provisions relate to gas or electricity.
Ownership of the hot water flow meters does not create a contractual relationship. There is no evidence that the meters were fitted in accordance with water authority regulations or licencing.
Even if they had, the supplier is endeavouring to charge for energy, which cannot be measured with a water meter, and notwithstanding policies in place.

contractually responsible for consumption and supply charges (other than for bottled gas) were no separate meter exists for gas or electricity. The Essential Services Commission Act 2001 s15 prohibits overlap and conflict with other regulatory schemes present and future. The Gas Distribution System Code permits disconnection of energy only, in the case.

In the event, disconnection of heated water occurred not energy. No energy enters the residential premises of the end-user of heated water as a composite product as an integral part of residential tenancy provisions

Dear Sir/Madam

Your Hot Water Supply

Further to our recent letter dated (date given) we are writing to request your assistance once again.

Your hot water supply is provided through a communal to 'bulk service" by your building and/or its body corporate. (Supplier's name) owns the hot water meters and supplies the gas for this service. The hot water is individually monitored and the quantity used by each apartment is billed directly to the respective apartment.

Our records show that hot water is being consumer through your meter but an account has not yet been established for you. Please contact us on (Telephone number provided) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required)

If we don't hear from you within (7) days from the date on this letter, we may need to initiate the steps for disconnection of your apartment's hot water supply.

If this occurs, we will not be able to reconnect this service till we receive your details. Please note that any of the information you give to us is treated confidentially, in line with privacy laws

Reproduced Disconnection notice issued an energy retailer licenced to sell gas or electricity and to disconnect energy only not water products, pursuant to the Gas Distribution System Code defining disconnection and decommissioning processes[56]

"Disconnection of bulk hot water supply"

(Host retailer) has requested your bulk hot water supply be disconnected for _(box not ticked) unknown usage

(box not ticked) Non-payment[57]

This occurred on:

Date: (entered)

Time (entered)
Meter No (shown)
Premises address: (the residential address showing flat number and street address of the Tenant)
"As this meter is owned by (energy retailers name), please call us on (telephone number shown) to arrange reconnection, and quote your meter number as shown above"

For more information about (energy retailer's name shown), please visit our website at (website address of energy retailer shown)

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[56] This disconnection notice and all that preceded it, including resumed letters of coercive threat by an energy supplier whose actions and approaches have been implicitly and explicitly endorsed, supported, condoned and accepted by the current Victorian Energy Regulator, notwithstanding the empty provisions of Wrongful Disconnection Procedures published by them to which lip service is accorded in many instances, Neither box shown on the form replicated above was ticked. Neither reason was applicable. The timelines for disconnection were not adhered to. The wrong commodity (water not energy) was disconnected. No energy at all enters the residential premises of the party held contractually responsible. However, this consideration is consistently overlooked by regulators and policymakers quite determined to uphold legally and technically unsustainable policies.
Leaving aside the policy considerations, nothing in the processes undertaken meets prescribed criteria. The complaints scheme purporting to represent consumer interests took an inflexible decision in this matter as did its guiding body, the VESC, and his nominally overseeing body DPI.
The consumer protections believed to be in place for certain categories of consumers simply do not exist.
It is inarguable that the prescribed processes were not followed, leaving aside all of the legal and technical arguments provided elsewhere

[57] This did not apply. No bills have ever been issued. The matter was one of disputed contract under deemed provisions, since no energy enters the residential premises of the end-user of heated water reticulated in water pipes. The energy is supplied to a single supply point/supply address on common property infrastructure used to heat a communal water tank supplying heated water to tenants.
The landlord is disallowed to differentiate between hot and cold water or to charge for the heating component of heated water where no gas or electricity exists. The supplier is not licenced to sell anything but energy. An energy retailer is permitted only to disconnect gas under the *Gas Distribution System Code*. For VenCorp purposes only a single supply/point/supply address and single billing point exists for all supply points providing energy to hot water storage tanks (BHW).
This is consistent with the legislation, which deems as a single supply and billing point any gas connection point in existence prior to 1 July 1997, as is the case with most supplies serving BWH systems.

If the disconnection is a result of non-payment and we receive your payment before 3 PM on X/X/X (date not filled in) your bulk hot water service will be reconnected on the same day. A reconnection fee may apply.

Background

I believe that many provisions, including those left under jurisdictional control (such as the policy provisions known as the "bulk hot water arrangements (BHW)), or dismissed as being of an entirely economic focus rather than relating to components of both economic and non-economic considerations (for example, BHW arrangements; embedded consumers and small scale licencing (electricity only); the issue of regulatory overlap with other schemes has been ignored; and the proposed protections under generic laws, including substantive unfair terms within both standard and market contracts; and unconscionable conduct considerations which are the subject of ongoing evaluation by the Treasury following receipt of expert panel advice.

For further discussion see pages X – X of this attachment, case studies also as attachments, Deidentified Case Study, and body of main submission

Victorian situation

These matters have been repeatedly raised by community organizations during the consultative dialogue and beyond that in efforts to effectively engage with certain jurisdictions, including Victoria's Department of Primary Industries and energy regulator Essential Services Commission.

It is interesting to note from examination of the Licences issued by the ESC to the three incumbent host retailers, Origin Energy, AGL and TRUenergy, the following precise wording was used when gas licences were issued to each party:

"9. HOT WATER METERING

9.1 The Licensee must, for a customer for which it is providing services associated with bulk hot water, ensure that each hot water metering installation is provided, replaced, installed, repaired and maintained in accordance with all applicable laws and any applicable guideline.

9.2 Without limiting clause 9.1, within 20 business days after receiving a request for the provision, replacement, installation, repair or maintenance of a hot water metering installation which is not functioning in accordance with all applicable laws and any applicable guideline, the Licensee must offer to provide the service requested on terms which are fair and reasonable and which are not inconsistent in the opinion of the Commission with any applicable guideline.

9.3 If a customer replaces the Licensee with another retailer as the supplier of bulk hot water services for a multi-unit dwelling, the Licensee must, if it is the owner of the relevant hot water metering installation, on request offer to sell that hot water metering installation to the other retailer on fair and reasonable terms and conditions.

9.4 Any question as to the fairness and reasonableness of the terms and conditions of an offer made under clause 9.3 shall be decided by the Commission on the basis of the Commission's opinion of the fairness and reasonableness of the terms and conditions."

It is implicit in these licence provisions that the intended customer is the one who had control of the multi-tenanted dwelling, i.e. Landlord or Body Corporate as the controller of premises, rather than a succession of residential tenants who have no choice whatsoever in the arrangements made between Landlords and energy suppliers either providing gas to a single communal gas master meter; or with responsibility for *"hot water system"* meaning the boiler tank and its associated water metering infrastructure. It is never the case that a renting tenant requests an installation associated either with the gas master meter or the associated boiler tank or its water infrastructure that communally heats water reticulated to those individual tenants. The contract lies with the Landlord/Body Corporate.

In Victoria under tenancy laws a Landlord may not charge for water other than a cold water rate in the absence of a separate gas meter associated with the heating of water provided to individual tenants.

In addition, where water meters do exist, only charges for the actual consumption of water, as calculated by individual reading of water meters is permitted, not any associated supply or meter reading charges. If no separate water meters exist, the Landlord must absorb the whole cost of supply of heated water as an integral part of the rent charged to tenants, in the same way as public lighting of stairwells and maintenance of communal grounds are also Landlord or Owners' Corporation responsibility.

Despite the existence of *Residential Tenancies Act 1997* provisions, the DPI and ESC together saw fit to over-ride these rights, expecting the RTA to change its provisions to suit their philosophies and flawed interpretation of the deemed provisions of the *Gas Industry Act 2001*

In Victoria are currently two separate contractual arrangements used by retailers to deliver its gas BHW service. These two arrangements are:

- Arrangement 1 - involves the retailer billing individual occupiers directly by using a conversion factor associated with the readings from a hot water flow meter.
- Arrangement 2- involves the retailer billing the body corporate for the gas or electricity consumed by the BHW system as measured by the BHW energy meter, with the body corporate apportioning consumption, determining individual bills and charging individual customers.

The scope of the Essential Services Commission's review of BHW arrangements undertaken in 2004 and 2005, with policy decisions becoming effective from 1 March 2006 was limited to billing arrangement 1 that involves retailers billing individual occupiers directly.

Less transparent are the arrangements made regarding public housing tenants. The Tenants Union Victoria advises as an advocacy organization and specialist community legal centre providing information and advice to residential tenants, rooming house and caravan park residents across Victoria with the aim of improving the status rights and conditions of all tenants in Victoria.

Queensland situation[58]

[58] Origin Energy FAQ's Service Property Charge online tariffs

In Queensland are those living in public housing, most disadvantaged. Even when they receive no gas at all they are required to pay FRC fees.[59]

There is no competition in the Queensland *"bulk hot water market"* wherein residential tenants are charged for deemed gas usage. Origin Energy has a monopoly of supplying to Landlords and Owners' Corporations, including public housing authorities or delegates.

Whilst this may be dismissed as a water issue or under the control of the Department of Infrastructure and Planning, Queensland, it is in fact energy that is being charged for with massive supply charges, FRC charges and other charges imposed, mostly on those who are the most vulnerable. This is entirely unacceptable.

I have direct knowledge of certain individuals who have been adversely impacted by the existing *"bulk hot water energy policies"* as described wherein water volume usage is used to calculate deemed energy usage of situations in which even those who receive not a joule of gas to their abodes, even for cooking purposes are charged *"free retail competition"* charges on their bills, allegedly for the direct sale and supply of energy.[60]

In Queensland bills for alleged supply of energy[61] associated with *"bulk hot water"* are frankly issued in cents per litre with no cursory attempt to imply that is gas that is actually being measured.

For electricity, the service to property charge may cover part of the provision and maintenance of the meters, poles, wires and billing and some retail operating costs. It is applicable to each electricity account.
For gas, customers are charged a supply charge which may cover part of the cost of maintaining and extending the gas distribution network e. g. transmission pipes, gas mains, and some retail operating costs.
http://www.originenergy.com.au/1254/About-tariffs-rates-and-pricing

59 FRC means *"Freedom of Retail Contestability."* It is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place. In Qld It is imposed on natural gas customers accounts, and is about $25 per year for the first 5 years after the FRC date : 1st June 2007. It accumulates over this first 5 years as a *"pass through cost"* of about $20 million and will be phased out in a couple of years.
Vencorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

60 See for Example Newsflash Dept of Infrastructure and Planning Qld referred to under Objective, Competition Issues
It is staggering to see from Origin Energy's website that *"In addition to the charges above customers should note that in certain circumstances Origin Energy Retail Limited may require lodgment of security deposits or may impose fees and charges that are incidental to the supply of Bulk Hot Water to a customer, including but not limited to an account establishment fee, site call out fee, disconnection fee, reconnection fee, dishonoured cheque fee and special meter reading fee."*
See
http://www.originenergy.com.au/bhwtariff
Bulk Hot Water Tariffs Queensland Bulk Hot Water
"Gas fired bulk hot water systems are installed in some apartment blocks. A bulk hot water system supplies all the hot water to the apartments using a centralised water heater(s), rather than a water heater in each apartment.
Customers in apartments using gas fired bulk hot water systems are charged on the basis of their hot water usage as measured by a hot water meter located at each apartment. The current usage rates are provided in the attached table.

This does not alter the fact that they are energy bills for the alleged (deemed) gas consumption that cannot possibly be calculated by legally traceable means, as for Victoria and South Australia.[62]

In Queensland Origin has a complete monopoly of the *"bulk hot water client group"*. Elsewhere under Objective (Competition issues) I have discussed the disaggregation of energy assets and how this may have impacted on the several rights of individuals (including possibly privacy rights), if a non-negotiable *"monopoly-type"* situation was allowed to arise during the arrangements and any warranties and assurances that may have been made during the privatization arrangements.

There are no published records as to how much gas is being transported via pipelines to heat communal water tanks (many in public housing; others in owner/occupier dwellings; others possibly in the private rental market without owner occupation; or those with owner-occupation, or how calculations regarding gas consumption (using hot water flow meters that measure water volume not gas or heat) were made regarding the alleged sale of gas to end-users of heated water, and on what basis under the provisions of contractual law.

Other aspects Queensland provisions as they relate to energy provided in the bizarre and inappropriate *"bulk hot water provisions"* are discussed elsewhere under Objective, BHW provisions)

Some apartments may also have a separately metered gas cooking appliance while other apartments have an un-metered gas cooking appliance.'

62 *Gas fired bulk hot water systems are installed in some apartment blocks. A bulk hot water system supplies all the hot water to the apartments using a centralised water heater(s), rather than a water heater in each apartment.*
Customers in apartments using gas fired bulk hot water systems are charged for deemed gas usage at the applicable natural gas rate for their region.
The amount of gas deemed to be consumed by you to supply hot water to your apartment is calculated on the basis of the:
gas consumed by the bulk hot water system, as measured by the master gas meter at your apartment site during the billing period;
allocated to each apartment on a prorata basis using the ***measured consumption of*** *hot water at each apartment during the billing period.*
Some apartments may also have a metered gas cooking appliance. The total usage for that apartment will be calculated on the basis of the total gas used for both cooking and hot water.
Water Meter Fee: *Each consumer of hot water from a bulk hot water system will be charged an additional* ***water meter fee****.*
These charges are largely required because the company responsible for the supply and maintenance of the water meter equipment and water meter reading services (Envestra Ltd) charge Origin Energy for these additional services. Effective 1st July 2009, the GST inclusive charges are listed below:
Water Meter Fee – Manual*;* ***Read: $7.96 per quarter Water Meter Fee – Remote****;* ***Read: $27.78 per quarter***

Note 1: Charges will be calculated on your bill on the basis of a daily rate. Note 2: For new apartment developments, these fees may vary, depending on the developers' specifications for metering equipment. Note 3: All apartments established and occupied prior to 1 July 2003 will be charged the Manual Read fee. Note 4: Prices are subject to CPI based increases in July each year or at other times if the costs to Origin Energy for these services are amended.

CONTEXT
(Victorian Deidentified Principal Case Example -

This attachment is focused on conduct issues associated with the adoption of and discrepantly applied provisions for trade measurement calculation, pricing and contractual apportionment under misguided interpretations of the deemed provisions under State policy provisions applying to providers of gas and electricity

The background history and adoption of the *"bulk hot water provisions"* previously contained within the Bulk Hot Water Pricing and Charging Guideline 20(1) (repealed 2009), and now within the Victorian Energy Retail Code v9 (commencement date 1 January 2009)[63] were mimicked but discrepantly applied in two other jurisdictions, South Australia and Queensland

For further details please refer to companion Attachment Deidentified Case Study (56 pages) detailing each of the allegations and the circumstances in which a particularly disadvantaged and vulnerable end-consumer of utilities was allegedly badgered, harassed and intimidated by a host retailer who from a residential tenant's perspective had monopoly status in supplying through a single master gas meter on common property infrastructure[64] belonging to an Owners' Corporation/Landlord as Controller of Premises[65]

Note that monopoly provisions under both national and jurisdictional competition policies are discrepantly and frequently inappropriately interpreted, especially in the context of the provision of communally heated water, whilst provisions regarding cost-recovery and non-existent parallel consumer protection for residential tenants is based on alleged energy consumption using a trade measurement instrument designed to measure water volume only but not heat or energy.

Not even gas meters measure energy – they measure gas volume, which under standard units of measurement is expressed in either joules or megajoules based on gas volume. The difference between gas volume and energy is poorly understood

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63 Essential Services Commission (Vic) Energy Retail Code v6

64 The Owners' Corporation Act (2006) defines the responsibilities and rights of Owners' Corporations
The extent to which these provisions may contravene legal traceability considerations within national measurement provisions is yet to be explored

65 See definitions of Controller of Premises; Premises; Residential Customer as contained within the revised National Measurement regulations which became effective on 1 July 2009, and in all jurisdictions will become fully operational on 1 July 2010, with the National Measurement Institute taking full control of all trade measurement nationwide. This will make NMI responsible for the full spectrum of measurement, from the peak primary standards of measurement to measurements made at the domestic trade level, and will provide the NMI with administrative and regulatory oversight in the area of trade measurement. Implementation is expected to take place at State and Territory level to uphold the fundamental principles of legal traceability in trade measurement, including for utilities
The interests of economic infrastructure, including the goal of securing the confidence of all stakeholders depends on the concept of legal traceability being upheld in all trade measurement transactions so that Australia and New Zealand *"establish and maintain a national and international reputation for equitable trading"*

Allegations in this case in brief

The range of allegations included unconscionable conduct, harassment and coercion

Allegation 1 unconscionable conduct; harassment and coercion

Allegation 2 Threats, intimidation and coercion[66]

Allegation 3 Breach of implied contract[67]

[66] Under s21 the Fair Trading Act prohibits *"undue harassment or coercion in connection with the supply or possible supply of goods or services to another person."* If a supplier is squarely on notice as to the vulnerable position of a deemed recipient of goods or services, it could be interpreted that certain approaches by a company may be in breach of s21 of the *FTA*. The supplier had been put on notice at the outset before the issue of the second letter of threat and whilst the file lay open before the complaints scheme. Later, the supplier was put on similar notice through the complaints scheme and/or regulator, who were provided with written evidence as to those vulnerabilities.

[67] The supplier alleged a contract with the Tenant for the supply of energy used to heat a bulk hot water tank centrally heating water supplied to several groups of tenants (four in one building and six in another, each supplied through a single supply point bulk meter residing in each of two car parks. The Tenant denies the existence of such a contract or requirement to form one.
The implied contract is an issue of debate between the parties. No contract exists except in the mind of the retailer; in faulty interpretation; or else in the intent behind the deliberative documents, final decisions, and bulk hot water charging guidelines.

Allegation 4 Breaches of Fair Trading Act 1999 (Vic) provisions – unfair business practice and unfair substantive terms of implied an/or alleged or deemed contract. [68]

(note also proposed changes to generic laws – all State Fair Trading Laws must be consistent with generic by 2010 noting all changes to proposed generic laws under Australian Consumer Law (TPA), including under unfair contract provisions and any clarification re unconscionable conduct

Allegation 6 Unfair and inappropriate trade measurement

(refer also to further changes to Trade Measurement laws which will become fully operational from 1 July 2010 with regard to regulations and enforcement provisions; the provisions are intended to apply to utility meters, for some of which exemptions have already been lifted; others pending)

Allegation 7 Use of trade measurement practices that are against the intent and spirit of national and state trade and utility measurement provisions

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[68] **Victoria's regime**
Part 2B of Victoria's *Fair Trading Act 1999* prohibits 'unfair terms' in consumer contracts. A term is 'unfair' if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.
Examples of unfair terms might include those which allow a supplier to unilaterally vary a contract, or those which allow the supplier, but not the consumer, to terminate the contract. The supplier and Tenant unjust imposed with an energy contract for energy not sold or supplied to him (and others like him) do not have equal responsibilities and rights.
The Tenant is penalized if the implied contract (which the complainant denies exists or ought to exist is terminated. Nevertheless he stands to lose water or heated water though the supply and cost of these are already included in his rental agreement directly with the landlord. The supplier can apparently vary the contract terms, price and goods without involvement of the deemed recipient under an implied and unjustly imposed contract. The supplier and others appear to have assumed sole right to interpret the meaning of the deemed contract, notwithstanding that there are many discrepancies within the legislation and many overlaps with other schemes, with common law provisions and contractual provisions and the rights of social and natural justice. The supplier appears to have sole rights to determine whether the contract has been breached. The contract contains confusing terms and inappropriately implies through wording that either a licence exists for supply of composite products; or alternatively that the energy can be separately measured; or alternatively that the practices are legitimate. Terms include the expectation that the end-consumer of water products, who has no obligation to form a contract and is not the ***'relevant customer'*** in this case, assumes all contractual responsibility and then battles to address merely the cost-recovery component.

There is an imbalance of power; the end-consumer has no provider choice; contractual status has been unilaterally and inappropriately imposed through misinterpretation of the intent of existing legislation regarding relevant customer and deemed contracts; demands were made to form an explicit contract under pain of threat of disconnection of hot water; the cost-recovery mechanism through s55 of the *RTA* imposes additional and unnecessary burdens on the end-consumer including filing fees through VCAT which would offset cost recovery, and in this case not readily achievable since the Complainant is unable to participant in legal proceedings without detriment. The misleading and deceptive conduct referred to elsewhere includes behaviour that leads another person into error, and thus unfair. Examples include the use of terminology, for example reference to meters implying gas meters, allegations of denial to meters, meaning water meters; intended use of an identifying number of the bills other than the MIRN. The implied and unilaterally imposed contract requires the end-consumer as a renting tenant to provide safe, unhindered and convenient access to meters where such meters may be in the care custody and control of the Owners Corporation, who are under the law responsible for supply and consumption charges of energy or other utilities unless separately metered.

Any measurement that allows for water volume calculations or some other bizarre equivalent, to be part of the equation that calculates energy consumption is fundamentally flawed. These provisions to not uphold public interest, best practice standards or the spirit and intent of existing provisions. The provisions are as good as relying on an oil funnel to measure the weight of a bag of apples. Energy retailers are licenced to sell gas and electricity not water products or heated water. Such practices appear to have been endorsed by existing provisions. The MCE seems to have made a decision to refrain from intervening, requiring policy changes or making sure that jurisdictional and national energy laws are consistent or that confusion does not arise between water and energy laws. In some cases where exemption granted non-licenced embedded network distributors are using similar methods without accountability through energy regulations

Gas does not pass through water meters. Electricity does not pass through water meters. Water meters are unsuitable instruments for measurement of energy Gas is measured in megajoules (MJ). . Electricity is measured in KW-h. See these revised provisions and any others that may be considered as exclusive to utilities:

18GD Inaccurate use of measuring instruments

18HE Measuring instruments used in transactions to have prescribed scale intervals

18HF Unreliable methods of measurement

18HG Limiting use of certain measuring instruments

18HH apply "correct use of …utility"

18GE apply using or supplying inaccurate measuring instrument

18GE Using or supplying inaccurate measuring instruments

Allegation 8 Failure to follow appropriate disconnection notice procedures (wrong commodity; wrong notice period; procedural irregularities)

Allegation 9 Breach of Gas Distribution Code

(see Gas Industry Act 2001 wherein provisions must not be inconsistent with the Gas Code – as they are within the BHW provisions contained in the Energy Retail Code v6. Disconnection and decommissioning have particular meanings and do not refer to disconnection of water but to separation of the flow of gas from the gas distribution system, which does not include any aspect of water infrastructure).

Allegation 10 Breach of ESC Product Disclosure Statement Guideline 19

Allegation 11 Breach of Informed Consent

Allegation 12 Misleading and deceptive conduct

(this is discussed in the extended Deidentified Case study as a separate attachment – see especially wording of the letters to "The Occupier" purporting to represent "vacant consumption letters" and wording contained in bills issued to other residential tenants)

Allegation 13 Misleading details in bills issued to other tenants on same block

Allegation 14 Similar inappropriate and unacceptable business conduct

Allegation 15 Contravention of the intent of trade measurement and utility provisions

Allegation 16 Probable intent to apply inappropriate supply and possibly meter reading charges (?rolled over into a bundled or unbundled charge perhaps including FRC charges and the like).[69]

Allegation 17 Inaccuracy of deemed consumption of gas and charges applied

(refers to the principles of best practice in adopting trade measurement practices that show legal traceability)

Allegation 18 Compromised protections and adequate access to appropriate recourses

(refer to EWOV's self-confessed conflicts of interest in dealing with those in situations referred to as "embedded" leaving aside that in a strict sense;

See also extensive discussion within this submission and other public submissions[70] regarding EWOV's limited jurisdiction and poor quality handling of the matter in question

The vexatious issue is illustrated here and Major Deidentified Case Study as Appendix 11 of compromised consumer protections for proportions of the community impacted by embedded situations and for the "BHW end-consumer groups" who neither consume nor receive energy at all

The limited jurisdictional powers of most non-statutory industry-specific complaints schemes known as Energy Ombudsman or Energy and Water Ombudsmen, forbids most ombudsmen schemes predominantly funded by industry, but some like EWOV also receiving funding from Consumer Affairs Victoria, which though set up as statutory enactments and considered to be "one-stop' complaints schemes for matters relating to energy or energy and water.

The gaps in consumer protection become more significant for the BHW groups and embedded electricity recipients (who do receive direct flow of energy but through changed ownership and/or operations) as well as those who will be defined under Exempt Selling regimes under the AER's jurisdiction.

For discussion of each of the above allegations refer to Deidentified case study as a separate attachment

Brief comment on unconscionable conduct – see full details of the specific instance used to illustrate the claims made (Deidentified Case Study Attachment X 56 pages)

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[69] No bills were actually issued to the subject of the extensive case study. The threats of disconnection were associated with coercive attempts to force an explicit market contract. However, I personally sighted bills issued to others residing on the same block of rented apartments, and have also sighted bills issued to other residential tenants, including from other States so am aware of the wording and implied gas usage, heating value, pressure factors and the like included on bills whereas a hot water flow meter cannot possibly provide this information and a single master gas meter cannot through legally traceable means show individual consumption of gas volume, let alone energy consumption when a single master gas meter is used to communally heat a hot water tank.

[70] Kingston, M (2008a) Productivity Commission's (PC) Review of Australia's Consumer Policy Framework (subdr242parts1-5, 8_; Kingston, M (2009a) Submission to PC Review of Regulatory Burdens, parts 1 & 3); Kingston, M (2009b) Submission to MCE NECF1 Consultation RIS; Kingston, M (2009c) Submission to MCE Gas Connections Framework Draft Policy Paper; Kingston, M (2009d) Submission to CCAC Review Statutory and Implied Warranty Kingston M, (2009e) Submission to Commonwealth Treasury Unconscionable Conduct Issues Paper – Can Statutory Conduct by better clarified? Submissions to National Measurement Institute (2007-2010); individual submissions to numerous State and Federal bodies and Ministers; and to selected community organizations

In determining whether unconscionable conduct had occurred the conduct set out in Section 8 of the Fair Trading Act may be regarded by a Court. Persistence in engaging unconscionable conduct may be interpreted in such a way, once a company has been made aware of a particular party's vulnerabilities, as was the case early in the piece.

The second, third, fourth and fifth communications from the supplier to the deemed contractual party (a recipient of water products not energy at all to his apartment, reticulated in water pipes not energy pipes, on the basis of ownership by the energy supplier of water meters, not gas infrastructure) were issued as coercive letters of threat after the supplier had been made aware of the peculiar vulnerabilities of the deemed contractual party as a residential tenant receiving water not energy.

Continued contact along similar lines to the correspondence generated after issue of the first letter of coercive threat issued prior to this knowledge being conveyed may be interpreted as breach of Section 8 of the *FTA*.

The supplier had after the issue of the first letter of coercive threat been made aware of the Tenant's peculiar vulnerabilities but persisted with similar correspondence, issued a second letter of threat despite being asked to communicate directly with another party; and finally resumed a series of similar threats after complaint file closure, ultimately disconnecting altogether heated water supplies

In this case the Tenant has alleged **unconscionable conduct**, by virtue of issuing unwarranted coercive threat of disconnection of hot water services by an energy supplier licenced only to sell gas and electricity in circumstances where no contract existed and without identifying the vulnerabilities of the subject of threat, who in this case is an exceptionally vulnerable and disadvantaged individual with permanent psychiatric disability, a history of parasuicide; ongoing suicidality; recently hospitalized and discharged on community treatment orders to aid in compliance with his treatment.

No redirection was offered in the content of the letters of threat to any industry-specific complaints scheme or any other redress option; and in the personal details sought by way of forcing the Tenant into an explicit contract were in contravention of the Product Disclosure Statement (ESC 19); the provisions of the *Energy Retail Code 2006 v2* and now 2007 v3 and of the *Fair Trading Act 1999*, including the issue of further threat during the course of an as yet incomplete investigation of the complaint by EWOV, whose conduct has been the subject of separate concern.

In the circumstances during a particularly low mood instability bout, the fear of losing essential services could have had a disastrous effect and has similar potential in the future.

The conduct of the provider appeared unconscionable because no due care was taken to assess the risk imposed and the threat was issued as a deliberate coercive attempt to secure an unwarranted contractual relationship. Even after the supplier became aware of the Tenant's vulnerabilities, further threat was issued to him as "The Occupier" in a letter-box drop whilst the complaint remained open before EWOV.

At the time of issue of the very first letter of coercive threat of disconnection of essential services the supplier was not aware of the tenant's vulnerabilities. However, immediately

upon discovery of that letter, EWOV was informed of this and passed that information on to the supplier.

Nonetheless, the supplier, having been put on notice of those vulnerabilities issued a second letter of threat, though later claiming an error. There was no error, as attested in EWOV's original letter laying out the supplier's perspectives.

Notwithstanding that both the *Energy Retail Code* and the *Fair Trading Act* prohibit such action whilst a complaint lays open. In addition, the peculiar vulnerabilities of the Tenant required that no harassment be continued, and a request was made via the Complaints scheme that all correspondence in the matter be directed to a third party. Section 21 of the *FTA* prohibits *"undue harassment or coercion in connection with the supply of possible supply of goods or services to another person."*

Though for the remainder of the time that the complaint lay open, nothing further occurred, the moment that EWOV's files were closed and the ESC had completed its cursory enquiries, with the full sanction of both bodies, a series of similar communications was resumed until disconnection not of energy, but rather of water occurred, simply on the basis that the supplier owned the *"meter"* meaning but not specifying that this was a device not designed for or capable of measuring gas but rather water volume only.

The supplier is not licenced to sell water at all or to authorized to on-sell it. The elaborate plans by either distributors to purchase or lease water meter infrastructure, including a subsidiary cold water meter and satellite hot water flow meters for the purpose of calculating through these of an inappropriate trade measurement instrument deemed gas or electricity usage facilitates disconnection of heated water when attempts to coerce an explicit energy contract with an end-user of heated water fail, as is amply illustrated in arguments in the main body and in various other attachments.

No attempt was made to redirect to complaint or redress recourses. Instead the supplier shamelessly advised EWOV that it would continue to rely on its perceived rights under sanctioned policies (seen to be the drivers for unacceptable market conduct and in Victoria impacting on some 40,000-50,000 Victorian residential tenants and thousands small businesses in shopping centres and the like many vulnerable and disadvantaged.

In the body of this submission; in submissions to the Productivity Commission, previous submissions to the MCE, and to the Commonwealth Treasury I have referred to both perceived conflicts of interests and self-confessed?"[71]

Does the current economic regulator have any idea what is going on and does it have sufficient, if any control of this situation?

The subject of the Deidentified Case study and of the letters of coercive threat with accompanied parodied version analysis has a serious irreversible psychiatric illness and vulnerability to stress, as well as a serious medical condition as referred to in medical reports provided to the self-run industry-specific complaints scheme through the

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71 See for example the submission of Energy and Water Ombudsman (Victoria) to the Essential Services Commission (Victoria) Small Scale Licencing Review 2006
See my submissions to the Productivity Commission (2008 & 2009) to the MCE SCO to the Commonwealth Treasury; and other bodies, Ministers and organizations

economic regulator, Essential Services Commission. This is besides financial hardship and difficulty managing bills. Any future contractual relationship with the supplier or imposed contractual obligation will impose further difficulties and stresses on him in dealing with a provider imposed on him without choice who has already demonstrated inappropriate market conduct.

The Tenant and his supporters were anxious about the prospect of further badgering coercive behaviour and potential loss of essential services (water) that the provider is not even licenced to sell.

In the circumstances this had promoted fear and dissonance about accepting premises that have unexpectedly come with so much baggage notably lack of choice in changing a provider of essential services with a contract more properly belonging to the Owners' Corporation where that provider's conduct has been unacceptable, reflects business practices that are unfair and inappropriate and appears to reflect predatory market conduct in a clear-cut case of power imbalance. This is a detrimental outcome from the practices alleged.

This does not excuse the manner in which threats were issued to the vulnerable tenant, one of them during the course of an as yet unresolved complaint before EWOV. This was in contradiction of the provisions of both the *Energy Retail Code* and the *Fair Trading Act*.

The issuer of those threats, the Tier 1 energy supplier of energy to a single communal gas master meter belonging to the Owners' Corporation (with a single gas meter regarded for distributor-retailer settlement purposes), has no contract with the Tenant, is not licenced to sell the water that the supplier intended to disconnect; and was using instruments to measure energy that were not designed to measure such a commodity.

That the threats were issued at all is a problem. There is never any justification for the issue of threats. This is a complex contractual issue.

There are issues of the absence of implied contract; unfair and inappropriate practices; the nature of the threats and the pretext and purpose of issuing such threats – by way of endeavouring to force a contract that should not exist at all.

There are further health complications that have been explained. There is a requirement for ongoing supply of hot water.

Beyond the conduct of the supplier, it could be held that strategies used by complaints schemes, regulators and even policy-makers could also be viewed as coercive techniques or at best *"high pressure conciliation techniques.* Using phrases suggesting the *"prudency;"* as *"as a matter of urgency"* of signing an explicit contract in order to avoid disconnection (of an unspecified utility).

In the event, this turned out to be water supplies, disconnected by energy suppliers licenced only to sell and supply energy through provision of energy that demonstrates the flow of energy to the premises deemed to be receiving that energy, using a meter as defined in the *Gas Industry Act 2001* and the *Gas Distribution System Code.* Regulatory provisions that are inconsistent with these provisions are frowned upon by the *GIA*.

The VESC have as the overseeing body responsible for guiding have seemingly recklessly put in place and are seeking to consolidate under revised *Energy Retail Code*

provisions (notably the BHW provisions) that have no legal of technical sustainability, represent gross overlap and conflict with other schemes, including residential tenancy provisions, owners' corporation provisions, as is specifically forbidden under s15 of the *Essential Services Commission Act 2001*, as well as conflict with the provisions of the unwritten laws, notably the natural and social justice rights of individuals.

No justification exists for disconnection warning or threat.[72] The Energy Retail Code was breached on a number of counts including it would seem ss8, 9 and 11 and 21 of the *FTA* Whether or not *FTA* provisions are included in the ERC, utility providers are required to abide by all laws. Provisions should not make it difficult to choose which to uphold.

Threats, coercion and intimidation are covered under the criminal code also. These may be politely phrased, but still constitute threat if undue power and pressure is used to obtain an outcome. In this case threat of disconnection of an essential service is being unjustly used as leveraged through which to obtain an explicit contract with a utility provider not licenced to sell the product the subject of disconnection threat. Neither is he permitted to disconnect that composite water product. No energy is involved. The threats are improper and tacitly upheld by regulators, policy-makers and complaints schemes.

The energy supplier is endeavouring to charge for gas, gas meter reading and gas supply for the heating component of the water. A meter is described under the *Energy Retail Code* and the *Gas Distribution System Code* as an instrument that measures the quantity of gas that passes through it and its associated metering equipment to filter, control and regulate the flow of gas. Water meters do not represent such instruments, though they appear to be posing as gas meters.

Though the water meters are owned by the energy supplier, and though these are behind locked doors; these instruments are not the type of instrument referred to in the energy provisions and were not designed for the purposes intended.

Therefore notwithstanding allegations of denial of access to meters, the Tenant continues to deny that allegation, and in any case is unable to deliver unfair contract provisions concerning safe convenient and unhindered access to meters that are not in his care custody and control, leaving aside for the moment the ongoing contractual debate, which is really a matter for the policy maker(s) and/or responsible regulators to address rather than EWOV as a conciliatory complaints scheme with no jurisdictional powers to address policy, legislative and tariff matters. However, EWOV is capable of gathering and clarifying factual matters.

As to denial of access of meters relied upon in previous EWOV correspondence under Clause 13 of the *Energy Retail Code* , there has been no such denial of access to meters as defined in the legislation and codes, namely a single gas meter on each of twin buildings.

These bulk gas meters are considered by VENCorp to be single supply points for the purposes of settlement between distributor and retailer.

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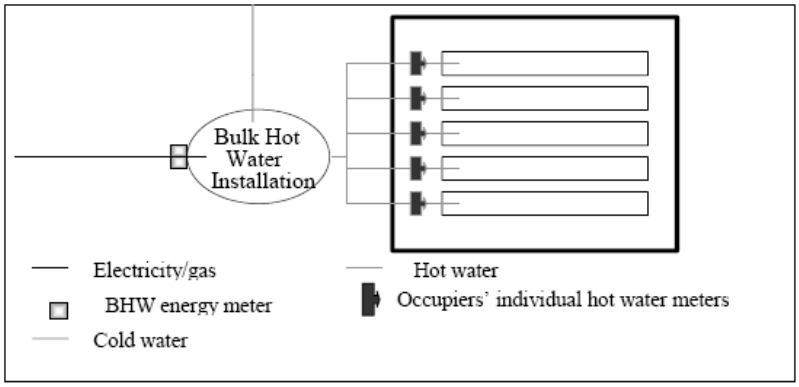
[72] These threats were dignified by EWOV as *"vacant consumption letters"* with the finding in that the supplier's conduct was in line with obligations.

The law requires a retailer to be licenced. Those licences are for the selling of energy not water. If retailers or their servants/contractors or agents are behaving as billing agents for the landlord for water products; value added products, heating components of composite products that cannot be separated from the product, this is an anomaly that may need to be reconsidered by the policy-makers and regulators. Meanwhile, EWOV should be cautious about making determinations outside of their jurisdiction.

Configuration and meter details

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

The item marked Bulk Hot Water Installation has no gas or electricity meters. It comprises a communal boiler tank, with several satellite hot water flow meters. These hoe water flow meters are represented by the black items labeled Occupiers' individual hot water meters. The latter can measure water volume only as individually proportion, but not heat or energy. Heated water of varying quality is reticulated in water service pipes to each individual apartment.

The item marked BHW energy meter has nothing to do with water. It is a single master gas meter or a single master electricity meter installed at the time the building was erected.

The cold water is supplied at the mains by the Water Authority. There is no licence provided for onselling of water. The Owners' Corporation takes direct responsibility for provision of cold water and all associated charges

The small black

In this case (Victoria) site-specific reading of meters was considered to be too onerous. Most alleged meter readings are estimates. Bills issued to others erroneously show a separate meter identifying number against gas usage on each individual bill. It is technically impossible to show gas usage individually, or heating, pressure or any other factor associated with gas since water meters of any description measure water volume only, not gas or energy. No bills were ever issued in this particular case. The dispute was over the existence in the first place for any energy contract (under contract law) for the sale and supply of energy since none is received through the flow of energy to the premises deemed to be receiving it.

The excuse that the arrangements were put in place to prevent price shock are unsustainable. The practices have not contained rent hikes, but have served to feather the nests of Landlords and Owners' Corporations endeavouring to escape their responsibilities under tenancy and Owners' Corporations provisions, by engaging third party billing and metering agents, either the retailer, a contractor to the retailer, or a contractor to the distributor.

Massive additional supply and other bundled or unbundled charges, including FRC charges are added, including water meter reading fees and the costs of alleged maintenance of the water meters, which are not suitable trade measurement instruments with which to calculate gas or electricity consumption.

The decision by the MCE to allow jurisdictions to adopt these practices in certain jurisdictions; apply them discrepantly when measured against each other; to fail to recognized the fundamentals of comparative laws or respect for other jurisdictional regulations; or to observe the fundamentals of contract law under the common law is regrettable.

Or the record I have once again provided substantiation of my concerns that the so-called national energy law is not a national law at all, and has failed its single objective for certain classes of end-consumers of utilities to sustain safety, security and reliability of supply of energy= or fair pricing – whilst at the same time confusing water provisions with energy provisions by allowing these practices to continue.

Electricity and gas are commodities. Their continued supply represent services.

The services such as billing and metering are fairly and squarely Owners' Corporation responsibility. The correct contractual arrangements should be adopted and reflected in all provisions.

Most communal water tanks are far removed from the individual occupants of multi-tenanted buildings. An enormous quantity of water has to be supplied before the water is heated when multi-storied buildings are involved. The end-user of the water pays for every drop and there is much wastage besides cost.

Inefficient hot water heating systems, including non-instantaneous boiler systems such as are in operation in older buildings and many new buildings should be banned. Existing inefficient boiler tanks and associated apparatus should be retrofitted with Govt grants made to assist with retro-fitting

Besides energy efficiency there are the health risks associated with these boiler systems, discussed in my submission to the MCE National Energy Efficiency Framework2 (NFEE2) consultation in 2007

APPENDIX 3

SELECTED ANALYSIS OF GAS INDUSTRY PROVISIONS, PROPOSED NATIONAL ENERGY RETAIL LAWS AND IMPACTS ON TENANCY LAWS

DEEMED CONTRACTS

RELATIONSHIPS BETWEEN RETAILERS DISTRIBUTORS AND CUSTOMERS

INTERPRETATION

Preamble – Some comparative tenancy law considerations

I refer to case studies cited by TUV and consistent findings by VCAT that tenants of premises not separately metered for gas cannot be charged for energy consumption. Water may only be charged in separately metered and only for actual consumption costs not supply or other costs, as upheld by most other state tenancy laws, though there are differences that deserve attention in the interests of parity, with the desirability to embrace consistent fair and equitable national tenancy laws that reflect ongoing changes to other laws including generic laws that will include substantive unfair terms provisions.

Under the ACT *Residential Tenancies Act 1997*[1] amongst several other obligations the Lessor (Landlord or OC) must pay for

42 (c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;

42 (d) all services up to the time of measurement or reading at the beginning of the tenancy

43 (1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

These provisions make it very plain that supply charges for water and sewage are Lessor responsibility, and also that the lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

These issues are not clarified in other tenancy provisions, but it is a matter of common sense that no tenant should be liable for installation costs of this kind, or that competition for utilities be deemed to exist because a theoretical but inaccessible "choice" may exist to install such infrastructure in order to ensure direct consumption of energy used to heat water.

Hot water services are normally an integral part of the rental costs in multi-tenanted dwellings were a single gas meter and a single boiler tank exists for the supply of heated water.

[1] *Residential Tenancies Act 1997 (ACT)* A1997-84 Republication No. 324 effective 22 December 2009. Last amendment made by A2009-44
http://www.legislation.act.gov.au/a/1997-84/current/pdf/1997-84.pdf

Repair, maintenance and safety

NSW tenancy laws holds that:

"If a tenant is willing to meet the costs and repair any damage when they leave the review can see no justification for a Landlord having an absolute right of refusal, ***unless it involves alterations of a structural nature****. Excising the alleged choice to have a separate gas meter to heat water in individual residential premises situated in multi-tenanted dwellings represents a structural change such as referred to."*[2]

Similarly, the South Australian tenancy provisions under the Residential Tenancies Act 1995[3] refers to alternation to premises as follows:

70—Alteration of premises[4]/[5]

(1) It is a term of a residential tenancy agreement that a tenant must not, without the Landlord's written consent, make an alteration or addition to the premises.

(2) A tenant may remove a fixture affixed to the premises by the tenant unless its removal would cause damage to the premises.

(3) If a tenant causes damage to the premises by removing a fixture, the tenant must notify the Landlord and, at the option of the Landlord, repair the damage or compensate the Landlord for the reasonable cost of repairing the damage.

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[2] Elsewhere I discuss the clarity with which the ACT *Residential Tenancies Act* explicitly apportions to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone. Similar provisions apply in Victorian provisions. NSW permits water charges for excess water only if metered; or additional water charges by consent only. Electricity and gas charges need to be metered to show consumption. Queensland tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Qld Govt at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

[3] *Residential Tenancies Act 1995* (SA), clause 70
http://www.legislation.sa.gov.au/LZ/C/A/RESIDENTIAL%20TENANCIES%20ACT%201995/CURRENT/1995.63.UN.PDF

[4] The South Australian *Residential Tenancies Act 1995* contains very similar provisions regarding alteration to premises – for which Landlord prior consent is always required – and in the case of attempting to fit gas meters and other such infrastructure such consent is almost always likely to be refused as discussed. Therefore using this as evidence that "choice" exists in order to fit infrastructure and receive direct supply of gas for water heating – which would also require a boiler tank would be ridiculous and unjust in the case of residential tenants. If this is what JGN means – and it certainly seems that it is what the Dept of Industry and Investment NSW means – in relation to choice of energy retailer – then the rationale needs to be vigorously challenged.
It is not the prerogative of other jurisdictions to attempt to re-write laws under other jurisdictional control, including the enshrined protections of tenancy acts, generic laws, trade measurement laws and generic laws current and proposed, not to over-ride enshrined rights in the unwritten laws = the common law including the rights of natural and social justice.

[5] Tasmanian tenancy provisions under the Residential Tenancies Act 1997 (TAS) have similar provisions about alteration to property without Landlord consent.

In addition, requirements imposed on a renting tenant under any circumstances to supply and fit at own cost water or any other utility infrastructure, including gas or electricity, would represent unreasonable and substantive unfair terms, especially if this is the justification provided for the misleading statement that *"competition"* exists in that a renting tenant or other occupant is at liberty to create a legitimate contract for sale and supply of energy or water by installing his own infrastructure.

Such infrastructure and their maintenance are always the responsibility of the Owners Corporation or other third party appointed to maintain these assets.

Most residential tenancy provisions in various states and territories contain very similar provisions regarding alteration to premises for which Landlord prior consent is always required. Structural alteration is normally not permitted especially if this involves fitting of utility infrastructure of any description.

The ACT tenancy provisions are explicit that such responsibility is always Landlord responsibility and cannot be imposed of residential tenants.

The **ACT** Residential Tenancies Act explicitly apportions to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone.

Similar provisions apply in Victorian provisions.

I discuss cost-recovery by Landlords and/or OCs under tenancy provisions elsewhere.

The collusive arrangements made that are apparently tacitly endorsed by energy policy-makers and regulators appear to have the effect of facilitating, through the use of third party contractors *"see-through tax advantages"* for Landlords that are not passed on to consumers; that cause ongoing detriment and erode enshrined rights under multiple provisions including tenancy rights; unfair contract terms under generic laws current and proposed; trade measurement practices and enshrined consumer protections therein – subject to the lifting of remaining utility exemptions as is the intent; common law rights including the rights of social and natural justice.

Reliance on the option of residential tenants to simply fit a individual boiler system or gas or electricity meter in order to *"opt-out"* of arrangements for central heating of water for all occupants in multi-tenanted dwellings as evidence of competitive choice is fundamentally flawed and is leading to widespread exploitation of the enshrined rights of individual consumers.

Even in the case of individual strata title owners, there are many matters of dispute, some before the open courts, based on current practices that form part of collusive arrangements between Landlords and/or OCs and energy providers including those fitting the description of either in-house or third-party external outsourced arrangements for data metering services.

I will not dwell here on interpretations of what constitute arms-length or non-arms length arrangements, but have cursorily discussed the structure of the Jemena Group and relationship to Singapore Power International.

In terms of repair it is always the Lessor's responsibility normally Landlord or Owners Corporation to maintain and replace infrastructure. It is unviable and inappropriate for a residential tenant to install such infrastructure, which in any case cannot be undertaken without the Lessor's consent, rarely given in terms of utility infrastructure

Refer to case studies cited by TUV and consistent findings by VCAT that tenants of premises not separately metered for gas cannot be charged for energy consumption. Water may only be charged in separately metered and only for actual consumption costs not supply or other costs, as upheld by most other state tenancy laws

Refer to provisions in ACT tenancy laws wherein amongst several other obligations the Lessor (Landlord or OC) must pay for

42 (c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;

42 (d) all services up to the time of measurement or reading at the beginning of the tenancy

43 (1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

In relation to alleged "choice" the erroneous perception that a residential tenant may "choose" to install physical infrastructure such as individual boiler system meter and associated equipment fails to recognize other laws, or practical considerations including affordability and the often transient nature of tenancy arrangements for which lease agreements are negotiated on a 12-month basis as a rule. To suggest that renting tenants can make their own arrangement is they do not like imprecise and legally unsustainable means of calculation is to ignore obligations under trade measurement and other provisions.

Jemena has alleged that NSW provisions are different in that individual occupants in multi-tenanted dwellings have choice in a competitive environment – in relation to the BHW provisions there is no such choice; and even if change of retailer were feasible the outcomes would be the same – the wrong instrument measures the wrong commodity, applying incorrect use of instrument, using the wrong prescribed unit and scale of measurement. The practices in place are inappropriate and legally unsustainable

In the case of the Jemena (JGN Gas Networks (NSW) 20010-2015 gas access proposal, JGN has suggested massive outlays for replacement of water meters that are entirely unnecessary for the calculation of gas provision and which do not form p-at of the gas distribution system

The ramifications for contract, trade measurement, generic and tenancy laws are huge, including unfair substantive terms of contract that would be voidable.

Similar arguments apply to all other providers of services, including metering data services using metrology practices and imposing contractual obligations on the right parties. The proper contractual party is the Landlord or OC, and the proper measurement instrument is the single gas or electricity meter that heats a communal boiler tank reticulating heated water supplies in water pipes to individual residential abodes in multi-tenanted dwellings.

Refer to impacts resulting from possible failure to consider comparative law and developments in multiple arenas, including the new national powers under national trade measurement provisions with full effect from 1 July 2010 (with some utility exemptions pending, and others being considered).

In the major case study cited, upon challenge to Victorian Civil and Administrative Tribunal (VCAT), all bills remitted to tenants and residents were found to contravene the Act and the amount paid under these unlawful bills were refunded

In that context, I now quote directly and dissect paragraph by paragraph here from s.46 and s48 respectively of the *Gas Industry Act 2001*,[6] administered by the *Essential Services Commission Victoria* (VESC) and overseen by the Department of Primary Industries Victoria, making particular note that the provisions refer to the sale of gas, and must not be inconsistent with the *Gas Distribution Code* published from time to time by the Office of the Regulator General (now Essential Services Commission).

[6] *Gas Industry Act 2001* found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/451636145440e6a2ca25705900078e48/$FILE/01-31a024.pdf*

TENANCY LAWS IN RELATION TO COST RECOVERY

On reviewing the website recently I stumbled on a number of regulatory cost allocation and other matters in several states that are also pertinent and would be affected by some of the considerations that I have raised.

These include impacts resulting from possible failure to consider comparative law and developments in multiple arenas, including the new national trade measurement provisions already in place, with full effect from 1 July 2010 (with some utility exemptions pending, and others being considered).

There are also impacts on several new provisions within the adopted Australian Consumer Law (1), with further additions expected after Senate consideration of the ACL Amendment Bill (2), which are expected to be incorporated into the ACL later this year, with the TPA being renamed Competition and Consumer Law (CC).

I discuss below on separate pages for each some of the considerations in States participating in the NECF

ACT

ACT Tenancy Provisions under the ACT Residential Tenancies Act 1997[7]

Lessor's costs

42 The lessor is responsible for the cost of the following:

(a) rates and taxes relating to the premises;

(b) services for which the lessor agrees to be responsible;

(c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;

(d) all services up to the time of measurement or reading at the beginning of the tenancy;

(e) all services after reading or measurement at the end of the tenancy providing the tenant has not made any use of the service after the reading.

43 (1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).
(2) The tenant is responsible for the connection of all services that will be supplied in the tenant's name.

44 The lessor must pay the annual supply charge associated with the supply of water or sewerage.

45 If the premises are a unit under the Unit Titles Act 2001, the lessor is responsible for all owners' corporation charges.

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[7] *Residential Tenancies Act 1997 (ACT)* A1997-84 Republication No. 324 effective 22 December 2009. Last amendment made by A2009-44
http://www.legislation.act.gov.au/a/1997-84/current/pdf/1997-84.pdf

Comment MK

These provisions make it very plain that supply charges for water and sewage are Lessor responsibility, and also that the Lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

These issues are not clarified in other tenancy provisions, but it is a matter of common sense that no tenant should be liable for installation costs of this kind, or that competition for utilities be deemed to exist because a theoretical but inaccessible "choice" may exist to install such infrastructure in order to ensure direct consumption of energy used to heat water.

Hot water services are normally an integral part of the rental costs in multi-tenanted dwellings were a single gas meter and a single boiler tank exists for the supply of heated water.

Tenant's costs (ACT)

46 The tenant is responsible for all charges associated with the consumption of services supplied to the premises, including electricity, gas, water and telephone.

47 The tenant is not required by the lessor to connect or continue a telephone service.

Comment MK:

No direct flow of gas or electricity occurs within the bulk hot water arrangements in which a single meter for gas or electricity exists which fires up a single communal boiler tank from which heated water is reticulated in water service pipes.

These provisions appear to me to be clearest and fairest within jurisdictions and make matters patently clear in relation to liabilities, separate metering expectations and lessor liability

Reading of metered services (ACT)

48 (1) The lessor is responsible for undertaking or arranging all readings or measurement of services, other than those that are connected in the name of the tenant.

Comment MK

This clause makes it plain that it conditions precedent and subsequent in relation to meter readings is Lessor responsibility. This is contrary to the expectations placed in the proposed National Energy Retail Laws and Rules

(2) The lessor must provide the tenant with an opportunity to verify readings and measurements.

49 If the lessor does not arrange reading or measurement of a service connected in the name of the lessor by the day after the date of expiry of notice to vacate given in accordance with this tenancy agreement or the Residential Tenancies Act, the lessor is be responsible for payment of the unread or unmeasured service after the date of the last reading or measurement.

50 (1) If the tenant vacates the premises without giving notice before departure, the lessor must arrange a reading or measurement of services connected in the lessor's name within a reasonable time of the lessor becoming aware of the departure of the tenant.

(2) The tenant is responsible for payment of services to the date of that reading or measurement.

Repairs in unit title premises

58 If the premises are a unit under the Unit Titles Act 2001, and the tenant's use and enjoyment of the premises reasonably requires repairs to the common property, the lessor must take all steps necessary to require the owners corporation to make the repairs as quickly as possible.

Comment MK

These provisions make matters clear and are not as succinctly put within other tenancy provisions, though in Victoria the OC Act exists to cover common property infrastructure liability by the OC.

Hot water services where water is centrally heated and a single gas or electricity meter exists to provide the energy are under that category. The existence of hot water flow meters are irrelevant and unnecessary, and under new trade measurement provisions would not be appropriate instruments to use to make any form of calculation regarding alleged energy usage or consumption by an end-tenant receiving merely heated water in composite form reticulated in water pipes rather than at the outlet of a gas meter (or electricity meter) representing flow of energy.

The proposed National Energy Retail Rules and Laws also embrace the concept of direct flow of energy and disconnection under specified circumstances only of gas or electricity not water.

MK further comment:

The energy supplier distributor or third party data metering provider or meter reader does not own the water and may not on-sell it. Exceptions may apply to public authorities in the role of Landlord.

Energy suppliers or other parties may own the energy being used to heat a single boiler tank, but they do not transmit energy to end users of a composite water product – reticulated in water of varying temperature quality and consistency in water service pipes.

In some apartment blocks depending on location a 200 litre draw can be necessary before the water is even hot. Landlords have no incentive to lag pipes or maintain infrastructure. The debates about who is responsible for each part of the infrastructure are perennial.

Energy policy makers and energy providers should not be interfering in contractual relationships between Landlords and tenants or endeavour to strip residential tenants of their enshrined rights under tenancy, generic, contractual, common law or trade measurement instruments, current or proposed.

The Water Authority supplies the water to the Body Corporate who then apportions to each owner (not renting tenant) the cost of heating the water, unless a separate gas meter already exists (at the owners' expense) through which gas consumption can be directly measured.

In each of these circumstances the question of choice is but an artifact based on perpetuated misconceptions across the board by policy-makers and providers of energy alike.

It is absurd and unjust to expect a renting tenant to exercise any choice that involves the outlay of considerable funds for fixtures, fittings or meters that are essential for the proper measurement of utilities using the right instrument, for the right commodity, applying the right scale of measurement, and applying the generic contractual and common law rights in force.

I remind all policy-makers that the always are in the process of change. The existing arrangements if it implies choice that cannot in practice be exercise; or use of water meters to effectively pose as gas or electricity meters in attempts to guestimate the alleged sale and supply of gas where no flow of gas to each residential abode can be demonstrated.

A supply point does not mean a street address – it means the point at which gas leaves the gas infrastructure and enters the outlet of a gas meter.

Poor understanding of these technicalities has resulted in distortion of interpretations of existing and future provisions and progressive erosion of existing rights.

As to suggest that no matter may be appealed in the open courts – this again represents another illustration of poor understanding of the powers of higher courts.

NEW SOUTH WALES

In **NSW** Landlords can only reclaim the costs of actual consumption of **excess water,** or alternatively where water meters exist, and where by consent (but not obligatory under the law), additional standard term clauses are included in a tenancy lease, may reclaim additional **actual water consumption costs only** not supply charges and other costs. The same applies in Victoria.

Electricity and gas charges need to be metered to show consumption.

The **NSW** tenancy regulations appear to omit specific mention of heated water provisions where no direct supply occurs, as do the ACT provisions, but it is clear that in terms of water – only the excess cost of water (without specifying hot or cold) needs to be paid; or if by non-mandatory consent additional water costs are included in a lease.

VICTORIA

In **Victoria** even if water meters exist, Landlords can only charge for water costs if energy-saving devices are fitted (s69); the cost of consumption of water only may be charged not any supply or other charges bundled or unbundled); Landlords are responsible for all capital and infrastructure costs, including common property. The Landlord may not recovery other utility costs for gas or electricity for example in the absence of separate meters for each utility.

In some States, including Victoria, residential tenancy laws do not permit a Landlord to charge for the heating component of water unless a separate meter is fitted for each form of utility – and the cost such infrastructure is expected to be borne by the Landlord as an intrinsic part of the facilities provided. In addition, the Landlord may not charge for water even when accurately calibrated satellite hot water flow meters exist except at the cold water rate.

Specifically under s53 of the Victorian *Residential Tenancies Act 1997*[8] the following provisions apply:

Residential Tenancies Act 1997 - SECT 52

Tenant's liability for various utility charges

52. Tenant's liability for various utility charges

A tenant is liable for-

(a) all charges in respect of the supply or use of electricity, gas or oil in respect of the tenant's occupation of rented premises that are separately metered except-

(i) the installation costs and charges in respect of the initial connection of the service to the rented premises; and

(ii) the supply or hire of gas bottles;

(b) the cost of all water supplied to the rented premises during the tenant's occupancy if the cost is based solely on the amount of water supplied and the premises are separately metered;

(c) that part of the charge that is based on the amount of water supplied to the premises during the tenant's occupation if the cost of water supplied is only partly based on the amount of water supplied to the premises and the premises are separately metered;

(d) all sewerage disposal charges in respect of separately metered rented premises imposed during the tenant's occupation of the rented premises by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(e) all charges in respect of the use of bottled gas at the rented premises in respect of the tenant's occupation of the rented premises.

[8] *Residential Tenancies Act 1997* Victoria

Landlord's liability for various utility charges

53. Landlord's liability for various utility charges

(1) A Landlord is liable for-

(a) the installation costs and charges in respect of the initial connection to rented premises of any electricity, water, gas, bottled gas or oil supply service;

(b) all charges in respect of the supply or use of electricity, gas (except bottled gas) or oil by the tenant at rented premises that are not separately metered;

(c) all charges arising from a water supply service to separately metered rented premises that are not based on the amount of water supplied to the premises;

(d) all costs and charges related to a water supply service to and water supplied to rented premises that are not separately metered;

(e) all sewerage disposal charges in respect of rented premises that are not separately metered imposed by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(f) all charges related to the supply of sewerage services or the supply or use of drainage services to or at the rented premises;

(g) all charges related to the supply or hire of gas bottles to the rented premises.

(2) A Landlord may agree to take over liability for any cost or charge for which the tenant is liable under section 52.

(3) An agreement under subsection (2) must be in writing and be signed by the Landlord.

In addition

Residential Tenancies Act 1997 - SECT 54 (Vic)

Landlord's liability for charges for supply to non-complying appliances

54. Landlord's liability for charges for supply to non-complying appliances

(1) A Landlord is liable to pay for the cost of water supplied to or used at the rented premises for as long as the Landlord is in breach of section 69 or of any law requiring the use of water efficient appliances for the premises.

(2) Subsection (1) applies despite anything to the contrary in section 52 of this Act and Part 13 of the Water Act 1989.

I raised the following issues on page 26 of my original April 2010 submission:

"If any party should be contractually obligated for any metering and data services it should be the developer or Owners Corporation (Body Corporation) who originally requested the gas or electricity metering installation.

Any arrangements as to ownership of water assets, including metering and associated equipment is an arrangement between provider and the controller of premises, normally once developer stage is passed, the Body Corporate, not the end user of heated water.

I am concerned that the AER MCE AEMC and AEMO may by implication be sanctioning services that are unrelated to the sale and supply of energy. Changes to generic and trade measurement laws are very clear.

The National Measurement Institute is the sole authority on metrology matters and upholds the principles of legal traceability of commodities and services. For the purposes of current and proposed generic and other laws, electricity and gas are commodities and therefore are covered by the full suite of protections.

The Jemena Gas Networks (NSW) Ltd Revised Access revised proposal is pending the AER's final decision by 28 May is but the tip of the iceberg and my concerns extend much further to cost allocation principles generally both for electricity and gas in certain areas; to the ACCC's independent role in competition and consumer protection matters.

As to consideration those receiving heated water as a composite product under such conditions to be "embedded" this is absurd since no flow of energy ever enters the abodes of those deemed to be receiving gas.

Gas and electricity are commodities for the purposes of generic laws and the full suite of protections applies. There are implications also for statutory and implied warranty terms; unfair contract terms embedded in proposed energy rules and laws; and the pending Rule Change proposal by the AEMC, which was not made part of a transparent process at the time when the NECF2 Exposure Drafts were put forward for consideration by stakeholders.

EnergyAdvice has also raised the issue of meaningful stakeholder consultation, and queried why the Draft Decision of the AER was published without a further public forum?

Though this is not a requirement, in view of the degree to which stakeholder endorsement is compromised, and also given the massive regulatory changes on foot in generic, trade measurement, national energy laws and so on, a hasty decision without further direct consultation may be against public interest. This case is a test case and not about a particular provider. The principles will apply across the board to all energy providers and impact on all stakeholders."

Residential Tenancies Act 1997 - SECT 69 (Victoria)

Landlord must ensure replacement water appliances have A rating

69. Landlord must ensure replacement water appliances have A rating

A Landlord must ensure that if an appliance, fitting or fixture provided by the Landlord that uses or supplies water at the rented premises needs to be replaced, the replacement has at least an A rating.

55. Reimbursement

(1) If a Landlord pays for anything for which the tenant is liable under section 52, the tenant must reimburse the Landlord within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(2) If a tenant pays for anything for which the Landlord is liable under section 53 or 54, the Landlord must reimburse the tenant within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(3) Subsection (1) does not apply if there is an agreement to the contrary under section 53.

Comment MK

The problems with this cost-recovery arrangement are discussed more fully in the deidentified case study that I submitted to various arenas, including the MCE SCO NECF1 (2008) NECF2 Package (2010); the Gas Connections Framework Draft Policy Paper (2009); the Treasury's Unconscionable Conduct Issues Paper (2009) and the Senate's Economics Committee Consumer Inquiry (ACL-TPA Amendment Bill2) ((2010); and previously the Productivity Commission's Consumer Policy Inquiry (2007-2008) (subdr242 Parts 1-5 and 8).

These include:

1. Inaccessibility to fair and just complaints and non-litigious dispute resolution processes. For example most industry-specific complaints schemes are expressly limited under their charters to deal with complaints relating to BHW arrangements; embedded or exempt selling regimes. In the case of EWOV (Vic) they have openly expressed conflicts of interests
2. Difficulties under VCAT or other Fair Trading jurisdictions in other States in dealing with third parties not party to the Landlord-tenant agreement – which is why it is so attractive for Landlords to use those third parties in collusive arrangements with energy providers, with or without tacit or explicit sanction from energy authorities.
3. Cost of filing fees on a quarterly basis or at least as often as bills are issued, these costs often outweighing the value of reimbursement in monetary and stress terms
4. Waiting time for 28 days before VCAT reimbursement claim can be met
5. Dealing with recalcitrant Landlords who refuse to comply with Orders – repeatedly as documented for instance by the Tenants' Union Victoria

6. The imposition of conditions precedent and subsequent especially with regard to access to meters that are not in the care custody and control of end-users of utilities. Alleged denial of access to such meters results in unwarranted disconnection of heated water in the case of the BHW arrangements

7. Consequences of alleged *"breach"* of energy contracts that do not under contract and common law or tenancy provisions exist in the first place between energy providers and end-users of centrally heated water

8. Possible implications for credit rating

9. The inability of certain client groups to effectively participate and follow-through in litigious proceedings, especially because of the stresses and delays involved; language barriers; or generally compromised ability

10. Unjust imposition of unfair substantive terms under contracts that are not reflected in parity with generic provisions existing and proposed

11. Unjust use of inappropriate trade measurement practices that erode best practice stands and breach the spirit and soon the letter of trade measurement laws upholding the principles of legal traceability of measurement and measurement standards that include using instruments for the right purposes, in the manner intended, measuring the right commodity with the right instrument; using the prescribed units and scales of measurement.

    As soon as remaining utility exemptions are lifted, many of the current practices may carry strict liability penalties under trade measurement provisions

12. The current arrangements for BHW contractual imposition trade measurement and charging will leave providers of energy vulnerable as well as potential those who tacitly or explicitly sanction practices that breach the spirit and letter of other provisions and violate best practice

SOUTH AUSTRALIA

In **South Australia** mandated tenancy terms require that The Landlord bears all statutory rates, taxes and charges imposed in respect of the premises (Div 11, s73 Rates taxes and charges)

In relation to the *"bulk hot water arrangements"* in **Queensland** tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Queensland Government at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

Please refer to the submission of Kevin McMahon to the NECF2 2nd Exposure Draft, now also included as submission 46 to the Senate's TPA-ACL Bill2 enquiry, now completed and reported. Mr. McMahon was a direct victim of these policies albeit living in social housing, living in public housing in Queensland.

The SA provisions[9] mention water within the Act itself as shown below

Division 11—Rates, taxes and charges

73—Rates, taxes and charges

(1) It is a term of a residential tenancy agreement that the Landlord must bear all statutory rates, taxes and charges imposed in respect of the premises.

(2) However, rates and charges for water supply are to be borne as agreed between the Landlord and the tenant.

(3) In the absence of an agreement—

(a) the Landlord will bear the rates and charges for water supply up to a limit fixed or determined under the regulations; and

(b) any amount in excess of the limit is to be borne by the tenant.

The SA tenancy regulations offer less clarification in relation to other utilities than do other provisions barring Qld, but it is more than reasonable to conclude that the provision of electricity nor gas must be by direct flow of energy and not on the basis of using a water meter to pose as a gas or electricity meter or where heated water reticulated in water pipes, having been heated in a communal water tank supplied by a single gas meter on common property represents electricity or gas provision.

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9 *Residential Tenancies Act 1995 (SA) version 1 February 2010 Accessed 27 May 2010 http://www.legislation.sa.gov.au/LZ/C/A/RESIDENTIAL%20TENANCIES%20ACT%201995/CURRENT/1995.63.UN.PDF*

Extract **South Australian** tenancy regulations[10]

8—Other amounts recoverable by the Landlord

Pursuant to section 53(2)(c) of the Act, a Landlord is also authorised to require or receive payments for the provision of electricity, gas or telephone services at the premises if the accounts for those items are in the name of the Landlord.

Note the SA tenancy provisions have not been updated for ten years since 2000

[10] *Residential Tenancies (General) Regulations 1995* (SA) last update 28 February 2000, Accessed 27 May 2010
http://www.legislation.sa.gov.au/LZ/C/R/RESIDENTIAL%20TENANCIES%20(GENERAL)%20REGULATIONS%201995/CURRENT/1995.210.UN.RTF

QUEENSLAND

In **Queensland** compromised tenancy and fair trading provisions as discussed by Kevin. It is not the Body Corporate in public housing in Queensland to whom bills are issued, but rather to the residential tenants in public housing, most on very slim incomes.

The **Queensland** provisions have recently been consolidated as the *Residential Tenancies and Rooming Accommodation Act 2008* with regulations of a similar name but dated 2009

12 Services

12.1 Any services supplied to the premises, other than water, for which the tenant must pay.

Examples of services— electricity and gas

Mr. McMahon says in his submission to NEF2 also published on the Senate website[11]

Since the FRC date in Queensland (1st July 2007) the price of natural gas has only increased by about 10%, but the price that Origin charge for BHW has increased to a level of 39% above the Victorian Conversion Factor, and the hot water meter reading fees have increased by 50%, over the last 3 financial years Origin has refused to converse with me, or give any reason why such price gouging is justified.

In Origin's case, even when the gas went down in price (the FRC date) - the price of BHW went up!

He has referred to 44% price gouge this by 44%. In relation to supply charges and hot water charges for BHW consumers in Queensland. (p4)

Mr. McMahon further states

LANDLORDS AND PROPERTY OWNERS

Bulk hot water meter reading fees on Origin invoices, show a fee to read and service that meter. On the 1st of July, prices increase and is applied to invoices as of that date. It is back-dated for 91 days (1 Qtr). It is not pro-rated for up to 91 days Other fees and charges on the bill (Gas, Hot Water, Supply Charges), are shown with both Pre and Post fees that center around the 1st of July.

Origin retrospectively apply this hot water meter reading fee.

BHW is not mentioned in government tenancy agreements in Queensland, for Landlords know that they cannot force a tenant to buy a service from someone else (Line Forcing TPA).

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11 Submissions (2010) to Senate Economics Standing Committee Consumer Law Inquiry (completed Trade Practices Act (Australian Consumer Law) Amendment Bill(2)
http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm
Published item copy of submission from Kevin McMahon Qld resident in public housing as made to the National Energy Customer Framework 2nd Exposure Draft (March 2010)

My Landlord (The Hon. Karen Struthers, MP) refuses to correspond with me also.

Housing Queensland does not allow a body corporate system for its tenants, for this usually relates to shared strata-titled property owners. Housing Queensland is exempt from most of the Residential Tenancies Act (Qld).

Over the last few years, the current state of affairs regarding Housing Queensland and QBuild, is to design properties for public housing and community housing where tenants have their own hot water systems, along with potable water, gas, electricity meters etc; with each individually metered. The Queensland Government is concerned about saving water in this time of climate change, and to help reduce carbon foot-prints. Energy and water saving restrictors are installed in tenants abodes.

Most of the BHW systems in Queensland are in older public housing flats and apartments, with the rest made up of nursing homes, caravan parks, converted old hotels and motels, boarding houses, and generally affect citizens on low incomes. Most tenants affected have a poor understanding of the energy sector at large.

Some tenancies may have gas BHW only, with an electric stove. Some may have BHW and a gas stove appliance also.

Tenants do not have the ability to turn down the hot water (say in hot weather) nor abate the cost of use, for they are charged by the litre, whether the water is tepid, warm or hot. These large shared boilers are running flat out, 24 hours a day, every day of the year and are a massive waste of energy. Stored hot water systems have poor insulation and have a lower energy rating, compared to "peizo spark - on demand" hot water units.

Stored hot water boilers have very basic insulation, and waste a lot of energy. Even the pilot light that is continually lit, is a waste of energy.

There are also health risks (known Legionnaire's Contamination) regarding low heat settings for Hot Water Systems."

Comment MK:

Note I have discussed Legionnaire's diseases associated with boiler tanks at great length in my 2007 submission to the National Energy Efficiency 2 Package (NFEE), citing Australian and overseas data in support

The BHW arrangements post health risks; are inefficient in terms of energy conservation (a 200 litre draw of water is not uncommon in certain apartment blocks before water is hot); leave exploitation open, may occasion loss of water through unattended pipe leakages or failure to lag; and do not encourage Landlords or OCs to face their liabilities for maintenance.

TASMANIA

The **Tasmanian** provisions regarding water and sewage are under special campaign efforts by the Tasmanian Tenants Union, and are seen as unfair and burdensome especially to low income tenants.

There are numerous gaps in the Tasmanian provisions

The *Residential Tenancies Act 1997* (Tas) [12] refers to a *"water consumption charge"* with increases expected. Consumption of water means that measured by a devise capable of measuring water volume. Heated water is not mentioned and neither is electricity or gas.

"water consumption charge" means an amount levied on an owner by a regulated entity, within the meaning of the Water and Sewerage Industry Act 2008, for water consumed by an occupant of residential premises that is calculated as a fee for each unit of water consumed.

Other States including Queensland and South Australia followed Victoria's lead with the bulk hot water arrangements. In Queensland the tenancy and fair trading protections are weaker and there are enhanced concerns about the operation of non-governmental monopolies in the provision of gas used to centrally heat a communal water tank. The segments of the community most impacted in Queensland are those living in public housing, most of them vulnerable and/or disadvantaged.

Even when they receive no gas at all they are required to pay FRC fees.[13]

Meanwhile, the QCA's November 2009 report omitted to identify the following:

- Precisely how much gas was being transported via pipelines to heat communal water tanks (many in public housing; others in owner/occupier dwellings; others possibly in the private rental market without owner occupation?
- How much gas in total was being used to heat communal *"bulk hot water tanks"* in multi-tenanted dwellings

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12 Tasmanian Tenancy Regulations
http://www.austlii.edu.au/au/legis/tas/consol_act/rta1997201/s17.html

13 FRC means "Freedom of Retail Contestability" is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place. In Qld It is imposed on natural gas customers accounts, and is about $25 per year for the first 5 years after the FRC date : 1st June 2007.It accumulates over this first 5 years as a "pass through cost" of about $20million and will be phased out in a couple of years.
Vencorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

- How calculations regarding gas consumption (using hot water flow meters that measure water volume not gas or heat) were made regarding the alleged sale of gas to end-users of heated water, and on what basis under the provisions of contractual law, revised generic laws under the *TPA* (which by the end of 2010 must also be reflected in all jurisdictional Fair Trading Laws); and the *Sale of Goods Act 1896 (Qld)*[14] or residential tenancy provisions; and what is likely to happen with the existing utility exemptions under National Trade Measurement provisions are lifted as is the intent., making the current practices directly invalid and illegal with regard to trade measurement.
- How such a contractual basis is deemed valid and will be consistent with the provisions of the Trade Practices (Australian Consumer Law) Act 2009, effective 1 January 2010, given that the substantive terms of the unilaterally imposed *"deemed contract"* with the energy supplier its servant/contractor and/or agent
- How the calculations used, which may be loosely based on the Victorian "BHW" policy provisions (based on what seem to be grossly flawed interpretations of s46 of the *GIA*)
- Whether and to what extent a profit base is used to "cross-subsidize" the price of Origin's gas sales barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market[15] is captured by an encumbent retailer who apparently purchased in its entirety the "BHW customer base" in 2007, based not on the number of single gas master meters existed in multi-tenanted dwellings (which for Distributor-Retailer settlement purposes represent a single supply point, there being no subsidiary gas points in the individual abodes of those unjustly imposed with contractual status in terms of sale and supply of gas.
- On what basis massive supply, commodity, service and FRC charges are imposed on end users of gas so supplied for the heating of a communal water tank, when the services and associated costs property belong to the OC.

Refer to Qld Govt Fact Sheet "Sale of the Qussnsland Government's Energy Retail Businesses, p2 "However, around 2,500 gas customers will now receive two bills if they are both serviced hot water (Origin) and natural gas (AGL) customers.

[14] *Sale of Goods Act 1896* (Qld) (reprinted and as in force as at 29 August 2007)

[15] A misnomer since it is not water that is charged for but the heating component of a composite product where only a single gas (or electricity) meter exists which is used to heat a communal water tank from which water is reticulated in water pipes to the individual abodes of renting tenants either in private of public housing.

This is because ENERGEX's former natural gas business was sold separately as Sun Gas Retail. Some of these 2,500 customers with low rates of usage may experience an increase in their bills if both accounts attract minimum usage charges. However, the introduction of full retail competition in gas will allow such customers to manage this situation by changing their gas retailer." This last comment means transfer from AGL to Origin to compound the monopoly situation so that supply charges for the actual supply of gas for heating and cooking purposes is not duplicated on the basis of alleged supply of gas from Origin for the purposes of centrally heating a communal boiler tank, but not providing any direct flow of gas to the recipients of the heated water. See Kevin McMahon's submission to the NECF2 Package, also published on the Senate's website (TPA_ACL-Bill2).

Refer also to the Second Reading Speech by the then Treasurer The Hon Anna Bligh (now Qld Premier) and Member for South Brisbane) 'Energy Assets (Restructuring and Disposal) Bill" Hansard Wednesday 11 October 2006, especially penultimate paragraph page 1, and first paragraph p2 in which extraordinary guarantees seem to have been made regarding exemption from challenge. Perhaps Part 3 Statutory Orders of Review as contained in the Queensland Judicial Review Act 1991 need to be evoked – since one monopoly – the State Government sold energy assets (and impliedly packaged these with water assets) to another monopoly Origin in order that Orin could claim retail sale of energy to its guaranteed monopoly market where no sale or supply of energy through flow of energy is effected.

Refer also to comments made by the law firm instructed to act on behalf of Energex, though the vendor instructions were handled by the Government in what appeared to be complex arrangements

In my view the circumstances , warranties and guarantees so made deserve scrutiny, as also arrangements in other states during sale and disaggregation of energy assets. Such scrutiny may provide the key to understanding why these bizarre, scientifically and legally unsustainable provisions have been retained despite detriment and unworkability, as arrangements that appear to be fanning market dysfunction and consumer detriment.

There is a fair and just way of a fairer system of addressing the issues.

The Victorian *Residential Tenancies Act 1997* (RTA) prohibits charging for water, even when meters exist other than at the cold water rate, so the question of charging for heating is inappropriate.

Victorian *RTA* provisions disallow utility supply charges or charges for anything other than actual consumption charges where individual utility meters (gas electricity or water) do exist. This is a vast improvement on Old provisions.

Nonetheless loopholes allow third parties and energy suppliers not party to Landlord-tenant agreements to exploit the system with the apparently collusive involvement and active instruction of policy-makers and regulators.

Despite the existence of these arrangements and both implicit and explicit endorsement of discrepant contractual governance and billing and charging practices associated with the *"BHW arrangements"* none of the policy-makers or regulators seem to be willing to clarify within market structure assessments; competitive assessments or reports that such arrangements exist, must be taken into account, and must be covered by appropriate consumer protection arrangements.

Regardless of whether these matters are considered of a predominantly "economic-stream" interest, there are consumer protection issues that have been entirely neglected with jurisdictional and proposed national energy consumer protection frameworks in areas where it is mostly the most vulnerable of utility end-consumer, in a captured monopoly-type market with no chance of actively competing in the competitive market

DISCUSSON OF OWNERS' CORPORATION PERSPECTIVES

In relation to the latter group I refer to an article by Shane McNally of September 2007 entitled *"Making Every Drop Count"* in discussing the anomalies of strata **water billing** that exist throughout Australia, which need addressing. This refers to water billing for cold water supplied at a mains by the Water Authority, not hot water

He refers to Bruce Wheeler's views as General Manager of the Institute of Strata Title Management who believes that the current situation in NSW is unfair. McNally on p1 of his article refers to Bruce Wheeler call for an: *"across-the-board move towards individual water meters as a fair means of billing and also as a water saving measure."*

I uphold those views, and therefore am sympathetic to both the needs of residential tenants and individual strata title owners, who may continue to be exploited by arrangements, including bundled arrangements for service provision made with Developer and previous Owners before ever taking up residence.

Wheeler is quoted in McNally's article[16] as saying that

"The current one-meter situation (for strata owners) is unfair because at present there is one water bill per building and this is paid out of the strata levy which is calculated as a share of unit entitlement.

"Water bills aren't paid based on consumption by each unit, measuring owners could be paying for the excessive water consumption of their neighbour."

There are also GST anomalies that are considered unfair and are discussed within the article. The Institute of Strata Title Management is seeking federal and state governments to act on several issues; including closing the GST loophole so owners are no longer paying non-existent GST on water bills.

As also mentioned elsewhere in discussing the strata title owners' perspectives, there are unfair terms also inherent in billing practices udne4rtaken when all the parties are owner-occupiers of strata title properties.

In these circumstances, the Australian Property Investor (Sept 2007) in discussing the situation in NSW, says that *"owners could be paying for the excessive water consumption of their neighbour."*

Wheeler says the GST anomaly is costing residents millions of dollars each year and argues that billing individuals rather than whole buildings for water would be fairer. This is not associated with hot water, but cost of water divided amongst owners.

[16] *see www.apimagazine.com.au "Making every drop count: Article by Shane McNally.*

The principles for billing owners simply by calculating the number of apartments or units and evenly dividing the cost has been also used for heated water in endeavouring to apportion to each supply and other charges – where for settlement purposes by a single gas supply or energization point exists, one GST charge and one proper contractual party – the Owners' Corporation, who have to meet divided costs in the manner agreed under their terms.

Forcing strata owners into bundled arrangements or contractual arrangements that would hot in contractual or common law to belong to them is inappropriate.

For residential tenants the situation is even more unfair when I comes to heated water, which under some tenancy laws may only be charged at the cold water rate, and the Owners' Corporation receives a bill for that cold water.

Though for settlement purposes only a single gas meter exists and the retailer is charged by the distributor for gas (or electricity) distribution to that single meter, the former are endeavouring to impose both consumption and supply and other charges, including metering data services and billing charges on end-users who are not party to any contract (except as a figment of imagination that bears no relationship to contract law or sale of goods provisions at either federal or state level).

NSW Strata owners are similar aggrieved by the provisions for different reasons as discussed elsewhere.

There are more class actions being initiated on the basis of contract, often by members of strata property in multi-tenanted dwelling

In one such litigious matter before the open courts the following issues are under challenge in the open courts:

1. Reliance on the flawed jurisdictional "bulk hot water arrangements" under energy laws (effectively using water meters to pose as gas meters for the purpose of calculating deemed gas usage), initiated by Victoria and adopted in two other States, albeit applied discrepantly in each.

   At least three jurisdictions continue to apply these provisions discrepantly without due regard to numerous overlapping provisions, and complete disrespect for the spirit and intent of trade measurement provisions, notwithstanding that the utility exemptions from the NMA are yet to be lifted. These are Victoria, Queensland and South Australia. In the case of NSW I am unable to see how these provisions are different except for nominally recognizing in the *Gas Supply Act 1996* that choice of energy provider must exist. In this case we are speaking of water provided, of varying temperature that is centrally heated and supplied to individual apartments.

   If Owners of each apartment obtain the consent of the OC to fit a separate gas meter and boiler system internally that is dedicated to that apartment, that is one thing.

   To expect tenants to do so is absurd and normally hot permitted by the OC or Landlord in any case.

2. The **legality of arrangements** for the sale of *"Hot Water and Internet Infrastructure;"*

3. The **signing of contracts** by the original Owners' Corporation Manager;
4. The **alleged contract**, allegedly signed by the OC;
5. The **possible excessiveness of the charges**, using the flawed Victorian algorithm conversion factors and employing hot water flow meters to pose as electricity meters;
6. **Challenge to operational and service design parameters** initiated by the Developer in consultation with the energy providers using hot water flow meters to pose as gas meters, and selection of hot water infrastructure leading to water wastage and inflated charges
7. **Operational design** – relating to flow rate of the hot water being greater than the cold water.
8. The **quality of supply and service** of all the above alleged supplies and services over a period of six years.

   (this last matter raises issues pertinent to proposed revisions to statutory and implied warranty considerations under the Australian Consumer Law (TPA)

   In the case of renting tenants the issue of inappropriate imposition of contractual status raises issues of inadequate and poorly conceived policies and practices that appear to un-monitored.

   Such lack of assessment of impacts has led to decades of compromised consumer protection, which has apparently been justified on the grounds of enhancing competition apparently without robust understanding of the original intents of national competition (refer to Senate Select Committee of 2000, as referred to in my multipart submission to the Productivity C omissions Inquiry Into Australia's Consumer Policy Framework (subdr242parts 1-5 and Part 8, 2008) and other public consultation arenas.

Some possible solutions:

- Withdraw existing the BHW arrangements from energy provisions. Revisit departmental local authority Infrastructure and Planning arrangements that allow perpetuation of the BHW arrangements (see for example Qld Dept of Infrastructure and Planning sanctions Fact Sheet under Building Codes Queensland.
- Allocate responsibility to the appropriate contractual parties - OCs
- Make sure metering databases and service compliance is undertaken
- Apply appropriate trade measurement practices using the right instrument to measure the right commodity in the correct unit of measurement and scale.
- Ban communal hot water systems and install individual utility meters for gas electricity and water in all new buildings.
- Assist existing OCs and Landlords to upgrade and retrofit with individual meters and instantaneous hot water systems in each residential abode - meeting efficiency and health risk issues in one fell swoop and enabling proper application of metrology procedures that are transparent.

ANALYSIS OF s46 GAS INDUSTRY ACT 2001
and conflict with Residential Tenancies Act 1997 (Vic)[17]

I now analyze in detail the deemed provisions of the *Gas Industry Act 2001* under s46 to support my view that these provisions have been mistakenly applied to those receiving bulk hot water supplies from a single energization point on common property infrastructure.

46. Deemed contracts for supply and sale for relevant customers

(1) If a relevant customer commences to take supply of gas at premises from the relevant licensee without having entered into a supply and sale contract with that licensee, there is deemed, on the commencement of that supply,[18] to be a contract between that licensee and that person for the supply and sale of gas—

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17 This section is dedicated to the Victorian tenancy provision as it was originally intended to support arguments in the Main Deidentified Case Study as Appendix 1 which was also submitted as supporting data to numerous other arenas, including the Productivity Commissions, Consumer Policy Review (2007-2008 (subdr242parts 4 and 5) (see also parts 1-7 and Part 8); MCE arenas including NECF1 Consultation RIS (2008); MCE SCO Gas Connections Framework (2009); Network Policy Working Group (2009) and NECF2 2nd Exposure Draft (2010); Federal Treasury's Unconscionable Conduct Issues Paper; Senate Economics Committee's Review of Consumer Legislation (TPA-ACL-Bill2). That Bill is now passed and steps are in hand for implementation of the revised Trade Practices Act 1974, which will be renamed Consumer and Competition Policy Act – see conduct provisions
In the light of nationalization of energy laws; the concept of direct flow of energy (regardless of changeover of ownership operation; trade measurement provisions subject to further changes and pending lifting of utility provisions and any further amendments) these issues need to be reioved in terms of conduct and interpretation. There is a risk of perpetuation of inappropriate interpretation of the deemed provisions under the NECF2 Package, with numerous ripple effects for conditions precedent and subsequent as repeatedly discussed by me and by numerous community organizations – apparently with no effect.
Sanction of practices and Interpretations that neither represent best practice, nor are compliant with further changes to the law will be seen as inappropriate policy and instruction to market participants to ignore their obligation to meet the requirements of all laws and best practice conduct, not just those iterated or impliedly endorsed within energy provisions.
By the end of 2010 all State generic laws will have to be updated to reflect the new generic laws
Parity and equity in all State tenancy laws is warranted – without going backwards and stripping end-users of utilities of their already enshrined rights. Inconsistencies between State provisions is a serious reflection of the parity and equity issues highlighted that need urgent attention across the board, with Office of Fair Trading urged to proactively address these anomalies within their jurisdictions and also through collaborative discussion with other jurisdictions

18 The term commencement of supply means commencement of gas supply to the said premises. In the BHW arrangements supply of gas is not the premises for which supply is billed. No gas associated with the heating of communal water tanks enters the premises at all. It is water in heated form as a composite product that enters the premises in a water transmission pipe. The water is supplied by the water authority. The heat is supplied to the Landlord, or OC at the outlet of a single gas meter on common property used to hear the water. In the absence of separate gas meters the landlord/Owner is responsible for all consumption supply and non-energy costs.

(a) at the tariffs and on the terms and conditions determined and published by that licensee under section 42; and

(b) on the conditions decided and provided for by the Commission under sub-section (5).

MK Comment

To meet the provisions of this clause (1) the only qualification is *"relevant customer" must be taking supply of gas at the premises from the relevant licencee"*

"relevant customer" has the same meaning as in section 43 as referred under s46 of the GIA

An Order (Order in Council exists dated 29 October 2002. It merely refers to consumption threshold of gas as 10,000 GJ per annum, and is not restricted to natural persons. Some 1.6 Victorian uses or gas consumer that amount. All provisions including the *Energy Retail Code* (VERC) provide for interchangeability of terms, i.e. natural person may be taken for an entity; plural may mean singular and the like

MK Comment

For s46 (1) to apply in respect of

"taking supply of gas at the premises from the relevant licencee"[19]

it must be shown that gas is being taken via a physical gas connection. That single supply point/supply address is on common property infrastructure. For BHW energization points, all of these are regarded as single supply and billing points for VENCorp Distributor-Retailer settlement purposes. The Landlord or Owners' Corporation takes supply.

Gas means gas, transmitted in gas transmission pipes not composite water products, value added products reticulated in water pipes.

This is regardless of creative redefinition of the term meter, distribution; supply; supply point/supply address, the fact is that the deemed provisions cannot be applied with regard to taking of gas supply if the gas does not enter the premises reticulated in gas service or gas transmission pipes. Therefore the deemed provisions are being inappropriately applied to recipients of heated water

[19] The *Gas Industry Act*, *Gas Code; Energy Retail Code* (save for the BHW provisions that are to transferred to it from the existing BHW Guideline 20(1) and the essence of deliberative documents of 2004 and 2005 relating to contractual matters); proposed NECF, all expect "taking supply of gas" to mean receiving gas through a gas service pipe or transmission pipe facilitating the flow of gas. Water meters, associated equipment and water service pipes do not facilitate the flow of gas or deliver gas to individual apartments where the water is communally heated in a storage tank on common property infrastructure. Ownership of the water meters does not create a contract or constitute sale of gas to the end-user of heated water in these circumstances. The contract lies with the Landlord or Owners/Corporation either explicitly because of authorization to fit the metering installation or implicitly since the supply has continued at the same supply point/supply address on common property infrastructure

Distribute,[20] in relation to gas, means convey gas through distribution pipelines; Gas does not pass through water meters; neither does gas pass through water service pipes. If no distribution takes places, no supply takes place of gas.

Therefore no contractual relationship exists on the basis that heated water has reached an individual apartment in water service pipes, where it can be shown that the premises in question deemed to be receiving "supply of electricity is devoid of connection point' supply/supply address; energization; electrical line delivering the "energy" alleged to have been supplied

[20] Definitions, *Gas Industry Act 2001* v36, No 31 of 2001, version incorporating amendments as at 25 July 2008

Notwithstanding that the VESC has authority under the *Gas Industry Act 2001* (GIA)[21] and the *Electricity Industry Act 2001 (EIA)*[22] to determine under an Order to specify a class of persons by reference to all who may supply electricity or gas, period of use, place of supply; purpose of use; quantity of energy used (consumption threshold) any other specified factor relevant to the sale of electricity or gas, the central contention in this submission and echoed in Part 2B of this tri-part submission[23] is that energy suppliers do not sell or supply energy to end-users of composite heated water products in multi-tenanted dwellings where the energy is supplied to a single energization point on common property infrastructure owned and controlled by Landlords/Owners or Owners' Corporations (OC).

Further, notwithstanding also that the VESC has the power under current legislation to regulate tariffs for *"prescribed customers"* the contention in this submission is that recipients of heated water products communally heated in a water storage tank and reticulated in water pipes, in the absence of any energy connection point in the individual premises of those parties, or any evidence of transmission of energy to those apartments in gas service pipes or gas transmission pipes or electrical lines, there is no sale or supply energy involved to the end-users of that water as a composite product heated at the request of the Landlord/Owner through a single energization point on common property infrastructure and supplied via either gas transmission pipes or else electrical lines to a communal water storage tank.

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[21] *Gas Industry Act 2001* Version No. 036, No 31 of 2001. Version incorporating amendments as at 25 July 2008-09-27 Found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

[22] *Electricity Industry Act 2000* Version No. 040 Act No. 68/2000 Version incorporating amendments as at 9 November 2006 found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/75C08FBF1CB61807CA257220001BA107/$FILE/00-68a040.pdf*

[23] In direct response to the VESC Regulatory Review 2008; but also to the MCE SCO Table of recommendations Policy Paper, and in addition intended for other relevant authorities and entities, including the proposed national regulator AER, the ACCC,. CAV, NMI

The *GIA* describes *customer* means a person to whom a gas company transmits, distributes or supplies gas or provides goods or services. Under s22 of the *GIA* it is an offence to distribute gas without a licence other than a gas retailer.

1. transmission pipeline means—

(a) a pipeline for the conveyance of gas—

*(i) in respect of which a person is, or is deemed to be, the licensee under the **Pipelines Act 2005;**[24] and*

(ii) that has a maximum design pressure exceeding 1050kPa—

*other than a gathering line within the meaning of the **Petroleum Act 1998**; or*

(b) a pipeline that is declared under section 10 to be a transmission pipeline—

2. but does not include a pipeline declared under section 10 not to be a transmission pipeline

3. Under the definitions of the *GIA*

4. ***transmit*** means convey gas through a transmission pipeline;

5. MK Comment

6. No gas is transmitted through a transmission pipeline to the individual abode of an end-user of heated water receiving such water supplies from a communal water storage tank situated on common property infrastructure and supplied with heat from a single energization point on the same common property infrastructure owned and controlled by a Landlord/Owner.

7. Therefore no supply or sale of gas takes place to that end-user. Therefore no deemed contract exists or can be said to exist, or the necessity to form a market contract. That contract is formed at the time that the infrastructure is in place and the Landlord/Owner accepts the installation at his request.

8. Under the definitions of the GIA, *gas distribution company* means a person who holds a licence to provide services by means of a distribution pipeline. No gas service or transmission pipe is involved in transporting heated water from a communal water tank to the individual abode or an end-user of heated water.

9. Water pipes transport such a composite water product, from which the heating component cannot be separately measured or transported. Therefore if no distribution pipe is used, no distribution takes place. Therefore no contact exists. The energy is supplied to the Landlord/Owner on common property infrastructure.

[24] *Pipelines Act 2005* found at *http://www.austlii.edu.au/au/legis/vic/consol_act/pa2005117/s5.html*

10. Under the *GIA* *"**gas fitting** includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas"*

No such gas fitting as described in connection with the consumption of gas is involved in delivering heated water to the abode of an end-user of heated water that is heated in a communal water tank serving multiple occupants in a multi-tenanted dwelling (BHW). Therefore no supply is taken; in particular no unauthorized gas is consumer or taken. No deemed contract exists or ought to exist.

In addition, under s48 the terms and conditions must not be inconsistent with the *Gas Distribution System Code* published by the Office of the Regulator- (Now Essential Services Commission).

Similarly, electricity does not pass through water meters either nor through water service pipes. If no distribution takes place through electric lines, no supply takes place. Therefore no contractual relationship exists on the basis that heated water has reached an individual apartment in water service pipes, where it can be shown that the premises in question deemed to be receiving "supply of electricity is devoid of connection point; supply/supply address; energization; electrical line delivering the "energy" alleged to have been supplied.

The BWH contractual arrangements are inconsistent with the *Gas Code* to the extent that all definitions for supply point, supply address, gas transmission, meter and the like are discrepant to those provisions, and also with other provisions current and proposed for the sale and supply of energy, which requires a physical connection, flow of gas or conduction of energy through gas pipes or electricity lines to the premises deemed to be receiving that energy. Water pipes are not substitutes for such equipment. Water meters are not substitutes for gas meters within the Law and within the remainder of all Codes.

These particular provisions and terms stand out as particularly discordant with the remainder of the energy provisions and definitions.

The introduction of a new meaning for meter *"as a device that measures and records consumption of bulk hot water consumed at the customer's supply address*

"Delivery of electric bulk hot water"

"Delivery of gas bulk hot water"

Supply address is the customer's apartment or flat rather than the technical use of the term that is synonymous with supply point and distribution supply point as described within the *Gas Code* and within the legislation.

It is explicit and/or implicit in all energy provisions that supply of gas means taking supply at a connection point for gas, being part of the distribution system.

This means at a distribution supply point (Gas Code=VGDSC; Energy Code=VERC); with synonymous terms *"supply point"* (VGDSC; VERC); *"supply address" "connection"* (NECF Glossary, Policy Paper {GPP}); *"energization point"*[25] NECF GPP

(2) If a relevant customer—

(a) commences to take supply of gas at premises under a supply and sale contract with the relevant licensee; and (b) that customer cancels the supply and sale contract within the cooling-off period relating to the contract; and (c) that customer continues to take gas from that licensee without entering into a further supply and sale contract with that licensee—

there is deemed, on the cancellation of the supply and sale contract, to be a contract between that licensee and that customer for the supply and sale of gas—

(d) at the tariffs and on the terms and conditions determined and published by that licensee under section 42; and

(e) on the conditions decided and provided for by the Commission under sub-section (5).

[25] This term means the same as supply address, supply point, distribution supply point and connection point, but must refer to an existing gas or electricity connection, as defined in the NECF and associated Glossary Policy Paper

MK Comment

As already discussed under (1) above, no supply of gas takes place as defined under the *GIA* definitions of *"customer;" "gas distribution company;" "transmission"*; "*transmission pipeline;"*

This sub-clause of s46 of the *GIA* refers to agreement to take supply and then defaulting on the agreement by withdrawing before the cooling-off period and then continuing to accept supply.

Such a circumstance is inapplicable for those receiving heated water that is communally heated by a single energization point on common property infrastructure supplied under either implicit or explicit contract between landlord and supplier. Though the BHW provisions do not acknowledge this, this is what is happening.

Those receiving communally heated water do not get to choose the supplier for the energy used. The Landlord makes that choice at the time of forming a contract and seeking for the installation of the metering installation for energy. It is not the succession of tenants who agree to take supply and then default. They take no energy at all. They take heated water supplies covered under the enshrined mandated terms of residential tenancy leases, lawfully accepted under those terms and residential tenancy provisions.

Those receiving communally heated water in multi-tenanted dwellings are not part of the distribution service since there is

1. *No the connection of the premises to the distribution network to allow the flow of energy between the network and the premises of end-users as occupants of flats and apartments)*
2. *No physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energization' of the connection)*
3. *No network can facilitate the flow of energy between the network and the premises through the connection; and services relating to the delivery of energy to the(alleged) customer's premises*

That being the case, no contract can exist or been seen to exist, or be required to be acknowledged or formalized by way of an explicit contract.

That being the case, it is improper to demand conditions precedent or subsequent to the obligation to supply in relation to an end-user or heated water products. The obligation to supply, and any reciprocal obligations precedent or subsequent belong to the Landlord/Owner where only a single energization or supply point exists to supply heat to a communal water tank used to supply water to multiple occupiers in a multi-tenanted dwelling.

As reported by Tenant's Union Victoria (TIV) in their submission to the VESC Small Scale Licencing Review (2006)

> *"…there have been a number of instances whereby residents of dwellings in embedded networks were charged for energy consumption where there is no separate metering. Upon challenge to Victorian Civil and Administrative Tribunal (VCAT), all bills remitted to tenants and residents were found to contravene the Act and the amount paid under these unlawful bills were refunded.*
>
> *Whilst recognizing that those receiving hot water supplies are not receiving energy at all through any energy connection facilitating the flow of gas, there are similarities in the arguments present*
>
> *The TUV advises that "The practice of charging tenants for the gas consumption in the absence of a separate meter prima facie contradicts sections 52 and 53 of the Residential Tenancies Act 1997"*
>
> *"Whilst we have successfully challenged these charges on a number of occasions the Body Corporate concerned has continued to modify the practice of charging including constructing third party agreements purportedly directly with the tenant."*
>
> *However, despite numerous orders providing refunds for tenants who have paid these exorbitant hot water charges, we believe the practice continues, and that bodies corporate are profiting from inappropriate and unlawful conduct.*

MK Comment

Since this is deemed to be unlawful conduct, it would seem that the explicit provisions of the BHW arrangements are encouraging and facilitating such unlawful conduct under other schemes. The energy policy-makers and regulators are adamant they wish to retain these provisions, which appear to philosophically driven and nothing to do with consumer protection, best practice or proper trade measurement practice

MK Comment

These examples are given here to show that impartial legal interpretation of what constitutes separate metering and can be charged, whether directly by landlords, or through collusive arrangements with utility or other providers

(3) A deemed contract under sub-section (2) is deemed to commence on the commencement of supply referred to in sub-section (2)(a).

Sub-section 3 above does not apply since (2) does not apply

(4) If a supply and sale contract referred to in subsection 2)(a) is—

*(a) a contact sales agreement within the meaning of the **Fair Trading Act 1999**, sections 65 to 67 of that Act do not apply on the cancellation of that contract;*

*(b) a non-contact sales agreement within the meaning of the **Fair Trading Act 1999**, sections 73 to 75 of that Act do not apply on the cancellation of that contract.*

Subsection (4) does not apply. No agreement takes place. The contract between supplier and landlord is already formed at the time that any given tenant takes up occupancy. A supply charge applies from the moment the infrastructure is in place and normally pre-dates occupancy by any tenant. No new tenant taking up occupancy is a new customer or new supply. There is no supply to the premises of the occupant receiving communally heated water supplies reticulated in water pipes.

(5) Without limiting the generality of section 28, the Commission may decide, and provide for in the licence of a licensee, conditions setting out—

(a) circumstances in which a licensee must continue to supply or sell gas to a customer to whom the licensee supplies or sells gas under a deemed contract under this section after that contract comes to an end in accordance with sub-section (7)(d) or (e); and

MK Comment

Though the circumstances of sale or supply may be determined such circumstances must relate to the supply at a physical gas or electricity connection, regardless of network arrangements or changeover. Reticulation of heated water transported in water pipes to individual apartments does not form part of the energy distribution service at all and the two lots of transmission are unconnected. The heat is merely used to heat a communal water tank. The water is supplied to the Landlord by the Water Authority. The energy is supplied to the Landlord to heat the water storage tank. Thereafter the terms of contract are as mandated in lease arrangements between Landlord and tenant.

(b) events on the happening of which a deemed contract under this section may come to an end.

MK Comment

The event that the supplier wishes to facilitate is capitulation into an explicit market contract for the "delivery of bulk gas water" or "delivery of bulk electric water. This is not technically feasible and cannot be delivered in equipment specific to energy, or calculated and apportioned in a legally traceable manner.

(6) A condition referred to in sub-section (5)(a) must provide for the tariff or tariffs and the terms and conditions for the continued supply or sale of gas to be determined by the licensee.

MK Comment

Notwithstanding that the Governor in Council may regulate tariffs for prescribed[26] customers, such a customer must be the subject of sale of gas. In the case of those receiving composite water products from a communal storage tank under the ownership and control of a Landlord/Owner of a multi-tenanted dwelling, no sale of gas to the end-user of heated water takes place. The same applies to electricity. It is the Landlord/Owner who takes supply of the energy supplied to the communal water tank.

Again, the central issue is not whether any sale or supply of gas or electricity takes place to end-users of heated water supplies communally heated and supplied in water transmission papers rather than gas transmission pipes or electrical lines. The issue is how it has come about in the first place that policy-makers, regulators, complaints handlers and retailers perceive a deemed contract for the sale and supply of gas or electricity of any description to exist with an end-user of composite water products.

The tariffs determined are derived costs using the measurement of water volume to determine deemed gas or electricity usage for the heating of a communal water tank. The costs are apportioned to individual tenants, and proportionate supply charges and non-energy costs calculated by dividing the total amount of gas or electricity supplied to a single energization point the Landlord, by the total number of residential premises at the multi-tenanted dwelling.

(6A) A person who is a relevant customer may be a party to a deemed contract under this section even if the person has previously been a party to a contract for the supply or sale of gas to different premises on different terms and conditions with the same licensee or another licensee.

[26] A prescribed customer means a person or a member of a class of persons to whom an order under section (5) (of the GIA) applies. See *GIA* found *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

(7) A deemed contract under this section comes to an end—

(a) if the contract is terminated; or

(b) if the customer enters into a new contract for the purchase of gas from the licensee in respect of the same premises, on the date of taking effect of that new contract; or

(c) if the customer transfers to become the customer of another licensee; or

(d) at the end of 120 days after the day on which the deemed contract commences; or

(e) on the happening of an event decided and provided for by the Commission under subsection (5)(b)—

whichever occurs first.

MK Comment

7 (a) – (d) are inapplicable for those receiving heated water supplies in water pipes. The Landlord is responsible for the energy supplied to heat the communal tank and has the implicit or explicit contract.

(8) Sub-section (1) does not apply where the relevant customer referred to in that sub-section commences to take the supply of gas by fraudulent or illegal means.

(9) Sub-section (2) does not apply where the relevant customer referred to in that sub-section takes the supply of gas by fraudulent or illegal means after the cancellation of the supply and sale contract referred to in sub-section (2)(a).

MK Comment

(8) and (9) inapplicable in relation to BHW recipients. No residential tenant receives heated water or energy fraudulently. The heating component of the water supplied is covered in the cost of rent under mandated lease provisions – residential tenancy laws are explicit about this and also the Landlord's liability for all non-energy costs in these circumstances.

It is preposterous to hint at illegal or unauthorized supplies of energy in the circumstances. Residential tenants receiving heated water supplies are being threatened with disconnection of heated water if they do not form explicit contracts to replace what represents unilaterally and unjustly imposed deemed contractual status.

Indeed if there is any question of illegality it is that collusive arrangements between utility providers and/or other providers are in place, sanctioned by policy-makers and regulators alike to strip end-users of their enshrined rights and directly contravene s52 and s53 of the RTA. It cannot possibly be acceptable regulation for there to be this degree of conflict and debate, whether it involves on-selling of water products or alleged provision of energy to end-user premises in there complete absence of any supply point/supply address/energization or connection for gas or electricity.

(10) In this section—

*"**cooling-off period**" means the period within which a relevant customer is entitled under a supply and sale contract or section 63, 67H*

*or 71 of the **Fair Trading Act 1999** to cancel the contract;*

*"**relevant customer**" has the same meaning as in section 43;*[27]

*"**relevant licensee**", in relation to premises, means the licensee last responsible for the supply and sale of gas to those premises;*

*"**supply and sale contract**" means a contract for the supply or sale of gas, whether oral or in writing, or partly oral and partly in writing.*[28]

(11) This section expires on 31 December 2008.[29]

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[27] An existing Order under s43 merely defines relevant customer as one who consumes no more than 10,000 GJ per annum. This applies to approx 1.6 million Victorians and is not a term restricted to natural persons. Consumption level must be related to the physical supply of gas (or electricity) facilitating flow of gas or conduction of energy to the premises in question in order for a contractual obligation to exist.
That obligation is with the Landlord/Owner to whose premises on common property infrastructure gas is transmitted to the outlet of a gas meter, and thence in a transmission pipe to a communal water tank for the heating of centrally heated water then distributed in water service pipes to individual apartments. The end-user of heated water is not a "final gas customer" but rather a recipient of heated water that is already paid for within the rent under mandated lease provisions in the absence of any connection point or proof of energy consumption. Charging formulae, the existence of or ownership of hot water flow meters that measure water volume and other considerations are irrelevant unless gas or electricity is supplied.
Residential tenants do not take illegal or unauthorized supply of gas or electricity in these circumstances, but rather fully authorized supply of heated water as part of their private contractual lease agreement with landlord based on mandated standard lease terms.
The provisions represent obvious regulatory overlap, besides using methodologies that cannot show legally traceable means of measurement and calculation.

[28] No such contract exists or ought to exist between retailer and recipient of heated water that is communally heated through energy supplied at the request of a Landlord/Owner at the time that a metering installation is ordered and in place. The Landlord/Owner has the contract

[29] The deemed provisions under the *GIA* were extended to 31 December 2008 under subordinate legislation, but the date is now reflected in the latest version of the *GIA* v34, No. 31 of 2001 found at *http://www.austlii.edu.au/au/legis/vic/consol_act/gia2001167/s3.html*

I cite excerpts from the submission by the 2006 Tenants Union of Victoria to the VESC Small Scale Licencing issues Paper which is cited in full under Small Scale Licencing

I note the following:

Those receiving water heated in communal water tanks are not embedded network customers. They receive no energy at all. Though managers and operators of buildings sharing walls with gas and/or electricity reticulated as part of the building infrastructure may manage the properties that they reside in and have a network other than that owned operated and managed by the original distributor and network system, they only receive energy for heating, cooking and lighting from the embedded network. For heated water, this is reticulated in water pipes. No energy papers through water pipes or the hot water flow meters posing as gas meters. Therefore the energy providers who try to pass off these customers as "embedded" requiring to pay for energy received are incorrectly applying the term. The two groups share some common ground in as far as it is difficult to calculate what energy they do use – but those receiving communally heated water should not have to pay at all for energy. The *Residential Tenancies Act 1997* (Victoria) covers them.

I reproduce this article and appreciate that community organizations have for several years fruitlessly been trying to call attention to inequities and exploitive loopholes that have left end-consumers of utilities disadvantaged; imposed with unwarranted utility bills, and have found their access to justice and to their enshrined rights under mandated provisions difficult to access.

The work done by these community organizations is appreciated. It is clear that lobbying activities were undertaken around the time that the Winters v Buttigeig case before VCAT attracted some public attention.

In this case, the Owners' Corporation had clearly been directly involved in collusive practices by engaging an energy provider as a *"billing agent."* That *"billing agent"* was identified as EnergyPlus (Australia) Pty Ltd.[30]

[30] EnergyPlus (Australia) is still around. Apparently operates as a billing agent for certain body coporate entities. See for example what appears to be a sample bill issued to occupants at "Blue City Tower Apartments in La Trobe Street Melbourne. Huge bills for hot water and cold water consumption are being applied, with hot water service

"Case Study 2: Courtyard Apartments, St Kilda West (TUV Submission to VESC SSL 2006)

The units in this apartment complex are separately metered for cold water. Hot water is provided by a bulk unit, provided by a utility company, that provides gas to heat the water for each apartment. The units are not separately metered in regard to gas

The utility company remits a bill to the body corporate for the supply of gas to the whole apartment complex. The body corporate estimates the approximate amount of gas supplied to each apartment (inclusive of a small administrative fee) on the basis of hot water consumption, and then remits each occupier a bill for hot water.

The body corporate also charged tenants a $100 "Hot Water Deposit" fee at the commencement of their tenancies, pursuant to one of the body corporate rules of the complex.

When the validity if the gas bills and the Hot Water Deposit fee were challenged by a tenant at VCAT, it was held that, pursuant to sections 52 and 53 of the Residential Tenancies Act"

- *Tenants were not liable to pay either to their landlords or the body corporate for the supply of gas (including an administrative fees in respective same), because the units were not separately metered for gas; and*

Tenants were not liable to pay the Hot Water Deposit fee, because this charge derived from the supply of gas to units that were not separately metered for gas. Furthermore, the fee could not be characterized as deriving from the supply of water to the units, and could therefore not be charged to tenants.

Case Study 3: Willow Lodge Caravan Park, Bangholme (TUV submission to VESC)

The owner of this caravan park installed water meters to all sites in July 2004, and commenced issuing bills to residents based on readings taken from these meters

Residents were not given any notice of this change in the provision of services. Prior to the installation of these meters, site rental charges where inclusive of utilities. Site rental costs were not reduced to reflect the new metering regime for water

A park resident refused to pay water bills remitted to him because he had not been notified by the owner of the change in his tenancy agreement wrought by the installation of the water meters. In July 2005, the park owner commenced proceedings at VCAT to recover the amount owing on the water bills. VCAT found that

The meters were not installed or approved by the relevant water utility company, as required by the Water Act 1989, s237A; and

- *The owner did not hold a licence pursuant to that Act and therefore was not permitted to levy water bills on residents*
- *Therefore, the sites are not separately metered for the purposes of remitting accounts to residents.*

We received advice from the relevant water supplier that they had no intention of approving the meters and it was not their role to do so

"Our concern is that as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities (TUV, 2006 to VESC SSL))"

Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act 1997 and other relevant utilities legislation (TUV, 2006 to VESC SSL))" *In relation to hot water pricing, in the same submission to VESC (2006 SSL) TUV raised concerns that* *"….these case studies also raise the question of the meters used to measure residents' consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained.*
Again, consumers in embedded networks are not being afforded the same level of protection from unfair practices and exploitation as other utilities consumers, and this must be addressed to ensure parity among Victorian consumers

Under s3, Definitions of the *GIA*:

***transmit** means convey gas through a transmission pipeline;*

Under s3, Definitions of the *GIA*:

***gas transmission system** means-*
(a) the primary transmission system; and
(b) any transmission pipeline or system of transmission pipelines that, under section 14(1) is an approved transmission connection; and
(c) any transmission pipeline or system of transmission pipelines that, under section 14(2), is an approved transmission adjunct

No such transmission system is employed in distributing heated water to the premises of an end-user of heated water that is communally heated in a water storage tank on common property infrastructure heated by a single supply point/supply address on such property.

Under s3, Definitions of the *GIA.*

gas fitting includes meter pipeline burner fitting appliance and apparatus used in connection with the consumption of gas

The end-user's premises (individual apartment, flat) is not a supply address which is a technical term synonymous with supply/connection point for energy.

If disconnection of gas or heated water supplies is undertaken by a retailer, with or without tacit or explicit sanction by policy-makers and/or regulator(s) the matter is serious if this occurs where no deemed contract exist; no just cause can be shown for such an action; no energy is supplied by the retailer or distributor on the basis of all the arguments shown above, that is to say, , no supply of gas takes place as defined under the *GIA* definitions of *"customer;" "gas distribution company;" "transmission;"* "*transmission pipeline.*

APPENDIX 5

CASE STUDIES

AS PRESENTED BY TENANTS UNION VICTORIA (2006, August)

(see also Appdx 6 further submission. 2006 and TUV 2007)

Contained in

Comments to Essential Services Commission Victoria

SMALL SCALE LICENCING FRAMEWORK ISSUES PAPER (2006)

By e-mail: smallscalelicensing@esc.vic.gov.au

31st August 2006

RE: SMALL SCALE LICENSING FRAMEWORK ISSUES PAPER[1]

The Tenants Union of Victoria (TUV) thanks you for the opportunity to respond the to the Essential Services Commission's Small Scale Licensing Framework Issues Paper.

Who we are

The Tenants Union of Victoria was established in 1975 as an advocacy organization and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. We represent the interests of tenants in law and policy making by lobbying government and businesses to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of rental housing and financial assistance provided to low-income households.

Embedded networks and the Residential Tenancies Act 1997

TUV is concerned that the existence of embedded networks creates confusion about the responsibility for payment for utilities for tenants and residents of rented accommodation within these networks.

In many instances, this confusion results in payment of utilities costs in excess of what would normally be required.

The Residential Tenancies Act 1997 (RTA) is the primary legislation governing residential tenancies, including caravan parks and rooming houses, in Victoria.

Sections 52 and 53 of the RTA apportion liability for utilities connection, service and consumption between landlords and tenants and residents of caravan parks and rooming houses: continued…

- *If a rental property is separately metered, the tenant pays for the connection of supply to the property and for consumption;*
- *Owners are liable for the installation and infrastructure costs of the initial connection of service to the property, and for the utilities consumed if the property is not separately metered.*

However, there have been a number of instances whereby residents of dwellings in embedded networks were charged for energy consumption where there is no separate metering. Upon challenge to Victorian Civil and Administrative Tribunal (VCAT), all

[1] Subject to appropriate citation TUV had previously agreed for its public submissions to be cited in this manner. These direct citations are therefore submitted in good faith to remind the MCE and other interested parties of the sound arguments presented in this valuable outline to exempt regime framework and related issues impacted on those who receive no energy at all but yet are inappropriately imposed with contractual obligation for energy that is not supplied through direct flow of energy. Therefore the arguments concerning alleged sale sand supply of energy are flawed and technically and legally unsustainable.

bills remitted to tenants and residents were found to contravene the Act and the amount paid under these unlawful bills were refunded.

However, despite the clarity of the Act on point of liability for utilities charges, and these VCAT orders, we believe that these practices are still occurring.

The following case studies illustrate the dissonance between the provisions of the Residential Tenancies Act 1997 and billing practices adopted by some bodies corporate or owners/managers of dwellings in embedded networks. In particular, the potential for profiteering from tenants and residents in the provision of utilities need to be urgently addressed.

Case Study 1: Condor Apartments and Arkley Towers, Docklands

The units in Condor Apartments and Arkley Towers at Docklands are all separately metered for water. However, hot water is supplied to each residence through a central boiler utilizing gas. Each residence is not separately metered in regard to consumption of this gas.

Since 2002, residents have been receiving accounts for water consumption, including charges for the provision of hot water. The cold water rate is $1.53/kl but the hot water rate is $10.00/kl.

The supply of water to each residence is controlled by the Body Corporate, who employ a billing agent to render accounts to occupants.

In some instances, tenants in the respective blocks have been asked to sign separate supply agreements with the Body Corporate or the billing agent.

The practice of charging tenants for the gas consumption in the absence of a separate meter prima facie contradicts sections 52 and 53 of the Residential Tenancies Act 1997.

Whilst we have successfully challenged these charges on a number of occasions the Body Corporate concerned has continued to modify the practice of charging including constructing third party agreements purportedly directly with the tenant.

However, despite numerous orders providing refunds for tenants who have paid these exorbitant hot water charges, we believe the practice continues, and that bodies corporate are profiting from inappropriate and unlawful conduct.

Case Study 2: Courtyard Apartments, St Kilda West

The units in this apartment complex are separately metered for cold water. Hot water is provided by a bulk unit, provided by a utility company, that provides gas to heat the water for each apartment. The units are not separately metered in regard to gas.

The utility company remits a bill to the body corporate for the supply of gas to the whole apartment complex. The body corporate estimates the approximate amount of gas supplied to each apartment (inclusive of a small administrative fee) on the basis of hot water consumption, and then remits each occupier a bill for hot water.

The body corporate also charged tenants a $100 "Hot Water Deposit" fee at the commencement of their tenancies, pursuant to one of the body corporate rules of the complex.

When the validity if the gas bills and the Hot Water Deposit fee were challenged by a tenant at VCAT, it was held that, pursuant to sections 52 and 53 of the Residential Tenancies Act:

- *Tenants were not liable to pay either to their landlords or the body corporate for the supply of gas (including an administrative fees in respective same), because the units were not separately metered for gas; and*
- *Tenants were not liable to pay the Hot Water Deposit fee, because this charge derived from the supply of gas to units that were not separately metered for gas. Furthermore, the fee could not be characterized as deriving from the supply of water to the units, and could therefore not be charged to tenants.*

Case Study 3: Willow Lodge Caravan Park, Bangholme

The owner of this caravan park installed water meters to all sites in July 2004, and commenced issuing bills to residents based on readings taken from these meters.

Residents were not given any notice of this change in the provision of services. Prior to the installation of these meters, site rental charges where inclusive of utilities. Site rental costs were not reduced to reflect the new metering regime for water.

A park resident refused to pay water bills remitted to him because he had not been notified by the owner of the change in his tenancy agreement wrought by the installation of the water meters. In July 2005, the park owner commenced proceedings at VCAT to recover the amount owing on the water bills. VCAT found that:

The meters were not installed or approved by the relevant water utility company, as required by the Water Act 1989, s237A; and

The owner did not hold a licence pursuant to that Act and therefore was not permitted to levy water bills on residents

Therefore, the sites are not separately metered for the purposes of remitting accounts to residents.

We received advice from the relevant water supplier that they had no intention of approving the meters and it was not their role to do so.

Despite this VCAT order, the park owner continued to issue water bills to residents. Bills issued post the date of the VCAT order indicated that payment would be required when the water supplier had approved the meters. However, we were advised by the water supplier that they had no obligation or intention of approving the water meters within the caravan park network.

It appears that this has caused some residents to commence or continue to pay the invalid bills, in fear that they will accrue a greater financial liability due at a later date. Some residents also entered into direct debit arrangements with the park owner to cover these water bills.

In addition, we were concerned that the caravan park owner who had been frustrated from applying the water charges had threatened to increase rents to compensate for this problem. As many of the residents are owners of moveable dwellings that are expensive to relocate it would be difficult for them to resist or respond to such an increase.

This case study provides a number of prima facie breaches of the Residential Tenancies Act 1997:

Section 159 provides that if a caravan park owner ceases to provide services to a resident, the rent must be reduced to reflect this. Water is included in the definition of 'services' for the purpose of this section; and

Section 501(c) of the Residential Tenancies Act makes it an offence to make false representations to a person in regard to the provision of the Act, terms included or to be included in a tenancy agreement, or any matter affecting a person's rights or duties under the Act or a tenancy agreement.

Our concern is that as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities.

Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act 1997 and other relevant utilities legislation.

Hot water pricing and the regulation of metering in embedded networks[2]

The previous case studies also demonstrate that there is insufficient regulation protecting consumers in embedded networks from profiteering in regard to the sale of hot water. In the Docklands and Courtyard Apartments cases, the consumer protection provisions of the Gas Industry Act did not apply because hot water, not gas, was being sold. However, because the price at which hot water can be sold in embedded networks is not regulated, on-sellers are able to set their own process and residents may be charged at higher rates than consumers of the same products who do not reside in embedded networks. This is manifestly unfair, and effectively creates two classes of consumer, one of whom is afforded appropriate legislative protections from exploitative pricing by providers, and one who is not.

Furthermore, these case studies also raise the question of the meters used to measure residents' consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained. Again, consumers in embedded networks are not being afforded the same

Furthermore, these case studies also raise the question of the meters used to measure residents' consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained. Again, consumers in embedded networks are not being afforded the same level of protection from unfair practices and exploitation as other utilities consumers, and this must be addressed to ensure parity among Victorian consumers.

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[2] **Comment MK:** I note that the TUV implies that those receiving heated water supplies from a communal water tank in multi-tenanted dwellings are "embedded consumers" The term strictly speaking applies to those receiving direct supply of energy through an electricity network. There is no such thing as a gas network technically, an issue raised by industry participants in direct submissions to the MCER on other matters. The Victorian Orders in Council were exclusive to electricity. If it is the MCE's intention to group recipients of "bulk hot water" under the exempt selling regime this should be made very plan. If not pricing and monitoring controls should be in place, notwithstanding that in contact law and under the revised proposed alternations to generic laws impacting on substantiate unfair contracts, the current arrangements will not be compatible with other consumer protections, with proposed national energy laws relating to direct "flow of energy" regardless of "network" operation changeover or ownership

For the sake of convenience, and given that most funded community organizations seem to deal with the *"bulk hot water issue"* as synonymous with *"embedded: electricity networks*." I have included many of my comments about this issue under the Exempt Selling Section in addition to discussion elsewhere under discussion of the tripartite contractual governance model and discussion of components of the Objective.

Comments on specific issues raised by the Paper

1. Are the current terms, conditions and limitations contained within the OIC sufficient for the regulation of small-scale electricity distribution and/or retailing?

Currently, the OIC does not require small-scale on-sellers to inform customers about the utilities concessions scheme, such as the Non-Mains Winter Energy Concession and the Non-Mains Utility Relief Grant. TUV believes that redrafting the OIC to oblige these on-sellers to provide information about the availability of concessions would rectify this oversight, and enable more vulnerable low-income households residing within embedded networks to access concessions.

We are also concerned that there is no effective compliance and enforcement regime supporting the OIC, and that regulation is driven by complaints rather than by active monitoring of the sector. This is not optimal practice in regard to consumer protection, and needs to be addressed to ensure that all customers enjoy the same level of protection, regardless of whether they reside in an exempt network.

2. What is the value of the current customer review and dispute resolution mechanisms provided under the OIC?

The OIC provides that if a dispute arises, distributors and/or on-sellers are required to inform the customer of their right to have the matter adjudicated by VCAT.

While the ability to access an independent dispute resolution process is important, there are a number of shortcomings with the VCAT process. Fees apply (though these can be waived if the applicant demonstrates financial hardship) and the process is not especially expeditious.

Furthermore, in the absence of enabling legislation, we are concerned that VCAT has no effective jurisdiction to hear and these matters. The Issues Paper (and presumably the Essential Services Commission and the Department of Infrastructure) accepts that VCAT is empowered to adjudicate dispute between consumers and small-scale operators and/or onsellers. Disputes in which the TUV has represented applicants were heard in VCAT's Residential Tenancies List or Civil Claims List, as the Tribunal has express jurisdiction over matters pertaining to the Residential Tenancies Act 1997 or the Fair Trading Act 1999. However, VCAT's jurisdiction to adjudicate disputes between small-scale operators and/or on-sellers and consumers in embedded networks has not been made explicit in legislation of the OIC, and we contend that express provision should be made empowering VCAT to hear these matters to effect an accessible and straightforward dispute resolution.

It is also important to note the reticence of low-income households in marginal tenures (such as caravan and residential parks) to access dispute resolution procedures, because they perceive that making complaints will result in their eviction.

Customers whose housing choices are constrained by poverty are much more likely to be living in substandard conditions, and their fear of potential homelessness makes them more likely to tolerate exploitative conduct on the part of service providers. Consequently, they are less likely to be aware of and to exercise their legal rights. The

availability of the VCAT process alone in these circumstances does little to protect vulnerable households from unfair and exploitative conduct on the part of small-scale distributors and/or on-sellers.

● *page **5** of **7***

Furthermore, as noted in the Issues Paper at p. 34, there is no regulatory oversight ensuring that the provision of the OIC requiring distributors and on-sellers to inform customers of the VCAT dispute resolution mechanism is being complied with. Without appropriate supervision of distributor and on-seller behaviour, this provision will not provide customers with adequate protection equivalent to that enjoyed by customers who do not reside in embedded networks. This is manifestly unfair, and should be addressed as a matter of urgency.

3. Should customers in small-scale arrangements have access to EWOV? How could this be facilitated? What are the advantages and disadvantages of providing access, including the likely impact on small-scale operators?

TUV contends that all consumers should have access to EWOV, to ensure customer parity and fairness. Consumers qua consumers should all enjoy the same level of governmental and legal protection, regardless of whether they reside in an embedded network.

Furthermore, EWOV's processes have the advantages of being free and non-adversarial.

However, permitting customers in small-scale arrangements access to EVOW would likely involve amending EVOW's Constitution and Charter to include a specific membership category for small-scale distributors and on-sellers. TUV recommends that further work be undertaken to determine the optimal means of effecting access to EWOV for customers in small-scale arrangements.

4. What is the extent to which customers within an embedded network can and do access alternative retailers, what barriers to competitive retail access may exist for customers within an embedded network and how these barriers may be addressed?

Currently, the OIC provides, where metered electricity is sold in an embedded network, the on-seller must inform business customers of their right to purchase electricity from the licensed retailer of their choice. However, this right is not extended to residential customers.

TUV contends that this anomaly should be rectified immediately to ensure that all consumers have the same rights.

In the embedded networks with which we have experience, there is no possibility of alternative supply for an individual consumer and the embedded network supplier is effectively in a monopoly position.

In many embedded networks such as those operated by bodies corporate in high-density housing, alternative supply options would require changing the utility infrastructure.

● *page **6** of **7***

5. What are the advantages and disadvantages of introducing a registration system for small-scale operators? How could such a system be established and who is the most appropriate enforcement agency is?

TUV supports the development of a registration and/or licensing system for small-scale operators, as this would make it easier to monitor and enforce compliance with regulatory requirements. Without such a system it is difficult to determine the number of operators, the extent of their activities and the number of customers affected.

Our most pressing concern is that the licensing system should provide both clarity and equity of consumer outcomes in both mainstream and embedded networks.

Given it's statutory obligation to protect the interests of Victorian consumers, including low income and vulnerable consumers, with regard to the price, quality and reliability of essential services, we suggest that the Essential Services Commission (ESC) would be the most appropriate enforcement agency.

Please do not hesitate to contact me at the Tenants Union of Victoria on (03) 9411 1410 or 0409 092 949 if you wish to discuss any matters raised in this submission further.

Yours sincerely,

Research & Policy Worker

Tenants Union of Victoria

● *page **7** of **7***

APPENDIX 6

REPRODUCED SUBMISSION

AS PRESENTED BY TENANTS' UNION VICTORIA (2006, September) Further Comments

to

Essential Services Commission Victoria

SMALL SCALE LICENCING FRAMEWORK DRAFT DECISION (2006)

By e-mail: smallscalelicensing@esc.vic.gov.au

Friday, 29th September 2006

"RE: FURTHER COMMENTS ON THE SMALL SCALE LICENSING FRAMEWORK ISSUES PAPER

Thank you for the opportunity to make further comments on the Small Scale Licensing Framework Issues Paper in light of the matters raised at the Essential Services' Commission's (ESC) Forum of 15th September 2006.

This response represents the views of a number of consumer and community advocates including:

- *Consumer Utilities Advocacy Centre (CUAC)*
- *Consumer Law Centre Victoria (CLCV)*
- *Kildonan Family Services*
- *Alternative Technology Association*
- *Tenants Union of Victoria (TUV)*

This response was enabled by a grant provided by CUAC for the small scale licensing review.

In summary our concerns and comments are as follows:

1. Registration

We agree that an extension of the current licensing model to embedded networks is impractical, given the diversity of these arrangements. However, because of that diversity we are reluctant to endorse fully the ESC's proposed registration model at this point in time, as we believe there is a dearth of information about the precise number of embedded networks currently operating, and the number and types of consumers affected by these networks.

A detailed list and description of current embedded networks should be collected, maintained and made accessible to the general public.

continued…

Given the breadth of housing types and tenures that are affected by embedded networks, we question whether the ESC model is appropriate for the variety of potential networks. We generally endorse the proposed obligation to provide information about pricing arrangements, concession entitlements, and dispute resolution avenues.

Those requirements should however be viewed as the minimum possible standard. When talking about domestic consumers in large developments (for example, in new housing estates or large high-density developments such as in Docklands) network managers should be required to comply with consumer protections in the Energy Retail Code. The ESC should therefore consider some form of threshold that would specify the level of obligation on network owners.

The registration model must be appropriately tailored to the needs of the types of consumers within an embedded network and, where appropriate in larger networks, consumers should be afforded the same protections available to all other residential customers.

It is also unclear from the ESC's proposed model how the anomalies for bulk hot water will be covered. As was clear from the case studies outlined in the TUV's previous submission, there are cases where domestic consumers have been overcharged.

We are also concerned that the consequences of non-compliance with registration requirements have not been properly explored. For example, would supplying without registration be an offence. Also, what would be the status of consumers in a non- or de-registered network? Does the ROLR take effect in these circumstances? If so, what if the network is no compliant in distribution terms?

Further work is therefore required to articulate the compliance and enforcement regimes effecting registration and consequential changes that might be required for network inheritance.

2. Retail choice

We agree that in some circumstances –- it is appropriate to place some limits on consumers' free retail choice. For example, to facilitate community development of embedded generation initiatives or to allow a consumer to sign a long-term contract). However, it is essential that consumers be able to exit the network should participation in the network prove materially disadvantageous.

Opting out of the network will necessitate the purchase of a separate meter. However, this may prevent low-income consumers and tenants from exiting a network. Requiring distribution businesses or retailers to amortize the cost of the meter could assist consumers who own their own properties, but would be unlikely to be of any benefit to tenants.

All consumers, regardless of their financial circumstances and/or housing tenure, deserve the same level of protection, and further work must be undertaken to ensure that low-income consumers and tenants enjoy the freedom to opt out of the network should continued participation be materially disadvantageous.

Furthermore, it is anomalous that networks are required to inform business consumers of their right of choice, but there is no such mandate in regard to residential consumers.

This anomaly should be rectified as soon as possible.

3. Incidental Supply

The ESC is seeking input on how to regulate networks that serve a mixture of transient and permanent consumers. We agree that there is no value in remitting bills for consumption for users of hotel and similar accommodation, university colleges and dormitories, and patients in hospitals.

However we strongly oppose any registration model that would exclude permanent residents, and contend that the registration scheme should apply where an embedded network is providing energy or water to a residential consumer's principal place of residence. The ESC has proposed that the definition of permanent resident rest on a criterion of 6 months residency. As an alternative we propose that 'principal place of residence' is a more effective criterion.

Furthermore, we also agree with the ESC's view (as stated in the public forum) that the definition should not revolve around the provision of separate bills, as this may act as a perverse incentive for network owners where there are permanent residents (such as caravan parks, rooming houses and apartment complexes) to cease remitting separate bills. Separate bills provide consumers with an accessible means of monitoring their own consumption, assisting them to make more informed choices about the amount of energy they consume. Consequently, separate bills have potentially beneficial impacts for both individual consumers and the environment.

The registration scheme should apply where an embedded network supplies utilities to a residential consumer's principal place of residence. The onus of proof that customers are transient and not permanent should rest with the network.

4. Price

Currently, the Order-in-Council (OIC) states that consumers in exempt networks cannot be charged more than the standing offer, but that protection is neither uniform nor effective. For consumers of bulk hot water, for example, there is no effective protection around price of either gas or water.

The OIC also does not effectively define the components of 'price'. Any new definition should include all ancillary charges (e.g. meter reading, late payment fees etc), as we are aware of cases where consumers are being charged for such services at a price that does not reflect the cost of services.

Given the diversity of embedded networks, we would also strongly recommend that the ESC implement an effective monitoring and compliance regime to oversee pricing arrangements.

Price caps should be instituted for embedded networks that ensure access and affordability for all Victorian consumers. The price caps should be rigorously monitored by the ESC.

The standing offer also sunsets at the end of 2007, raising the issue of how to benchmark a standard price after that date. Given the monopoly enjoyed by providers in embedded networks, independent price regulation and monitoring are essential to protect consumers from profiteering and other poor practices. We suggest that a benchmark maximum based on an average price would be the most appropriate method.

The ESC should develop a longer-term strategy to develop a system of price regulation that ensures that energy remains affordable for consumers within embedded networks.

- ***5. Dispute resolution***

We agree that capacity to access an independent dispute resolution process is essential, but contend that there are a number of shortcomings with the Victorian Civil and Administrative Tribunal (VCAT) process. Fees apply (though these can be waived if the applicant demonstrates financial hardship) and the process is not especially expeditious. Furthermore, in the absence of enabling legislation, we are concerned that VCAT may not have effective jurisdiction to hear and determine these matters.

The Issues Paper accepts that VCAT is empowered to adjudicate dispute between consumers and small-scale operators and/or onsellers. Disputes in which the TUV has represented applicants were heard in VCAT's Residential Tenancies List or Civil Claims List, as the Tribunal has express jurisdiction over matters pertaining to the Residential Tenancies Act 1997 or the Fair Trading Act 1999. However, VCAT's jurisdiction to adjudicate disputes between small-scale operators and/or on-sellers and consumers in embedded networks has not been made explicit in legislation or the OIC, and we contend that express provision should be made empowering VCAT to hear these matters to effect an accessible and straightforward dispute resolution.

It is also important to note the reticence of low-income households in marginal tenures (such as caravan and residential parks) to access dispute resolution procedures, because they perceive that making complaints will result in their eviction. Customers whose housing choices are constrained by poverty are much more likely to be living in substandard conditions, and their fear of potential homelessness makes them more likely to tolerate exploitative conduct on the part of service providers. Consequently, they are less likely to be aware of and to exercise their legal rights. The availability of the VCAT process alone in these circumstances does little to protect vulnerable households from unfair and exploitative conduct on the part of small-scale distributors and/or on-sellers.

All consumers should enjoy the same level of government and legal protection, regardless of whether they reside in an embedded network. The Electricity and Water Ombudsman's (EWOV) dispute resolution processes have the advantages of being free and non-adversarial.

We believe all consumers should have access to EWOV, to ensure customer parity and fairness.

We note permitting customers in small-scale arrangements access to EVOW would likely involve amending EWOV's Constitution and Charter to include a specific membership category for small-scale distributors and on-sellers. We would also wish to ensure that the addition of embedded networks does not threaten the viability of EWOV's existing scheme, which offers real protection for Victorian consumers.

We recommend that further work be undertaken to determine the optimal means of effecting access to EWOV for customers in small-scale arrangements. ● *Page **4** of **5***

6. Retailer of Last Resort (ROLR)

We are concerned about how consumers would be protected in the following scenarios:

- *• Failure of an embedded network owner;*
- *• Failure of a network manager;*
- *• Failure of the retailer.*

How consumers would be protected in the instance of any these failure scenarios is not clear.

Further work clarifying how services are to be maintained for consumers in the event of any of these failure scenarios must be undertaken.

7. Alignment with other legislative obligations

Finally, we are conscious that there are a range of obligations through other legislative instruments that affect the owners and managers of caravan parks, retirement villages and tenancies. As such, Consumer Affairs Victoria (CAV), which administers the Fair Trading Act, Residential Tenancies Act, and Retirement Villages Act, should be actively engaged in the development of a regulatory model, including to ensure that the networks are appropriately defined.

In that process, the ESC and CAV should maintain vigilance on the range of utilities provided by some of these networks (gas and water, for example), to see whether the registration model should be expanded to capture other essential services.

The registration model and accompanying obligations on network owners and operators must be effectively and appropriately aligned with other legislative and regulatory instruments.

If you require any further information about any of the matters raised in this submission, please do not hesitate to connect Rebecca Harrison, Research & Policy Worker at TUV on (03) 9411 1410.

Yours sincerely,

(name omitted)

*Research & Policy Worker Tenants Union of Victoria ● Page **5** of **5***

APPENDIX 7

REPRODUCED SUBMISSION

AS PRESENTED BY TENANTS UNION VICTORIA (2007, September)

to

Essential Services Commission Victoria

SMALL SCALE LICENCING FRAMEWORK DRAFT DECISION (2007)

Tenants Union Victori**a** (2007) Submission by Tenant's Union Victoria to VESC 2006 Small Scale Licencing Issues Paper[1]"

The Tenants Union of Victoria welcomes the opportunity to comment on the Small Scale Licensing Framework Draft Recommendations.

We endorse the submission made by the Consumer Utilities Advocacy Centre (CUAC) but would like to make some additional comments.

Who we are

The Tenants Union of Victoria was established in 1975 as an advocacy organization and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. We represent the interests of tenants in law and policy making by lobbying government and businesses to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of rental housing and financial assistance provided to low-income households.

The registration system – caravan parks and rooming houses

The Essential Services Commission (ESC) Draft Recommendations indicate that it does not intend that the registration system cover entities such as caravan parks and rooming houses, which distribute and supply electricity as an integral part of another service and do not charge for it separately. The ESC believes that providers of caravan park and rooming house accommodation are not actively involved in the distribution and reselling of energy to their residents and therefore should not subject to energy-specific customer protection regulation (see 2.3.1, p.16).

However, the decision to exclude caravan parks and rooming houses from the registration system is based on a misapprehension of this sector of the housing market. Many caravan parks and most rooming houses do not provide temporary, holiday or crisis accommodation – they are the long term or permanent homes for around 25,000 Victorian households. Specifically, they are the only housing option available to very low-income, complex needs and/or unemployed or retiree households. As a group, caravan park and rooming house residents are very vulnerable – their limited incomes and health or other issues mean that they have effectively no choices in the housing market and are at high risk of homelessness. Consequently, they have a particular need for effective consumer protection frameworks to defend them from potentially exploitative practices.

In particular, it should be noted that crisis accommodation and rooming houses are not comparable entities. Crisis accommodation is a temporary source of housing for people

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[1] Tenants Union Victori**a** (2007) Submission by Tenant's Union Victoria to VESC 2006 Small Scale Licencing Issues Paper *http://www.tuv.org.au/pdf/submissions/Small_Scale_Licensing_Review_ESC_082006.pdf*

in need that is funded by the government, while rooming houses are generally operated by private or non-government providers offering long-term or permanent homes.

In the case of caravan parks, most are 'mixed use' in that they provide holiday or temporary accommodation as well as homes for permanent residents. As a matter of equity among consumers, caravan park residents should all enjoy the same level of protection regardless of the population of the park in which they live. Therefore, all caravan parks where there are any permanent residents should be subject to the registration system, not just those where the majority of residents are permanent.

The Tenants Union of Victoria recommends that that registration system be extended to capture caravan parks and rooming houses to ensure that residents are appropriately protected. The stated reason for their exclusion is based on the assumption that these complexes provide temporary accommodation to a transient population. This is clearly not the case, as caravan parks and rooming houses provide long-term or permanent housing to a class of especially vulnerable Victorians in need of particular protection.

We hope that this submission clarifies the issue for the ESC. If you wish to discuss any of the matter raised in this submission further, please contact Rebecca Harrison, Research & Policy Worker, on (03) 9411 1410

Yours sincerely,

Research & Policy Worker Tenants Union of Victoria

Comment MK

It is clear from the above that the intent was to exempt from licencing small scale operators providing electricity in embedded networks.

Elsewhere it was clearly specified that the intent was to exempt only those networks where that electricity was provided on an 'incidental" basis, such as transitory accommodation, motels, rooming houses, caravan parks; nursing homes; student accommodation associated with education institutions

The TUV pointed out that some permanent residents live in rooming houses, and caravan parks. For as long as any residents were permanent proper protections should apply.

"…there is no regulatory oversight ensuring that the provision of the OIC requiring distributors and on sellers to inform customers of the VCAT dispute resolution mechanism is being complied with. Without appropriate supervision of distributor and on-seller behaviour, this provision will not provide customers with adequate protection equivalent to that enjoyed by customers who do not reside in embedded networks. This is manifestly unfair, and should be addressed as a matter of urgency

APPENDIX 8

REPRODUCED SUBMISSION

Extract only: Energy issues – tenancy matter Residential Parks Act 1998

NEW SOUTH WALES GOVERNMENT OFFICE OF FAIR TRADING (2008)[1]

SUBMISSION TO PRODUCTIVITY

COMMISSION'S REIVEW OF AUSTRALIA'S CONSUMER POLICY FRAMEWORK

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1 *http://www.pc.gov.au/__data/assets/pdf_file/0008/89207/subdr251.pdf*

Appendix 7

Case Study

New South Wales Government Office of Fair Trading (2008) Submission to Productivity Commission's Review of Australia's Consumer Policy Framework Draft Report

http://www.pc.gov.au/__data/assets/pdf_file/0008/89207/subdr251.pdf

Extract only: Energy issues – tenancy matter Residential Parks Act 1998

"Attachment B – Litigation Case Studies

Case studies where only the Fair Trading Act could provide an effective enforcement outcome:

1. The owner of a caravan park engaged in conduct that was in breach of his obligations under the Residential Parks Act 1998. His tenants took action in the Consumer, Trader and Tenancy Tribunal and the Office of Fair Trading prosecuted him for offences under the Act.

The owner continued the misconduct. The only option was to seek an injunction under section 66 of the Fair Trading Act and orders that the owner comply with the Residential Parks Act."

APPENDIX 9

REPRODUCED

ELECTRICITY INDUSTRY ACT 2000

EXEMPTION ORDER (2002)

UNDER SECTION 17

MINISTERIAL ORDER IN COUNCIL

VICTORIA

Appendix 9

http://www.esc.vic.gov.au/NR/rdonlyres/695EF0E8-FBEB-4B42-879F-B233058DFAF0/0/PublicforumSmallScaleLicensing20060914.pdf

http://www.esc.vic.gov.au/NR/rdonlyres/9EC969C8-B301-4BD9-8E62-4A8042085616/0/MinisterLetterMarch06.pdf

http://www.esc.vic.gov.au/NR/rdonlyres/E0479D36-BC99-4563-9D1B-58D064BCBE13/0/GeneralOrderMay02.pdf

ELECTRICITY INDUSTRY ACT 2000

EXEMPTION ORDER UNDER SECTION 17

ORDER IN COUNCIL

The Governor in Council acting under section 17 of the **Electricity Industry Act 2000** (the "Act") hereby makes the following Order:

1. Date of effect

This Order comes into effect on 1 May 2002.

2. Exemptions

A person identified in Column 1 of the Schedule, or falling within a class of persons identified in Column 1 of the Schedule, is exempt from the requirement to obtain a licence under section 16 of the Act in respect of each activity identified opposite that person's name, or the class of persons in which that person is included, in Column 2 of the Schedule, subject in each case to the terms, conditions and limitations (if any) specified in Column 2 of the Schedule.

3. Revocation of Existing Orders

The General Exemption Order is revoked on 1 May 2002. It is the intention of this Order not to affect the revocations made by the General Exemption Order.

4. Definitions

In this Order, including the Schedule, the following terms have the following meanings unless the contrary intention appears:

“approved meter” means any device that is of a type that the holder of a licence under the Act is permitted by law to use to measure consumption of electricity for the type of person to whom electricity is being transmitted, distributed, supplied or sold;

"Distribution Code" means the Electricity Distribution Code from time to time approved by the Essential Services Commission;

“Electricity Customer Metering Code” means the Electricity Customer Metering Code from time to time approved by the Essential Services Commission;

“ETSA Utilities” means ETSA Utilities Pty Ltd (ACN 082 711 895) and any person who in accordance with the laws of South Australia succeeds to the entitlements of ETSA Utilities;

“General Exemption Order” means the Order made under section 160 of the Electricity Industry Act 1993 and published in the Government Gazette on 27 June 1996 and varied

by an Order made on 19 December 2000 and published in Government Gazette G51 on 21 December 2000;

"generation" includes co-generation;

"Hume Power Station Agreement" means the agreement for the construction, operation and maintenance of the Hume power station and associated works between the State Electricity Commission of Victoria and the Electricity Commission of New South Wales dated 25 July 1957;

"intermediary distribution or supply", in relation to a supply of electricity to a customer, means the conveyance of electricity through facilities of a person other than a distribution company after the electricity leaves a supply facility owned or operated by a distribution company and before being supplied to the customer in premises of a kind which, as at the date of this Order, it is customary for electricity to be so supplied;

"kVa" means 1,000 volt amps;

"large business customer" means a person to whom peak demand of not less than 500 kVa, or consumption of not less than 160MWh per annum, is distributed, supplied or sold for commercial or industrial purposes;

"licensed electricity distributor" means the holder of a licence to distribute or supply electricity under the Act;

"licensed retailer" means the holder of a licence to sell electricity under the Act otherwise than through the wholesale electricity market;

"long term resident " has the same meaning as **"resident"** in the Residential Tenancies Act 1997 and the Retirement Villages Act 1986, but does not include a person who was a resident of a retirement village but who has left the retirement village or who has died, or their legal personal representative;

"metered intermediary sale of electricity" means the sale of electricity by a customer of a licensed retailer to a short term resident, long term resident, small business customer or large business customer where consumption by each such person is measured by an approved meter;

"Minister" means the Minister responsible for the Electricity Industry Act 2000;

"MW" means megawatts;

"MWh" means megawatt hours;

"National Electricity Code" has the meaning given to "Code" in the National Electricity (Victoria) Law as defined in the National Electricity (Victoria) Act 1997;

"related body corporate" has the same meaning as in the Corporations Act;

"Pricing Rule" means the price or prices determined by reference to clause 7 of this Order;

"Retail Code" means the Electricity Retail Code from time to time approved by the Essential Services Commission;

"short term resident" means any person, other than a person who is a long term resident, who resides in a premises used for residential purposes only (such as a retirement village, a rooming house or a site in a caravan park) whether or not on a temporary or intermittent basis;

"small business customer" means a person to whom peak demand of less than 500kVa, and consumption of less than 160MWh per annum, is distributed, supplied or sold for commercial or industrial purposes;

"**Snowy Mountains Hydro-electric Agreement** " means the agreement for the construction, operation and maintenance of the Snowy Mountains Hydroelectric Scheme between the Commonwealth of Australia, the State of New South Wales and the State of Victoria dated 18 September 1957;

"Special Power Payment rebate" means the payments made by licensed retailers to certain customers, in accordance with the scheme implemented by the Minister and administered by VENCorp to reduce the electricity bills payable by those customers;

"System Code" means the Electricity System Code from time to time approved by the Essential Services Commission;

"VENCorp" means the Victorian Energy Networks Corporation subsisting under section 158 of the Gas Industry Act 2001.

5. Certification by Commission

The Essential Services Commission may, on application by any person whose interests are affected, issue a certificate stating that, in the opinion of the Essential Services Commission, a particular activity does or does not constitute:

(a) the intermediary distribution or supply of electricity; or

(b) the metered intermediary sale of electricity,

and, if it does so, that activity does or does not, as applicable, constitute the intermediary distribution or supply of electricity or the metered intermediary sale of electricity, as the case may be, for the purposes of this Order.

6. Condition for all circumstances

It is a condition of each exemption granted under this Order that the person to whom the exemption applies must provide (whether or not through an agent), to the Minister or the Essential Services Commission, any information requested by the Minister or the Essential Services Commission, respectively, that either may require for the reasonable administration of this Order.

7. Pricing Rule

The price, or range of prices, at which electricity (and services related to the provision of electricity) may be distributed, supplied and sold to a short term resident, long term resident or small business customer pursuant to an exemption granted under this Order must:

(a) not be more than the tariff that would apply to the customer if the customer purchased the electricity and related services pursuant to an offer made in accordance with the requirements of section 35 of the Act ; and

(b) allow for the Special Power Payment rebate to which the customer would be entitled if the customer purchased electricity from a licensed retailer, in accordance with any guidelines that may be issued by the Essential Services Commission.

8. Safety

A person to whom an exemption under this Order applies is not, by reason of this Order, exempt from any provisions of the Electricity Safety Act 1998 or the Regulations or any other instruments made under that Act.

Dated 2002

Responsible Minister:

_____

Candy Broad

Minister for Energy and Resources

_____

Clerk of the Executive Council

SCHEDULE

PART A – GENERIC SITUATIONS

Column 1

Column 2

1. GENERATION

Exempt Persons

Exemption

Any person

The generation of electricity for supply or sale where the total output by that person (whether or not with another person), using a generator or generators connected to the transmission network or distribution network at a common point, is less than 30MW.

Conditions

This exemption is subject to the conditions that:

(a) the total exported output of the relevant electricity generator or group of generators must be supplied or sold to a licensed retailer; and (b) the exempt person must observe all applicable provisions of the Distribution Code.

Limitations

This exemption does not apply to the generation of electricity for supply or sale if the relevant electricity generator or group of generators is required by the National Electricity Code to be centrally dispatched.

Examples of such networks include caravan parks and office buildings.

Exempt Persons

Exemption

Any person The intermediary distribution or supply of electricity to a short term resident, long term resident, small business customer or large business customer within the limits of the premises owned or occupied by the person engaging in that activity.

Conditions

This exemption is subject to the condition that the exempt person must observe all applicable provisions of the Distribution Code as if that person was a licensed electricity distributor.

This exemption is subject to the additional condition that in the event of a dispute concerning the distribution or supply of electricity to a short term resident, long term resident or small business customer, and in the absence of any determination of the Victorian Civil and Administrative Tribunal, that the exempt person must:

(a) make reasonable endeavours to resolve the dispute;

(b) advise the person to whom electricity is distributed or supplied, of his or her right to apply to have a matter heard by the Victorian Civil and Administrative Tribunal; and

(c) continue to distribute or supply electricity to that person.

Limitations

This exemption does not apply to the intermediary distribution or supply of electricity in respect of any premises where:

(a) in relation to any existing premises, the supply arrangements are restructured; and

(b) in relation to any new premises, the supply arrangements are structured,

in such a way as may have the effect of denying:

(c) a person any rights they may have if the supply arrangements were not so structured or restructured; or

(d) a licensed retailer the ability to sell electricity to a customer with an approved meter.

The Essential Services Commission may, on application of any person whose interests are affected, issue a certificate stating that in the opinion of the Essential Services

Commission the structuring or restructuring of supply arrangements may have an effect specified in the preceding paragraph and, if it does so, then the arrangements have that effect for the purposes of this Order.

SALE OF METERED ELECTRICITY IN EMBEDDED NETWORKS

Exempt Persons

Exemption

Any person

The metered intermediary sale of electricity within the limits of the premises owned or occupied by the person engaging in that activity.

Conditions

This exemption is subject to the conditions that:

(a) the exempt person must observe all applicable provisions of the Retail Code as if that person was a licensed retailer;

(b) in the case of the sale of electricity to a short term resident, long term resident or small business customer, the exempt person must observe all applicable provisions of any Pricing Rule;

(c) in the case of the sale of electricity to a large business customer or a small business customer, the exempt person must, when it commences selling electricity to the customer, inform the customer in writing that it may have the right to elect to purchase electricity from a licensed retailer of its choice; and

(d) the exempt person must not, by reason only that the exempt person has changed its licensed retailer, cease to sell electricity to any relevant short term resident, long term resident, small business customer or large business customer unless that customer has elected to purchase electricity from a licensed retailer.

This exemption is subject to the additional condition that in the event of a dispute concerning the sale of electricity to a short term resident, long term resident or small business customer, and in the absence of any determination of the Victorian Civil and Administrative Tribunal, the exempt person must:

(e) make reasonable endeavours to resolve the dispute, and

(f) advise the person to whom electricity is sold, of his or her right to apply to have a matter heard by the Victorian Civil and Administrative Tribunal.

4. SALE OF ELECTRICITY BETWEEN RELATED COMPANIES

Exempt Persons

Exemption

Any person

The sale of electricity by the exempt person to a related body corporate of the exempt person.

5. SUBDIVISION OF LAND

Exempt Persons

Exemption

Any person

The distribution, supply and sale of electricity outside premises owned or occupied by the person engaging in the activity to a large business customer with an approved meter as the direct consequence of a subdivision of a property.

Conditions

This exemption is subject to the conditions that the exempt person:

(a) must not engage in the exempt activities other than incidentally to its core business function, which function must not be related to the distribution, supply or sale of electricity;

(b) must cause an easement to be recorded on the titles of all affected properties in accordance with the Transfer of Land Act before the distribution, supply or sale of electricity occurs;

(c) must cause the distribution, supply or sale arrangements to be noted on any statements provided under section 32 of the Sale of Land Act relating to all affected properties;

(d) must observe all applicable provisions of the Distribution Code as if the person was a licensed electricity distributor;

(e) must not take any action which prevents the large business customer from purchasing electricity from a licensed retailer of its choice;

(f) must not take any action which prevents a licensed retailer from selling electricity to the large business customer;

(g) unless otherwise agreed, must provide, at the request of any person who occupied the subdivided property at the time of subdivision, a separate point of supply (as defined in the Electricity Safety Act) from the licensed distribution company at no cost to that person if such a separate point of supply does not already exist; and

(h) accepts full liability for any claims, losses, damages or costs incurred by any materially affected person as a direct result of any breach by the exempt person of any of these conditions.

Limitations

This exemption ceases to apply where there is any restructuring of the distribution or supply arrangements other than like-for-like replacement in the course of maintenance, or the replacement of an approved meter with another approved meter.

PART B – SPECIFIC SITUATIONS

Exempt Persons

Exemption

1. Country Energy The distribution, supply and sale of electricity in the areas of Bonang, Tebbutt, Dedick, Goongerah, Delegate River, Bendoc, Lower Bendoc, Jingellic, Bongilla Island and Tocumwal.

Conditions

This exemption is subject to the conditions that Country Energy:

(a) must distribute, supply and sell electricity to persons in these areas on the same terms and conditions of any licence it holds that enables it to distribute, supply and sell electricity to customers in New South Wales;

(b) agrees, that the Energy and Water Ombusdman of New South Wales has jurisdiction to hear and determine disputes in accordance with its functions;

(c) must not take any action that would affect the ability of a customer to purchase electricity from an electricity retailer licensed in New South Wales to sell electricity to a customer in these areas; and

(d) must not take any action that would affect the ability of an electricity retailer licensed in New South Wales to sell electricity to a customer in these areas.

2. ETSA Utilities The distribution, supply and sale of electricity by ETSA Utilities to another licensed electricity distributor or licensed retailer in Victoria, and existing customers of ETSA Utilities in Victoria as at the date of this Order, subject to the conditions that ETSA Utilities:

(a) distributes, supplies and sells electricity to persons in these areas on the same terms and conditions of any licence it holds that enables it to distribute, supply and sell electricity to customers in South Australia; and

(b) provides customers in Victoria with access to the same dispute resolution process it provides to comparable customers in South Australia.

3. Federal Airports Corporation

The distribution, supply and sale of electricity at Melbourne International Airport, Tullamarine.

This exemption is subject to the conditions that Federal Airports Corporation must:

(a) observe the Pricing Rule;

(b) observe all applicable provisions of the Distribution Code, the Electricity Customer Metering Code and the Retail Code;

(c) not take any action which prevents a customer from purchasing electricity from a licensed retailer of the customer's choice; and (d) not take any action which prevents a licensed retailer from selling electricity to a customer.

Melbourne Exhibition Centre The distribution, supply and sale of electricity within the exhibition centre owned and operated by Melbourne Exhibition Centre.

Conditions

This exemption is subject to the conditions that:

(a) Melbourne Exhibition Centre must observe the Pricing Rule;

(b) Melbourne Exhibition Centre must observe all applicable provisions of the Distribution Code;

(c) any dispute relating to the distribution, supply or sale of electricity between Melbourne Exhibition Centre and a person to whom it distributes, supplies or sells electricity must, except where both parties otherwise agree, be resolved in accordance with any dispute resolution process that has been agreed between them; and

(d) Melbourne Exhibition Centre supplies electricity to its exhibitors at cost and

does not seek to make a profit on the re-sale of electricity.

076 279) ("HRL")

The distribution, supply and sale of electricity within the limits of the premises owned or occupied as at the date of this Order by HRL or one of its related bodies corporate at Tramway Road, Morwell.

Conditions

This exemption is subject to the conditions that HRL observes:

(a) all applicable provisions of the Distribution Code; and

(b) the Pricing Rule.

6. Loy Yang B Power Station Pty Limited (ACN 052 530 551)

Mission Energy Australia Ltd (ACN 055 563 785) as managing partner of the Latrobe Power Partnership The generation of electricity by the Loy Yang B power station for supply or sale to the State Electricity Commission of Victoria.

Mission Energy Management Australia Pty Ltd (ACN 055 563 696) as the

operator of the Loy Yang B power station and any other person appointed in its place as operator of the Loy Yang

B power station by Loy Yang B Power Station Pty Ltd and Mission Energy

Australia Ltd as managing partner of the Latrobe Power Partnership

Electricity Trust of South Australia ("ETSA") and any person who in accordance with the laws of South Australia succeeds to the entitlements of ETSA

The generation of electricity for supply or sale pursuant to any remaining entitlements under the former Interconnection Operating Agreement dated 14 July 1986.

8. Electricity Commission of New South Wales ("ECNSW") and any person who in accordance with the laws of New South Wales succeeds to the entitlements of ECNSW under the Snowy Mountains Hydro-electric

Agreement or the Hume Power Station Agreement

The generation of electricity for supply or sale to any licensed distributor or licensed retailer in Victoria pursuant to the Snowy Mountains Hydro-electric Agreement or the Hume Power Station Agreement.

9. Department of Natural Resources and Environment

The generation of electricity for supply or sale, the transmission, distribution, supply or sale of electricity, in each case within Wilson's Promontory National Park in the manner and to the extent such activities are engaged in as at the date of this Order.

Conditions

This exemption is subject to the conditions that the Department observes:

(a) all applicable provisions of the Distribution Code; and

(b) the Pricing Rule.

Alpine Resorts Commission

The generation of electricity for supply or sale, the transmission, distribution, supply or sale of electricity, in each case in the areas of Lake Mountain and Mount Baw Baw in the manner and to the extent that such activities are engaged in as at the date of this Order.

Conditions

This exemption is subject to the conditions

that the Alpine Resorts Commission

observes:

(a) all applicable provisions of the

Distribution Code; and

(b) Pricing Rule.

11. Lions Village Licola Incorporated

The generation of electricity for supply or sale, the transmission, distribution, supply or sale of electricity, in each case in respect of Licola Village in the manner and to the extent that such activities are engaged in as at the date of this Order.

Conditions

This exemption is subject to the condition that Lions Village Licola Incorporated observes:

(a) all applicable provisions of the Distribution Code; and

(b) Pricing Rule.

Appendix 10

COMPARATIVE ANALYSIS OF

SELECTED ENERGY PROVISIONS

and

TRADE MEASUREMENT PROVISIONS

FOCUS ON TRIPARTITE GOVERNANCE MODEL

Document incomplete work in progress

Prepared by Madeleine Kingston

current and proposed, and of some trade measurement interpretations, demonstrating continuing conflict and overlap within and outside energy provisions; with other statutory regulatory schemes and with common law contractual provisions

Appendix 10

ANAYLSIS OF INCONSISTENCIES IN DEFINITIONS BETWEEN BUL HOT WATER ARRANGEMENTS AND ALL OTHER ENERGY –SPECIFIC DEFINITIONS

SELECTED FURTHER PERTINENT DEFINITIONS
DOCUMENT IN PREPARATION

Note: last minute changes to prepared documentation similar to that submitted to the GCF Draft Policy Paper in September and the Commonwealth Treasury was changed upon discover of even further revisions to the Energy Retail Code in February 2010, effective date April 2010 – with retained and more extended discrepancies and inconsistencies within and outside energy laws and also to common law provisions. Though every effort has been made to incorporate comments and changes, this document remains a work in progress but is submitted as is in good faith.

I also attach extracts from the Interpretation section of the Energy Retail Code (v7) for direct comparison – a task that by now should have been achieved given the advanced stage of the NECF2 Package

Extracts:

ENERGY RETAIL CODE[1]
Version 7
~~**October 2009**~~
February 2010 applicable April 2010

The BWH definitions and provisions are inconsistent with all other existing energy provisions, about metering, supply points and ancillary supply points (taken as one under existing legislation), supply address (with the same meaning as supply point); energization point; billing points)

Under the *Gas (Residual Provisions) Act 1994* (GRPC) provides that any gas connection point in existence prior to 1 July 1997 considered as a single supply billing point remains so. Note the bulk gas meter measures gas volume not heating; the hot water flow meters measure water volume only not heat or gas. Under residential tenancies provisions the Landlord is responsible for any utility not separately metered (other than bottled gas). The term meter implies use of an instrument designed for the purpose

[1] *http://www.esc.vic.gov.au/NR/rdonlyres/132FD501-0774-467E-A8EF-800354BDA755/0/RIEnergyRetailCodeOctober2009_trackedchanges_20090814C0920410.pdf*

Customer/Relevant Customer/Business/Domestic/Prescribed/Deemed Customer

These terms are used variously and discrepantly within numbers of provisions and are interpreted at will especially in relation to the proper contractual party for communal utility infrastructure under the control of "Controller of Premises" (see NMA definitions) normally the Owners' Corporation

A customer may be an Owners' Corporation. In the case of the Energy Retail Code and most other Interpretations plural may mean singular, reference to natural person may mean a body corporate (Owners' Corporation)

A **relevant** customer is defined under the *Gas Industry Act 2001*, which is one with the Gas Industries Residual Provisions Act 1994 simply as one who consumes no more than 10,000 GJ of gas per annum, which applies to some 1.6 million Victorians. A renting tenant in a multi-tenanted dwelling is not the relevant contractual party despite the provisions in Codes and Guidelines relied up

A residential customer is one who is an end-consumer of any utility. Such a customer does not consumer, or purchase gas or electricity from any party in the absence of flow of energy to the premises deemed to be receiving it under contract law and the terms of current and proposed generic laws (see revised implied and statutory warranties provisions) and most Sale of Goods Acts

Where only a single gas meter exists on common property infrastructure as a single connection or energization point used to heat a communal water tank centrally heating water reticulated in water pipes to multiple end-users (whether residential tenants or individual owners) the proper contractual party for the sale and supply of energy is the Owners' Corporation not individual renting tenants or owners. However, if owners, arrangements exist for the Owners' Corporation to apportion utility costs in the manner dictated by Owners' Corporation Rules and consistent with the Owners' Corporation Act 2006.

For market settlement purposes only a single charge and a single supply point is deemed to exist. This is consistent with the Gas Residual Provisions Act 1994 provisions and the Gas Distribution Code

Deemed Contract/Deemed Contract Arrangements/Customer Contract (terms implying the same)[2] – see s46 of the *GIA* and analysis on Apdx 1, 201-218

Revised Energy Retail Code, v 7 February 2010 effective April 2010 provisions allow a "deemed customer" relationship to last no more than two billing cycles.

[2] See analysis of s46 of the *GIA*. Taking supply means from a physical connection where energy is received. Taking supply of heated water does not meet that description. Therefore the deemed provisions under s46 do not apply to end-users of heated water products reticulated in water pipes rather than gas transmission pipes or electrical lines

The effect of this is that if deemed status is imposed on the wrong contractual parties such as occurs within the *"bulk hot water policy arrangements"* a move-in customer as a residential tenant refusing to accept unjust and unwarranted deemed contractual status for the sale and supply of energy that simply does not occur to his or her residential premises on the basis of provision of communally heated water reticulated in service pipes, repeated threats of disconnection can occur, culminating in disconnection of heated water supplies, though the clamping of hot water flow meters, despite every definition within existing and proposed energy laws that defines disconnection (ERC, NECF2, de-energization or decommissioning (Gas Code) for gas as follows:

disconnect means:

(a) for electricity, the disconnection of contact between the electrical systems of two persons preventing the supply of electricity between those systems; and

(b) for gas, the separation of a ***natural gas installation*** from a distribution system to prevent the flow of gas.

At the same time, those adopting the "BHW policies" and the NECF2 Package fails to acknowledge that disconnection processes applying unjustly and improperly the term disconnection to extend to severance or suspension of heated water supplies that are communally heated and reticulated in water service pipes to individual residential premises (abodes) in multi-tenanted dwellings.

The refusal of the MCE in finalization the NECF2 Package to address the issues of discrepancies within and outside energy laws and in particular deal appropriately and fairly with these arrangements is cause for concern and will be instrumental in continuing to contribute to perceptions of poor energy-specific protection; poor commitment to the concepts of harmonization, consistency, adoption of best practice and respect for the provisions of other regulatory schemes, including national measurement provisions and the concepts of legal traceability in the sale and supply of goods and services that can be measured; and adherence to the fundamentals of the common law especially with regard to contract.

The disconnection practices, unjustly imposed contractual status on the wrong parties also have implications unjust perceived damage to credit rating and a number of provisions precedent and subsequent including expectation of provision of access to meters (usually water meters) that are behind locked doors in the care custody and control of landlords

In addition, by deemed contractual status imposition on the wrong parties, the path is opened up for exploitive conduct as has been extensively discussed in case studies and in particular the extended Deidentified Case Study again lodged with this submission, but already published on the MCE arena, Productivity Commission site and Commonwealth Treasury site

In these respects – and beyond, the single market object is not met

customer retail contract means a contract between a small customer and a retailer of a kind referred to in section 202 for the provision of customer retail services for particular premises;

See all comments above. For more detailed discussion please see my various submissions to the ESC (Vic) 2008); Productivity Commission (2008) and (2009) MCE NECF1 Consultation RIS; MCE Gas Connections Framework (2009); Treasury's Unconscionable Conduct Issues Paper

The term *"customer"* needs to be distinguished from the term *"consumer"* or end-user or any utility (be it gas or electricity). This point was raised by a market participant delegate on Day 2 of the NECF2 Public Workshop Forum in Melbourne

In multi-tenanted dwellings, it is the Owners' Corporation who is provided with either a basic or negotiated connection service, not a succession of renting tenants. The contractual responsibility of a gas installation or service is always OC responsibility. Please refer Owners' Corporation Act 2006 (Vic). These provisions may vary from jurisdiction to jurisdiction.[3]

If the supply of gas through a dedicated gas meter

The term *"premises"* needs further clarification. A clear distinction needs to be made between *"premises"* which can donate chook-house, boiler room; underground facilities (under care custody and control of the Controller of Premises, normally a Landlord and/or Owners Corporation (Body Corporate)[4]

The Gas Supply Act 1996 defines premises as follows

premises includes any building or part of a building, any structure or part of a structure, any land (whether built on or not) and any river, lake or other waters.

The *National Measurement Act 1960* amended to 1 July 2009[5] Act No. 64 of 1960 refers to these definitions:

*"**controller"** , in relation to premises, a part of premises or a vehicle, means the person apparently in control of the premises, the part of the premises or the vehicle.*

*"**premises"** means:*

(a) an area of land or any other place, whether or not it is enclosed or built on; or

(b) a building or other structure

connection means a physical link between a distribution pipeline and a customer's premises to allow the flow of natural gas."

Supply Remit/

Retailer Supply Remit

Classes of Premises/Businesses Premises/Residential Premises

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[3] Note there is a court proceeding on foot currently with an estimated total liability over the full term of the alleged contracts with regard to the legality of the contract for "provision of hot water services

[4] Note Owners Corporation provisions vary between jurisdictions. Refer to Victorian Owners Corporation Act and the sorts of facilities and services that do come under their control – all common property infrastructure, including hot water services, public lighting, car-parks, gardens, etc.

[5] National Measurement Act 1960 amended to 1 July 2009, Act No. 60 of 1960, taking into account amendments up to Act No. 137 of 2008
http://www.austlii.edu.au/au/legis/cth/consol_act/nma1960222/notes.html

Classes of Consumers

Leaving definition and re-definition of these "classes" will continue to give rise to the confusion and distortion identified above -=n as has been the case through numerous Orders in Council which have often had the effect of attempting to entirely re-define the laws that may have originally attempted to take care to achieve consistency, party, equity and fairness.

Supply Address

This term is discrepantly used within the revised Energy Retail Code to imply a residential abode. It has the meaning within the Gas Industry Act and Gas Industry Code as synonymous with supply point (or connection/energization) point. This has implications for move-in-customers and alleged deemed carry over customers

Supply Point

This term is synonymous with supply address though the latter is entirely incorrectly used within the ERC to imply a residential abode (premises) This has ripple effects on other contractual matters and on conditions precedent and subsequent, including move-in and carry-over customer issues, provision of identification on the basis of deemed contractual status; provision of access to meters (normally hot water flow meters) in the care custody and control of Owners' Corporations in the case of multi-tenanted dwellings whether publicly or privately owned and managed.

Since supply points and ancillary points are taken as one no need for mention of the latter, though for embedded networks the parent/child concept has been introduced) Since supply points and ancillary points are taken as one no need for mention of the latter, though for embedded networks the parent/child concept has been introduced)

Energization/Connection Point Supply point

As previously discussed there is no flow of energy effected to the residential premises of residential tenants or individual owners supplied with heated water in service pipes where the heating of the water has been achieved through a single supply point/supply address ((technical terms); connection point;; energization point. For settlement purposes that single master gas meter or electricity meter referred to under the ERC "bulk hot water policy provisions" is a single connection or energization point. Yet massive supply and other charges, bundled or unbundled are being imposed on end-users of communally heated water deemed individually to be contractually liable under those provisions

Distribution supply points

See comments above

Supply Address[6]/Supply Point

The terms supply point and ancillary supply point are synonymous under the legislation and the *Victorian Gas Distribution System Code*. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points

[6]

Supply[7]

All of these are intended to imply for gas, gas supply points and take into account the metering and metering installation concepts and definitions that apply to gas. The same applies in principle to electricity

Supply Address/Supply Point/Connection Point/Energization Point

The end-user's premises (individual apartment, flat) is not a supply address which is a technical term synonymous with supply/connection point for energy

Distribution Supply Point/Supply

Since supply points and ancillary points are taken as one no need for mention of the latter, though for embedded networks the parent/child concept has been introduced)

For embedded networks the parent/child concept has been introduced)

Energization/Supply point/supply address

Distribution supply points/

Supply Address

The terms supply point and ancillary supply point are synonymous terms under the legislation and the *Victorian GDSC*. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points. See *GRPA, taken as one with the GIA*

Supply/Sale and Supply of Gas/Sale and Supply of Electricity

MK Comment

All of these are intended to imply for gas, gas supply points and take into account the metering and metering installation concepts and definitions that apply to gas. The same applies in principle to electricity.

Erroneously used within some jurisdictional definitions to imply costs for delivery of heated water in water service pipes, which is not the responsibility of energy retailers. They sell and supply gas or electricity under licence. If they supply metering services such as maintenance of hot water flow meters, this is a service offered to Landlords and/or Owners' Corporation entities, not individual end-users of heated water. The ESC has introduced a new definition of meter for BHW which means "a device that records consumption of hot water."

No aspect of current or proposed legislation intends meter to be defined in this way or for sale and supply of gas to mean *"delivery of bulk hot water services."* This service is provided directly to the business customer, the Owners' Corporation or Landlord, not the end-user of a composite water product.

Energy suppliers are encouraged to form collusive arrangements with landlords by offering third party "maintenance and management of hot water flow meters" used in conjunction with boiler systems (hot water installation) Installation in this sense has

nothing to do with a gas or electricity metering installation, but rather a boiler system with associated water service pipes that carry heated water of varying quality and temperature to individual residential premises in multi-tenanted dwellings

Gas supply is through the *"physical connection that is directly activating or opening the connection in order to allow the flow of energy between the network and the premises* (this is referred to throughout as 'energization' of the connection)[188]

Gas supply is through facilitation of the flow of gas (or electricity) between the network and the premises through the connection; and services relating to the delivery of energy to the (alleged)

- connection to customer's premises, using a gas fitting that "includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas"

Connection Point/Supply Point/Energization Point

Connection (VGDSCV9)/Connect (VERC)/Connection Point

The joining of a gas installation to a distribution supply point to allow the flow of gas

(a) for electricity, the making and maintaining of contact between the electrical systems of two persons allowing the supply of electricity between those systems;

and

(b) for gas, the joining of a ***natural gas installation*** *to a distribution system* ***supply point*** *to allow the flow of gas.*

See all comments under disconnection

No such connection takes place for those receiving heated water centrally heated in a communal boiler tank belonging to a Landlord, and where a single energization point exists responsible for heating the Landlord's boiler tank. Heated water is reticulated in water pipes to each residential tenant's apartment or flat.

It would seem quite clear cut, yet the BHW policy arrangements contained within the same code develop a new lexicon exclusive to the bulk hot water arrangements in defining meters, implicitly endorsing disconnection or suspension of water; considering poor credit rating with "water bills" to be relevant to credit history, security deposit, over due bill history, and other conditions precedent and subsequent which will have ongoing implications and which the MCE in its Package has declined to appropriately address.

The collective attitude is one of overlooking the glaring discrepancies, the inconsistency and direct overlap and conflict with other statutory regulatory schemes and within the common law, and especially regarding contract and legal traceability of goods and services

The connection of a single mast gas or electricity meter is undertaken at the time of building erection at the request and under contract to the Developer or Owners Corporation. The same normally applies for hot water flor meters or cold water flow meters relied upon under the BHW arrangements as suitable instruments through which to measure and by conversion factor algorithm estimated deemed gas or electricity usage by end-users of heated water supplies

Since no flow of energy is effected to the individual residential premises of end-users of communally heated water, no contract can possibly exist under existing, proposed generic laws, sale of goods acts (save in Qld which changed Fair Trading and Sale of Goods Acts just prior to the sale of energy assets, presumably to make way for arrangements and any warranties made regarding the "BHW provisions; refer also to Queensland's Infrastructure and Planning provisions discussed elsewhere)

Connection/Energization

See all comments above variously under supply point/supply address/ energization point; customer, residential customer; residential premises; business premises

Connect in the Victorian *ERC* and proposed *NECF* means

for electricity the making and maintaining of contact between electrical systems for two persons allowing the supply of electricity between those systems; and

for gas, the joining of a natural gas installation to a distribution system supply point to allow the flow of gas"

See Energy Retail Code, v 7 (revision Feb2010) Barring the 1.1 Introduction: Purpose, Authority and Commencement date the explanations for the algorithm formula (how the calculation is actually made); interpretation – how to interpret the Guideline; Appendices 1 and 2 outlining the algorithm conversion factor formula after calculating water volume usage allegedly *"individually monitored"* for each tenant in a multi-tenanted bloc of flats and apartments) (without the necessity for site-specific reading);

Connection/Energization

Energy Supply DPI/VESC's Energy Retail Code alternative definition

"delivery of gas bulk hot water" or *"delivery of electric bulk hot water"*

Massive charges including hidden and bundled unspecified charges incorporating alleged heating component of communally heated water as a composite water product; recovery of some water supply charges; all other charges unspecified that aids a retailer and/or Landlord OC recover costs not properly the contractual responsibility of end-users of heated water products in the absence of any separate energy meter or energy connection/energization point into the residential premises of the

Creative distortion of the meaning of *"metering" "separate metering"* by policy-makers, regulators, complaints handlers and energy suppliers does not dilute the strength of existing legislation under other schemes. The definition to be transferred from the BHW Guideline 20(1) to the Victorian ERC is a distortion of the meaning of meter in all other provisions, and therefore impact on every aspect of perceived deemed contracts, conditions precedent and subsequent and consequences for end-consumers of utilities.

Instead a mere reference to the DPI will be included. The DPI has taken over policy responsibility for the conversion factor formulae and tariffs; whilst the ESC retains responsibility for what is included on the bills under 2.3 of the Guideline, to be transferred to 4.2 of the VERC.

Disconnect (VERC)

(a) for electricity, the disconnection of contact between the electrical systems of two persons preventing the supply of electricity between those systems; and

*(b) for gas, the separation of a **natural gas installation** from a distribution system to prevent the flow of gas.*[8]

It is implicit that disconnection of hot water services is not part of the concept, definition, permissible action or provision when hot water supplies are provided by the Landlord to residential tenants, using a water storage tank that is first heated by energy supplied to him as Landlord by implicit or explicit contract to a single energization point on common property infrastructure. It is the Landlord who is supplied the energy. For VENCorp purposes, consistent with the existing legislation, the single energization point represents a single supply point, single billing point. Therefore all supply and bundled charges, and all charges for the sale of energy belong to the Landlord

Under residential tenancy laws, unless a separate energization point exists for residential tenants for the supply of any component of energy, the landlord is the responsible contractual party. Therefore the energy legislation needs to explicitly reflect and acknowledge this.

Disconnection/Decommissioning/Disconnection-Reconnection

As mentioned the term supply point is synonymous with supply address and implies an energized or new connection in relation to gas (or electricity). For gas these terms are together defined within the existing legislation as synonymous with ancillary supply point. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points. Refer to Gas (Residual Provisions) Act 1994 which is one with the *Gas Industry Act 2001* (GIA).

From the time of that the Essential Services Commission undertook deliberation, structuring, adoption and implementation of the existing BHW Charging Provisions, (2004 and 2005) with implementation on 1 March 2006 of the Guideline 20(1) now to be repealed and for the most part transferred to the *Energy Retail Code* Clauses 3.3 and 4.2 respectively, supply points, supply address, relevant customer and meters have been defined in such a way as to be entirely inconsistent with all other existing and proposed provisions.

The ESC was originally responsible for development of the algorithm conversion factor formulae in use (soon to be repealed and replaced with similar provisions following negotiation of regulated price).

On 1 January 2008 the DPI took over the responsibility for the formula and tariff to be used, presumably with the regulated tariff to be negotiated with retailers. It is unclear how off-peak rates will apply or where the revised formula details currently contained in Appendices 1 and 2 will reside and whether these will be transparently available online on the DPI, ESC and/or retailers' websites.

Ready accessibility to such information is crucial to providing informed consent, at least on websites, though not all stakeholders are internet literate, or would know where to look unless a specific web link is provided on bills.

If disconnection of gas or heated water supplies is undertaken by a retailer, with or without tacit or explicit sanction by policy-makers and/or regulator(s) the matter is serious if this occurs where no deemed contract exist; no just cause can be shown for such an action; no energy is supplied by the retailer or distributor on the basis of all the arguments shown above, that is to say, , no supply of gas takes place as defined under the *GIA* definitions of *"customer;" "gas distribution company;" "transmission;"* "*transmission pipeline.*

Gas Service Pipes/Gas Transmission Pipes

For gas these are intended to be gas service pipes or gas transmission pipes not water pipes service pipes, disconnection and decommissioning; and other such definitions are described within VENCorp rules and how these sit with the interpretation placed on deemed provisions and application of BHW arrangements to end-users of heated water from which the heating component cannot be separated or measured through legally traceable means.

Consistent with existing legislation, for VENCorp purposes all BHW gas energization points are considered for Distributor-Retailer purposes to be single supply points and single billing points

Electrical Service Lines

a ***supply address*** as a medical exemption ***supply address*** if a ***customer*** requests registration and provides a current medical certificate certifying that a person residing at the ***supply address*** has a medical condition which requires continued supply of gas; or

(d) a ***customer***, unless otherwise requested by that ***customer***:

- after 2 pm (for a ***domestic customer***) or 3 pm (for a ***business customer***) on a weekday; or
- on a Friday, on a weekend, on a ***public holiday*** or on the day before a ***public holiday***.

Comment: What happens if medical advice is that continuity of heated water supplies is warranted on medical grounds, but that reliance is placed by distributors and retailers and their servants/contractors and/or agents to suspend those heated water supplies on the basis of wrongly imposed contractual status for the alleged sale and supply of energy.

Which disconnection procedures , checks and balances will apply?

Which complaints mechanism may be relied upon?

Who will decide whether this comes under water provisions, energy provisions, generic provisions, common law provisions?

Energy-specific ombudsman who are industry-run are forbidden to deal with the bizarre bulk hot water arrangements, contractual disputes, over-charging, under-charging, improper disconnection practices, conditions precedent and subsequent and the host of issues for which customers who receive direct flow of energy to their residential premises are covered.

Refusal by the MCE to deal with these matters within the NECF2 Package implies disregard for proper protection of all Australians who should be able top implicitly rely on fundamental protections for security, safety and reliability of supply in addition to price parameters.

Deemed Contract/Deemed Contract Arrangements/Customer Contract (terms implying the same)[9] – see s46 of the *GIA* and analysis on (attachment XXX)

See analysis of s46 of the *GIA*. Taking supply means from a physical connection where energy is received. Taking supply of heated water does not meet that descried. Therefore the deemed provisions under s46 do not apply to end-users of heated water products reticulated in water pipes rather than gas transmission pipes or electrical lines

Supply Remit/Retailer Supply Remit

Classes of Premises

Allowing continuing changes to definitions such as under OIC's gives rise to the same sorts of discrepancies within and outside energy laws at jurisdictional and state level, with other statutory regulatory schemes and within the common law.

Classes of Consumers

Allowing continuing changes to definitions such as under OIC's gives rise to the same sorts of discrepancies within and outside energy laws at jurisdictional and state level, with other statutory regulatory schemes and within the common law

Electrical Service Lines

Disconnection/Decommissioning/Disconnection-Reconnection

Gas fitting (Gas Industry Act) *"includes meter pipeline burner fitting appliance and apparatus used in connection with the consumption of gas*

Gas Service Pipes/Gas Transmission Pipes

For gas these are intended to be gas service pipes or gas transmission pipes not water pipes service pipes, disconnection and decommissioning; and other such definitions are described within VENCorp rules and how these sit with the interpretation placed on deemed provisions and application of *BHW* arrangements to end-users of heated water from which the heating component cannot be separated or measured through legally traceable means.

Consistent with existing legislation, for VENCorp purposes all *BHW* gas energization points are considered for Distributor-Retailer purposes to be single supply points and single billing points

Continuing problem – contractual issues and legal traceability of goods and services allegedly supplied to end-users of heated water within energy laws

The proper contractual party is the Owners' Corporation in these circumstances, not end-users of the heated water

[9]

Meter/Double Custody Changeover Point normally at outlet of meter

Meter - DPI/ESC's ERC alternative definition:

No meters as defined in the legislation reside in individual apartments receiving bulk hot water. There is no distribution supply point for gas associated with the provision of heated water to tenants

Allowing continuing changes to definitions such as under OIC's gives rise to the same sorts of discrepancies within and outside energy laws at jurisdictional and state level, with other statutory regulatory schemes and within the common law

meter in respect of a ***customer*** means:

(a) for electricity, the device which measures and records the consumption of electrical energy consumed at the ***customer's supply address***;

(b) for gas, an instrument that measures the quantity of gas passing through it and includes associated equipment attached to the instrument to filter, control or regulate the flow of gas and;

(c) for ***electricity bulk hot water*** or ***gas bulk hot water***, the device which measures and records the consumption of bulk hot water consumed at the ***customer's supply address***.

Comment: A supply address is a technical term meaning the same as supply point/connection point/energization point. It does not have the meaning in legislation as given above and commonly used by the ERC in its documents. This is also reflected within the NECF2 package though the discrepancy has been pointed out many times over.

Defining a meter in this manner, discrepantly with all other existing and proposed energy laws, and in conflict with the principles of legally traceability of goods and services in trade measurement will continue to make for distortions, inequities, unwarranted imposition of contractual status for the alleged sale and supply of energy. In the case of the heated water provided under the BHW arrangements, no flow of energy to the premises deemed to be receiving it is achieved.

Appendix 2

Bulk Hot Water Charging

Gas Bulk Hot Water Pricing Formulae

A. ***Gas bulk hot water rate*** (cents per litre) = CF (MJ per litre)

* ***gas bulk hot water tariff*** (cents per MJ)

Where ***customers*** are charged by their ***retailer*** for ***energy*** in delivering ***gas bulk hot water***:

CF = the ***gas bulk hot water conversion factor*** = 0.49724 MJ per litre

gas bulk hot water tariff = the ***standing offer*** tariff applicable to the ***gas bulk hot water*** unit (gas tariff 10/11)

Where ***customers*** are charged for ***energy*** in delivering ***gas bulk hot water*** pursuant to a ***market contract***:

CF = the ***gas bulk hot water conversion factor*** = 0.49724 MJ per litre

gas bulk hot water tariff = the market tariff applicable to the ***bulk hot water*** unit B. ***Retailer*** provided ***gas bulk hot water*** per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant ***gas bulk hot water*** unit divided by the number of ***customers*** supplied by the relevant ***gas bulk hot water*** unit.

Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.

C. ***Customer gas bulk hot water*** charge (cents) = the ***customer's*** metered consumption of hot water (litres)

* ***gas bulk hot water*** price (cents per litre)

+ ***customer's*** supply charge (cents)

http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf

Electric Bulk Hot Water Billing Formulae

A. Where ***customers*** are charged for ***energy*** in delivering ***electric bulk hot water*** either by their ***retailer*** under a ***standing offer*** contract or pursuant to a ***market contract*** the:

Customer electricity bulk hot water charge (cents) = the ***customer's*** metered consumption of hot water (kilolitres)

* electricity tariff rate(s) applicable to the ***customer*** for the applicable ***electric bulk hot water*** unit (cents per kWh)

* CF (kWh per kilolitre)

Where:

CF = ***electric bulk hot water conversion factor*** used by ***retailers*** to bill ***electric bulk hot water*** customers. The ***electric bulk hot water conversion factor*** will have a maximum value of 89 kWh per kilolitre. Where ***customers*** are currently billed using a lower ***electric bulk hot water conversion factor***, or a lower ***electric bulk hot water conversion factor*** for the site is assessed, ***retailers*** must bill ***customers*** using the lower ***electric bulk hot water conversion factor***.

The ***customer's*** electricity tariff must be an off-peak tariff if supplied from an off-peak ***electric bulk hot water*** unit.

Comment:

Option 2—Fixed conversion factor

Selected for Victoria without site specific meter readings – all usage is deemed – calculated from water volume using a hot water flow meter whilst at the same time including heating values, pressure factors and other alleged gas data usage apportioned to

individuals receiving no flow of gas or electricity to their premises. What they receive is a composite water product from which the gas volume or heat cannot possibly be calculated.

The option fixes the conversion factor at the previous historic level of 0.49724 MJ per litre. To provide for such an approach, the fixed conversion factor would need to be included in the GTO (or current equivalent).

In Queensland the market is operated like a water market but energy sale and supply alleged. Bills is cents per litre applying a gas rate and massive supply and FRC charges also included to each individual

Though in theory the Owners Corporations in public housing are meant to receive the bills and fairly apportion along with a composite service charge for a range of services, use of communal laundry facilities, etc, in practice the original "agreement" is believed to be obsolete and energy bills and directly sent to end-users in public housing receiving communally heated water.

In South Australia it is more common for site specific reading to take place, also based on water volume calculate to determine how the prescribed "gas rate" should be applied.

Metrology Procedure: Part A (National Electricity Market) is the procedure as published by the Australian Energy Market Operator in accordance with clause 7.14.1(a) of the ***National Electricity Rules***.

Metrology Procedure: Part B (National Electricity Market) is the procedure as published by the Australian Energy Market Operator in accordance with clause 7.14.1(a) of the ***National Electricity Rules***.

National Electricity Rules means the Rules made under the National Electricity (Victoria) Law applicable in Victoria as a result of the operation of section 6 of the *National Electricity (Victoria) Act* 2005.

National Gas Rules means the Rules made under the *National Gas Law* as contained in a Schedule to the *National Gas (South Australia) Act 2008*.

As mentioned in the footnotes, the term supply point is synonymous with supply address and implies an energized or new connection in relation to gas (or electricity). For gas these terms are together defined within the existing legislation as synonymous with ancillary supply point. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points.

The NGL refers to an end-user of gas as follows: *"**end user** means a person who acquires natural gas or proposes to acquire natural gas for consumption purposes."*

It is preposterous to suggest illegal consumption of supply; commencement of taking supply or any other such term when no flow of energy can be shown to occur regardless of change of ownership or operation of network in the case of electricity (no networks exist for gas and therefore cannot be strictly termed embedded
This is discussed elsewhere in the context of contract law; generic laws current and proposed including unfair contract and implied and statutory warranty provisions; Owners' Corporation laws; residential tenancy provisions.

Extracts Dictionary Gas Supply Act 1996 (NSW) last updated 23 March 2010

Historical notes

An Act to amend the *Gas Supply Act 1996* to make further provision, and to clarify the regulatory framework, in relation to gasfitting work, autogas work, gas installations, autogas installations and gas appliances.

1 Name of Act

This Act is the *Gas Supply Amendment Act 2010*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Omit the definitions of ***gas appliance***, ***gas installation*** and ***gasfitting work***.

Insert in alphabetical order:

basic metering equipment means a gas meter and any equipment prescribed by the regulations for the purposes of this definition when used in conjunction with gas meters.

(*same as existing Act)*

consumer service means any pipe or system of pipes used to convey or control gas, and any associated fittings and equipment, that are connected to a gas network upstream of the gas supply point, but does not include any part of a gas network.

(same as existing Act)

MK Comment

This is distinct from data management, meter reading (of water meters) and billing services provided through collusive arrangements between Developers and/or OC entities, and/or Landlords and energy suppliers, endeavouring to strip end users of enshrined rights.

What is clear is that Jemena (JGN), as part of its current Revised Gas Access Proposal in NSW is seeking to upgrade water meters at enormous expense, claiming that they are part of the gas distribution infrastructure – which is scientifically impossible. The basis for such a claim needs to be transparently explained.

Vigilance requires that the NSW Department of Industry and Investment directly checks with each supplier of energy and each distributor or data metering service exactly what practices are in place regarding imposition of contractual status for alleged sale and supply of energy (or heated water) and direct billing of end-user recipients of heated water reticulated in water pipes after being centrally heated.

gas appliance means any gas burning or gas using appliance that is manufactured, adapted or designed for connection to a gas installation, whether by means of a gas outlet socket or otherwise, and includes any liquefied petroleum gas dispenser, catalytic burner or vaporiser, but does not include an internal combustion engine that is installed in, or forms part of, a vehicle, vessel or machine.

gas container includes a gas cylinder, a gas cartridge, a pressure vessel and a gas tank.

gas installation means:

(a) any pipe or system of pipes used to convey or control gas, and any associated fittings and equipment, that are downstream of the gas supply point, but does not include anything beyond the gas installation end point, and

(b) any flue that is downstream of the gas supply point, but does not include an autogas installation.

gas installation end point means:

(a) in the case of a gas installation to which gas is supplied from a gas network—the gas outlet socket, or

(b) in any other case—the control valve or other connection point of a gas appliance or of another gas container.

gas network means a distribution pipeline or a distribution system.

gas supply point means:

(a) in the case of a gas installation to which gas is supplied from a gas network—the outlet of the gas meter at which the gas is supplied, or

(b) in any other case—the control valve or other connection point of a gas container.

gasfitting work means any work involved in:

(a) the installation, alteration, extension or repair of a gas installation, or

(b) the installation, alteration, extension, removal or repair of a flue, or

(c) the connection of a gas installation to, or the disconnection of a gas installation from, a gas supply point, or

(d) the connection of a gas appliance to, or the disconnection of a gas appliance from, a gas installation (otherwise than where the point of connection is a gas outlet socket), or

(e) the connection of a gas container, gas regulator or gas appliance to, or the disconnection of a gas container, gas regulator or gas appliance from, a gas installation (otherwise than where it is designed to be readily detachable from the installation whether by the use of a tool, mechanical force or otherwise).

Gas Supply Act 1996 (NSW)

Updated 23 March 2010

Last accessed 28 May 2010

http://www.austlii.edu.au/au/legis/nsw/num_act/gsa1996n38175/

Dictionary

(Section 4)

access agreement means an access agreement referred to in section 22 (4).

Access Code means the Access Code referred to in section 31 (1).

access determination means an access determination referred to in section 23 (5).

access order means an access order referred to in section 21 (2).

access undertaking means an access undertaking referred to in section 20 (1).

associated system user means an associated system user referred to in section 24 (1).

authorisation means a reticulator's authorisation or a supplier's authorisation.

authorised reticulator means a person who holds a reticulator's authorisation.

authorised supplier means a person who holds a supplier's authorisation.

council means the council of a local government area.

declared distribution system means a declared distribution system referred to in section 19 (1).

Department means the Department of Energy.

Director-General means the Director-General of the Department.

distribution district means the district to which a network operator is restricted under the conditions of an authorisation or licence.

distribution system means the gas pipes and associated equipment that are used to convey and control the conveyance of gas to the premises of customers, but does not include:

(a) any pipeline in respect of which a licence is in force under the *Pipelines Act 1967* (other than a pipeline that the regulations declare to be, or to form part of, a distribution system), or

(b) any gas installation, or

(c) any gas pipe or associated equipment that is wholly situated on land owned by the person who owns or controls the gas pipe or equipment, or

(d) any gas pipe or associated equipment that the regulations declare not to be, or not to form part of, a distribution system.

distributor means a person who supplies gas (other than natural gas) to other persons by means of a distribution system.

distributor's licence means a licence referred to in section 35.

exercise a function includes perform a duty.

function includes a power, authority or duty.

gas means:

(a) natural gas, or

(b) liquefied petroleum gas, or

(c) any other substance that the regulations declare to be a gas for the purposes of this Act.

gas appliance means any gas burning appliance that is manufactured, adapted or designed for connection to a gas installation, whether by means of a gas outlet socket or otherwise.

gas installation means the gas pipes and associated equipment that are used to convey and control the conveyance of gas within premises to which gas is supplied, whether from a distribution system or otherwise, but does not include anything connected to and extending or situated beyond a gas outlet socket.

gas pricing order means a gas pricing order referred to in section 27 (1).

gas works means any gas pipes or associated equipment that form part of a distribution system.

gasfitting work means any work involved in:

(a) the installation, alteration, extension or repair of a gas installation, or

(b) the connection of a gas installation to, or the disconnection of a gas installation from, a distribution system, or

(c) the connection of a gas appliance to, or the disconnection of a gas appliance from, a gas installation (otherwise than where the point of connection is a gas outlet socket).

inspector means a government inspector or gas industry inspector appointed under section 77 (1) or (2).

licence means a distributor's licence.

licensed distributor means a person who holds a distributor's licence.

liquefied petroleum gas means a liquid or gaseous substance containing a mixture of hydrocarbons, basically consisting of butane or butene or propane or propene, or any mixture of them.

natural gas means a naturally occurring mixture of hydrocarbon and non-hydrocarbon gases, the principal constituent of which is methane.

network operator means a reticulator or a distributor.

premises includes any building or part of a building, any structure or part of a structure, any land (whether built on or not) and any river, lake or other waters.

reticulator means a person who owns or controls a distribution system for natural gas.

reticulator's authorisation means an authorisation referred to in section 6 (a).

roads authority has the same meaning as it has in the *Roads Act 1993*.

supplier means a person who supplies natural gas to other persons, whether end user customers or other suppliers.

supplier's authorisation means an authorisation referred to in section 6 (b).

system user means a person whom the regulations declare to be a system user or who belongs to a class of persons so declared.

Page 60

tariff customer means a person whom the regulations declare to be a tariff customer or who belongs to a class of persons so declared.

Tribunal means the Independent Pricing and Regulatory Tribunal established under the *Independent Pricing and Regulatory Tribunal Act*

1992.

[Minister's second reading speech made in—

Legislative Assembly on 5 June 1996

Legislative Council on 19 June 1996]

Page 61

http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2009%20AND%20no%3D31&nohits=y

Energy Infrastructure Amendment Act

Currency of version

Current version for 9 June 2009 to date (accessed 28 May 2010 at 15:52).

Legislation on this site is usually updated within 3 working days after a change to the legislation.

Energy Legislation Amendment (Infrastructure Protection) Act 2009 No 31

Current version for 9 June 2009 to date (accessed 28 May 2010 at 15:53)

Commencement

This Act commences on a day or days to be appointed by proclamation.

Excerpt Gas Supply Act 1997 SA

http://www.legislation.sa.gov.au/LZ/C/A/GAS%20ACT%201997/CURRENT/1997.24.UN.RTF

4—Interpretation

(1) In this Act, unless the contrary intention appears—

annual gas consumption level means a level of consumption of gas determined in accordance with the regulations (and the regulations may, for that purpose, make provision for the estimation or agreement of the level in specified circumstances);

authorised officer means a person appointed under Part 6 as an authorised officer;

Commission means the Essential Services Commission established under the *Essential Services Commission Act 2002*;

condition includes a limitation or restriction;

contravention includes a failure to comply;

council means a council within the meaning of the *Local Government Act 1999*;

customer means a person who has a supply of gas available from a distribution system for consumption by that person, and includes—

(a) the occupier for the time being of a place to which gas is supplied by a distribution system; and

(b) where the context requires, a person seeking a supply of gas from a distribution system; and

(c) a person of a class declared by regulation to be customers;

disconnect a gas supply includes a procedure to interrupt or discontinue the gas supply to a customer;

distribution system means the whole or a part of a system of pipes and equipment for use for, or in connection with, the distribution and supply of gas to persons for consumption, but does not include—

(a) a transmission pipeline (other than a pipeline declared by the regulations to be, or form part of, a distribution system); or

(b) a system of pipes and equipment—

(i) installed in a place for the conveyance and use of gas from a pressurised vessel situated in the place; and

(ii) not extending to, or connected to pipes in, some other place in separate occupation; or

(c) pipes or equipment declared by the regulations not to be, or form part of, a distribution system;

gas means a fuel consisting of hydrocarbons or predominantly of hydrocarbons that is in a gaseous or vapour form when it is at the pressure and temperature of its normal pipeline transportation and utilisation conditions, but does not include anything declared by regulation not to be gas;

gas appliance means an appliance that uses gas as a fuel, but does not include anything declared by regulation not to be a gas appliance;

gas entity means a person licensed under Part 3, and includes (where the context requires) a person who has been licensed under that Part whose licence has been suspended or cancelled or has expired;

gas infrastructure means any part of a distribution system owned or operated by a gas entity;

gas installation means fixed pipes and any fixed gas appliances, and associated equipment (including flues), installed in a place for the conveyance, control, measurement or use of gas that is, is to be, or has been, supplied (whether by a distribution system or pressurised vessel) for consumption in the place, but does not include gas infrastructure;

gas officer means a person appointed under Part 4 as a gas officer;

gas supply industry means the operation of a distribution system, the retailing of gas and any other operation for which a licence is required under Part 3;

land includes—

(a) an estate or interest in land (including an easement); or

(b) a right or power over or in respect of land;

National Gas Procedures (South Australia) means the National Gas Procedures under the *National Gas Law* that apply in, or in relation to, South Australia, as in force from time to time;

occupier of land or a place means a person who has, or is entitled to, possession or control of the land or place;

operations includes activities;

retailing of gas means the sale and supply of gas to a person for consumption (and not for resale) where the gas is to be conveyed (whether or not by the seller) to the person by a distribution system, but does not include an activity declared by regulation not to be retailing of gas;

small customer means a customer classified by regulation as a small customer;

Technical Regulator means the person holding the office of Technical Regulator under Part 2;

transmission pipeline means a transmission pipeline within the meaning of the *Petroleum Act 2000*.

Excerpt Gas Supply Act 1997 SA

http://www.legislation.sa.gov.au/LZ/C/A/GAS%20ACT%201997/CURRENT/1997.24.UN.RTF

33—Price regulation by determination of Commission

(1) The Commission may make a determination under the *Essential Services Commission Act 2002* regulating prices, conditions relating to prices and price-fixing factors for—

(a) the sale and supply of gas to small customers or customers of a prescribed class;

(d) the sale and supply of gas by a gas entity to customers of another gas entity in accordance with a condition of the entity's licence imposed under Division 3B;

(e) other goods and services in the gas supply industry specified by the Minister by notice in the Gazette.

MK Comment

The "other goods and services" refer to those within the gas supply industry.
The wording was never intended to include water industry price regulation or water infrastructure

The deemed provisions for sale and supply of gas habve become distorted within the "bulk hot water arrangements"

51—Entry to disconnect supply

If a gas officer has proper authority to disconnect a gas supply to a place, the gas officer may, at any reasonable time, enter and remain in the place to disconnect the gas supply to the place.

MK Comment

The authority under specified conditions is for disconnection of gas not water.

Providers of energy to single gas meters heating central boiler tanks do not supply gas and do not disconnect gas.

Yet the existence of water meters is used to dangle the threat of disconnection of heated water supplies because of creating the illusion that a contract existence for sale and supply of energy where in fact none is supplied in these circumstances in multi-tenanted dwellings where no separate gas meter exists for the purposes of heating water

Gas Regulations1997

under the Gas Act 1997

Expiry Program Information

Date of expiry: 1.9.2010 (original date of expiry, 1.9.2008, postponed under Subordinate Legislation Act 1978).

GAS DISTRIBUTION CODE (SA
8 March 2004
(As last varied on 6 July 2006)

http://www.escosa.sa.gov.au/library/060629-GasDistributionCode.pdf

9. DEFINITIONS AND INTERPRETATION

9.1 Definitions

In this industry code:

"***Access Arrangement***" means the arrangement for third party access to a ***distribution pipeline*** filed by the ***distributor*** pursuant to the ***Access Code***, and which has been approved by the relevant regulator;

"***Access Code***" means the *National Third Party Access Code for Natural Gas Pipeline Systems* in force pursuant to the *Gas Pipelines Access (South Australia) Act 1997*;

"***Act***" means the *Gas Act 1997*;

"***applicable regulatory instruments***" means any Act or regulatory instrument made under an Act, or a regulatory instrument issued by the ***Commission***, which applies to a ***distributor*** or a ***retailer***;

"***best endeavours***" means to act in good faith and use all reasonable efforts, skill and resources;

"***business day***" means a day on which banks are open for general banking business in Adelaide, other than a Saturday or Sunday;

"***Commission***" means the Essential Services Commission established under the *Essential Services Commission Act 2002*;

"***connection***" means the joining of a ***gas installation*** to a ***delivery point*** to allow the flow of ***gas***;

"***customer***" has the meaning given to that term in the ***Act***, namely a person who has a supply of ***gas*** available from a system for consumption by that person, and includes:

(a) the occupier for the time being of a place to which ***gas*** is supplied by a ***distribution system***; and

(b) where the context requires, a person seeking a supply of ***gas*** from a ***distribution system***; and

(c) a person of a class declared by regulation to be customers;

"***delivery point***" means a point on a ***distribution system*** at which ***gas*** is withdrawn from the ***distribution system*** for delivery to a ***customer*** and which is normally located at:

(a) the inlet of a ***gas installation*** of a ***customer***; or

(b) the outlet of a meter;

"***distribution pipeline***" has the meaning given to that term in the *Gas Pipelines Access (South Australia) Act 1997*;

http://www.escosa.sa.gov.au/library/040227-EnergyRetailCode.pdf

"*connection point*" means:

(a) In the case of a ***small electricity customer***, the agreed point of ***supply*** between the ***small electricity customer's*** electrical

installation and the distribution network; and

(b) In the case of a ***small gas customer***, the agreed point of ***supply*** between the ***small gas customer's*** gas installation and the

distribution system.

"*customer*" means a ***customer*** as defined in the ***Electricity Act*** or the ***Gas Act***, as the context requires, who buys or proposes to buy ***energy*** from a ***retailer***;

SCHEDULE 1: DEFINITIONS

"*acceptable identification*" in relation to:

(a) A ***residential customer***, includes one or more of the following:

(i) a driver's licence, a current passport or other form of photographic identification;

(ii) a Pensioner Concession Card or other entitlement card issued by the State or Commonwealth Government;

(iii) a birth certificate.

(b) A ***business customer*** which is a sole trader or partnership, includes one or more of the forms of identification for a ***residential customer*** for each of the individuals that conduct the business.

(c) A ***business customer*** which is a body corporate, includes the body corporate's Australian Company Number or Australian Business

Number.

"*ADI*" means an authorised deposit taking institution within the meaning of the *Banking*

Act 1959 (Cth) as defined in section 4 of the *Acts Interpretation Act 1915 (SA)*;

"*Adelaide central*" means the area shaded red on the attached plan;

"*annual energy consumption level*" has the same meaning:

(a) in the case of an electricity ***customer***, as is given to that term in the ***Electricity Act***;

(b) in the case of a gas ***customer***, as is given to that term in the ***Gas Act***.

"*applicable regulatory instruments*" means any Act or regulatory instrument made under an Act, or any industry code, guideline or other regulatory instrument issued by the ***Commission***, which applies to a ***retailer***;

"*assigned metering identifier*" means either or both of a ***NMI*** and a ***MIRN***;

"*best endeavours*" means to act in good faith and use all reasonable efforts, skill and resources;

"*billing cycle*" means the regular recurrent period for which a ***small customer*** receives a bill from a ***retailer***;

"*business customer*" means a ***small customer*** who is not a ***residential customer***;

"*business day*" means a day on which banks are open for general banking business in Adelaide, other than a Saturday, or a Sunday;

"*Commission*" means the ***Essential Services Commission*** established under the *Essential Services Commission Act 2002*;

"*connection point*" means:

(a) In the case of a ***small electricity customer***, the agreed point of ***supply*** between the ***small electricity customer's*** electrical installation and the distribution network; and

(b) In the case of a ***small gas customer***, the agreed point of ***supply*** between the ***small gas customer's*** gas installation and the

distribution system.

"*customer*" means a ***customer*** as defined in the ***Electricity Act*** or the ***Gas Act***, as the context requires, who buys or proposes to buy ***energy*** from a ***retailer***;

"*Customer Charter*" means the charter prepared by the ***retailer*** under clause 2;

"*customer sale contract*" means a ***standing contract***, a ***market contract*** or a ***default contract***;

"*date of receipt*" means, in relation to the receipt by a ***customer*** of a notice (including a ***disconnection warning***) given by a ***retailer***:

(a) in the case where the ***retailer*** hands the notice to the ***customer***, the date the ***retailer*** does so;

(b) in the case where the ***retailer*** sends a notice by facsimile or by e-mail before 5pm on a ***business day***, on that ***business day,*** otherwise on the next ***business day***;

(c) in the case where the ***retailer*** leaves the notice at the ***customer's supply address***, the date the ***retailer*** does so;

(d) in the case where the ***retailer*** gives the notice by post or, registered mail or lettergram, a date 2 ***business days*** after the date the ***retailer*** sent the notice.

"default contract" means the ***customer sale contract*** between a ***retailer*** and a ***default customer*** arising in accordance with the regulations under the ***Electricity Act*** or the ***Gas Act***, as the context requires;

"default customer" means, in relation to a ***connection point,*** a person who is deemed pursuant to the regulations under the ***Electricity Act*** or the ***Gas Act***, as the context

requires, to have a ***default contract*** with a ***retailer*** in relation to that ***connection***

"***disclosure statement***" means the written disclosure statement provided to a ***small*** \

customer by a ***retailer*** in accordance with a ***retailer's*** obligations under the *Energy Marketing Code* made by the ***Commission*** under section 28 of the *Essential Services Commission Act 2002*;

"disconnection warning" means a notice in writing issued in accordance with clause 9;

"distributor" means a holder of a licence to operate a distribution network under Part 3 of the ***Electricity Act*** and a holder of a licence to operate a distribution system under Part 3 of the ***Gas Act***;

"dual fuel contract" means a single ***customer sale contract*** for the sale of electricity and for the sale and supply of gas by a ***retailer*** to a ***customer***;

"Electricity Act" means the *Electricity Act 1996*;

"energy" means either or both of gas or electricity;

"explicit informed consent" has the same meaning as is given to that term in the *Energy Customer Transfer and Consent Code* made by the ***Commission*** under section 28 of the *Essential Services Commission Act 2002*;

"fixed-term market contract" means a ***market contract*** which has start and finish dates set expressly under the terms and conditions of that ***market contract***;

"force majeure event" means an event outside the control of a ***retailer*** or a ***small customer***;

"Gas Act" means the *Gas Act 1997*;

"Industry Ombudsman" means the ombudsman appointed under the scheme approved by the ***Commission*** in accordance with the ***retailer's*** licence;

"in-situ termination" means a termination of a ***customer sale contract*** where the ***small customer*** is not vacating his or her ***supply address***;

"last resort event" means an event which triggers the operation of the retailer of last resort scheme approved by the ***Commission;***

"market contract " means a ***customer sale contract*** between a ***retailer*** and a ***small customer*** which complies with Part A of this *Energy Retail Code,* other than a ***standing contract*** or a ***default contract***;

"metering data" has the meaning given that term:

(a) in the case of electricity, in the *National Electricity Code*; and

(b) in the case of gas, in the *Retail Market Rules*.

"*metropolitan area*" means the areas shaded green on the attached plans, excluding the ***Adelaide central*** and ***remote areas***;

"*Metrology Procedure*" means the South Australian Electricity Supply Industry

Metrology Procedure published under the *National Electricity Code*;

"*MIRN*" means a Meter Installation Registration Number assigned to a metering installation at a gas ***customer's supply address***;

"*NEMMCO*" means the National Electricity Market Management Company Limited can 072 010 327, the company which operates and administers the wholesale electricity market in accordance with the *National Electricity C*ode;

"*NMI*" means a National Metering Identifier assigned to a metering installation at an electricity ***customer's supply address***;

"*prescribed customer*" has the meaning given to that term in regulation 8AB of the *Gas Regulations 1997*;

"*quarterly*" means the period of days represented by 365 days divided by 4;

"*remote area*" means all areas in which ***customers*** are supplied through a 19kV SWER line, irrespective of their location;

"*residential customer*" means a ***small customer*** who acquires ***energy*** for domestic use;

"*responsible person*" has the same meaning as is given to that term in the *National Electricity Code* and clause 1.3.3 of the *Electricity Metering Code* made by the ***Commission*** under section 28 of the *Essential Services Commission Act 2002*;

"*retailer*" means a person licensed under the ***Electricity Act*** to sell electricity and a person licensed under the ***Gas Act*** to sell and supply gas;

"*rural area*" means all areas in South Australia other than ***Adelaide central,***

metropolitan areas and ***remote areas***;

"*security deposit*" means an amount of money or other arrangement acceptable to the ***retailer*** as a security against a ***customer*** defaulting on a bill;

"*small customer*" means either or both of ***small electricity customer*** and ***small gas customer***;

"*small electricity customer*" has the same meaning as is given to the term "*small customer*" in the ***Electricity Act***;

"*small gas customer*" has the same meaning as is given to the term "*small customer*" in the ***Gas Act***;

"*standing contract*" means:

(a) in relation to a ***small customer***, a ***customer sale contract*** published by a ***retailer*** in the form set out in Part B or Part C of this *Energy*

Retail Code in accordance with the ***retailer's standing offer obligation*** under the ***Electricity Act*** or the ***Gas Act***, as the context requires; and

(b) in relation to a ***prescribed customer***, a ***customer sale contract*** published by a ***retailer*** in accordance with the ***retailer's standing offer obligation*** under the ***Gas Act*** and clause 1.2 of this *Energy*

Retail Code.

"*standing offer obligation*" means the obligation imposed on a ***retailer*** under the ***Electricity Act*** or the ***Gas Act*** to agree to sell electricity or to sell and supply gas to a ***small customer*** or a ***prescribed customer*** in accordance with the ***retailer's standing contract*** terms and conditions when requested to do so by that ***small customer*** or ***prescribed customer***;

"*supply*" means the physical delivery of electricity or gas;

"*supply address*" means:

(a) the address for which a ***small customer*** purchases gas or electricity

from a ***retailer*** where there is only one gas or electricity ***connection point*** at that address; or

(b) where there is more than one ***supply point*** at the address, each gas or electricity ***connection point*** through which the ***small customer*** purchases gas or electricity from the same ***retailer***.

ERC/01

Made by the Essential Services Commission on 27 February 2004.

Note V2 2006 was temporary unavailable – re-check

SA Government Gazette, 4 March 2004. Date of operation: 8 March 2004.

ORIGIN ENERGY RETAIL LTD
Proposed Price Path for Standing Contract Prices for Supply & Sale of Natural Gas: 2005/06 to
2007/08
SOUTH AUSTRALIA
Public Submission

http://www.originenergy.com.au/1312/Queensland-Bulk-Hot-Water

see

9 Throughout this submission, consistent with the definitions under the Act, recipients of bulk hot water services are not counted as standing contract customers and the gas associated with providing those services is not counted in the volume of gas supplied to standing contract customers.

http://www.ocv.org.au/pdfs/API_Article_Sept07.pdf

Making every drop count

The anomalies of strata water billing that exist throughout Australia need addressing, according to the experts. **Shane McNally**

"This article reports that the Institute of Strata Title Management general manager Bruce Wheeler believes the current situation in NSW is unfair and the government has no right to the GST.

He is calling for an across-the-board move towards individual water meters as a fair means of billing and also as a water saving measure."

He is reported as saying:

'Individual water meters will benefit individuals owners and tenants and they will pay only for the water each residence uses.'

see

http://www.escosa.sa.gov.au/library/100512-OriginTariffApplication_2010-2011-Public.pdf

SA Gas Standing Contract Retailer Tariffs For 1 July 2010 to 30 June 2011 Public Version

11 May

APPENDIX 11

REPRODUCED EXTRACTS

REVISED ENERGY RETAIL CODE (VICTORIA)[1]

Version 7

February 2010

(effective Date April 2010)

[1] Energy Retail Code Version 7 February 2010 commencement date April 2010 *http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf*

http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf

ENERGY RETAIL CODE

Purpose

This Code specifies the terms and conditions required in a contract for the supply or sale of energy.

The code applies to:

1. all domestic consumers
2. for electricity purposes, small business consumers who consume less than 40MWh of electricity per year and
3. for gas purposes, small business consumers who consume less than 1000GJ of gas per year1.

Relevant legislation

The terms and conditions specified by this Code are determined by the ***Commission*** for the purposes of section 36 of the ***Electricity Act*** and of section 43 of the ***Gas Act***:

- to any ***market contract*** made before or after 1 January 2009;
- to any ***energy contract*** arising from the acceptance of a ***standing offer***; and
- to any deemed contract;

As contemplated by section 36(1)(b) of the ***Electricity Act*** and by section 43(1)(b) of the ***Gas Act***, all of the terms and conditions determined by the ***Commission*** and set out in Parts 1 to 9 (inclusive) of this Code are provided for in ***retailers'*** electricity and gas retail licences.

Commencement

The February 2010 amendments to the Code takes effect from 1 April 2010.

1 As defined by the *s* 36 of the *Electricity Industry Act 2000* and s 43 of the *Gas Industry Act 2001*.

PART 9 DEFINITIONS AND INTERPRETATION

34. DEFINITIONS

In this Code, including the preamble, unless the context otherwise requires:

acceptable identification in relation to:

(a) a ***domestic customer***, includes one or more of the following: a driver's licence, a current passport or other form of photographic identification, a Pensioner Concession Card or other current entitlement card issued by the Commonwealth or a birth certificate;

(b) a ***business customer*** which is a sole trader or partnership, includes one or more of the forms of identification for a ***domestic customer*** for each of the individuals that conduct the business; and

(c) a ***business customer*** which is a company, includes the company's Australian Company Number or Australian Business Number.

additional retail charge means a charge relating to the sale of ***energy*** by a ***retailer*** to a ***customer*** other than a charge based on the ***tariff*** applicable to the ***customer*** and which must be calculated in accordance with clause 30 of this Code. To avoid doubt:

(a) any network charge relating to the supply, but not sale, of ***energy*** to a ***customer's supply address*** is not an ***additional retail charge*** (whether or not the network charge is bundled in the ***retailer's tariff***);

(b) without limiting paragraph (a), any charge the ***retailer*** may impose as a direct pass through of a distribution tariff, excluded service charge for electricity, ancillary reference tariff for gas or other charge imposed on the ***retailer*** by a ***distributor*** for ***connection*** to, or use of, the ***distributor's*** distribution system is not an ***additional retail charge***; and

(c) any amount payable by a ***customer*** to a ***retailer*** for the ***customer's*** breach of their ***energy contract***, whether under an ***agreed damages term*** or otherwise, is not an ***additional retail charge***.

agreed damages term means a term or condition of an ***energy contract*** under which a ***customer*** and a ***retailer*** have agreed the amount, or a basis for determining the amount, that will be payable by the ***customer*** to the ***retailer*** for the ***customer's*** breach of their ***energy contract***.

amount outstanding, in respect of an ***energy*** or water bill issued to a ***domestic customer***, means:

(a) unless paragraph (b) applies, any amount which is not paid by the due date specified on the bill; or

(b) if the ***domestic customer*** and the relevant service provider enter into an agreement or arrangement for the ***domestic customer*** to pay the amount or an instalment on a later date, any amount or installment which is not paid by that later date in accordance with the agreement or arrangement.

applicable regulatory instruments may include (but is not necessarily limited to) one or more of the following:

(a) for electricity:

- the ***National Electricity Rules***;
- the ***Metrology Procedure: Part A (National Electricity Market)***;
- the ***Metrology Procedure: Part B (National Electricity Market)***;
- the ***Electricity Customer Transfer Code***; and
- the ***Electricity Customer Metering Code***; and

(b) for gas:

- the ***Gas Distribution System Code***;
- the ***Retail Rules***; and
- the ***National Gas Rules***;

or any other regulatory instrument which substitutes, amends or supplements any of the above.

assigned meter identifier means:

(a) for electricity, the National Meter Identifier assigned to the ***customer's*** metering installation; and

(b) for gas, the Meter Installation Reference Number assigned to the ***customer's*** metering installation.

assignment includes dispose of, declare a trust over or otherwise create an interest in rights under an ***energy contract***.

bank bill rate in respect of the interest a ***retailer*** must pay to a ***customer*** on the amount of a ***refundable advance***, means a daily published rate no less than the pre-tax rate of return the ***retailer*** would earn over the period the ***retailer*** retains that amount if it were invested in bank bills that have a tenor equal to 90 days.

best endeavours in relation to a person, means the person must act in good faith and do what is reasonably necessary in the circumstances.

billing cycle means the regular recurrent period in which a ***customer*** receives a bill from a ***retailer***.

business customer means a ***customer*** who is not a ***domestic customer***.

business day means a day other than a Saturday or Sunday or a ***public holiday***.

checksum means:

(a) for electricity, the National Meter Identifier checksum; and

(b) for gas, the Meter Installation Reference Number checksum.

Commission means the Essential Services Commission under the *Essential Services Commission Act* 2001.

concession means a concession, rebate or grant including, without limitation, those known as or relating to:

(a) Winter Energy Concession;

(b) Life Support Machines;

(c) Group Homes;

(d) Multiple Sclerosis or Associated Conditions;

(e) Service to Property Charge Supply Concession;

(f) Property Transfer Fee Waiver; and

(g) Utility Relief Grant Scheme.

connect means:

(a) for electricity, the making and maintaining of contact between the electrical systems of two persons allowing the supply of electricity between those systems; and

(b) for gas, the joining of a ***natural gas installation*** to a distribution system ***supply point*** to allow the flow of gas.

cooling-off period in respect of an ***energy contract*** means any period within which the ***customer*** has a right to cancel the ***energy contract*** under clause 3.4 of the Code of

Conduct for Marketing Retail Energy in Victoria issued by the Commission in January 2009 or the Fair Trading Act 1999 (Vic).

customer means a person other than:

(a) for electricity, a ***retailer***; and

(b) for gas, a participant or market participant as defined in the ***National Gas Rules***, who buys or proposes to buy energy from a ***retailer***.

date of receipt in relation to a notice given by a ***retailer*** means:

(a) if the ***retailer*** hands the notice to the ***customer***, the date the ***retailer*** does so;

(b) if the ***retailer*** leaves the notice at the ***customer's supply address***, the date the ***retailer*** does so; or

(c) if the ***retailer*** gives the notice by post, a date two ***business days*** after the date the ***retailer*** posts the notice.

deemed in respect of an ***energy contract*** means an ***energy contract*** deemed to apply between a ***customer*** and a ***retailer*** under the ***Electricity Act*** or the ***Gas Act*** and ***deemed contract*** has a corresponding meaning.

deemed customer means a person who is ***deemed*** to have an ***energy contract***.

disconnect means:

(a) for electricity, the disconnection of contact between the electrical systems of two persons preventing the supply of electricity between those systems; and

(b) for gas, the separation of a ***natural gas installation*** from a distribution system to prevent the flow of gas.

distributor means a person who holds, or in the case of electricity only is exempt from holding, a distribution licence under the ***Electricity Act*** or the ***Gas Act***.

domestic customer means a ***customer*** who purchases ***energy*** principally for personal, household or domestic use at the relevant ***supply address***.

dual fuel contract means an ***energy contract*** for the sale of electricity and for the sale of gas by a ***retailer*** to a ***customer***, or two ***energy contracts*** between the same ***customer*** and the same ***retailer,*** one an ***electricity contract*** and one a ***gas contract***, under which

billing cycles for electricity and gas are synchronised. The ***dual fuel contract*** may also oblige the ***retailer*** to ***connect*** the ***customer's supply address*** or to otherwise procure the supply of electricity or of gas or of both electricity and gas.

electric bulk hot water means water centrally heated by electricity and delivered to a number of ***customer supply addresses*** where the ***customer's*** consumption of hot water is measured with a ***meter*** and where an ***energy*** bill is issued by a ***retailer***.

electric bulk hot water conversion factor means the ***conversion factor*** used by ***retailers*** to bill ***electric bulk hot water customers***. The ***electric bulk hot water conversion factor*** will have a maximum value of 89kWh per kilolitre. Where ***customers*** are currently billed using a lower ***electric bulk hot water conversion factor***, or a lower ***electric bulk hot water conversion factor*** for the site is assessed, ***retailers*** must bill ***customers*** using the lower ***electric bulk hot water conversion factor***.

Electricity Act means the *Electricity Industry Act* 2000.

electricity contract means a contract for the sale of electricity by a ***retailer*** to a ***customer***. The ***electricity contract*** may also oblige the ***retailer*** to ***connect*** the ***customer's supply address*** or to otherwise procure the supply of electricity.

Electricity Customer Metering Code means the industry code of that name certified by the ***Commission***.

Electricity Customer Transfer Code means the industry code of that name certified by the ***Commission***.

energy means electricity or gas or both electricity and gas.

energy contract means an ***electricity contract*** or a ***gas contract*** and may include a ***dual fuel contract***.

evergreen contract means an ***energy contract,*** other than a ***fixed term contract,*** which includes a ***maturity date***.

explicit informed consent means consent given:

(a) by the ***customer*** directly to the ***retailer*** or the ***retailer's marketing representative***:

(i) in writing or by electronic communication signed by the ***customer***; or

(ii) except for the purposes of clause 5.1 and 10.1 of this Code, orally;

(b) only after the ***retailer*** or the ***retailer's marketing representative*** has clearly, fully and adequately disclosed in plain English all matters relevant to the consent of the ***customer***, including each specific purpose and use of the consent; and

(c) by a person competent to do so.

fixed term contract means an ***energy contract*** the term of which continues for a fixed, certain or definite period including, in the case of a ***deemed contract***, any fixed, certain or definite period under or contemplated by the ***Electricity Act*** or the ***Gas Act***.

force majeure breach means a breach by a ***retailer*** or a ***customer*** of their ***energy contract*** which, but for clause 18, the ***retailer*** or the ***customer*** would commit arising only through a ***force majeure event***.

force majeure event means an event outside the reasonable control of a ***retailer*** or a ***customer***.

franchise customer in relation to the period ending on:

(a) for electricity, 31 December 2000; and

(b) for gas, 31 August 2001, means a franchise customer within the meaning of:

(a) for electricity, the *Electricity Industry Act* 1993 immediately before 1 January 2001; and

(b) for gas, the *Gas Industry Act* 1994 immediately before 1 September 2001.

FRC date means the date on which there ceases to be in effect an Order made under section 35 of the ***Gas Act*** (i.e., the date from which all ***customers*** will be able to choose their gas ***retailer***).

Gas Act means the *Gas Industry Act* 2001.

gas bulk hot water means water centrally heated by gas and delivered to a number of ***customer supply addresses*** where the ***customer's*** consumption of hot water is measured with a ***meter*** and where an ***energy*** bill is issued by a ***retailer***.

gas bulk hot water rate means the gas price in cents per litre that is used by a ***retailer*** to charge ***customers*** for ***energy*** in delivering ***gas bulk hot water***.

gas contract means a contract for the sale of gas by a ***retailer*** to a ***customer***. The ***gas contract*** may also oblige the ***retailer*** to ***connect*** the ***customer's supply address*** or to otherwise procure the supply of gas.

Gas Distribution System Code means the code of that name certified by the ***Commission***.

gazetted tariff at any time means a ***tariff*** determined by a ***retailer*** and published by the ***retailer*** in the Government Gazette and at that time effective under:

(a) for electricity, section 35 of the ***Electricity Act***; and

(b) for gas, section 42 of the ***Gas Act***.

A ***gazetted tariff*** corresponds with a ***tariff*** applicable to a ***customer*** under an ***energy contract*** if it is the ***tariff*** that a ***retailer*** would be required to offer to the ***customer*** if the

customer at that time made a request for a ***standing offer*** in respect of the relevant ***supply address***.

gazetted term or condition at any time means a term or condition determined by a ***retailer*** and approved by the ***Commission*** and published by the ***retailer*** in the Government Gazette and at that time effective under:

(a) for electricity, section 35 of the ***Electricity Act***.

(b) for gas, section 42 of the ***Gas Act***.

guideline means a guideline published by the ***Commission***.

late payment fee means an amount payable by a ***customer*** to a ***retailer*** in connection with the ***customer*** having breached the ***customer's*** obligation to pay an amount due on or before the pay by date on the ***retailer's*** initial bill.

last resort event in respect of a ***retailer*** means when:

(a) the ***retailer's*** retail licence is suspended or revoked; or

(b) the right of the ***retailer*** to acquire:

- for electricity, electricity from the wholesale electricity market; and
- for gas, gas from a wholesale gas market or a producer, is suspended or terminated, whichever first occurs.

local retailer has the same meaning :

(a) for electricity, as made under Order-in-Council S315 dated 25.11.08 in accordance with section 35 of the ***Electricity Act***; and

(b) for gas, as made under Order-in-Council S315 dated 25.11.08 in accordance with section 42 of the ***Gas Act***.

market contract means an ***energy contract*** between a ***customer*** and a ***retailer*** which is not a ***deemed contract*** nor an ***energy contract*** arising from the acceptance of a ***standing offer***.

marketing representative includes an employee, agent, representative, contractor or person acting on behalf of a ***retailer***, who is engaged in marketing and or selling the ***retailer's energy contracts***.

maturity date in respect of an ***energy contract*** means a date included in the ***energy contract*** on which a fixed, certain or definite period ends:

(a) before which, if the ***customer*** terminates the ***energy contract***, the ***retailer*** may have a right to impose an early termination fee; and

(b) after which, if the ***customer*** terminates the ***energy contract***, the ***retailer*** has no right to impose an early termination fee.

meter in respect of a ***customer*** means:

(a) for electricity, the device which measures and records the consumption of electrical energy consumed at the ***customer's supply address***;

(b) for gas, an instrument that measures the quantity of gas passing through it and includes associated equipment attached to the instrument to filter, control or regulate the flow of gas and;

(c) for ***electricity bulk hot water*** or ***gas bulk hot water***, the device which measures and records the consumption of bulk hot water consumed at the ***customer's supply address***.

Metrology Procedure: Part A (National Electricity Market) is the procedure as published by the Australian Energy Market Operator in accordance with clause 7.14.1(a) of the ***National Electricity Rules***.

Metrology Procedure: Part B (National Electricity Market) is the procedure as published by the Australian Energy Market Operator in accordance with clause 7.14.1(a) of the ***National Electricity Rules***.

National Electricity Rules means the Rules made under the National Electricity (Victoria) Law applicable in Victoria as a result of the operation of section 6 of the *National Electricity (Victoria) Act* 2005.

National Gas Rules means the Rules made under the *National Gas Law* as contained in a Schedule to the *National Gas (South Australia) Act 2008*.

natural gas installation means any gas equipment located at a ***customer's supply address*** downstream of the ***supply point*** that is not part of a distribution system.

public holiday means a public holiday appointed under the *Public Holidays Act* 1993.

reasonable assurance in relation to a ***customer's*** willingness to pay means a fair and reasonable expectation, based on all the circumstances leading to, and which are anticipated to follow, the assurance that the ***customer*** will pay.

reconnect means to connect following a disconnection.

refundable advance means an amount of money or other arrangement acceptable to a

retailer as security against a ***customer*** defaulting on a final bill.

relevant customer means a person, or a member of a class of persons, to whom an

Order under:

(a) for electricity, section 36 of the ***Electricity Act***; and

(b) for gas, section 43 of the ***Gas Act***, applies.

relevant default in relation to a ***domestic customer***, occurs where:

(a) within the previous five years, the ***domestic customer*** has failed to pay a bill under an ***energy*** contract with the ***retailer*** or any former or other ***retailer*** or in respect of the ***customer's*** water consumption, where:

• the ***amount outstanding*** is greater than or equal to $120;

• the payment is at least 60 days overdue; and

• the ***retailer***, the former or other ***retailer*** or water provider has taken steps to recover the whole or any part of the ***amount outstanding***;

(b) within the past five years, a court has issued judgment against the ***domestic customer*** in relation to a debt; or

(c) the ***domestic customer*** has been declared bankrupt and the bankruptcy order has not been discharged.

responsible in respect of a ***retailer*** and a ***supply address*** means the ***retailer*** is responsible for the ***energy*** supplied at the ***supply address*** for the purposes of settlement of a relevant wholesale ***energy*** market under ***applicable regulatory instruments***.

retailer means a person who holds a retail licence under the ***Electricity Act*** or under the ***Gas Act***.

Retail Rules means the *Retail Market Procedures (Victoria)* issued by the Australian Energy Market Operator and authorised under the *National Gas Law* and the ***National Gas Rules***.

second tier electricity customer means, in respect of the relevant ***supply address,*** the ***customer*** who purchases electricity otherwise than directly and in its entirety from the ***retailer*** that is the ***local retailer*** in respect of that ***supply address***.

standing offer means an offer made by a ***retailer*** as contemplated by:

(a) for electricity, section 35 of the ***Electricity Act***; and

(b) for gas, section 42 of the ***Gas Act***.

supply address includes:

(a) for electricity, the relevant market connection point (as defined in the ***National Electricity Rules***) in respect of that supply address; and

(b) for gas, the point where gas leaves the distribution system before being supplied to a ***customer***, whether or not it passes through facilities owned or operated by another person after that point and before being so supplied.

supply point means the point where gas or electricity leaves the distribution system before being supplied to the customer, whether or not it passes through facilities owned or operated by another person after that point and before being so supplied.

tariff means a price for the supply or sale of ***energy***.

transfer in respect of a ***customer*** and two ***retailers***, means that ***responsibility*** for the relevant ***supply address*** of the ***customer*** has transferred from one of the ***retailers*** to the other.

writing includes any mode of representing or reproducing words, figures, drawings or symbols in visible form.

35. INTERPRETATION

35.1 Connection, disconnection and reconnection

A ***retailer*** is not in a position to ***connect***, ***disconnect*** or ***reconnect*** the electrical system or ***natural gas installation*** at a ***customer's supply address*** to a ***distributor's*** distribution

system. In this Code unless the context otherwise requires, a reference in a term or condition to a ***retailer***:

(a) having a right or not having a right to ***disconnect*** a ***customer*** is to be construed as a reference to the ***retailer*** having a right or not having a right to procure the

distributor to ***disconnect***; or

(b) being obliged to ***connect***, ***disconnect*** or ***reconnect*** a ***customer*** is to be construed as a reference to the ***retailer*** being obliged to use its ***best endeavours*** to procure the ***distributor*** to ***connect***, ***disconnect*** or ***reconnect***, the electrical system or ***natural gas installation*** at the ***customer's supply address*** to the ***distributor's*** distribution system.

35.2 General

In this Code including the preamble, unless the context otherwise requires:

(a) headings and footnotes are for convenience or information only and do not affect the interpretation of this Code or of any term or condition set out in this Code;

(b) words importing the singular include the plural and vice versa;

(c) an expression importing a natural person includes any company, partnership, trust, joint venture, association, corporation or other body corporate and any governmental agency and vice versa;

(d) a reference to a clause or appendix is to a clause or appendix of this Code;

(e) a reference to any statute includes all statutes varying, consolidating, re-enacting, extending or replacing them and a reference to a statute includes all regulations, proclamations, ordinances, by-laws and determinations issued under that statute;

(f) a reference to a document or a provision of a document includes an amendment or supplement to, or replacement of or novation of, that document or that provision of that document;

(g) a reference to a person includes that person's executors, administrators,

successors, substitutes (including, without limitation, persons taking by novation)

and permitted assigns;

(h) other parts of speech and grammatical forms of a word or phrase defined in this Code have a corresponding meaning;

(i) a period of time:

- which dates from a given day or the day of an act or event is to be calculated exclusive of that day; or
- which commences on a given day or the day or an act or event is to be calculated inclusive of that day;

(j) a reference to:

- time is a reference to Standard Time within the meaning of the *Summer Time Act* 1972 and not Summer Time within the meaning of that Act;

- a day is a reference to a period commencing immediately after midnight and ending the following midnight; and
- a month is a reference to a calendar month; and

(k) an event which is required under any term or condition set out in this Code to occur on or by a stipulated day which is not a ***business day*** may occur on or by the next ***business day***.

Appendix 1

Variation by Agreement

A list of the terms and conditions set out in this Code which are marked with an asterisk (*),

are allowed to be varied by agreement between customers and retailers in the formation of market contracts. These terms and conditions are:

• Clause 3.1(a) and (b)

• Clause 4.2(m).

• Clause 4.4(a).

• Clause 5.3.

• Clause 5.4(a).

• Clause 7.1(b).

• Clause 7.2(a).

• Clause 7.3.

• Clause 24.1(b).

http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf

Appendix 2

Bulk Hot Water Charging

Gas Bulk Hot Water Pricing Formulae

A. ***Gas bulk hot water rate*** (cents per litre) = CF (MJ per litre)

* ***gas bulk hot water tariff*** (cents per MJ)

Where ***customers*** are charged by their ***retailer*** for ***energy*** in delivering ***gas bulk hot water***:

CF = the ***gas bulk hot water conversion factor*** = 0.49724 MJ per litre

gas bulk hot water tariff = the ***standing offer*** tariff applicable to the ***gas bulk hot water*** unit (gas tariff 10/11)

Where ***customers*** are charged for ***energy*** in delivering ***gas bulk hot water*** pursuant to a ***market contract***:

CF = the ***gas bulk hot water conversion factor*** = 0.49724 MJ per litre

gas bulk hot water tariff = the market tariff applicable to the ***bulk hot water*** unit B. ***Retailer*** provided ***gas bulk hot water*** per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant ***gas bulk hot water*** unit divided by the number of ***customers*** supplied by the relevant ***gas bulk hot water*** unit.

Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.

C. ***Customer gas bulk hot water*** charge (cents) = the ***customer's*** metered consumption of hot water (litres)

* ***gas bulk hot water*** price (cents per litre)

\+ ***customer's*** supply charge (cents)

http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf

Electric Bulk Hot Water Billing Formulae

A. Where ***customers*** are charged for ***energy*** in delivering ***electric bulk hot water*** either by their ***retailer*** under a ***standing offer*** contract or pursuant to a ***market contract*** the:

Customer electricity bulk hot water charge (cents) = the ***customer's*** metered consumption of hot water (kilolitres)

* electricity tariff rate(s) applicable to the ***customer*** for the applicable ***electric bulk hot water*** unit (cents per kWh)

* CF (kWh per kilolitre)

Where:

CF = ***electric bulk hot water conversion factor*** used by ***retailers*** to bill ***electric bulk hot water*** customers. The ***electric bulk hot water conversion factor*** will have a maximum value of 89 kWh per kilolitre. Where ***customers*** are currently billed using a lower ***electric bulk hot water conversion factor***, or a lower ***electric bulk hot water conversion factor*** for the site is assessed, ***retailers*** must bill ***customers*** using the lower ***electric bulk hot water conversion factor***.

The ***customer's*** electricity tariff must be an off-peak tariff if supplied from an off-peak ***electric bulk hot water*** unit.

PERTINENT EXTRACTS[2] –

National Measurement Act 1960

Act Compilation (current) - C2009C00273

Number 64 of 1960

[2] See also Appendices 11 and 12 to follow NMI info and regs

PERTINENT EXTRACTS – National Measurement Act 1960

Act Compilation (current) - C2009C00273
Number 64 of 1960

http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/696988C40661A93ACA2575E60006C499?Open

INTERPRETATION

Part I—Preliminary

1 Short title [*see* Note 1]

This Act may be cited as the *National Measurement Act 1960*.

3 Interpretation

business premises means premises or a part of premises:

(a) used for the importation, packing, storage or sale of articles or utilities sold, or to be sold, by measurement; or

(b) on which a measuring instrument is used for trade; or

(c) used for activities incidental to the uses mentioned in paragraph (a) or (b);

but does not include premises or a part of premises occupied as a residence or for residential accommodation.

business vehicle means a vehicle:

(a) used for the transportation of articles or utilities sold, or to be sold, by measurement (whether packed in advance ready for sale or otherwise); or

(b) on which a measuring instrument is used for trade; or

(c) used for the measurement of articles or utilities sold, or to be sold, by measurement; or

(d) used for activities incidental to the uses mentioned in paragraph (a), (b) or (c).

premises means:

controller, in relation to premises, a part of premises or a vehicle, means the person apparently in control of the premises, the part of the premises or the vehicle.

component, in relation to a thing (in this definition called the ***basic thing***) by means of which a measurement of a physical quantity may be made, includes another thing (whether or not forming part of the basic thing) where:

(a) the basic thing is so designed or constructed as to include, or have associated with it, the other thing; and

(b) the other thing is designed or intended to do any or all of the following:

(i) carrying out a conversion of the result of a measurement made by the basic thing;

(ii) calculating a number, tax or price by reference to the result of a measurement made by the basic thing;

(iii) correcting the result of a measurement made by the basic thing;

(iv) providing or repeating information consisting of or relating to any or all of the following:

(A) the result of a measurement made by the basic thing;

(B) a conversion of the result of a measurement made by the basic thing;

(C) a calculation of a number, tax or price calculated by reference to the result of a measurement made by the basic thing;

(v) controlling the measurement process carried out by the basic thing.

controller, in relation to premises, a part of premises or a vehicle, means the person apparently in control of the premises, the part of the premises or the vehicle.

(a) an area of land or any other place, whether or not it is enclosed or built on; or

(b) a building or other structure.

measurement means a determination of number or physical quantity, other than for descriptive purposes only.

measuring instrument means:

(a) a thing by means of which a measurement of a physical quantity may be made; or

(b) a component of such a thing.

measuring instrument gives an inaccurate measurement has the meaning given in subsection (6).

recognized-value standard of measurement means a standard of measurement that the Chief Metrologist has, under section 8A, determined shall be a recognized-value standard of measurement.

reference standard of measurement means a standard of measurement (other than an Australian primary standard of measurement, an Australian secondary standard of measurement, a recognized-value standard of measurement or a State primary standard of measurement) that has been verified in accordance with the regulations and for which the period for which a certificate of verification is given under the regulations has not expired.

residential premises means premises, or a part of premises, that is occupied as a residence or for residential accommodation.

sell includes barter or exchange.

4 Objects and application of Act

(1) The objects of this Act are:

(a) to establish a national system of units and standards of measurement of physical quantities; and

(b) to provide for the uniform use of those uniform units and standards of measurement throughout Australia; and

(c) to co-ordinate the operation of the national system of measurement; and

(d) to bring about the use of the metric system of measurement in Australia as the sole system of measurement of physical quantities; and

(e) to provide for a national system of trade measurement;

and this Act shall be construed accordingly.

Any measurement that allows for water volume calculations or some other bizarre equivalent, to be part of the equation that calculates energy consumption is fundamentally flawed. These provisions to not uphold public interest, best practice standards or the spirit and intent of existing provisions. The provisions are as good as relying on an oil funnel to measure the weight of a bag of apples. Energy retailers are licenced to sell gas and electricity not water products or heated water. Even if they were so licenced, there are the issues of gener4ic and common law provisions.

Appendix 12

NATIONAL MEASUREMENT INSTITUTE

GENERAL INFORMATION AND ROLE

ABOUT NATIONAL MEASUREMENT

http://www.measurement.gov.au/Pages/About.aspx

Last updated 20 May 2010 last accessed 27 May 2010

NMI is the peak Australian measurement body responsible for biological, chemical, legal and physical measurement.

Our vision and purpose is to deliver capability for measurement in Australia that is world class, increases national economic efficiency, enhances export trade prospects, empowers sound environmental regulation, and enables effective social and health policies.

Our goals are to maintain Australia's measurement standards, provide national leadership in measurement science, lead global collaboration, improve and develop our services, grow research and development capability, and implement the national trade measurement system.

Functions

NMI is responsible for Australia's units and standards of measurement and for realising those units of measurement through the development and maintenance of standards of measurement, reference materials and reference techniques. It represents Australia in the peak international measurement forums including BIPM and OIML.

Meeting the measurement needs of government, industry and scientific organisations for calibration, measurement, analysis and training are key functions of NMI. The services section of this website provides more information.

NMI is an important element of Australia's standards and conformance infrastructure and provides advice on measurement to the other members, the National Association of Testing Authorities,Standards Australia and the Joint Accreditation System of Australia and New Zealand.

NMI works with state and territory trade measurement

http://www.measurement.gov.au/TradeMeasurement/Documents/Guide%20to%20the%20New%20National%20Trade%20Measurement%20Regulations.pdf

GUIDE TO THE NEW TRADE MEASUREMENT REGULATIONS

November 2009

Excerpt from National Measurement Guidelines (verbatim)

On 1 July 2010 a new national system of trade measurement will commence under the administration and regulatory oversight of the National Measurement Institute (NMI) a division of the Australian Government's Department of Innovation, Industry, Science and Research.

Trade measurement is an important element of economic infrastructure. It has the critical role of ensuring that all transactions whose value is determined by a measurement are correct. An estimated four hundred billion dollars a year in trade transactions rely on measurement.

Consumers and businesses alike rightly expect that goods that are sold on the basis of such measures as length, weight and volume, are accurately and faithfully represented. Suppliers of measuring instruments expect clear and comprehensive regulatory requirements. Governments and the economy as a whole require a trade measurement system that establishes and maintains a national and international reputation for equitable trading.

NMI is Australia's peak measurement organisation, responsible for maintaining Australia's primary standards of measurement and for providing the legal and technical framework for the dissemination of measurement standards. We represent the only 'one-stop shop' for all disciplines of measurement in Australia – analytical, biological, chemical, physical and legal. We provide measurement expertise, calibration services, chemical and biological analyses and pattern approval testing.

NMI takes its new responsibility of trade measurement very seriously. We are keen to support industry and consumers alike by ensuring timely communication of legislative and regulatory obligations for businesses and rights for consumers.

This Guide provides a concise summary of the new national regulatory framework.

Dr Laurie Besley

CEO and Chief Metrologist

WHEN WILL THE REGULATIONS COMENCE?

Under the *National Measurement Act 1960 (Cth)*, provisions that pertain to utility meters commenced on 1 July 2009. The *National Trade Measurement Regulations 2009 (Cth)* commenced on 11 September 2009. However, the enforcement provisions of the Act do not commence until 2010 and therefore some provisions, in both the Act and the Regulations, relating to other trade measuring instruments and packaging do not come into effect until the transition day, 1 July 2010.

Appendix 13

NATIONAL MEASUREMENT INSTITUTE

EXCERPTS

EXPLANATORY MEMORNDUM

NATIONAL MEASUREMENT AMENDMENDMENT BILL 2008[1]

[1] National Measurement Amendment Bill 2008 – approved *National Measurement Amendment Act 2009*
http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword
amends the *National Measurement Act 1960* (Cth) to introduce a national system of trade measurement
The National Measurement Institute is now the sole authority for authority for trade measurement
On 1 July 2010 a new national system of trade measurement will commence under the administration and regulatory oversight of the National Measurement Institute (NMI) a division of the Australian Government's Department of Innovation, Industry, Science and Research

GENERAL NOTES[2]

OFFENCE PROVISIONS IN THE BILL

The offence provisions in the Bill will apply to a wide range of entities, from small businesses to large multinational concerns, in a wide variety of circumstances. This makes it desirable to have a range of enforcement options appropriate to the different circumstances to which the Bill might apply. Consequently, the Bill provides for: different categories of offences in relation to particular conduct; for a range of responses, depending on the circumstances of a particular suspected offence; and for three tiers of penalties. The Bill does this in the following ways:

- a number of provisions in the Bill create offences requiring a fault element and corresponding strict liability offences;
- as an alternative to prosecution, the Bill enables trade measurement inspectors to issue infringement notices to suspected offenders; and
- the Bill provides for three tiers of penalties, with the highest penalties being imposed for fault element offences, lower penalties for strict liability offences, and the lowest penalties are payable under infringement notices.

Where appropriate, the offence provisions in the Bill also extend geographical jurisdiction for offences committed outside Australia.

These issues are discussed in further detail immediately below, and in relation to specific provisions later in this Explanatory Memorandum.

Offences requiring a fault element

A number of provisions in proposed Parts IV, V, VI and VII create offences requiring a fault element.

Section 3.1(1) of the Criminal Code (which is contained in a Schedule to the *Criminal Code Act 1995*) explains that an offence ordinarily consists of physical elements and fault elements. A person will be guilty of an offence requiring a fault element if it can be proved that the relevant physical elements for that offence exist, and one of the fault elements for each physical element is also proved.

The physical elements for offences requiring a fault element contained in the Bill are set out in the proposed provisions creating those offences. The fault elements are set out in Division 5 of Part 2.2 of the Criminal Code.

The offences requiring a fault element that are proposed to be created by the Bill have been designed to be consistent with the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Attorney-General's Department, and in particular Parts 4.3 and 4.4 of that Guide.

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[2] Extracts National Measurement Act Amendment Bill 2009 Explanatory Memorandum

Strict liability offences

A number of provisions in proposed Parts IV, V, VI, VII, IX, X and XI create strict liability offences.

Section 6.1 of the Criminal Code explains what is meant by 'strict liability'. A person will be guilty of a strict liability offence if it can be proved that the person committed a certain prohibited act. For example, a person will breach proposed subsection 18GA(2) if that person uses a measuring instrument for trade and that instrument is not verified. The person's state of mind is not relevant to their guilt. For example, it does not matter whether the person did not intend to breach subsection 18GA(2): the person will be guilty if it can be proved they committed the prohibited act.

The proposed strict liability offences created in the Bill are consistent with the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. In particular:

- none of the strict liability offences is punishable by imprisonment;
- the maximum penalty for committing one of the strict liability offences is a fine of up to 40 penalty units for an individual; and
- as explained below in relation to relevant provisions, strict liability has been imposed to enhance the effectiveness of particular provisions of the Act, by deterring people from committing offences, and to encourage people to be vigilant so as to ensure they do not breach the Act.

Reports 17/2000 and 6/2002 by the Senate Standing Committee for the Scrutiny of Bills were also considered in relation to the strict liability provisions of the Bill.

Extended geographical jurisdiction

Where appropriate, some offences have been extended in geographical reach, by applying extended geographical jurisdiction - category B (as provided for in section 15.2 of the *Criminal Code*). In these cases, a person will commit an offence if a requirement for standard geographical jurisdiction is satisfied, or the conduct constituting the offence occurs outside Australia and the person who commits it is an Australian citizen, resident or body corporate at the time of the alleged offence, subject to any applicable defences.

POWERS OF TRADE MEASUREMENT INSPECTORS

Proposed Part IX is concerned with trade measurement inspectors, who are responsible for monitoring compliance with the Act. Part 3 of Part IX confers powers on inspectors, for the purposes of the Act, to enter and search business or residential premises, to inspect business vehicles, to seize certain things, to require answers to certain questions, and to require certain documents to be produced.

These powers are conferred on inspectors to enable them to effectively monitor compliance and enforce the Act. The principles set out in Chapters 8 and 9 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were

carefully considered when creating these powers. In particular, the following things were taken into account.

- There was extensive consultation with the Attorney-General's Department and the Australian Federal Police regarding the proposed provisions.
- It was decided that, given the large number of inspections involved, it would not be practicable to require warrants for the exercise of monitoring powers by inspectors in all cases.
- The powers replicate long-established equivalent powers in existing state and territory corresponding laws. These powers are familiar to, and accepted by, traders.
- If these powers were not available, it would not be possible to effectively administer the Act. In particular, it would be difficult to monitor compliance.
- The powers will only be exercisable by inspectors who are properly selected, qualified and trained to do so.
- In the case of residential premises, inspectors may be refused entry.

NATIONAL MEASUREMENT ACT 1960

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_pdf/319962.pdf;fileType=application%2Fpdf

Extracts from 2nd reading speech last accessed 27 May 2010

Strict liability offences

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Section 6.1 of the Criminal Code explains what is meant by 'strict liability'. A person will be guilty of a strict liability offence if it can be proved that the person committed a certain prohibited act. For example, a person will breach proposed subsection 18GA(2) if that person uses a measuring instrument for trade and that instrument is not verified. The person's state of mind is not relevant to their guilt. For example, it does not matter whether the person did not intend to breach subsection 18GA(2): the person will be guilty if it can be proved they committed the prohibited act. The proposed strict liability offences created in the Bill are consistent with the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. In particular:

none of the strict liability offences is punishable by imprisonment;

the maximum penalty for committing one of the strict liability offences is a fine of up to 40 penalty units for an individual; and

as explained below in relation to relevant provisions, strict liability has been imposed to enhance the effectiveness of particular provisions of the Act, by deterring people from committing offences, and to encourage people to be vigilant so as to ensure they do not breach the Act.

Reports 17/2000 and 6/2002 by the Senate Standing Committee for the Scrutiny of Bills were also considered in relation to the strict liability provisions of the Bill.

Extended geographical jurisdiction

Where appropriate, some offences have been extended in geographical reach, by applying extended geographical jurisdiction - category B (as provided for in section 15.2 of the *Criminal Code*). In these cases, a person will commit an offence if a requirement for standard geographical jurisdiction is satisfied, or the conduct constituting the offence occurs outside Australia and the person who commits it is an Australian citizen, resident or body corporate at the time of the alleged offence, subject to any applicable defences.

NATIONAL MEASUREMENT ACT 1960

See also regulations

http://www.austlii.edu.au/au/legis/cth/consol_act/nma1960222/s4.html

NATIONAL MEASUREMENT ACT 1960 - SECT 4

Objects and application of Act

(1) The objects of this Act are:

(a) to establish a national system of units and standards of measurement of physical quantities; and

(b) to provide for the uniform use of those uniform units and standards of measurement throughout Australia; and

(c) to co-ordinate the operation of the national system of measurement; and

(d) to bring about the use of the metric system of measurement in Australia as the sole system of measurement of physical quantities; and

(e) to provide for a national system of trade measurement;

and this Act shall be construed accordingly.

(1A) Subsections(2) and (3) do not apply in respect of the application of this Act and regulations to utility meters used for trade.

Note: Section 4A deals with the application of the Act in respect of utility meters used for trade

(2) This Act and the regulations do not apply to the exclusion of any law of a State or Territory except in so far as that law is inconsistent with an express provision of this Act or of the regulations.

NATIONAL MEASUREMENT ACT 1960 - SECT 3

Interpretation

Selected extracts

"business premises" means premises or a part of premises:

(a) used for the importation, packing, storage or sale of articles or utilities sold, or to be sold, by measurement; or

(b) on which a measuring instrument is used for trade; or

(c) used for activities incidental to the uses mentioned in paragraph (a) or (b);

but does not include premises or a part of premises occupied as a residence or for residential accommodation.

"business vehicle" means a vehicle:

(a) used for the transportation of articles or utilities sold, or to be sold, by measurement (whether packed in advance ready for sale or otherwise); or

(b) on which a measuring instrument is used for trade; or

(c) used for the measurement of articles or utilities sold, or to be sold, by measurement; or

(d) used for activities incidental to the uses mentioned in paragraph (a), (b) or (c).

"controller" , in relation to premises, a part of premises or a vehicle, means the person apparently in control of the premises, the part of the premises or the vehicle. ***"use for trade"*** : a person uses a measuring instrument for trade if:

(a) the person is actually or apparently in control of the measuring instrument; and

(b) the person uses it, or makes it available for another person to use, for either or both of the following purposes:

(i) determining the consideration in respect of a transaction;

(ii) determining the amount of a tax.

"interest in land" includes an interest by way of stratum title (by whatever name known), an interest by way of strata title (by whatever name known) and a time-sharing interest in land (by whatever name known).

"premises" means:

(a) an area of land or any other place, whether or not it is enclosed or built on; or

(b) a building or other structure

"unit of measurement" includes any word or expression that is used in conjunction with numerical values in order to describe the magnitudes of physical quantities.

"use for trade" : a person uses a measuring instrument for trade if:

(a) the person is actually or apparently in control of the measuring instrument; and

(b) the person uses it, or makes it available for another person to use, for either or both of the following purposes:

(i) determining the consideration in respect of a transaction;

(ii) determining the amount of a tax.

"utility" means gas, electricity or water.

"utility meter" means a measuring instrument that is:

(a) a gas meter; or

(b) an electricity meter; or

(c) a water meter;

but does not include a meter that is included in a class of meters exempted from the operation of Part IV by the regulations.

Note: Most of the definitions dealing with utility meters are in section 18H.

As mentioned in the Explanatory Memorandum that accompanied the Bill leading to the finalization of the *National Measurement (Amendment) Act 2009*, it is the intent of the NMI to lift remaining exemptions for utilities. Some exemptions have already been lifted.

Forecasts for costs, including CAPEX AND OPEX COSTS and changes to other regulations should bear this in mind and not authorizer unreasonable and unnecessary costs in the face of provisions for unreliable methods of calculation

Water meters and gas meters or electricity meters may be accurate.

But if the wrong instrument is used to calculate actual or estimated consumption of the wrong commodity, and contractual obligation, conditions precedent and subsequent and other considerations, including matters relating to price or tax - such practices adopted whether or not tacitly or explicitly sanctioned by codes guidelines or other provisions in other regulatory jurisdictions may be seen to be contradicting these provisions, as well as containing substantive unfair terms that would qualify for voidance under revised unfair contract provisions contained with proposed generic laws – when the new TPA takes full effect and is renamed Competition and Consumer Law 2010, with an effective proposed date of 1 January 1011.

These matters will affect cost allocations and other determinations such as gas or electricity access determinations and related rule changes initiated by the AEMC or considered by the AEMC.

PART V--GENERAL PROVISIONS ON USING MEASUREMENT IN TRADE

NATIONAL MEASUREMENT ACT 1960 - SECT 18H

Overview

Overview of Part

(1) This Part regulates the use of measurement in trade generally.

(2) This Part deals with:

(a) articles that must be sold by measurement (sections 18HB and 18HC); and

(b) the units of measurement that must be used for certain transactions (section 18HD); and

(c) the scale intervals of measuring instruments used for certain articles (section 18HE); and

(d) unreliable methods of measurement (section 18HF); and

(e) the use of certain measuring instruments (section 18HG); and

(f)measuring instruments and methods of measurement used in monitoring compliance with this Act (section 18HH).

(3) All trade measurement is to be a net measurement (section 18HI).

Explanatory Memorandum

Last accessed 27 May 2010

Part V—General provisions on using measurement in trade

Section 18H Overview

1. This section highlights the key elements of new Part V of the Act.

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

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Section 18HD Transactions based on measurement to be in prescribed units of measurement

2. Proposed subsection 18HD(1) contains an offence provision that relates to the units of measurement that must be used for certain transactions. Under subsection 18HD(1), a person commits an offence if:

- the person sells an article (whether packed in advance ready for sale or otherwise) or a utility for a price determined by reference to measurement of the article; and
- a unit of measurement is prescribed by the regulations for that article or utility, or articles or utilities of that class, for the purposes of this paragraph 18HD(1)(b); and
- the price is not a price determined by reference to a measurement of the article or utility in that unit of measurement.

3. The offence is punishable by a penalty of 40 penalty units (currently $4,400).

4. It is important for the proper operation of the Act that the regulations may prescribe a unit of measure for a particular article or utility, or class of articles or utilities, so that these units may be prescribed comprehensively and precisely, and so that they may be relatively readily amended to reflect changes in industry practice and the creation of new types of articles.

5. Proposed subsection 18HD(2) provides that the offence in proposed subsection 18HD(1) is an offence of strict liability. The subsection contains a note referring to section 6.1 of the *Criminal* Code, which explains the concept of strict liability.

6. The penalty imposed by subsection 18HD(1) is designed to encourage people to be vigilant in ensuring that they comply with the subsection's requirements and to deter them from engaging in the prohibited behaviour.

7. Proposed subsection 18HD(3) provides that section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code* applies to offences against proposed subsection 18HD(1). This is because these offences could be committed outside Australia in circumstances where it may be appropriate and practicable to take action against the person who committed the offence. Proposed subsection 18HD(3) is designed to be consistent with the principles discussed in par 4.8 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

NATIONAL MEASUREMENT ACT 1960 - SECT 18HE

Measuring instruments used in transactions to have prescribed scale intervals

(1) A person commits an offence if:

(a) the person sells an article (whether packed in advance ready for sale or otherwise) or a utility for a price determined by reference to measurement of the article; and

(b) the regulations prescribe scale intervals for measuring instruments used in the measurement of the article or utility, or articles or utilities of that class; and

(c) the price is not a price determined by reference to a measurement of the article or utility using a measuring instrument of those scale intervals.

Penalty: 40 penalty units.

(2) Subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code* .

(3) Section 15.2 (extended geographical jurisdiction--category B) of the *Criminal Code* applies to an offence against subsection (1).

Explanatory Memorandum last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HE Measuring instruments used in transactions to have prescribed scale intervals

8. Proposed subsection 18HE(1) contains an offence provision that relates to the scale intervals of measuring instruments used for certain articles. Under subsection 18HD(1), a person commits an offence if:

- the person sells an article (whether packed in advance ready for sale or otherwise) or a utility for a price determined by reference to measurement of the article; and
- the regulations prescribed scale intervals for measuring instruments used in the measurement of the article or utility, or articles or utilities of that class; and
- the price is not a price determined by reference to a measurement of the article or utility using a measuring instrument of those scale intervals.

9. The offence is punishable by a penalty of 40 penalty units (currently $4,400).

10. Proposed subsection 18HE(2) provides that the offence in proposed subsection 18HE(1) is an offence of strict liability. The subsection contains a note referring to section 6.1 of the *Criminal* Code, which explains the concept of strict liability.

11. The penalty imposed by subsection 18HE(1) is designed to encourage people to be vigilant in ensuring that they comply with the subsection's requirements and to deter them from engaging in the prohibited behaviour.

12. Proposed subsection 18HE(3) provides that section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code* applies to offences against proposed subsections 18H(1), (2), (3) and (4). This is because these offences could be committed outside Australia in circumstances where it may be appropriate and practicable to take action against the person who committed the offence. Proposed subsection 18HE(3) is designed to be consistent with the principles discussed in par 4.8 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

NATIONAL MEASUREMENT ACT 1960 - SECT 18HF

Unreliable methods of measurement

(1) The regulations may prescribe unreliable methods of measurement of an article or utility or a class of articles or utilities.

(2) If the regulations make provision under subsection (1):

(a) the unreliable method of measurement must not be used in working out the amount of any tax (however described) payable by reference to measurement of the article or utility or an article or utility of that class; and

(b) no contract, dealing or other transaction is to be made or entered into that requires the unreliable method of measurement to be used in measuring the article or utility or an article or utility of that class for the purpose of determining the consideration under that contract, dealing or transaction; and

(c) to the extent that a contract is entered into requiring the unreliable method to be used for that purpose, the contract is null and void.

"measuring instrument gives an inaccurate measurement" has the meaning given in subsection (6).

Explanatory Memorandum last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HF Unreliable methods of measurement

13. Proposed section 18HF deals with unreliable methods of measurement. Subsection (1) of this proposed provision provides that the regulations enabled by the *National Measurement Act 1960* may prescribe unreliable methods of measurement of an article or utility or a class of articles or utilities.

14. Proposed subsection 18HF(2) provides that if the regulations make provision under proposed subsection 18HF(1):

- the unreliable method of measurement must not be used in working out the amount of any tax (however described) payable by reference to measurement of the article or utility or an article or utility of that class; and
- no contract, dealing or other transaction is to be made or entered into that requires the unreliable method of measurement to be used in measuring the article or utility or an article or utility of that class for the purpose of determining the consideration under that contract, dealing or transaction; and

- to the extent that a contract is entered into requiring the unreliable method to be used for that purpose, the contract is null and void.

15. It is important that regulations may be made prescribing precisely unreliable methods of measurement so that this information is readily available and can be relatively readily amended to accommodate changing business practices and practical circumstances.

16. EXAMPLE: When firewood is sold by volume, and is not stacked with as few gaps as practicable, a measurement method based on the size of the stack would be unreliable. Also, weighing a vehicle on a weighbridge using the 'end and end' method is not as reliable a method of measurement as direct weighing of the vehicle.

NATIONAL MEASUREMENT ACT 1960 - SECT 18HG

Limiting use of certain measuring instruments

Offence requiring fault element

(1) A person commits an offence if:

(a) a measuring instrument is of a class that, by regulation, must only be used for prescribed purposes; and

(b) the person uses the measuring instrument for trade for another purpose.

Penalty: 100 penalty units.

Strict liability offence

(2) A person commits an offence if:

(a) a measuring instrument is of a class that, by regulation, must only be used for prescribed purposes; and

(b) the person uses the measuring instrument for trade for another purpose.

Penalty: 20 penalty units.

(3) Subsection (2) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code* .

Explanatory Memorandum extract: last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HG Limiting use of certain measuring instruments

17. Proposed subsection 18HG(1) contains an offence provision that relates to the use of certain measuring instruments. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HG(1), a person commits an offence if:

- a measuring instrument is of a class that, by regulation, must only be used for prescribed purposes; and
- the person uses the measuring instrument for trade for another purpose.

18. The offence is punishable by a penalty of 100 penalty units (currently $11,000).

19. It is important for the proper operation of section 18HG that the regulations may prescribe purposes for which only certain classes of measuring instruments may be used. This is so that the circumstances in which certain measuring instruments may be used for certain purposes in the course of trade can be comprehensively and precisely prescribed, and that these prescribed purposes may be relatively readily amended to reflect changes in technology and business practices. Par 4.2 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered when framing this provision.

20. Proposed subsection 18HG(1) is designed to strongly deter people from engaging in the prohibited behaviour.

21. Proposed subsection 18HG(2) contains an offence provision that also relates to the use of certain measuring instruments. Under subsection 18HG(2), a person commits an offence if:

- a measuring instrument is of a class that, by regulation, must only be used for prescribed purposes; and
- the person uses the measuring instrument for trade for another purpose.

22. The offence is punishable by a penalty of 20 penalty units (currently $2,200).

23. Proposed subsection 18HG(3) provides that the offence in proposed subsection 18HG(2) is an offence of strict liability. This provision contains a note referring to section 6.1 of the *Criminal* Code, which explains the concept of strict liability.

24. Offences under subsection 18HG(2) will attract a lesser penalty than the corresponding offence requiring a fault element. This provision is designed to encourage people to be vigilant in ensuring that they do not engage in the prohibited behaviour and to deter people from engaging in that behaviour.

NATIONAL MEASUREMENT ACT 1960 - SECT 18HH

Measuring instruments and methods of measurement used in monitoring compliance with the Act

(1) The regulations may prescribe:

(a) measuring instruments, or classes of measuring instruments, to be used by trade measurement inspectors in the measurement of an article or utility, or a class of articles or utilities, for the purpose of monitoring compliance with this Act; and

(b) the methods of measurement of an article or utility, or a class of articles or utilities, to be used by trade measurement inspectors in monitoring compliance with this Act.

(2) All courts, judges and persons acting judicially must presume that:

(a) a measuring instrument or a class of measuring instruments prescribed for an article or utility, or a class of articles or utilities, will, if used correctly, produce an accurate measurement of the article or utility, or articles or utilities of that class; and

(b) the use of the method of measurement prescribed for an article or utility, or a class of articles or utilities, will produce an accurate measurement of the article or utility, or articles or utilities of that class.

Explanatory Memorandum last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HH Measuring instruments and methods of measurement used in monitoring compliance with the Act

25. Proposed section 18HH deals with measuring instruments and methods of measurement used in monitoring compliance with the *National Measurement Act*. Subsection (1) of this proposed provision provides that the regulations enabled by the *National Measurement Act* may prescribe:

- measuring instruments, or classes of measuring instruments, to be used by trade measurement inspectors in the measurement of an article and utility or a class of articles or utilities for the purpose of monitoring compliance with this Act; and
- the methods of measurement of an article or utility or an article or utilities of a class, to be used by trade measurement inspectors in monitoring compliance with this Act.

26. It is important regulations may be made for these purposes, so that there is a clear public document setting out these important matters, and that the regulations prescribing these matters may be relatively readily amended to accommodate changes in technology and business practices. This will help ensure that inspectors discharge their duties in accordance with the best of current standards and practices.

27. Proposed section 18HH(2) provides for presumptions that must be made by all courts, judges and persons acting judicially:

- a measuring instrument or a class of measuring instrument prescribed for an article or utility in relation to which it is prescribed, will, if used correctly, produce an accurate measurement of the article or utility; and
- the use of the method of measurement prescribed for an article or utility, in relation to which the method is prescribed will produce an accurate measurement.

28. This provision is designed to facilitate administration of the Act, by avoid unnecessary collateral proceedings in relation to the Act. For example, this provision would avoid the need to establish in a number of different proceedings that a measuring instrument will, if used properly, will give an accurate result.

Explanatory Memorandum Last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HI Articles sold by measurement to be sold by net measurement

29. Proposed subsection 18HI(1) contains an offence provision relating to sellers and trade measurement being a net measurement. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HI(1), a person commits an offence if:

- the person sells an article (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
- the price is not determined by reference to the net measurement of the article when sold or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.

30. The offence is punishable by a penalty of 100 penalty units (currently $11,000).

31. This provision is designed to strongly deter people from engaging in the prohibited behaviour.

32. Proposed subsection 18HI(2) contains an offence provision relating to sellers and trade measurement being a net measurement. Under subsection 18HI(2), a person commits an offence if:

- the person sells an article (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
- the price is not determined by reference to the net measurement of the article when sold or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.

33. The offence is punishable by a penalty of 20 penalty units (currently $2,200).

34. Proposed subsection 18HI(3) contains an offence provision relating to possession, offer or exposure for sale and trade measurement being a net measurement. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HI(3), a person commits an offence if:

- the person possesses an article for sale, or offers or exposes it for sale, at a particular time (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
- the price is not determined by reference to the net measurement of the article at that time, or if an alternative time is prescribed in relation to the article, or articles of that class, at an alternative time.

35. The offence is punishable by a penalty of 100 penalty units (currently $11,000).

36. This provision is designed to strongly deter people from engaging in the prohibited behaviour.

37. Proposed subsection 18HI(4) contains an offence provision relating to possession, offer or exposure for sale and trade measurement being a net measurement. Under subsection 18HI(4), a person commits an offence if:

- the person possesses an article for sale, or offers or exposes it for sale, at a particular time (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
- the price is not determined by reference to the net measurement of the article at that time or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.

38. The offence is punishable by a penalty of 20 penalty units (currently $2,200).

39. Proposed subsection 18HI(5) provides that the offences in proposed subsections 18HI(2) and (4) are offences of strict liability. This provision contains a note referring to section 6.1 of the *Criminal* Code, which explains the concept of strict liability.

40. Offences under subsections 18HI(2) and (4) will attract a lesser penalty than the corresponding offence requiring a fault element. These provisions are designed to encourage people to be vigilant in ensuring that they do not engage in the prohibited behaviour and to deter people from engaging in that behaviour.

41. Proposed subsection 18HI(6) provides that section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code* applies to offences against proposed subsections 18HI(1), (2), (3) and (4). This is because these offences could be committed outside Australia in circumstances where it may be appropriate and practicable to take action against the person who committed the offence. Proposed subsection 18HI(6) is designed to be consistent with the principles discussed in par 4.8 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Explanatory Memorandum

Last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HI Articles sold by measurement to be sold by net measurement

42. Proposed subsection 18HI(1) contains an offence provision relating to sellers and trade measurement being a net measurement. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HI(1), a person commits an offence if:

- the person sells an article (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
- the price is not determined by reference to the net measurement of the article when sold or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.

43. The offence is punishable by a penalty of 100 penalty units (currently $11,000).

44. This provision is designed to strongly deter people from engaging in the prohibited behaviour.

45. Proposed subsection 18HI(2) contains an offence provision relating to sellers and trade measurement being a net measurement. Under subsection 18HI(2), a person commits an offence if:

- the person sells an article (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
- the price is not determined by reference to the net measurement of the article when sold or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.

46. The offence is punishable by a penalty of 20 penalty units (currently $2,200).

47. Proposed subsection 18HI(3) contains an offence provision relating to possession, offer or exposure for sale and trade measurement being a net measurement. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HI(3), a person commits an offence if:

- the person possesses an article for sale, or offers or exposes it for sale, at a particular time (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and

- the price is not determined by reference to the net measurement of the article at that time, or if an alternative time is prescribed in relation to the article, or articles of that class, at an alternative time.

48. The offence is punishable by a penalty of 100 penalty units (currently $11,000).

49. This provision is designed to strongly deter people from engaging in the prohibited behaviour.

50. Proposed subsection 18HI(4) contains an offence provision relating to possession, offer or exposure for sale and trade measurement being a net measurement. Under subsection 18HI(4), a person commits an offence if:

- the person possesses an article for sale, or offers or exposes it for sale, at a particular time (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
- the price is not determined by reference to the net measurement of the article at that time or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.

51. The offence is punishable by a penalty of 20 penalty units (currently $2,200).

52. Proposed subsection 18HI(5) provides that the offences in proposed subsections 18HI(2) and (4) are offences of strict liability. This provision contains a note referring to section 6.1 of the *Criminal* Code, which explains the concept of strict liability.

53. Offences under subsections 18HI(2) and (4) will attract a lesser penalty than the corresponding offence requiring a fault element. These provisions are designed to encourage people to be vigilant in ensuring that they do not engage in the prohibited behaviour and to deter people from engaging in that behaviour.

54. Proposed subsection 18HI(6) provides that section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code* applies to offences against proposed subsections 18HI(1), (2), (3) and (4). This is because these offences could be committed outside Australia in circumstances where it may be appropriate and practicable to take action against the person who committed the offence. Proposed subsection 18HI(6) is designed to be consistent with the principles discussed in par 4.8 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

NATIONAL MEASUREMENT ACT 1960 - SECT 18KA

Measurement must be open to scrutiny if purchaser present

Offence requiring fault element

(1) A person commits an offence if:

(a) the person sells an article for a price determined by reference to measurement of the article; and

(b) the article is not packed in advance ready for sale; and

(c) the purchaser is present at the point of sale; and

(d) the measurement is made in either of the following circumstances:

(i) the measuring process is not readily visible to the purchaser;

(ii) any reading or information displayed by the measuring instrument is not readily visible to the purchaser.

Penalty:200 penalty units.

Strict liability offence

(2) A person commits an offence if:

(a) the person sells an article for a price determined by reference to measurement of the article; and

(b) the article is not packed in advance ready for sale; and

(c) the purchaser is present at the point of sale; and

(d) the measurement is made in either of the following circumstances:

(i) the measuring process is not readily visible to the purchaser;

(ii) any reading or information displayed by the measuring instrument is not readily visible to the purchaser.

Penalty: 40 penalty units.

(3) Subsection (2) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code* .

Explanatory memorandum last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18KA Measurement must be open to scrutiny if purchaser present

55. Proposed subsection 18KA(1) provides for an offence in relation to a person who sells an unpackaged article, where the price of the article is determined by measurement of the article, and the customer is present at the point of sale. The offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under proposed subsection 18KA(1), a person commits an offence if:

- the person sells an article for a price determined by reference to measurement of the article; and
- the article is not packed in advance ready for sale; and
- the purchaser is present at the point of sale; and
- the measurement is made in either of the following circumstances:
- the measuring process is not readily visible to the purchaser;
- any reading or information displayed by the measuring instrument is not readily visible to the purchaser.

56. The offence is punishable by a penalty of 200 penalty units (currently $22,000).

57. This provision is designed to strongly deter people from engaging in the prohibited behaviour, and to ensure that customers are given complete information as to the measurement and price of relevant articles.

58. Proposed subsection 18KA(2) provides for an offence in relation to a person who sells an unpackaged article, where the price of the article is determined by measurement of the article, and the customer is present at the point of sale. Under proposed subsection 18KA(2), a person commits an offence if:

- the person sells an article for a price determined by reference to measurement of the article; and
- the article is not packed in advance ready for sale; and

- the purchaser is present at the point of sale; and
- the measurement is made in either of the following circumstances:
  - the measuring process is not readily visible to the purchaser;
  - any reading or information displayed by the measuring instrument is not readily visible to the purchaser.

59. The offence is punishable by a penalty of 40 penalty units (currently $4,400).

60. Proposed subsection 18KA(3) provides that the offence in proposed subsection 18KA(2) is an offence of strict liability. This provision contains a note referring to section 6.1 of the *Criminal Code*, which explains the concept of strict liability.

61. Offences under subsection 18KA(2) will attract a lesser penalty than the corresponding offence requiring a fault element. This provision is designed to encourage businesses to be vigilant in ensuring that they do not engage in the prohibited behaviour, to deter people from engaging in that behaviour, and to ensure that customers are given complete information as to the correct measurement and price of relevant articles.

Appendix 12

COPY OF FURTHER COMMENT

AEMC ERC0092 DRAFT DECISION

METERING DATA SERVICE PROVISION

3 JULY 2010-08-04

MADELEINE KINGSTON

3 July 2010

Telephone 9017-3127

email: mkin2711@bigpond.net.au

Mr. Rory Campbell and Mark Tutaan
Senior Adviser and Project Leader
Australian Energy Commission
Canberra, ACT

by email: submissions@aemc.gov.au

Dear Mr. Campbell and Mr. Tutaan

Further Comment to Draft Determination ERC0092 Metering Data Service Provision and Clarification of Metrology Procedures[1]

I refer to my formal submission sent by email dated 1 July now acknowledged to the AEMC ERC0092 Draft Determination, and submissions to the AER – which appeared to have no impact on their determination in the Jemena Gas Network (NSW) Gas Determination, which is almost bound to be appealed before the Australian Competition Tribunal – in yet another turnaround of decisions impacting on the taxpayers' pockets.

Similar concerns relate to the ACT matter brought to the ACT in Merits Review to be determined on 26 July. I attended the Directions Hearing last week. The perception by Jemena Ltd its servants contractors and/or subsidiary companies, including JGN and ActewAGL Distribution, either directly expressed or through its asset management company Jemena Asset Management (JAM), and by the AER that the matters do not impact on NSW and the ACT is misguided. Similar concerns apply to other states and other distributors.

The Decision by the AER of 11 and 28 June respectively is misguided in the sanctioning of unnecessary CAPEX and OPEX costs associated with water meter upgrades as alleged legitimate *"additional services"* under energy laws, to be incurred by one of two major distributors with all the power – including over policy-makers, rule makers, and politicians, in a monopoly-like market will ultimately be regretted and criticized as much as the ill-fated and ill-considered Victorian smart meter roll out. The MCE is completely dominated by Victorian influences and ill-considered decisions.

I have referred to the Victorian Auditor-General's scathing comments about complete lack of governance leadership and demonstrable economic and technical case. The same issues stand to impact on ill-considered proposals, sanctioned by the AER for the unnecessary upgrade of water meters, conveniently listed as *"additional services"* or *"ancillary services"* in attempts to squeeze non-system, non-distribution excluded services into energy laws.

This I believe is beyond the jurisdiction of energy policy makers, rule makers and regulators under energy laws.

I have sighted what Kevin McMahon has sent to the AEMC. I could not agree more.

Though living in different States, our experiences of the exploitive market are very similar. Many stakeholders from Queensland and other States have contacted me regarding the public concerns that I have expressed. I have reflected back those concerns, with little real expectation of being heeded. When has the consumer voice ever been regarded with anything but disdain. It is not wonder that every one is so very disillusioned.

Nonetheless I urge the AEMC to carefully consider and discuss the consumer submissions received in the ERC0092 Matter and to submissions by consumers to other related arenas.

It is my view that the AMEC, MCE, AER and others "pandering" to those who undoubtedly dominate the market, as Mr. McMahon puts it, may well be laying itself open to legal action eventually, even if statutory provisions don't support this.

The potential also exists, despite all attempts to preclude parties from taking matters before the open courts for market participants to expose themselves to class action litigation - this is

bound to happen eventually. The failure of all policy-makers and regulators to consider comparative law is not merely regrettable, but, forgive me for saying, possibly grossly misguided and bordering on risk-taking.

Perhaps the AEMC, who gets to appoint the Chairperson of the AER is not quite aware of what is happening at the level of regulatory determinations under constant challenge by those with market power.

I am aware of more than one legal matter on foot in the open courts challenging the precepts that have been adopted in the lucrative serviced hot water data metering provider monopoly and exploitive market. The enshrined rights of those covered under contract and the common law cannot be stripped from them by mere statutory provisions. The worm will turn ultimately and will bring in its wake expensive and unnecessary litigation.

Though my formal submissions deals with many of these issues, I cannot resist reinforcement at this stage before the AEMC publishes is Final Determination.

Consumers won't forever tolerate abuse of market power and misguided policies.

I can only begin to suggest that a Pandora's box of issues that appear to have been so incompletely considered in the formulation of state and national laws, with such minimal consideration of the impact of comparative law.

For example, no single State or Commonwealth statutory provision will affect other rights or remedies.

Specifically, for example such a provision **WILL NOT** at the end of the day, even in the name of *"competition policy;"* or the alleged *"the best long term interests of consumers"* or any other such guise, under any circumstances; howsoever engrossed, structured, intimated or otherwise conveyed within such provisions, or for that matter terms of commercial agreement between one party or another, including between government authorities and other entities:[1]

a) **affect or limit a civil right or remedy** apart from such an Act, whether at common law or otherwise

b) **exonerate from liability including under the common law** such recourses, including through, compliance with any given legislative Act or ancillary provision including, Code or Guideline or reference thereto within statutory provisions; generic, state or territory; industry-specific or otherwise; and irrespective of discrepancies; misinterpretations (for example deemed sale and supply of gas or electricity as commodities attractive the full suite of protections under multiple

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[1] One example is the Energy Assets (Restructuring and Disposal) Act 2006 (Qld)
See Queensland Legislative Assembly, Hansard pp 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction, (then) Qld Treasure and Minister for Infrastructure) pp231, 559. 11, 12, 31 October 2006
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_12_WEEKLY.pdf
http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2006/06AC042.pdf

provisions) or any other energy form; or any other commodity or service to a customer (incorporated or otherwise)

c) **hamper, restrict or remove civil or other rights or obligations under other statutory other provisions**, notwithstanding any misguided transparent or hidden warranties or guarantees (for example any warranties or guarantees entered into during the disaggregation of infrastructure or other assets)

d) **over-ride recourse to seeking justice under enshrined rights** within the written or unwritten laws, including under the common law

e) imply or create **limitations as to culpability and/or liability** by the mere existence of perceived exoneration under one enactment or ancillary provision (or for that matter terms of any commercial agreement, whether or hot between government authorities); including but not limited to for example; commercial agreements formed between government organizations during the disaggregation and sale of infrastructure assets;[2] specific legal provisions under state, local government or federal laws; or generic laws; will in any way limit a court's powers under the *Penalties and Sentences Act (2) Without limiting subsection (1), compliance with this Act does not necessarily show that a civil obligation that exists apart from this Act has been satisfied or has not been breached.*

I now refer to provisions currently operational in State jurisdictions. These issues are further discussed and analyzed in the appendices already submitted with my main submission of 1 July and under various headings including Contractual arrangements, and tenancy provisions

If not too late I have no objection to the publication of this brief comment as an additional submission, but at any rate I hope the AEMC and others will take into account in any decision making current and future

Madeleine Kingston

Regards

Madeleine Kingston

Private Stakeholder

[2] See for example the extraordinary and perhaps misguided arrangements, guarantees, warranties and assurances provided to purchases within the energy industry of energy (and impliedly other assets and/or client bases

APPENDIX 15

SOME EVALUATIVE PRINCIPLES

SOME BURNING EVALUATION PRINCIPLES

CONVERTING THEORY INTO PRACTICE[1]

The following principles may assist with general evaluative and record-keeping best practice principles – for all policy, regulatory and other entities working in the public policy arena

Recommendations: General evaluative principles

1. **What was the evaluand *{Funnell and Lenne 1989]* at several levels, mega, macro and micro, since different stakeholders will have different concerns at each of these levels *{Owen (1999:27].***
2. **In choosing design and methods, were any cautions used against replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:].***
3. **What external threats were identified and considered before the data gathering exercise was undertaken?**
4. **What comparisons were used?**
5. **What were the boundaries and objectives?**
6. **Was an evaluability assessment undertaken to more precisely determine the objectives of the intervention, the different possible ways in which the item could be evaluated and the cost and benefits of different evaluation designs[2]**
7. **What were the implied or explicit criteria used to judge the value of the intervention?**
8. **Which evaluation design was employed was employed, since a decision on this issue would impact on the data-gathering measures?**

[1] **How many of these principles were adopted in the various evaluative processes undertaken by those guiding or undertaking major or minor policy reform in various State, Commonwealth or advisory arenas**

[2] **Wholly (1977) *"Evaluability assessment"* in L Rutman (ed.) Evaluation Research Methods: A Basic Guide, Beverly Hills, CA: Sage**
Wholey JK (1983), *Evaluation and Effective Public Management",* Boston: Little, Brown c/f Ovretveit Evaluating Health Interventions. Open University Press. McGraw-Hill (reprinted 2005), Ch 2 p 41

9. **Was the evaluative design in this case case-control, formative, summative, a combination of process (formative) and summative; cost-utility or audit? Will assessment of the data gathered be contracted out to an informed researcher or research team with recent professional development updates and grasp of the extraordinary complexities in the evaluative process?[3]**

10. **How was the needs assessment conceptualized?**

11. **Was the program design clarifiable?**

12. **How was the formative evaluation undertaken?**

13. **What are or were the Program Implementation process evaluation parameters?**

14. **What measures will be in place for evaluating the "settled program" (or policy change proposed)?**

15. **How were short term impacts by conceptualized and identified for the proposed changes?**

16. **What definitive outcomes are sought and how will these outcomes be determined by follow-up?**

17. **Was/will there be time to activate the evaluation's theory of action by conceptualizing the causal linkages?[4] Whilst not ideal, if no theory of action was formulated, perhaps it is not too late to partially form a theory of action plan.**

18. **Was there be room or time in the data-gathering exercise to probe deeper into the answers provided by the people whose lives will be affected by any decision the Government may make to deregulate within the energy industry? The skilled questioner knows how to enter another's experience?[5]**

19. **As Eyler (1979) said *What are figures worth if they do no good to men's bodies or souls?*[6]**

20. **What was be done do assess the intended impacts of the studies undertaken.**

21. **Before the data-gathering exercise was undertaken, and considering the time constraints were these factors considered: feasibility, predictive value; simulations; front-end; evaluability assessment?**

22. **What processes will be undertaken to ensure added-value components to the evaluation?**

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[3] **Patton, M. Q. (2002) *Qualitative Research & Evaluation Method"* Sage Publications**

[4] **Patton, M. E. *The Program's Theory of Action"* in *Utilization Focussed Evaluation*, Sage, Thousand Oaks, 1997, pp 215-238**

[5] **From Halcom's *Epistemological Parables* c/f ibid *Qualitative Research and Evaluation Methods,* Ch 7 *Qualitative Interviewing***

[6] **c/f Ovretveit (1997) *"Evaluating Health Interventions".* Open University Press. McGraw-Hill (reprinted 2005), Ch 1**

23. **How will the agencies/entities utilize case study example in augmenting the**

existing relatively generic study undertaken addressing standard demographics over a large sample without sub-segmentation of more vulnerable groups (such as residential tenants or regional consumers) with more in-depth evaluation?

24. How carefully will the agencies/entities in their parallel Review/Inquiry review in tandem program documentation, especially where there is overlap; or examine complaints and incident databases; form a linkage unit for common issues.

25. To what extent have the following evaluative process been undertaken[7] by both bodies, and all Commonwealth and State bodies including the MCE and COAG Teams, policy advisers and policy-makers regulators:

- **Strongly conceptualized parameters**
- **Descriptive**
- **Comparative**
- **Constructively skeptical**
- **Positioned from the bottom up**
- **Collaborative**

- **Does all of the government, quasi-government, regulators and others a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?"[8]**
- **How will the success of the policy changes ultimately effected be monitored and reevaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?**
- **What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?**
- **Generic protections such as those afforded by trade practices and fair trading provisions are currently insufficient and not quite as accessible as is often purported.**
- **Within an industry that represents an essential service and where large numbers of vulnerable and disadvantaged consumers (not just on financial grounds) are under-represented how will the Government ensure that the rights of specific stakeholder groups are not further compromised?**

[7] Centre for Health Program Evaluation, Melbourne University

[8] Funnell S, Program Logic (1997): *"An Adaptable Tool for Designing and Evaluating Programs"* in Evaluation News and Comment, V6(1), pp 5-17

How accessible will Rule Changing be?

- **How will the success of the policy changes ultimately effected by monitored and re-evaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?**
- **In choosing design and methods, what will be done about replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}.***
- **What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?**
- **How accessible will Rule Changing be?**
- **Perhaps the agencies and entities would consider seeking specialist evaluation input with further evaluation of data when making major regulatory reform decisions**
- **Does Government have a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?"[9]**

Evaluation is a sophisticated and scientific professional challenge. It is not just a trade, though compromises often make it so. Professional evaluators are humble people. They make no pretenses. Regardless of reputation or status, they are never too humble to ask for collaborative input and peer opinion and suggestion. Evaluation is a continuing process and does not start and end with data gathering. They recognize the challenges of best practice data gathering and evaluation and do not pretend to have all the answers.

For instance, check out the University of Alabama's EVALUTALK facility. American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]. This group is the cutting edge of evaluative practice. The rest of the world respects the results this group achieves.

One such evaluator could be Bob Williams a highly respected NZ evaluator with an international reputation and particular expertise in public policy evaluation. He is a frequent visitor to Australia, and is a fairly well known figure in Australasian evaluation, through evaluations, his work within the Australasian Evaluation Society (AES) (which merged with Evaluation News and Comment under Bob Williams' supervision) and his contributors to the two Internet discussions groups Evalutalk and Govteval. He has vas experience of Governmental evaluations.

On the online Evaluator's Forum, EVALUTALK, Bob Williams responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen

Funnell, S, (1997) *"Program Logic: An Adaptable Tool for Designing and Evaluating Programs"* in Evaluation news and Comment, V6(1), pp 5-17

as craftspeople with a pride in their work and the outcomes of their findings long after the consultative process is over.

Williams' specialty is evaluation, strategy development, facilitating large-group processes and systemic organizational change projects. He has his own website under his name. Reviews books for Journal Management Learning, writes for Australasian Evaluation Society's Journal. He wrote the entries on *"systems" "systems thinking" "quality"* and planning Encyclopaedia of Evaluation {Sage 2008) and co-written with Patricia Rogers in *"Handbook of Evaluation" {Sage 2006}.*

There is a great deal of valuable consultative evaluation advice out there for the asking. Lay policymakers are not normally trained in this area.

Bob Williams, has commented as follows on EVALUTALK:

> ***"The Ministry of Education here in New Zealand has been doing something very interesting for the past four or five years. The policymakers along with teachers university researchers and others have been developing a series of "best evidence syntheses". The concept of "best evidence" is fairly comprehensive with a set of agreed criteria for what constitutes "best" and "evidence". As each synthesis is developed it is opened up for discussion with practitioners and academics - and placed on the Ministry of Education's website. I was involved in some of the early discussions (as a facilitator rather than evaluator) and was impressed by both the method and the content of the syntheses. What I found most impressive was that the policymakers were brave include evidence that challenged some of the assumptions that have dominated education policymaking in the past few decades (e. g. the extent to which socio-economic status effects student performance)."***
>
> ***"The 2006 edition of the World Education Yearbook describes the BES Programme "as the most comprehensive approach to evidence" and goes on to say: "What is distinctive about the New Zealand approach is its willingness to consider all forms of research evidence regardless of methodological paradigms and ideological rectitude and its concern in finding...effective appropriate e and locally powerful examples of 'what works."***

Bob Williams suggests that before data gathering is undertaken the underlying assumptions must be made, followed by identification of the environment and environmental factors that will affect the way in which the intervention and its underlying assumptions will interact and thus behave.

A recent dialogue between evaluators on that Discussion List produced a useful list of criteria that would cover the processes that should ideally be undertaken.

Though the inputs came from a number of Discussion List members, I cite below how Bob Williams[10] a respected New Zealand evaluator with an international reputation summarized as follows inputs from various evaluators participating on the Discussion List[11].

Position the evaluation – that is, locate the evaluation effectively in its context, in the broader systems.

MK Comment:

This is impossible to achieve without a comprehensive informed SWOT analysis that goes well beyond background reading of other components of the internal energy market –a highly specialized exercise, especially in an immature market. Prior to undertaking the survey mentioned to ascertain market awareness, what steps were taken to mount a strengths and weakness analysis (SWOT).

If undertaken, where can the results be located? This type of exercise is normally undertaken prior to the gathering of data so that the survey data is meaningful, is robust to address a range of relevant factors; and not simply narrowly focused on data-gathering that may yield compromised results if the goals and parameters that could have been initially identified in a SWOT analysis were not clearly identified and addressed in the study design.

1. ***Clarify the purpose and possibilities, etc (design phase – why do it)***
2. ***Plan the evaluation (design phase) (what do we want to know)***
3. ***Data Gathering (how will we find out what we want to know)***
4. ***Making meaning from the data (e.g. analysis; synthesis; interpretation (how can we get people to be interested in the evaluation processes/results***
5. ***Using the results (shaping practice) (what would we like to see happen as a result of the evaluation and what methods promote that?)***

Stanley Capella on the University of Alabama Online Evaluation Discussion Group EVALUTALK has whether evaluators should push for program decisions based on evaluation, or is this an advocate's role.

Bob Williams a New Zealand Evaluator on the same discussion group has responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen as craftspeople with a pride in their work and the outcomes of their findings.

As suggested by *Ovretveit*[12]

[10] ~~http://www.eval.org~~

[11] Bob Williams, Discussion List Member Evalutalk

[12] Ovretreit (1997) *Evaluating Health Interventions.* Open University Press. McGraw-Hill (reprinted 2005), Ch 6

"Design is always balancing trade-off." "Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives." These parameters cannot be decided "without some consideration of possible designs and the answers they could give" (since) planning is an interaction between the possible design and the questions and purposes."

"Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention."

"Randomized experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable comparisons. There is not a staggering number of opportunities for its use[13]

"Politicians often do not examine in detail the cost and consequences of proposed new policies, or of current policies." [14]

In discussing better informed political decisions *Ovretreit* noted, for example, the lack of prospective evaluation or of even small scale testing of internal market reforms in Sweden, Finland and the UK. Whilst he did not infer that all new policies should be evaluated or that the results of an evaluation should be the only basis on which politicians decide whether to start, expand or discontinue health policies, just that politicians could sometimes save public money or put it to better use if they made more use of evaluation and of the *"evaluation attitude.*[15]

Ovretreit[16] **embraces six evaluation design types: descriptive (type 1); audit (type 2) outcome (type); comparative (type 4); randomized controlled experimental (type 5) and intervention to a service (type 6) Each of these six broad designs can and have been successfully used in a variety of interventions targeted at examining policies and organizational interventions, depending on which of the four evaluation perspectives have been selected: quasi-experimental; economic; developmental or managerial.**[17]

In recent years there has been increasing pressure on all scientists to communicate their work more widely and in more accessible ways. For evaluators, communication is not just a

[13] **Webb et all 1966 c/f Ovretveit Evaluating Health Interventions, *"Evaluation Purpose Theory and Perspectives"* Ch 2, p31**

[14] **Ibid, Ovretveit Ch 2, p 27**

[15] **Ibid, Ch 2, p27**

[16] **Ibid Ovretveit , Ch 3 *Evaluating Health Interventions Six Designs***

[17] **Ibid Ovretveit's Ch 3 Model Evaluating Health Interventions, p73**

question of improving the public image of evaluation, but an integral part of their role and one of the phases of an evaluation. It is one of the things they are paid to do. Here we consider evaluators' responsibility for communicating their findings and the different ways in which they can do so.

The following is an abstract from Edmund Chatto's 1995 Research Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme.[18] The paper:

> ***".....addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained.***
>
> ***The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations. This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development."***

Daniel L Shufflebaum's Program Evaluations Metaevaluation Checklist is worth looking at.[19]

Michael Scriven's Key Evaluation Checklist is a useful resource[20]. Scriven's Checklist poses some challenging questions that are touched on here in good spirit:

> - ***Can you use control or comparison groups to determine causation of supposed effects/outcomes?***
> - ***If there is to be a control group, can you randomly allocate subjects to it? How will you control differential attrition, cross-group contamination, and other threats to internal validity.***
> - ***If you can't control these, what's the decision-rule for aborting the study? Can you single or double-blind the study.***
> - ***If a sample is to be used, how will it be selected; and if stratified, how***

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[18] **Chattoe, E. (1995) *"Can Sociologists and Economists Communicate?"* Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Department of Sociology, University of Surrey, Guildford, GU2 5XH (plus an impressive array of reference on Consumer Behaviour)**

[19] **Shufflebeam, D. L. (1999) *"Program Evaluations Metaevaluation Checklist",* based on The Program Evaluation Standards (University of Michigan)**

[20] **Michael Scriven's *Key Evaluation Checklist* <www.evaluation.wmich.edu>**

stratified?

- *If none of these apply, how will you determine causation (the effects of the evaluand)*
- *If judges are to be involved, what reliability and bias controls will you need (for credibility as well as validity)?*
- *How will you search for side effects and side impacts, an essential element in almost all evaluations*
- *Identify, as soon as possible, other investigative procedures for which you'll need expertise, time, and staff in this evaluation, plus reporting techniques and their justification*
- *Is a literature review warranted to brush up on these techniques?*

Texts such as *Schiffman and Kaunk's* Consumer Behaviour[21] may provide some useful insights during the evaluative process.

As previously mentioned, The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols o Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

"Logic models can be described as frameworks for thinking about (including evaluating a program in terms of its impact

Stakeholders processes inputs etc. Typically these run from inputs through activities/processes to outputs/products outcomes/results and impact including beneficiaries"[22]

In response to Fred Nichols comments, Sharon Stone on the same EVALUTALK, comments on the assumptions that include program theory and external conditions (meaning factors not included that could affect positively or negatively the hypothesized chain of outputs, outcomes.

Stone[23] poses two questions:

[1] **Schiffman, Leon G and Kanuk, Leslie Lazar Consumer Behaviour. (1994) Prentice-Hall International Editions**

[2] **Fred Nichols, Senior Consultant, Distance Consulting on EVALUTALK, American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]; on behalf of; nickols@att.net**

[23] **Sharon Stone, Evaluator, on EVALUTALK, University of Alabama September 2007**

> *"Are these just "logical chains" – or are these cause the effect"*
>
> *Either way – are things really that simple – or do we need to pay more attention to those 'external' factors" – and how they are identified as external*

Patton (1980)[24] **has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.**

Patton **claims:**

> *"One reason why evaluation can be confusing is that there are so many types of evaluation. Case- control, formative, summative, process, impact, outcome, cost-utility, audit evaluations.*[25]

Funnel (1996) **has some views on Australian practices in performance measurement. Her 1996 article in the Evaluation Journal of Australasia**[26] **provides broad-brush review of the state of evaluation for management in the public service.**

Funnell **provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as** ***'managerial accountability.'*** **p452).**

As well ***Funnell*** **explores the impact of cutbacks on the conduct of evaluations, the levels of evaluation expertise available and on evaluation independence and rigor. Her arguments on the impact of market-based policies imply there could be both benefits and dangers.**

Hawe and Degeling (1990)[27] **have some ideas of survey methods and questionnaire design. These authors describe random, systematic, convenience and snowballing sampling and look at questionnaire layout and presentation; the need for piloting and some simpler basic description analysis of quantitative and qualitative data. For more sophisticated analysis such as may be warranted before any decision is made by the Government to deregulate in the energy industry may warrant the employment of a highly trained researcher, recently trained.**

[24] Patton (1980) *"Qualitative Evaluation Methods",* London Sage, c/f Evaluation Purpose and Theory in Evaluating Health Interventions

[25] See Patton, M. Q. (1997) Utilisation Focused Evaluation. The new Century text 3rd edn.

[26] Funnell S (1996): *"Reflections on Australian practices in performance measurement",* 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

[27] Hawe, P., Degeling D., & Hall, J (1990) *Evaluating Health Promotion* Ch 7 Survey Methods and Questionnaire Design, Sydney, McLennan & Petty

These authors examine a) the types of items; (b) questionnaire layout and presentation; (c) the need for piloting (this is often overlooked by evaluators undertaking small-scale evaluations; d) maximizing response rates.

Note their comments on the analysis of quantitative and qualitative data. These comments describe simple, basic descriptive analysis. For more sophisticated analysis evaluators should employ a trained researcher.

Funnel (1997)[28] **has discussed program logic as a tool for designing and evaluating programs. This is simply a theory about the causal linkages amongst the various components of a program, its resources and activities, its outputs, its short-term impacts and long-term outcomes. It is a testable theory, and must be made explicit as a first step to testing its validity.**

The process by which this is achieved is program analysis. This is a job for an expert in evaluation where major government policy is being reexamined.
As *Funnell*[29] points out, the many models of program theory

> ***.... "date back to the 1970s and include amongst others Bennett's hierarchy of evidence for program evaluation within the context of agricultural extension programs and evaluability assessment techniques developed by Wholey and others."***

A typical program logic matrix may include a grid that includes ultimate and intermediate outcomes, and immediate impacts, with success criteria being measurable and specific in accordance with the SMART principles.

One theme in the responses (TO EVALUTALK) as summarized by Johnny Morrell), is that

> ***"..... logic models can be seen as constructions that can be used to test key elements of a program's functioning.***[30]
>
> ***Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms.***

[28] **Funnel S (1997) *"Program Logic: An adaptable tool for designing and Evaluating Programs"* in *Evaluation News and Comment* v.6(1) 1997 pp 5-17. Sue Funnell is Director of Performance Improvement Pty Ltd and chair of the AES Awards Committee.**

[29] **Ibid Funnell Program Logic, p5**

[30] **American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU] as summarised by Johnny Morrell, PhD, Senior Policy Analyst, Member American Evaluation Association EVALUTALK Discussion Group**

> ***To me, this gets at the notion that while there is a useful distinction between "design" and "logic model", the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.***
>
> ***From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference. But the distinction is not clean.***
>
> ***Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms. To me, this gets at the notion that while there is a useful distinction between "design" and "logic model", the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.***
>
> ***From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference.***
>
> ***But the distinction is not any given logic model is never anything more than a work in progress that has to be updated on a regular basis. With this approach, logic models (and the evaluation plans they drive), can be updated as the consequences of program action evolve.***[31]
>
> ***The major point in this category is that "design" means a lot more than a logic for looking at data. According to this view, "design" includes procedures for gathering data, schedules for doing evaluation tasks, and so on***

Johnny Morrell calls this:

> ***"an evaluation plan and reserve the term 'design' for the logical structure of knowing if observations have meaning."***[32]

There is a consensus amongst EVALUTALK members that:

> ***"the use of logic models (may be seen as) a consensus building tool. The notion is that logic models come from collaborative cross- functional input from various evaluator and stakeholder groups. Thus, the act of building a logic***

[3] **Johnny Morrell on EVALUTALK, American Evaluation Association**

[32] **Ibid Johnny Morrell**

model works toward common vision and agreed upon expectations."

Swedish evaluator *John Ovretreit (1987, reprinted 2005)*[33] has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.

***Rossi's'* evaluation theory[34] is about whether the intentions of the program were effected by delivery to the targeted recipients.**

This task is typically undertaken by independent evaluators and can be a stand-alone evaluation if the only questions addressed focus on operational implementation, service delivery and other matters. This form of evaluation is often carried out in conjunction with an impact evaluation to determine what services the program provides to complement findings about what impact those services have.

One example of a combined process and summation evaluation is shown in the study reported by *Waller, A. E et al (1993)*[35]

In that study, the summative component was inbuilt into the original program design. The findings were inclusive and relatively useless primarily because of flaws in conceptual assumptions made. However there were lessons to be learned in designing other similar studies, so the pilot study was not entirely wasted.

***Rossi* examines outputs and outcomes as distinct components of an evaluative program, with the former referring to products or services delivered to program participants (which can be substituted for end-consumers) and with outcomes relating to the results of those program activities (or policy changes).**

Program monitoring can be integrated into a program's routine information collection and reporting, when it is referred to as MIS, or management information system. In such a system data relating to program process and service utilization is obtained, compiled and periodically summarized for review.

The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols of Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

***Patton (1980)*[36] has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.**

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[3] Ovretreit (1997) *Evaluating Health Interventions* Open University Press. McGraw-Hill (reprinted 2005)

[4] Rossi, P., Freeman and Lipsey, M. (1995) *"Monitoring Program Process and performance: Evaluation: A Systematic Approach"* (6th edition) Sage, pp 191-232

[5] Waller, A. E, Clarke, J. A., Langley, J. D. (1993). An Evaluation of a Program to Reduce Home Hot Water Temperatures. *Australian Journal of Public Health (17(2), 116-23.*

Patton claims:

> ***"One reason why evaluation can be confusing is that there are so many types of evaluation. Case control, formative, summative, process, impact, outcome, cost-utility, audit evaluations.***[37]

Funnel (1996) **has some views on Australian practices in performance measurement. His 1996 article in the Evaluation Journal of Australasia[38] provides broad-brush review of the state of evaluation for management in the public service.**

Funnell **provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as 'managerial accountability p452)'.**

Swedish evaluator ***John Ovretreit (1987, reprinted 2005)***[39] **has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.**

As suggested by ***Ovretveit***[40]

> ***"Design is always balancing trade-off." "Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives." These parameters cannot be decided "without some consideration of possible designs and the answers they could give" (since) planning is an interaction between the possible design and the questions and purposes."***
>
> ***"Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention."***
>
> ***"Randomised experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable***

[5] Patton (1980) Evaluation Purpose and Theory

[37] See Patton, M. Q. (1997) *"Utilisation Focused Evaluation."* The New Century Text 3rd edn.

[38] Funnell S (1996): *Reflections on Australian practices in performance measurement",* 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

[39] Ovretreit (1997) *Evaluating Health Interventions.* Open University Press. McGraw-Hill (reprinted 2005)

[40] Ibid Ovretreit (1997) (reprinted 2005), Ch 6

> ***comparisons. There is not a staggering number of opportunities for its use***[41]

Of quality assurance *Davey and Dissinger* said

> ***"Quality assurance (QA) and evaluation are complementary functions which collect data for the purpose of decision- making. At the process level, quality assurances provides both a system of management and also a framework for consistent ser4vice delivery with supporting administrative procedure. When implemented appropriately QA methods provide rapid feedback on services and client satisfaction, and a means to continuously upgrade organizational performance.***
>
> ***Despite client feedback being part of QA, it lacks the depth provided by evaluation in determining individual client outcomes from a person centered plan for service delivery.***[42]

[41] **Webb et all 1966 c/f Ovretveit *Evaluating Health Interventions, Evaluation Purpose Theory* and perspectives Ch 2, p31**

[42] **Davey, R. V. and Dissinger, M (1999) *"Quality Assurance and Evaluation: essential complementary roles in the performance monitoring of human service organisations."* Paper presented at Australasian Evaluation Society Conference, Melbourne 1999, p 534-550**

Bill Fear[43]/[44] recently wrote to EVALUTALK, the American Evaluation Association Discussion Group on the topic of self-efficacy. His insights are topical so I quote them below:

> ***Why do policy makers make such bad policy most of the time? Why is good policy so badly implemented most of the time? Why don't policy makers listen to honest evaluations and act on the findings? And so on.***
>
> ***Could we actually bring about meaningful changes by giving people the tools to think things through and act accordingly? Does empowerment actually mean anything? (Well, yes, but it seems to lack substance as a term in its own right.)***
>
> ***Does anybody ask these questions? Or is everybody just concerned with the latest methodology which will always be historic not least because it can only be applied to the past (there is an argument there).***
>
> ***I digress. The point is, to my mind at least, the importance of self-efficacy in the field of evaluation has been overlooked at our expense.***

MK Comment:

See my posts on Gov2 re evaluation and its role in public policy

Evaluation and analysis factors impacting on market failure. Interpretations that switching conduct is predictive of real outcomes in an unstable market are yet to be substantiated. Much discussion on the Productivity Commission site and in responses to AEMC and other consultative processes has focused on behavioural economics and the value of superficial evaluation of switching conduct. I will not repeat those arguments here, save to say that the data relied upon does not appear to robustly embrace these principles.

[43] **Bill Fear Online contribution to EVALUTALK, the American Evaluation Association Discussion Group April 2008**

[44] **~~Bill Fear, BA (Education)~~ MSc (Social Science Research Methods), PhD (Cognitive Psychology). Member UK Evaluation Society. He sits on the UKES council, and the American Evaluation Association. He has excellent research and evaluation experience, as well as solid grounding in PRINCE project management. He has attended top level training programs in the US with both Michael Scriven and Michael Patton. Recent experience include working for the Office for National Statistics where he led a large index rebasing project, and helped set up the development of both a banking and insurance index for the corporate sector. He is currently running the Investing in Change project (a Wales Funders Forum project). This project is using an evaluation framework to explore funding of the voluntary sector from a funders perspective. A recent achievement in this includes building a partnership with the Directory of Social Change to deliver a Funding Guide for Wales. He presents workshops on the emerging findings of this project to a wide range of policy makers. He is frequently asked to comment on evaluation methodology and proposals**

Finally for those interested I pass on the invitation extended by Patricia Rogers and Jane Davidson of the American Evaluation Association Discussion Group EVALUTALK who will join respected evaluator Michael Scriven in a guest blogging week during the week beginning 19 April 2010 (this week)

http://GenuineEvaluation.com.

discussion, see http://genuineevaluation.com/michael-scriven-to-be-our-celebrity-guest-blogger-next-week/

Daily email updates:

http://feedburner.google.com/fb/a/mailverify?uri=GenuineEvaluation&loc=en USRSS feed: http://genuineevaluation.com/feed/

Michael Scriven is Associate Director Evaluation Centre, Western Michigan University. He is author of Evaluation Thesaurus[45] and many other books and resources. Western Michigan University Kalamazoo, Michigan (BA and MA, Melbourne University)

Prof Patricia Rogers is a Research Program Leader at RMIT Melbourne with a primary focus of government, social and public policy

Dr. Jane Davidson returned to Aotearoa New Zealand in 2004 from the United States, where she served as Associate Director of the internationally recognized Evaluation Center at Western Michigan University. There, she launched and directed the world's first fully interdisciplinary Ph.D. in evaluation. http://evaluation.wmich.edu/idpe/

She is author of Evaluation Methodology Basics: The Nuts and Bolts of Sound Evaluation (2004, Sage Publications).

Prepared and collated by (UPDATED 22 April 2010)

Madeleine Kingston

~~Evaluation Thesaurus 4th Edn~~ Sage Publications California 1991