

**AUSTRALIAN ENERGY REGULATOR  
REVISED GAS ACCESS PROPOSAL  
JEMENA GAS (PTY) LTD  
MADELEINE KINGSTON  
OPEN SUBMISSION<sup>1</sup>  
APRIL 2010**

**Available to be freely quoted with appropriate citation  
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<sup>1</sup> Intended also for the Australian Energy Market Commission, Ministerial Council on Energy; Australian Energy Market Operator; Federal Treasury and the National Measurement Institute to supplement previous communications

## DISCLAIMERS

Subject to appropriate acknowledgement and citation, I place no restrictions on dissemination of this material with the disclaimers herewith. This material, including all appendices have been prepared as a public document to inform policy-makers, regulators and the general public and hopefully to stimulate debate and discussion about reforms in a climate where regulatory burden and consumer protection issues are being re-examined. Its central aim is to provide a selection of collated views of stakeholders.

The material has been prepared in honesty and in good faith, expressing frank opinion and perceptions without malice about perceived systemic regulatory deficiencies and shortfalls, market conduct and poor stakeholder consultative processes, with disclaimers about any inadvertent factual or other inaccuracies. Perhaps I should go a step further and take a leaf from the wording of disclaimers adopted by CRA in their various reports<sup>2/9</sup> and add that

*“I shall have and accept no liability for any statements opinions information or matters (expressed or implied) arising out of contained in or derived from this document and its companion submissions and appendices) or any omissions from this document or any other written or oral communication transmitted or made available to any other party in relation to the subject matter of this document.”*

The major case study material presented as one of the attachments has been deidentified but represents actual case examples of consumer detriments, some seen to be driven by existing policies on the brink being carried into the National Energy Law and Rules at Second Exposure Draft stage with significant implications for generic laws and for general and industry-specific consumer protections. Implementation is expected by September 2010 when the Bill is introduced into Parliament. In that particular matter I acted as a nominated third party representative and am able to testify through direct experience my endeavours to have the matter fairly and appropriately handled by numerous bodies fulfilling a public role

Other case studies referred to have also been deidentified and reproduced or discussed with the prior consent in principle by organizations original reporting and publishing. Every endeavour has been made to acknowledge as accurately as I can the numerous citations included from material accessible from the public domain.

As to perceptions and opinions expressed by a private citizen, and those referred to from public domain documents, these too are expressed in honesty, good faith and without malice or vexatious intent, but reflect genuine concerns about policy and regulatory provision and complaints and redress mechanisms.

*Madeleine Kingston*

**Madeleine Kingston**

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<sup>2 9</sup> See for example the CRA commissioned Report to the AEMC’s Review of the effectiveness of competition in the gas and electricity retail markets in Victoria 2008. This report was analyzed in my 2007 2-part submission to the AEMCs Victorian review of retail energy competition

## GLOSSARY

Abbreviation	Definition
ACCC	Australian Consumer and Competition Commission
AER	Australian Energy Regulator
AEMO	Australian Energy Market Operator
ACL	Australian Consumer Law
ACL Bill or Bill	Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010
Applied ACL	Applied Australian Consumer Law
ASIC Act	<i>Australian Securities and Investments Commission Act 2001 (Cth)</i>
BWH	Bulk hot water jurisdictional arrangements in three states, Victoria, New South Wales and Queensland. Contains discrepancies with other jurisdictional provisions; definitional and interpretational conflict within energy and other provisions  Includes derived costing based on readings of water meters effectively posing as gas meters wherein (in Victoria) a meter are described as “ <i>a device that measures the consumption of bulk hot water</i> ”  <i>See annotated glossary and submission to National Energy Consumer Framework NECF2 Package February 2010</i>
CALV (Cwth)	Commonwealth Assembly of Legislative Counsel of which Eamonn Moran <sup>3</sup> is current President. The Commonwealth Association of Legislative Counsel publishes a Journal called The Loophole, from which I have included pertinent citations relating to legislative drafting
CC Act	<i>Competition and Consumer Act 2010</i>
CPF	Productivity Commission’s Review of Australia’s Consumer Policy Framework 2008
CPRS	Carbon Pollution Reduction Scheme (CPRS). <sup>4</sup>
CRA	CRA International Pty Ltd
Corporations Act	<i>Corporations Act 2001 (Cth)</i>

<sup>3</sup> Eamonn Moran, QC (Law Draftsman, Department of Justice, Hong Kong, formerly Chief Parliamentary Counsel for the State of Victoria with 32 years of legislative drafting)

<sup>4</sup> Major Energy Users (2009). “*The effectiveness of current gas and electricity emergency arrangements.*” Discussion Paper prepared by Energy Security Working Group

Corporations law	The ASIC Act and the <i>Corporations Act 2001</i> (Cth)
COAG	Council of Australian Governments
CPF	Productivity Commission's Review of Australia's Consumer Policy Framework 2008
CPRS	Carbon Pollution Reduction Scheme (CPRS).
CRA	CRA International Pty Ltd
DHS	Department of Human Services, (incorporating the former Dept of Housing). This body acts as Landlord/OC for public housing
DPI	Department of Primary Industries Victoria The DPI has statutory responsibilities under <i>GIA</i> and <i>EIA</i> and overall consumer protection and service quality
EAG	Energy Action Group (President John Dick) A 33-year old unfunded not for profit incorporated association representing the interests of residential energy consumers. EAG has had over 16 years experience with regulatory processes and determinations in the gas and electricity markets. Andrea Sharam was previously President EAG <sup>5</sup>

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<sup>5</sup> Andrea Sharam, PhD currently works at the Community Housing Federation of Victoria as its Partnerships, Policy & Projects Officer. Prior to this role she was a councillor at the City of Moreland where she held the role of Councillor Responsible for Affordable Housing. In 2008 Andrea completed pioneering research for Women's Information Support & Housing in the North; 'Going it Alone: Single, Older Women and Hidden Homelessness'. She examined the role of sub-prime markets in essential services for her PhD thesis. Andrea was the President of EAG and has an extensive background in advocating around essential services. She also holds a Graduate Diploma in Planning, Policy & Landscape

In most of my public submissions I have extensively cited from Dr. Sharam disturbing reports including EAG Retailer Non-Compliance Report Power Markets and Exclusions

EIO	Energy Industry Ombudsman SA
ESC	<p>Essential Services Commission Victoria, set up under the Essential Services Commission Act 2001.(ESC Act)</p> <p>The ESC is required under s15 of the ESC Act 2001 to avoid regulatory overlap and conflict with other schemes<sup>6</sup></p> <p>Administers the Electricity Industry Act 2001 (EIA)</p> <p>Administers Gas Industry Act 2001 (GIA) Formulated and administered the “bulk hot water arrangements” the policy provisions and derived costing formulae responsibilities transferred to the Department of Primary Industries (DPI) Victoria in mid-2008</p> <p>Similar BHW provisions are in existence in NSW and Queensland but not in other states</p>
ESC RRI	Essential Services Commission (Victoria) (2008) Review of Regulatory Instruments. See also (Further) Amendments to ERC (Vic) intended effective date 1 October 2009 <sup>7</sup>
ERC	<p>Energy Retail Code (Victoria)</p> <p>The BHW provisions under the BHW Guideline 20(1) authored originally in 2004 by the ESC were transferred to the Victorian Energy Retail Code wherein crucial energy terms and interpretations contained in all other energy provisions, including the GIA and the Gas Industry Distribution Code (GIDC) (Victoria) appear to have creatively redefined allowing for apparent distortion of such fundamental terms as meter, disconnection sale and supply of gas or electricity</p>

<sup>6</sup> See Madeleine Kingston (2008) Response to NECF Consultation RIS Part 3 Detailed Discussion of operational parameters, oversight of Energy and Water Ombudsman under the terms of EWOV’s constitution and charter  
[http://www.ret.gov.au/Documents/mce/documents/Madeleine\\_Kingston\\_part320081208120718.pdf](http://www.ret.gov.au/Documents/mce/documents/Madeleine_Kingston_part320081208120718.pdf) . Indexed submission with executive summary

<sup>7</sup> See especially responses of TRUenergy and Origin Energy regarding BHW arrangements in relation to credit rating in their respective summarized responses to the ESC Final Decision Review of Regulatory Instruments, both suggesting that there were remaining ambiguities regarding whether the use of the term (unpaid) water bills was intended to capture BHW and whether it was appropriate to include reference to water bills at all given that the ERC relates to energy provision. ESC confirmed that historically water bills may be included within assessment of energy credit rating, but also that BHW was not intended to be captured.  
 Nevertheless such further clarification has not been included in the suggested pending Amendments to the Victorian ERC. At the very least confusion in the minds of all stakeholders should be supported with direct reference within the amended Victorian ERC, to be effective from 1 October 2009. It is regrettable that the wrongful disconnection procedures have been removed and that better clarity was never obtained as to disconnection of heated water supplies s opposed to gas or electricity within these provisions and the BHW provisions. The *GIA* and *GDSC* refers to disconnection or decommissioning of gas quite specifically as being the discontinuance of gas supply or suspension of the flow of gas. Disconnection of heated water supplies as a composite product hardly fits this definition.

EIOWA	<p>Energy Industry Ombudsman (Western Australia) Ltd See Receives investigates and facilitates resolution of complaints regarding supply of gas or electricity (but not water) within the limits of constitution only but has limited binding power. Constitution<sup>8</sup></p> <p><b>“Distribution Customers”</b> means –</p> <p>(a) for the purposes of calculating Customer Numbers under clause 20.5(a), Gas Customers receiving gas, or entitled to receive gas, at an outlet point on a gas distribution system<sup>9</sup> owned or operated by a Member holding a licence of a type referred to in paragraph (b) of the definition of Licence; and</p> <p>(b) for the purposes of calculating Customer Numbers under clause 20.5(b), Electricity Customers receiving electricity, or entitled to receive electricity, at a point of connection on an electricity distribution system owned or operated by a Member holding a licence of a type referred to in paragraph (d) or (e) of the definition of Licence.</p>
	<p><b>“Retail Customers”</b> means:</p> <p>(a) for the purposes of calculating Customer Numbers under clause 20.5(a), Gas Customers buying gas from a Member holding a licence of a type referred to in paragraph (a) of the definition of Licence and having an arrangement to transport gas through the gas distribution network to its customers; and</p> <p>(b) for the purposes of calculating Customer Numbers under clause 20.5(b), Electricity Customers buying electricity from a Member holding a licence of a type referred to in paragraph (c) or (e) of the definition of Licence and having an arrangement to transport electricity through an electricity distribution system to its customers</p>

<sup>8</sup> [http://www.ombudsman.wa.gov.au/energy/doc/EIO\\_Constitution\\_Nov\\_08.pdf](http://www.ombudsman.wa.gov.au/energy/doc/EIO_Constitution_Nov_08.pdf)

<sup>9</sup> Regardless of ownership of water infrastructure assets, a gas distribution system cannot possibly include a hot water flow meter. Gas does not pass through a water meter of any description. A hot water flow meter measures water volume not heat, In multi-tenanted dwellings where a single gas-fired or electricity-fired boiler tank is supplied with heat through a single gas or electricity meter; the supply of such energy is to the Owners’ Corporation (body Corporate entity) not the end-user of heated water, the heating component of which cannot be measured by legally traceable means; whilst the water is not owned by the supplier of alleged heated water even if water infrastructure is owned by a distributor or retailer or their servants, contractors or agents, in-house, related body or other third party agent, licenced or otherwise. Therefore s46 of state and territory gas and electricity acts are inappropriately applied to end-users of heated water where that water is supplied from a communal boiler tank and reticulated in water services pipes.

	<p><b>“Licence”</b> means:</p> <p>(a) a trading licence in force under the <i>Energy Coordination Act 1994</i>;</p> <p>(b) a distribution licence in force under the <i>Energy Coordination Act 1994</i>;</p> <p>(c) a retail licence in force under the <i>Electricity Industry Act 2004</i>, including a licence of this type deemed to be in force pursuant to section 46 of that Act;</p> <p>(d) a distribution licence in force under the <i>Electricity Industry Act 2004</i>, including a licence of this type deemed to be in force pursuant to section 46 of that Act; or</p> <p>(e) an integrated regional licence in force under the <i>Electricity Industry Act 2004</i> that authorizes either or both of the activities described in sections 4(1)(c) or (d) of that Act, including a licence of this type deemed to be in force pursuant to section 46 of that Act.</p>
EWOV	<p>Energy and Water Ombudsman</p> <p>As discussed in my Part 3 submission to the NECF Consultation RIS Part 3 at extraordinary length with substantiation by case study of complaints handling by this body, and by discussion of existing provisions and inter-body inter-relations, the body, misleading known as Ombudsman (implying to most people direct accountability to Parliament and a degree of independence that it simply does not enjoy, despite its incorporation as a company limited by guarantee, this body handles complaints from consumers about energy provision,</p> <p>Its jurisdictional parameters are exceptionally limited. EWOV cannot become for example become involved in disputes about policy matters, tariffs and the like</p> <p>Redress options through EWOV are frequently unsatisfactory and as observed by Andrea Sharam in Power Markets and Exclusions, with regard to financial hardship, for those for whom repayment plans are negotiated, the end-consumer often ends up in worse spiraling debt than before.</p> <p>EWOV can only achieve outcomes where both parties agree – being a conciliatory body with exceptionally limited powers over energy suppliers otherwise, who fund the scheme by paying membership fees to EWOV, a body structured in such a way as to be substantially subservient to its parent company ESC despite protests from both bodies and from the DPI.</p> <p>This is extensively discussed in my Part 3 submission to the MCE SCO Consultation RIS.</p>
	<p>In relation to BHW matters, EWOV is entirely powerless to achieve fair and equitable outcomes for consumers, sometimes suggestion s55 RTA options as a pragmatic cost-recovery solution. There is much more to the issue that cost recovery, which can be negated by the mere cost of failing fees and other costs in stress and time for utility costs that should in the first place be the responsibility of Landlords and/or OCs.</p>

	RTA options are less than satisfactory and even when brought to the civil list did not result in best outcomes or deal with contractual issues with third parties or the policies and conduct that cause detriment. Current VCAT outcomes show heavy weighting in favour of landlords
	Those receiving BHW are not embedded consumers though this is often misunderstood by numerous parties. I now refer to the disturbing report by EAG <sup>10</sup> dated 2004 following FOI investigation of complaints handling (attached as appendix). That report examined the attitude of the ESC, the total lack of triangulation in reviews of its own reporting performance and the perceived gaps in EWOV's performance and reporting. I quote directly below from the full report also for immediate reference as a public domain document
Federal Court	Federal Court of Australia
First ACL Bill	Trade Practices Amendment (Australian Consumer Law) Bill 2009 The Bill has been passed through Parliament and became effective on 14 April 2010
FT Act or FT Acts	State and Territory Fair Trading Legislation, including <i>Fair Trading Act 1987</i> (New South Wales), <i>Fair Trading Act 1999</i> (Victoria), <i>Fair Trading Act 1989</i> (Queensland), <i>Fair Trading Act 1987</i> and <i>Consumer Transactions Act 1972</i> (South Australia), <i>Fair Trading Act 1987</i> and <i>Consumer Affairs Act 1971</i> (Western Australia), <i>Fair Trading Act 1990</i> (Tasmania), <i>Fair Trading Act 1987</i> and <i>Fair Trading (Consumer Affairs) Act 1973</i> (Australian Capital Territory) and <i>Consumer Affairs and Fair Trading Act 1990</i> (Northern Territory).
FTA	Fair Trading Act 1999
GDSP	<i>“gas distribution supply point”</i>
GIA	<i>Gas Industries Act 2001</i> which is taken as one with the <i>Gas Industry (Residual Provisions) Act 1994</i> .
GIRPA	<i>Gas Industry (Residual Provisions) Act 1994</i> (Victoria)
GCF	Gas Connections Framework for the Connection of Retail Customers to Natural Gas Distribution Networks – a component of the NECF
IGA	<i>Intergovernmental Agreement for the Australian Consumer Law</i> signed on 2 July 2009 by COAG

<sup>10</sup> EAG Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code. Found at <http://www.chronicillness.org.au/utilitease/downloads/Energy%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc>



LI Act	<i>Legislative Instruments Act 2003 (Cth)</i>
MCCA	Ministerial Council on Consumer Affairs A body responsible for energy policy and legislation for which the Commonwealth Department of Energy Tourism and Resources (RET) offers a Secretariat service. This body comprising representatives from State and Territory Ministers and a single Federal Minister
MCE	Ministerial Council on Energy <sup>11</sup>
MEU	Major Energy Users
MIRN	Meter Identifying Registration Number
NECF1	National Energy Consumer Framework 2 (First Exposure Draft)
NECF2	National Energy Customer Framework 2 (Second Exposure Draft) Note the Gas Connections Framework now forms part of the NECF The differences between gas and electricity markets has now been adequately reflected within the NECF2 package, as noted by industry participants and other stakeholders. For example there is no such thing as an embedded gas network, yet the provisions continue to explicitly include gas under this heading  Further, where heated water supplies are provided after a single gas or electricity meter fires a centrally heated water tank supplying water to individual occupants with heated water in water pipes, neither group of recipients is “embedded” This term is being creatively and inappropriately used, with implications for determination of the proper contractual party, their rights, the threat of disconnection of the wrong party; using the wrong trade measurement instrument and the wrong scale of measurement. See revised National Measurement regulations, subject to intended lifting of the utility exemptions and the concept of legal traceability  It would seem that these provisions have been created without due regard to recognition of the National Measurement Institute sole legal authority on metrology matters relating to measurement.
NERC	National Energy Retail Code (proposed)
NERL	National Energy Retail Law
NGL	National Gas Law
NGR	National Gas Rules

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NMA	<p><i>National Measurement Act 1960</i> and all corollary provisions including the <i>National Measurement Amendment (Utility) Act 2009</i>, effective dated 1 July 2009</p> <p>See NMA, Part V Using Measuring Instruments for Trade</p> <p><a href="http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/AC996739A0F25545CA2575E60019C6E7/\$file/NatMeas60_WD02.doc">http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/AC996739A0F25545CA2575E60019C6E7/\$file/NatMeas60_WD02.doc</a></p> <p>see National Amendment (Utility Meters Act) 1999 No. 9 Commencement Date 31 March 2009</p> <p><a href="http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/3A68EBC53AC7A50CCA25742500057102/\$file/009-99.doc">http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/3A68EBC53AC7A50CCA25742500057102/\$file/009-99.doc</a></p> <p>see National Measurement Regulations 1999 1999 No. 100</p> <p><a href="http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmr19991999n110358.html">http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmr19991999n110358.html</a></p> <p>See National Measurement Regulations 1999 1999 No. 110 Explanatory Statement Statutory Rules 1999 No. 110 National Measurement Act 1960 found at</p> <p><a href="http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmar20091n151o2009521.html">http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmar20091n151o2009521.html</a></p>
NMI	<p>National Measurement Institute</p> <p><i>“The National Measurement Act 1960 (NMA) provides the legislative basis for Australia's National Measurement System. See also the <i>National Measurement (Amendment) Utility) Act 1999</i> effective date</i></p> <p><i>The aim of the Act (NMA) is to ensure that measurements are what they purport to be and to give legal sanction to the national standards of measurement.</i></p> <p><i>The NMI or its agents provide legal metrological traceability to the national standards of measurements through the issue of certificates issued under regulation 13 of the National Measurement Regulations 1999.</i></p> <p><i>The NMI, a division within the Department of industry, Tourism and Resources, is responsible for Australia’s national infrastructure in physical, chemical, biological and legal measurements. Under the NMA, NMI is responsible for coordinating Australia’s national measurement system, and for establishing, maintaining and realizing Australia’s units and standards of measurement, thereby allowing Australian industry to operate competitively in a global environment<sup>12</sup></i></p> <p>The Hawkless Report (2006) on Utility Metering Regulations recognizes that “A national approach to the regulation of energy distribution and retail has been the subject of review. Any attempts to implement national energy regimes for consumer protection and distribution price regulation will risk being ineffective if they fail to address metering</p>
NMAUA	<p>National Measurement Regulations 1999 No 110 Explanatory Statement commencement date 1 July 2009, found at</p> <p>(Minister for Industry Science and Tourism)</p> <p><a href="http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmar20091n151o2009521.html">http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmar20091n151o2009521.html</a></p>

<sup>12</sup> Taken from Hawkless Report (commissioned for CAV) (2006) Utility Metering Regs under the NMA

NMR	<i>National Measurement Regulations Amendment Act 2009</i>
NPA	<i>National Partnership Agreement to Deliver a Seamless National Economy</i>
PC	Productivity Commission
Regulators	The ACCC and the consumer agencies of the States and Territories, including: NSW Office of Fair Trading, Consumer Affairs Victoria, Queensland Office of Fair Trading, Department of Commerce — Consumer Protection (Western Australia), Office of Consumer and Business Affairs (South Australia), Department of Justice — Consumer Affairs and Fair Trading (Tasmania), Department of Justice — Consumer Affairs (Northern Territory) and Department of Justice and Community Safety — Office of Regulatory Services — Fair Trading (Australian Capital Territory)
RPWG	Retail Policy Working Group (*MCE SCO)
RUCP	Review of Unfair Contract Provisions
RTA	Residential Tenancies Act 1997 (Vic)
SCO	Standing Committee of Officials (MCE)
SICW	Statutory Implied Conditions and Warranties
SMWG	Smart Meter Working Group (MCE SCO)
TPA	<i>Trade Practices Act 1974</i> This will be repealed. Meanwhile Part 1 of the new national generic law is operational the Trade Practices (Australian Consumer Law) Amendment Bill (No.1) Following incorporation of further proposed amendments under the Trade Practices (Australian Consumer Law) Amendment Bill (No.2) expected to take place during 2010, the TPA will be renamed Competition and Consumer Law 2010 The Senate Economics Committee is currently referring the Second Bill and will also introduce separate legislation regarding unconscionable conduct
TUV	Tenants Union Victoria An incorporated body funded by Consumer Affairs Victoria (CAV) a regulator of numerous provisions including the Residential Tenancies Act 1994; the Victorian Fair Trading Act and the Unfair Contracts provisions Note there is community pressure to adopt national unfair contract provisions
UTP	Unfair Trade Practices
VCAT	Victorian Civil and Administrative Tribunal

## INTRODUCTION AND CONTEXT

The most effective way for me to begin this submission is to cite directly from the Executive Summary of the submission dated 10 November 2009 addressed to the AER in response to the Revised Gas Access Proposal of Jemena Gas Networks (NSW) Ltd (hereinafter JGN).

In citing that submission here and elsewhere I acknowledge and thank Roman Domanski – for your brevity and inspiration. Whilst you represent major users, I write as an individual private stakeholder. But we have more common ground that you may imagine – save for the issue of brevity.

Thank you for drawing attention to benchmarking issues and the need for the AER (and implied others responsible for energy policy and regulation).

I too have concerns about JGN's capital expenditure proposal. EUAA said on 10 November 2009:

*“The proposal by JGN shows a significant increase in revenue required for the access arrangement period in question of 18% driven mostly by an increase in forecast of capital expenditure of 34.6%. These are significant increases and of major concern to gas users in New South Wales. The proposal noted that these increases would result in average price increases of 14.5% in the first year and a compounded increase of 32% over the 5-year period.”*

*The increase in capital expenditure is shown in figure E1 and the resulting increase in revenue requirements is shown in figure E2.*

EUAA said – and I applaud the way in which this is expressed:

*“Jemena Gas Networks has cited customer number growth and asset renewal and replacement as the primary drivers for capital expenditure. The customer numbers are forecast to grow 17% over the period of the proposal but this comes entirely from the residential and small business section. The number of Demand Tariff users is actually forecast to go down slightly.”*

Given that the CAPEX proposal includes upgrading of water meters which is likely to include upgrade to water meters in multi-tenanted dwellings where either cold water meters or hot water flow meters in multi-tenanted dwellings with a single gas meter, are posing effectively as gas meters under the sanction of existing and proposed energy policy, my outrage is at least equal to yours. This I explained later and in my multiple submissions to energy and other arenas.

Whilst familiar with ACCC and AER documentation and processes, and whilst I have written to key ACCC and AER personnel previously, I have not till now participated in the formal submission process. I hope you will consider publishing this.

It is impossible to keep up with conflicting deadlines and overlapping issues in so many arenas. I am disappointed to see how rarely a formal consumer submission is made.

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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 powers of the National Measurement Institute and their revised regulations 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).

It is not my intent to presume to analyze the broader aspects of the divergent expert opinions discussed by NERA Economic Consulting through Greg Houston<sup>13/14</sup>; the analysis by Allens Arthur Robinson referred to in that report; or that of Mr. Jeffrey Balchin<sup>15/16</sup> or the opinion of Mr. Geoff Swier<sup>17</sup> in the Farrier Swier Report also presented by JGN in support of their Revised Proposal.

There are clearly complex matters that are discussed from different philosophical perspectives presented by highly qualified experts.

My proposal is to discuss a single element of JGN's Revised Access Proposal, particular with regard to the validity of the claim that water meters (or hot water meters) form part of the gas distribution and transmission network as used in calculating deemed gas (or deemed electricity) usage by end-users supplied in water pipes with a composite product – heated water of varying temperature.

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<sup>13</sup> Appendix 9.11 NERA-ACG Report Benchmarking of Contractors Margins  
<http://www.aer.gov.au/content/item.phtml?itemId=735244&nodeId=d9af495c4711e9c1acb387ba246925f6&fn=Appendix%209.11%20-%20NERA%20Allen%20Consulting%20Group%20Report%E2%80%93Benchmarking%20of%20Contractors%E2%80%99%20Margins.pdf>

<sup>14</sup> Gregory Houston has twenty years experience in the economic analysis of markets and the provision of expert advice in litigation, business strategy, and policy contexts. His career as a consulting economist was preceded by periods working in a financial institution and for government. Source: appendix to NERA Report *ibid*  
Greg Houston has directed a wide range of competition, regulatory economics and valuation related assignments since joining NERA in 1989

<sup>15</sup> Balchin, J., Statement of Jeffrey John Balchin, Gas Access Arrangement Review Outsourcing by Regulated Businesses, para 157c/f NERA Economic Consulting  
<http://www.aer.gov.au/content/item.phtml?itemId=726698&nodeId=02ca6504ea7284d242d7edc9683a2ec3&fn=JIA%20Appendix%20AB%20-%20Jeff%20Balchin%20CV-ACG.pdf>  
<http://www.esc.vic.gov.au/NR/rdonlyres/533DFB7A-21D0-453F-AC85-3CF1F3E21666/0/ACGOutsourcingStatementFINAL2.pdf>

<sup>16</sup> Mr. Jeffrey Balchin is a Director with the Allens Consulting Group economic regulation of price and service, with a particular emphasis on the application of incentive regulation to infrastructure and network industries. He has experience in gas electricity, rails, ports and telecommunications, post and banking in Australia and NZ. He has advised governments, regulators and major corporations on issues including regulatory price reviews, licensing and franchise bidding, market design and development of regulatory frameworks. Jeff has also undertaken a number of expert witness assignments. His experience is outlined below in more detail. He was previously lead role in the development of a National Code for third party access to gas transportation systems, a particular focus on market regulation and pricing, a particular focus on market regulation and pricing.

Source: Balchin, J., Statement of Jeffrey John Balchin, Gas Access Arrangement Review Outsourcing by Regulated Businesses

<http://www.aer.gov.au/content/item.phtml?itemId=735244&nodeId=d9af495c4711e9c1acb387ba246925f6&fn=Appendix%209.11%20-%20NERA%20Allen%20Consulting%20Group%20Report%E2%80%93Benchmarking%20of%20Contractors%E2%80%99%20Margins.pdf>

<sup>17</sup> Mr. Geoff Swier is an experienced economist, consultant and company director with a background in energy and regulated industries

I also challenge JGN's proposal at enormous expense, to upgrade those water meters, and fit RH heads to enable fitting of RF heads and ultimately remotely read those water meters, if the proposal is intended to capture water meters that are being used effectively as gas or electricity meters in connection with calculation of deemed gas usage. This is discussed in all my submissions to public arenas, including NECF1 (2009) and NECF2 (2010, the Commonwealth Treasury; the Senate Economics Committee (2010) and the Victorian Essential Services Commission's Review of Regulatory Instruments

## **LIMITED DISCUSSION OF ASPECTS OF JGN'S REVISED ACCESS PROPOSAL**

The NERA Outsourcing Report accompanying the JGN's Revised Access Proposal in support of its position expresses the opinion that:

Alinta, Agility and Origin Energy – Networks should be retained in the sample unless it can be clearly demonstrated that they have engaged in transfer pricing.

Notwithstanding this view we have, for completeness, estimated the effect of excluding these entities from our results, which is that:

- the average margin across the sample falls to 4.8%;
- the revised 95% confidence interval for the true population mean of this sample broadens to 3.5% to 6.1% which would encompass the EBIT margin payable to OEAM excluding incentive payments (5.6%); and

The Essential Services Commission of Victoria had asked for the opinion of Mr. Jeffrey Balchin to:

1. *Assess and /or comment comprehensively upon the 'outsourcing assessment framework' prepared by NERA Economic Consulting on behalf of Envestra, in the context of the National Third Party Access Code for Natural Gas Pipeline Systems (the Gas Code).*
2. *Evaluate the quality and robustness of evidence presented in the NERA and PricewaterhouseCoopers Reports in support of the proposed 'outsourcing assessment framework'.*

A vast amount of material was examined by both expert witness groups and there appears to be a difference of professional opinion that remains to be evaluate.

I refer to Appendix 12.2 of JGN's Revised Gas Access Proposal

I reproduce from p6 of that Appendix JGN's description of standalone costs as follows:

*"Standalone cost represents the cost that would be required to replicate or bypass the network. It follows that if customers were charged above standalone costs it would be beneficial for that group of customers to bypass the network or be provided by a new entrant. Therefore, these costs are comprised of the assets and operating costs that would be required to provide services to that tariff class on a dedicated basis (i.e. without sharing costs with other tariff classes).*

*To estimate the standalone costs for each relevant tariff class JGN has relied on two optimised replacement cost (ORC) studies and its own operating costs.*



*The first ORC study was carried out by Jemena Asset Management (JAM) engineers for each non-country demand tariff zone prior to the last access arrangements review. This represents the cost to replace the segment of the network considered without the benefit of scale that is achieved through a combined network.*

*The second study is the ORC value considered for the entire network by Independent Pricing and Regulatory Tribunal of New South Wales (IPART) in 2000 which was considered when setting the initial capital base (ICB). JGN has allocated this total network estimate between the volume market tariff classes using a factored index<sup>2</sup> to account for the benefits of scale.*

*To achieve an annual cost estimate that can be compared to expected revenues the following steps were undertaken:*

- calculate the depreciation charge using the standard life for each asset class from the ORC estimated value*
- multiply the remaining asset value by the weighted average cost of capital (WACC) for a return on capital charge*
- summarise the above two components with the estimated operating costs required to provide services to the relevant tariff class.*

Jemena mentions of p15 3.3.3 of the Appendix that meter data services are essential about metering costs, but explains that these activities are outsourced to an external contractor “*that carries out the meter reading and sends the data to JGN for billing purposes.*”

*“Therefore the cost to JGN of providing this service to its customers is the contractor cost, which is charged per read, and a portion of overheads to account for contract management. Since JGN does not own equipment nor manage personnel necessary for the provision of meter reading services it is difficult to estimate a standalone cost.*

### *3.3.3 Meter data service*

The meter data service is essentially meter reading costs. However, JGN currently outsources this service to an external contractor that carries out the meter reading and sends the data to JGN for billing purposes.

It is further explained that

*“...the costs that the contractor would necessarily incur such as software to store data prior to sending to JGN, hand held devices and the vehicles to carry out meter reading and administration and management.*

*Assuming that the contractor is pricing to recover these costs across all its customers the standalone costs of providing meter reading to JGN alone would presumably be higher, since JGN is not the sole customer of the contractor.*

*Moreover, the avoidable costs of the meter data service to JGN is the contractor price per read of the meter, i.e. all costs included in the meter data service apart from some allocated overhead.”*

I discuss here some aspects of Jemena’s structure and re-branding.

Jemena’s business was previously part of the old Alinta Ltd. That company was sold to a consortium of Babcock and Brown and Singapore Power International in 2007, at which time the sale of agreement required re-branding.

I note from online information<sup>18</sup> and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009<sup>19</sup> that it has a complicated company structure wholly owned by Singapore Power International, a holding company for SPI Australia Assets associated with two other Jemena companies, Jemena Group Holdings and Jemena Holdings Ltd. Together with holding company Singapore Power International, the two other Jemena Holding companies own Jemena Ltd. Jemena owns and operates over 9 billion dollars worth of utility assets

Jemena Ltd wholly owns Jemena Electricity Networks (Victoria) Ltd; (referred to online as Jemena Electrical Distribution Network) Jemena Gas (Distribution) Networks (NSW) Ltd; Jemena Networks (ACT) and Jemena Colunga Pty Ltd) (referred to online as VicHub; Colunga Gas Storage and Transmission; Queensland Gas Pipeline; Eastern Gas Pipeline.

Jemena manages and partly owns ActewAGL Gas and Electricity Networks ACT (50%)’ United Energy Distribution Vic (34% ownership) and TransACT 6,8% ownership

Jemena manages but does not own Tasmanian Gas Pipelines (Tas, Vic) gas transmission) and Multinet Gas Holdings (Gas Distribution)

AGL’s Distribution Assets belong to the Jemena Group.

UED and Multinet have Operating Service Agreements (OSAs) in place with Jemena Asset Management (JAM). DBP and WA GasNetworks have OSAs in place with WestNet Energy (WNE). Further details regarding the OSAs of UED, Multinet, DBP and WA Gas Networks are provided within the original DUET Initial Public Offering PDS and the DUET Offer PDS in relation to the DBP acquisition. The energy mix includes electricity and gas distribution and transmission. DUET has three registered managed investment schemes (DUET1, 2 AND 3)<sup>20</sup> referred to as energy diversity trusts.

UED’s operating services agreement (OSA) has re-tendered but is incumbent service provider has the right to match the terms and conditions offered by the winning tenderer.<sup>21</sup> UED’s website describes its OSA as follows

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<sup>18</sup> <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>

<sup>19</sup> Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009

<sup>20</sup> Source: <http://www.duet.net.au/duet/about-duet/structure.htm>

<sup>21</sup> Ibid

***“Operating services agreement***

*In December 2008 UED requested Expressions of Interest (EOI) from interested parties as part of the re-tender process of the Operating Services Agreement (OSA). UED is currently assessing the proposals made by those parties. UED’s incumbent service provider has the right to match the terms and conditions offered by the winning tenderer.*

*The range of services in the OSA include network operations management, program delivery, customer service and back office services, information technology and corporate services.”*

I do not have data available to confirm the details of the particular outsourcing contractors used or what their relationship may be to Jemena.

In describing its Asset Management services in

*“Jemena’s infrastructure investments are complemented by an asset management business that provides services on commercial terms to companies within the Jemena group and to third parties.”*

*Jemena Asset Management is a management and service provider to owners of electricity, gas and water infrastructure assets. These services range from multi-year contracts for a full suite of asset management planning, control room, construction, maintenance, metering, billing, back office services and corporate support services to single contracts for either construction and/or maintenance. Jemena Asset Management provides services across a range of assets including regulated and non-regulated electricity and gas distribution networks and gas transmission pipelines within Australia. The asset management business is separated into two separate business units, Asset Strategy and Infrastructure Services.*

In addition there are a number of associated companies including XX and unnamed outsourced contractors who also appear to be associated with the Jemena Group.

There is a software and services company called UXC listed on the ASX in 1997<sup>22</sup>. UXC as it is today was formed in 2002 via the merger of Utility Services Corporation (USC) and DVT Holdings Limited (DVT). At present, UXC has a market capitalisation of over \$70 million. UXC’s share registry is listed as Link Market Services.

UXC has three divisions the Utility Services Group (USG), the Business Solutions Group (BSG), and the IP Ventures Group.

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<sup>22</sup> <http://www.uxc.com.au>

Within that group the Utility Group is described as follows:

*“...relatively consolidated customer base (due to electricity distribution industry structure) determined primarily by degree and pace of state-based reform programs and concentrated on the east coast of Australia. Customers include United Energy, TXU, Citipower, Powercorp, Energy Australia, AGL, Actew AGL, Ergon. IT Service Group: broad range of clients from government to medium to large end of the corporate market.”*

United Energy (UED) and Multinet<sup>23</sup> and Alinta, DUET and AGL are part of the Singapore Power International consortium, whilst it is my understanding that Alinta Asset Management (AAM) is responsible for Jemena’s asset management.

Since United Energy is listed on UXC’s customer base, it is reasonable to suppose that this company may be one of the companies providing IT, backroom and/or utility meter reading serviced by Jemena.

I do not mean to suggest anything irregular in any of this. Nor will I enter into the complicated arguments about what may or may not constitute an arm’s length business relationship. Jemena has listed in one of the slides shown at the 17 December Public Meeting some companies, unnamed groups of companies supplying outsourced services that appeared to be part of the Jemena network.

In relation to Meter Data Services for Customers

I note the comments made by EnergyAdvice and others on page 6 of their 10 November submission to the AER in November

*“Still no direct data service to end users is being provided. As meter data services are not contestable, this needs to be reviewed. See below.”*

In addition, on p8 of that joint submission by EnergyAdvice meter data service was not supported. These comments were made:

*“Meter Data Service Not supported. JGN proposes to increase both the Meter Reading Charge and Provision of On-Site Data and Communications Equipment Charge by 49%. What is the basis of such an increase?”*

I support that viewpoint.

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<sup>23</sup> *“Multinet Group Holdings is a Victorian gas distribution company with a network covering 1,940km<sup>2</sup> of the eastern and south-eastern suburbs of Melbourne. Multinet is currently expanding its geographic base through participation in the state government’s natural gas extension program. Multinet’s distribution network transports gas from the high pressure transmission network to residential, commercial and industrial gas users.”*

In addition I raise the whole issue of who the contractual party should be in the first place where metering and data services are provided as a consequence of arrangements between suppliers of energy of any description and developers and/or Body Corporate entities who own and have managed on their behalf communal infrastructure in multi-tenanted dwellings and shopping centres.

In these cases a single gas or electricity meter is used to heat a single communal boiler tank which centrally heats water, reticulating this water product this is water pipes not gas infrastructure. Regardless of ownership of water infrastructure, this does not create a contractual obligation for the alleged sale and supply of energy to end-users of heated water products. This is exactly what is occurring, apparently with the sanction of existing industry codes that have adopted flawed reasoning to the detriment of end-consumers and their enshrined rights.

My concern is that where there may be a single gas meter supplying a single boiler tanks to which energy suppliers provide to developers and/or Owners' Corporations gas to a single gas or electricity meter, which for settlement purposes represent a single connection or energization point, for gas that point being the point at which the double-custody changeover of gas occurs, normally at the outlet of a gas (not water) meter

See especially Refer to the Revised Access Arrangements proposed by Jemena Gas Networks (NSW) Ltd Initial Response to Australian Energy Regulator's (AER) Draft Decision for the period 1 July 2010 to 30 June 2015.

See esp. Appendix 3b.9-Metering forecast capital expenditure—19 March 2010 Clause 1.8 and 1.8.1 pages 5 and 6 of 17 pages; and conflicting reports associated with outsourcing, perceptions of "*arm's length operations*" and the like.

There have been a number of public meetings and presentations, discussions, revisions, and questions asked regarding outsourcing arrangements, the question of the existence or not of related body status and the like which remain incompletely addressed, which will also have impacts on cost analysis matters.

I note that EUAA's 10 November submission to JGN's proposal commented on the primary drivers for increased expenditure

*The primary drivers for this increased expenditure has been stated by Jemena to be an increase in customer numbers, requiring new connections, and various other increased costs included asset renewal/replacement and non-system assets, such as vehicles and IT infrastructure.*

Jemena Gas Networks (NSW) Ltd is seeking funding for expensive upgrade to **WATER** meters that they claim are part of the gas network and have referred to rodent activity and seriously damaged infrastructure that poses a fire risk. They are proposing remote readings. That proposals has intrinsic implications for smart metering (water grid if water meters) but surely not a GAS grid?

The Department of Climate Change Energy Efficiency and Water, and the National Measurement Institute should surely both be involved in these proposals. Are there not safety, technical and correct use of meters involved in some instances, such as when water meters are effectively posing as gas meters, apparently with the sanction of policy-makers, rule makers and regulators (see “bulk hot water arrangements”).

I note on the smartgridaustralia website<sup>24</sup> from the description of services by industry participations delivering alleged benefits of AMI and Smart Grid initiatives for “*electric, gas and water utilities*” using e-meter technology.

For example emeter.com describes its services as follows:

[www.emeter.com](http://www.emeter.com)

*With over 24 million meters under contract, eMeter enables electric, gas and water utilities to realize the full benefits of their AMI and Smart Grid initiatives, through the eMeter Smart Grid Management software suite. eMeter's flagship solution, EnergyIPTM, is being implemented by many leading utilities around the world and has been enhanced to support the specific requirements of the Australian National Electricity Market. eMeter has customers in Australia and New Zealand and a Sales and Support office in Sydney.*

JGN describes its services in this regard as follows:

[Jemena http://www.jemena.com.au](http://www.jemena.com.au)

*Jemena is a leading, national infrastructure company that develops, owns and services a combination of major electricity, gas and water assets.*

*They deliver innovative infrastructure solutions that support the vital daily electricity, gas and water needs of millions of Australians. They manage over \$8 billion worth of Australian utilities assets and specialise in both the transmission and distribution of electricity and gas.*

*Together with UED, they are leading the rollout of the Advanced Meter Infrastructure program to just on 1 million homes and businesses in Melbourne and the Mornington Peninsula.*

*Jemena is owned by Singapore Power International.*

On 19 March 2010, the AER received the revised access arrangement proposal for the NSW gas distribution network owned by Jemena Gas Networks (NSW) Ltd (Jemena). Responses to the revised gas access arrangement proposal by JGN Ltd are required by 28 April, giving an unreasonable timeframe given the huge number of documents to be studied. I cannot do justice to this as well as attempt a response to the ACL Explanatory Memorandum, Bill and Second Reading Speech, but am very concerned about developments.

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<sup>24</sup> [www.smartgridaustralia.com](http://www.smartgridaustralia.com)

Jemena Gas Networks (NSW) Ltd., which describes under 1.8, p5 of that appendix the use of water meters as follows:

*“1.8 Water Meters: JGN has a population of hot water meters, usually located in apartment buildings that are used for network purposes.<sup>25</sup>”*

*As the water meters age JGN has experienced an increase in field failures for these meters. It has been JGN’s experience that the accuracy of these meters deteriorates as they age.”*

*“As a means of ensuring that the accuracy of the population of meters is maintained and a cost efficient means of replacing meters, rather than waiting until the meters fail in the field JGN is instituting a water meter replace program.*

*As an initial starting position JGN has adopted an in service life of 25 years so as to minimise the cost of establishing the replacement program. JGN will continue to monitor the data of the performance of in field.*

*As of 2010, there were more than 8,000 meters older than 25 years. It is proposed that these meters are gradually removed over 2011-2014.*

*In 2015, the number of units is much greater than in previous years. This is due to increase in number of water meters in apartments due for replacement in that year.*

*Even if some cables in a building were found to be sound, all meters in that apartment would be installed with RF heads to prevent having two incompatible systems within.*

*The benefit of installing the RF head is to continue to allow the remote reading of these meters. This is important because as noted above access to the meters is problematic and would result in less frequent reads of the customer’s water meters.*

*This rate is very conservative and assumes that access to individual apartments would be relatively easy.*

#### *1.8.1 Radio frequency data loggers*

*Currently installed water meters are linked by cable to data loggers which report water consumption via telephone link. It is expected that many cables would be broken due to the aging process or rodent activity. Cable replacement would be impossible in existing buildings due to construction and fire protection. It is proposed to utilize a wireless system using radio frequency (RF) heads to replace cable data logging systems in such locations to continue remote billing.”*

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<sup>25</sup> Since it a Gas access matter and since there are absolutely no gas networks – provision is always direct and in these cases to a single gas meter on common property infrastructure by arrangement with the developer or owners’ cooperation (body corporate). It is quite absurd to even use the term network and include water meters in this.

These **WATER** and **HOT WATER FLOW METERS** are effectively posing as gas or electricity meters in multi-tenanted dwellings, apparently under the sanction of flawed policies at jurisdictional level that have been the subject of all of my public submissions to date to various arenas, including the ESC, AEMC, Productivity Commission, MCE arenas available on the RET website and the Commonwealth Treasury.

I leave aside for now the appropriateness of any arrangements being made by those responsible for energy laws to become involved in costing proposals by energy providers for upgrades and maintenance of water meters under energy laws and rules. This I believe is outside the parameters of energy laws and these instruments are being quite inappropriately used for the calculation of “*deemed*” gas or electricity consumption by end users of a heated water product.

I leave aside for the moment the question of “*metering and billing contractors*” under various models of “*asset management services*” involved, or the question of further artificially inflating costs that should not be incurred at all.

It concerns me greatly what may happen if maintenance matters are left in the hands of multiple distributors and other providers of “*metering and billing services*” each seeking to hold contractually responsible end-users of a composite water product for massive outsourced or in-houses services through “*asset management facilities.*”

This leaves the contractual burden inappropriately allocated to end-users of a heated water product who are normally renting tenants in multi-tenanted dwellings, though some are owner-occupiers. The proposed Energy Retail Laws and Rules to be rubber-stamped through the Australian Parliament clearly refer to “*flow of energy*” in relation to sale and supply.

Mere ownership of water infrastructure does not mean ownership of water, nor a right to impose contractual status for sale and supply of **energy** (gas and electricity in this case) on recipients of heated water reticulated in water pipes. Under existing revised laws with more revisions to follow no-one can sell anything without first owning that commodity.

The original reasoning adopted by the ESC in 2004 when the “*bulk hot water arrangements were discussed*” were flawed in the first place. They sought to validate the provisions, which have been discrepantly adopted in other states by transferring the substance of the Bulk Hot Water Guideline into the Energy Retail Code in the illusion that the arrangements are consistent with generic laws and revised trade measurement provisions, subject to pending lifting of utility restrictions. To defy the intent and spirit and letter of such laws is failure to adopt responsible policy, and will leave providers of utilities at risk.

The CoAG Intergovernmental Agreement of 2009 to avoid duplication and conflict appears not to have been embraced.



The proposed Energy Laws and Rules require adoption of existing jurisdictional provisions, thereby indirectly sanctioning provisions that are in direct conflict with the concept of “*flow of energy*” and the national measurement provisions regarding legal traceability, correct use of instruments, correct scale of measurement and the like.

By deeming end-recipients of heated water who receive no energy at all to be contractually obligated to energy providers of one sort or another is to fail to embrace existing laws and provisions and to adopt best practice.

The point is that these services are being delivered by either licenced energy providers or their servants, contractors and/or agents under energy laws governing gas and electricity in monopoly markets with the artificial perception being promoted that the choice exists through retailers. No such choice exists for those receiving heated water supplies in multi-tenanted dwellings.

The issue of competition has simply been ignored whilst the middle ends of the markets are considered without proper regard for what is happening at the wholesale end.

These matters are settled at the time of construction of buildings and are matters of contract between developers and/or landlords or owners’ corporations at that stage. Retailers allocated site patches geographically pass on all costs that they inherit from distributor monopolies, who apparently own and manage water assets in addition to gas distribution services and electricity distribution and network services.

It is impossible to see how and why water meters can be part of a gas distribution network, though it is common knowledge that water meters are being used by energy providers to calculate the deemed consumption by end-recipients of a gas used to provide a heated water product. This topic is covered in great detail in several submissions including my submission to the NECF2 Second Exposure Draft (proposed National Energy Retail Law and Rules).

End consumers of heated water products are being unjustly and unfairly imposed with contractual status for alleged provision of an energy commodity that they do not receive at all. There are no redress resources and no proper guarantee provisions.

Massive supply and cost-recovery maintenance charges are being imposed on the wrong parties. The ESC’s role in all of this has been highlighted and it may well be that inappropriate tariff arrangements were sanctioned without proper understanding of the issues involved.

I draw these matters again to the attention to the AEMC, since I do not believe that the MCE or AEMC has reflected on the implications of policies and provisions at national level that are inconsistent with the proposed national retail laws and rules with regard to flow of energy and proper contractual parties.

In addition there is the question of implications of revised generic laws with further changes pending, as well as trade measurement laws, climate change policies, technical and safety issues and unnecessary expenditure on upgrade to water meters for which the Jemena Group through one or other of its associated companies or outsourced contractors, of arrangements that are loosely referred to as outsourced metering and data services.

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 April 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.

By the same token, so will related decisions being considered by the AEMC as the Rule Change agent empowered under CoAG agreements.

The concerns extend to all distributors of gas and electricity in all states and their servants contractors and/or agents whether or not *"at arm's length."* or considered to be *"related entities."*

I have a number of concerns that are inter-related but will refrain at this stage from committing these to paper to the ACCC and AER, who have in any case received copious material from me in the past, and have an opportunity to study my various submissions mostly to MCE and ESC (Victoria) arenas, including:

Essential Services Commission Review of Regulatory Instruments (2 parts together called Part2A, (1 and 2)

<http://www.esc.vic.gov.au/NR/rdonlyres/6AD5F77F-15F2-47E8-BA69-A0770E1F8C50/0/MKingstonPt2ARegulatoryReview2008300908.pdf>

NECF 1 Consultation RIS

[http://www.ret.gov.au/Documents/mce/\\_documents/Madeleine\\_Kingston\\_part320081208120718.pdf](http://www.ret.gov.au/Documents/mce/_documents/Madeleine_Kingston_part320081208120718.pdf)

Gas Connections Framework Draft Policy Paper (2009)

[http://www.ret.gov.au/Documents/mce/\\_documents/Energy%20Market%20Reform/ec/Madeliene%20Kingston.pdf](http://www.ret.gov.au/Documents/mce/_documents/Energy%20Market%20Reform/ec/Madeliene%20Kingston.pdf)

NECF2

major submission with case studies and analysis - examining amongst other things objectives comparative law and application

[www.ret.gov.au/Documents/mce/emr/rpwg/necf2-submissions.html](http://www.ret.gov.au/Documents/mce/emr/rpwg/necf2-submissions.html)

[http://www.ret.gov.au/Documents/mce/\\_documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/Madeleine%20Kingston.pdf](http://www.ret.gov.au/Documents/mce/_documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/Madeleine%20Kingston.pdf)

See also submission by Kevin McMahon, private citizen, as a victim of the *"bulk hot water policy arrangements"* in Queensland

and of Dr. Leonie Solomons Director of failed second-tier retailer Jackgreen International

Preliminary submission to

Consumer and Competition Advisory Committee, Ministerial Council on Competition and Consumer Affairs (2009)

[http://www.treasury.gov.au/documents/1614/PDF/Kingston\\_Madeline.pdf](http://www.treasury.gov.au/documents/1614/PDF/Kingston_Madeline.pdf)

Commonwealth Treasury Unconscionable Conduct Issues Paper: Can Statutory Unconscionable Conduct be better clarified?

[http://www.treasury.gov.au/documents/1614/PDF/Kingston\\_Madeline.pdf](http://www.treasury.gov.au/documents/1614/PDF/Kingston_Madeline.pdf)

includes case study, detailed analysis of selected provisions; other appendices (mis-spelt Madeline and instead of Madeleine)

MCE Network Policy Working Group

[Economic Regulation](#)

[http://www.ret.gov.au/Documents/mce/\\_documents/Energy%20Market%20Reform/ec/Madeliene%20Kingston.pdf](http://www.ret.gov.au/Documents/mce/_documents/Energy%20Market%20Reform/ec/Madeliene%20Kingston.pdf)

ESC Review of Regulatory Instruments

<http://www.esc.vic.gov.au/NR/rdonlyres/6AD5F77F-15F2-47E8-BA69-A0770E1F8C50/0/MKingstonPt2ARegulatoryReview2008300908.pdf>

Commonwealth Treasury Unconscionable Conduct Issues Paper (2009)

[http://www.treasury.gov.au/documents/1614/PDF/Kingston\\_Madeline.pdf](http://www.treasury.gov.au/documents/1614/PDF/Kingston_Madeline.pdf)

includes case study, detailed analysis of selected provisions; other appendices (mis-spelt Madeline and instead of Madeleine)

Senate Economics Committee Review of Trade Practices Amendment (Australian Consumer Law) Bill2) (current)

[http://www.aph.gov.au/Senate/committee/economics\\_ctte/tpa\\_consumer\\_law\\_10/submissions.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm)

also

Productivity Commission's Review of Australia's Consumer Policy Framework (subdr242parts 1-5 and 8) (2008 divided-parts)

[www.pc.gov.au/projects/inquiry/consumer/.../subdr242part4](http://www.pc.gov.au/projects/inquiry/consumer/.../subdr242part4)

[www.pc.gov.au/projects/inquiry/consumer/submissions/subdr242part5](http://www.pc.gov.au/projects/inquiry/consumer/submissions/subdr242part5)

[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0007/89197/subdr242part8.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0007/89197/subdr242part8.pdf)

Productivity Commission's Review of Performance Benchmarking of Australian Businesses: Quality and Quantity (2009)

[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0006/83958/sub007.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0006/83958/sub007.pdf)

and Part 3 substantially similar to Part 3 submission published on MCE website NECF1 Consultation RIS

AEMC

Submission (2 parts) to AEMC First Draft Report Review of the Effectiveness of Competition in the Electricity and Gas Markets in Victoria

examines the marketplace at the time

<http://www.aemc.gov.au/Media/docs/Madeleine%20Kingston%202nd%20Sub%20Part%201-d448ce8f-6626-466d-9f97-3d2c417da8b4-0.pdf> (first 100 pages)

AEMC

Belated submission to AEMC ERC0092 Proposed Rule Change Provision of MDS and Metrology Requirements Section 107 Notice (2 letters 16 and 27 April 2010)

<http://www.aemc.gov.au/Electricity/Rule-changes/Open/Provision-of-Metering-Data-Services-and-Clarification-of-Existing-Metrology-Requirements.html>

Finally, I remind the AER, AEMC, MCE and other stakeholders of the changes to generic laws and the Media Release issued on 15 April. The first part of the Australian Consumer Law (replacing the TPA) is now in force.

See

<http://www.accc.gov.au/content/index.phtml/itemId/923837>

*"This will provide greater protection from unscrupulous operators*

*The ACL gives the ACCC new enforcement powers to protect consumers, including the ability to seek or issue:*

- *civil monetary penalties*
- *banning orders*
- *substantiation notices*
- *infringement notices*
- *refunds for consumers, and*
- *public warnings.*

*Under the new legislation the ACCC can seek financial penalties of up to \$1.1 million for corporations and \$220,000 for individuals in civil cases for unconscionable conduct, pyramid selling and sections of the law dealing with false or misleading conduct.*

*"Further the ACCC will be able to deal with 'repeat or serious offenders' by seeking court orders banning them from managing corporations," he said. "This will now be available in cases involving unconscionable conduct, and breaches of various consumer protection and product safety provisions.*

*"The ACCC will now be able to use substantiation notices to require traders to justify claims they make about products they promote. These will provide a fast-track way to identify if a potentially harmful misrepresentation has been made.*

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*Examples could include was/now advertising and claims about food, health, environmental impact and business opportunities.*

*"Where the ACCC has reasonable grounds, it may now issue an infringement notice in cases of suspected unconscionable conduct, some false or misleading conduct, pyramid selling and various product safety provisions. Infringement notices will enable the ACCC to respond quickly to alleged breaches of these parts of the law and help facilitate a quick resolution of ACCC concerns with traders.*

*"Infringement notice penalties for false or misleading, unconscionable conduct, pyramid selling and breaches of product safety provisions are \$6,600 for corporations and \$1,320 for individuals.*

*"Vulnerable and disadvantaged consumers will particularly benefit from the ACCC's new ability to seek redress through the courts for consumers who are not included in a particular legal action. For example, the ACCC could ask the court to order an unscrupulous trader to provide refunds to consumers affected by misleading conduct."*

*Unfair contract terms are also covered in the new legislation with provisions applying to standard form consumer contracts. These come into effect on 1 July 2010 and public guidance will be circulated to major business and consumer organisations before then."*

It may be that neither the AER, MCE nor the AEMC adequately understood the implications of the tacit endorsement of existing jurisdictional arrangements, or the implications of the proposed outsourcing arrangements in respect of the issues that I have raised that have been brought to the attention of various bodies, mainly within the energy arena for the last four years and are again articulated in my submission to the National Energy Consumer Framework (NECF2).

The issues of comparative laws, conflict and overlap with other schemes, unnecessary expenditure proposals for upgrade and maintenance to water meters, to be passed on to end-consumers of heated water receiving no energy at all, are matters of ongoing unaddressed concern.

The major case study that I included with submissions to the Gas Connections Framework Draft Policy Paper (2009); to the NECF2 Package and to the Commonwealth Treasury's Unconscionable Conduct Issues paper illustrates the consumer detriment that has resulted from inappropriate imposition of contractual status on a particularly vulnerable end-recipient of heated water who received no energy in connection with what is commonly termed the *"bulk hot water arrangements."*

I repeat that those receiving heated water that is fired by a single gas meter cannot ever be termed as *"embedded customers."* There is no such thing as an embedded gas network. Gas is either directly supplied to the abode of the party deemed to be receiving it or it is not. The supply is always by a licenced distributor. If those arrangements have been changed or are proposed to be changed there are unaddressed technical and safety considerations, besides the issues of substantive unfair contracts implicit in the terms of deemed contracts proposed by the NERL and NERR.

I urge the AER, AEMC, MCE and AEMO to consider these matters.

As much as this material may be out of time for the current deliberations, failure to consider them would be irresponsible. The MCE and AEMC have had ample opportunity to study this material in the context of formal submissions already on record and has chosen not to do so.

The perceived general failure to distinguish between gas and electricity markets, wholesale and retail markets, or to properly understand the many technical and legal issues involved seems to have led to flawed decision-making to date.

The outsourcing arrangements, and the implicit endorsement of the *“bulk hot water arrangements”* reflect disregard of the principles of comparative law, the revised generic laws with further changes effective from 1 July 2010; trade measurement best practice and existing and proposed changes to trade measurement laws; tenancy laws; the general and specific rights of individual consumers; and the implications of using the threat of disconnection of heated water supplies as a means of endeavouring to impose by coercion inappropriate and unjustifiable contractual obligation for the sale and supply of energy let alone the proposed capital expenditure for water meter upgrades and inflated outsourcing costs associated with this.

The metering and billing services whether in-house or outsourced are provided to Body Corporate entities; a single gas meter (or electricity meter) exists, which for settlement purposes is a single supply connection or energization point. It is only necessary to read a single meter and directly charge the Body Corporate entity who requested the service.

It is those matters and the proposal to upgrade water meters that I raise particular concerns if any of the water meters referred to are in fact the satellite water meters associated with.

In discussing special meter reads, temporary disconnections; permanent disconnections and decommissioning on page 17 of the Appendix [12.2 Standalone and avoidable costs—19 March 2010](#), JGN makes the following statements, but does not refer to meter reads for water meters effectively posting as gas meters in multi-tenanted dwellings where only one gas meter or electricity meter exists used to heat a single boiler tank centrally heating and reticulating heated water to multiple tenants who receive no energy at all.

Neither does JGN (nor any other provider of energy) speak of the distortions that have occurred in the interpretation of disconnection and decommission, as contained in Gas and Electricity Codes and all metrology provisions in use or envisaged.

I refer to p17 of Jemena's Appendix 12.2

### ***Special Meter Reads***

*This activity incorporates the direct costs of responding to requests for meter reads outside the scheduled reads, for example in the case of new connections or disconnections. As such, it effectively relates only to volume customers, as demand customers typically already have daily meter reads. Associated costs are therefore fully allocated to the volume customer category and are comprised of the direct operating cost of the read, effectively internal or contract labour costs. This activity excludes special reads relating to quality of supply or fault management.*

### ***Temporary Disconnections***

*Temporary disconnections occur in response to retailer requests for a suspension of supply to a customer. The cost of each disconnection reflects the operating cost of each site visit, a negligible materials cost and the cost of a site visit for the purpose of reconnection. Temporary disconnections may occur with respect to both demand and volume customers, however the level of activity with respect to demand customers is expected to be so low as to be negligible. Costs are therefore allocated across tariff classes within the volume customer category only.*

### ***Permanent Disconnections***

*Permanent disconnections occur in response to retailer requests for a permanent stoppage of supply, generally by means of meter removal from the site (the service line is left in place). The cost of permanent disconnection incorporates the direct operating cost associated with the site visit, as well as the capital cost of write off of the meter asset. As for temporary disconnections permanent disconnections may occur with respect to both demand and volume customers, however the level of activity with respect to demand customers is expected to be so low as to be negligible. Costs are therefore allocated across tariff classes within the volume customer category only..*

### ***Decommissioning and Meter Removal***

*Decommissioning occurs in response to requests by customers for a permanent disconnection of supply to a site and additionally the removal of aboveground onsite assets. The cost of decommissioning involves the direct operating cost of a site visit for removal of assets, the capital cost of write off of both meter and service assets, and the direct operating cost of disconnection of supply at the main.*

*Decommissioning may occur with respect to both demand and volume customers.*

*As for disconnections, however, the number of decommissioning relating to demand customers is expected be so low as to be negligible. Costs are therefore allocated across tariff classes within the volume customer category only.*



The background to my concerns is fully discussed in my various submissions to the AEMC (2007); to the Victorian Essential Services Commission 2008 Review of Regulatory Instruments;<sup>26</sup> to various MCE arenas, including NECF1 and NECF2<sup>27</sup>; (2008, 2009, 2010); the Commonwealth Treasury's Unconscionable Conduct Issues Paper and to the Senate Economics Committee's Inquiry into the *Trade Practices Amendment (Australian Consumer Law) Bill(2)*, under current review<sup>28</sup>.

In addition, I refer to my limited belated submissions 16 and 27 April 2010<sup>29</sup> to the AEMC's Proposed Rule Change Provision of Metering Data Services and Metrology Requirements Section 107 Notice Project ERC0092, which briefly covers the essence of my7 concerns, though perusal of my submissions to Ministerial Council on Energy's National Energy Customer Framework (NECF2) Package (and earlier related consultations); as well as my recent submission to the Senate Economics Committee will add more detail that time does not permit me to include here also.

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<sup>26</sup> Madeleine Kingston (2008) Submission to Victorian Essential Services Commission Review of Regulatory Instruments (Part2A divided)

<http://www.esc.vic.gov.au/NR/rdonlyres/6AD5F77F-15F2-47E8-BA69-A0770E1F8C50/0/MKingstonPt2ARegulatoryReview2008300908.pdf>

<sup>27</sup> [www.ret.gov.au/Documents/mce/emr/rpwg/necf2-submissions.html](http://www.ret.gov.au/Documents/mce/emr/rpwg/necf2-submissions.html)

<http://www.ret.gov.au/Documents/mce/documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/Madeleine%20Kingston.pdf>

<sup>28</sup> Madeleine Kingston (2010) Submission to the Senate Economics Committee Review of the Trade Practices Amendment (Australian Consumer Law) Bill(2)

See also submission of Kevin McMahon, private individual Queensland, victim of the "bulk hot water policy arrangements" which the NECF2 package has implicitly endorsed by directing participants to abide by Codes and Guidelines, despite making no mention in the NECF2 package of practices involving the use of water meters effectively as substitute gas and electricity meters; or the consumer protection considerations involved, to say nothing of trade measurement practices or revised generic laws

<sup>29</sup> Madeleine Kingston (2010) Submission to AEMC Proposed Rule Change Provision of Metering Data Services and Metrology Requirements Section 107 Notice Project ERC0092

<http://www.aemc.gov.au/Media/docs/Madeleine%20Kingston%20-%20Individual%20Stakeholder%20-%20received%2016%20April%202010-fa7a95c2-d4f9-4785-9ac2-839e80662e90-0.pdf>

<http://www.aemc.gov.au/Media/docs/Madeleine%20Kingston%20-%20Individual%20Stakeholder%20-%20received%2027%20April%202010-7200aa55-24ea-4e3f-b98a-3622a3fcc22-0.pdf>

## METER DATA SERVICE

On page 15 of Appdx 12.2 of its Revised Access Proposal, JGN describes Meter Data Services as follows

### ***B. Meter Data Service***

*(a) The Meter Data Service is a service for the provision of meter reading and onsite data and communication equipment to a Delivery Point in accordance with the Reference Service Agreement contained in Schedule 3.*

*(b) The Service Provider will read the meter at a Delivery Point in respect of which the User has entered into a Reference Service Agreement.*

*(c) The Service Provider will provide on-site data and communication equipment where economically feasible, at a Delivery Point:*

*(i) where a Demand Tariff has been assigned by the Service Provider; and*

*(ii) in respect of which the User has entered into a Reference Service Agreement.*

*(d) The Meter Data Service, or relevant elements thereof, will cease to be offered as a Reference Service, and at the Service Provider's discretion, as a Service, on the date provisions by a relevant regulatory authority come into force that permit a person other than the Service Provider to provide meter reading or onsite data and communication services.*

*(e) There are two categories of Charges under a Meter Data Service, namely the Meter Reading Charge and the Provision of On Site Data and Communication Equipment Charge. The Initial Reference Tariffs for the Meter Data Service are set out in Schedule 2.*

### **COMMENT MK**

Use of the term “*delivery point*” especially if applied in a geographic sense is guaranteed to raise discrepant and in some circumstances inappropriate interpretation.

The delivery point for gas is the same as a connection or energization point. It is the point at which gas is withdrawn from the gas infrastructure, normally at the outlet of a meter, but in some circumstances at the gas inlet or at the gas mains. It is never ever at a geographical address. This entirely distorts the technical meaning of supply point, supply address, energization or connection point, which under the proposed National Energy Consumer Framework has nothing at all to do with geographical zones or boundaries.

That is where confusion has crept in the first place in connection with those who live in multi-tenanted dwellings who receive not energy in any form to their residential abodes, but rather water as a composite product.

Under new generic laws such a commodity, regardless of ownership of metering infrastructure, whether energy or water or some other unidentified utility cannot be interpreted as *“sale or supply”* (of commodities). Electricity and gas are commodities for the purposes of the revised generic laws i. e. Trade Practices Amendment (Australian Consumer Law) Bill1 and Bill2, the latter under current consideration of the Senate Economics Committee.

Moving on with the same theme, ownership of water authorities also does not create a contractual relationship with an energy provider for *“sale and supply of energy.”*

The water, whosoever owns it in the first place sells it to the Developer or Owners’ Corporation. That body is the responsible contractual party in a relationship with any provider, whether distributor, licenced energy retailer; data metering service contractor (arms-length or net).

It is entirely inappropriate to rely on postal addresses in metrology jargon. Providers of utilities should know better. Doesn’t matter which postal resource is relied upon, a supply address/supply point/connection point/energization point/delivery address is a technical phrase with a technical meaning – for energy it denotes flow of energy; specifically for gas, the double custody change-over point where the gas leaves the infrastructure and enters the gas (NOT WATER OR HOT WATER FLOW METER) meter, normally at the outlet of the meter.

If the mechanics of gas (and electricity) delivery are not understood and incorporated appropriately into metrology lexicons, whoever designs them, anomalies will arise; expensive dispute and litigation, whether or not regulator led will result; to the overall detriment of market functioning.

Because these matters are poorly understood and because there is no consistency in the adoption of metrology terminology, the anomalies have been long-standing and are unacceptable in the world of metrology.

The National Measurement Institute is trying to set world standards for metrology. It is the sole authority on metrology. Whilst relationships between utility market participants and the end-consumers that they service may be defined elsewhere, metrology and technical standards are the province of those who are expert and recognized authorities on legal metrology. In Australia that is the National Measurement Institute.

Failure to recognize the NMI provisions, subject to pending lifting of utility exemptions is failure to recognize a commitment to national and world standards for metrology.

### **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/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

## **Supply<sup>30</sup>**

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**

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)<sup>1ss</sup>

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 (VGDSVC9)/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 flow 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.<sup>31</sup>*

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).

I cite directly from the response dated 10 November 2009 of the Energy Users Association of Australia (EUAA) to Jemena's Gas Access Proposal as follows – (with acknowledgement to Roman Domanski – wish I had your skills in brevity)

### **Extract from submission of Energy Users Association of Australia, pp3-4**

*“Jemena Gas Networks has cited customer number growth and asset renewal and replacement as the primary drivers for capital expenditure. The customer numbers are forecast to grow 17% over the period of the proposal but this comes entirely from the residential and small business section. The number of Demand Tariff users is actually forecast to go down slightly.*

*In this submission we ask the Australian Energy Regulator to investigate the need for these large increases and alert them again to the need for good regulatory oversight in general and we urge them to perform benchmarking specifically.*



*We believe that without benchmarking, users face a significant information asymmetry and cannot assess efficient investment and management of these monopoly businesses.*

*We also address several specific issues raised by Jemena. These include the proposed new methodology for determining the regulatory rate of return and the allowed weighted average cost of capital which they would like increased from 10% in the current AA period to 12.63%. The AER needs to investigate both of these and determine whether they are efficient. We also alert the AER to the fact that the National Gas Rules require that the rate of return set be commensurate with a benchmark efficient network provider, again illustrating the importance of benchmarking.”*

In terms of metrology processes, outsourcing and data management, and related concerns that may be relevant to vertical and horizontal integration, outsourcing practices to related bodies or others as servants, contractors and/or agents of energy supplies, believing themselves under energy laws to be also operating unregulated water monopoly distribution and transmission businesses on the basis of perceived flawed energy policies enshrined in jurisdictional codes and guidelines implicitly endorsed by new national regulations, Rule Changes existing and proposed and the complicated area of embedded generation (a term that does not apply to those receiving heated water products reticulated in water pipes to individual abodes in the absence of flow of energy to each abode).

These and similar issues have been raised repeatedly with energy arenas including the MCE, AEMC, recently AEMO, and with the ACCC and AER.

I have not considered the market to be well-functioning for a good while. I am disappointed that so many issues made the subject of d hoc Rule Changes with their associated regulatory impacts

This is a very limited submission because of time constraints. Failure to comment on any aspect does not imply endorsement but rather lack of time to tackle this.

In recent public submissions to various consultative arenas I have raised concerns within narrow parameters for particular determinations that have impacts on others.

It does not appear to me that robust inter-body collaboration occurs. For example, matters relating to an access arrangement may have implications for parallel current or future determinations or enquiries re cost allocation, on rule changes regarding outsourcing of metering data services; on competition issues and others.

For that reason, though this is a submission to the AER, I make reference also to a number of related initiatives being undertaken by both the AER and AEMC, with impacts on how energy laws will be operational and how these will coexist and represent complementary provisions rather than conflict with other regulatory schemes, including the new generic laws, existing and proposed.

Before examining a bit cursorily selected aspects of the Jemena Revised Gas Access Proposal, and at the same time discussing at least one related matter under the consideration of the AEMC on the brink of publishing a Draft Decision regarding Metering Data Services and Metrology Procedures as determined by the AEMO and incorporated into Chapter 7 of the National Electricity Rules.

My interest area on this occasion AER/ACCC Gas Access Arrangements Appendix 12.2 Standalone and avoidable costs. There are implications also for the AEMC Proposed Rule Change Provision of Metering Data Services and Clarification of Existing Metrology Requirements Rule Change - Section 107 Notice ERC0092 for which a Draft Decision will be published on 6 May. I have already send to key AER staff a copy of the two items submitted to the AEMC on 27 April now published on their website

Other matters impacted include:

Rule Change Proposal by the AEMC for Cost Recovery of “*Other Services*” Directions for which submissions closed on 8 April 2010 ERC0090.

National Electricity Amendment (Aggregation of Ancillary Service Loads Rule 2010 **Rule Proponent** Australian Energy Market Operator 25 March 2010<sup>32</sup>

<sup>32</sup>

AEMC Rule Change Proposal: Cost Recovery for Other Services Directions

<http://www.aemc.gov.au/Electricity/Rule-changes/Open/Cost-Recovery-for-other-services-directions.html>

Closing date 8 April – unclear whether late submissions are acceptable as the online submissions process looks to be open

On 13 March 2009 NEMMCO (now AEMO) submitted a Rule change proposal to the Australian Energy Market Commission (Commission) seeking to modify the method of cost recovery for directions for “other” services directions.

Consultation was undertaken on the proposal under section 95 of the National Electricity Law (NEL), and closed on 24 August 2009. One submission was received from the National Generators Forum (NGF), which did not disagree with the AEMO proposal, but proposed two other possible approaches to the related wider issue of how “other” services are defined.

Additional consultation was undertaken on the alternatives proposed by the NGF, which resulted in a further submission from AEMO that was not supportive of the NGF’s alternative approaches.

<http://www.aemc.gov.au/Media/docs/National%20Generators%20Forum-77378b02-288b-40ec-9c21-79e1df7e3ef7-0.PDF>

Subsequently, further submissions were received by the Commission from AEMO and the NGF reflecting the outcomes of discussions held by these parties on an agreed position. This agreed position incorporates the changes initially proposed by AEMO and the NGF, with the addition of a drafting amendment affecting the operation of a specific aspect of compensation methodology.

The Commission has the power under Section 91A of the NEL to make a more preferable Rule, if it considers that a more preferable Rule would better contribute to the achievement of the National Electricity Objective (NEO). The making of a more preferable Rule would potentially allow the Commission to incorporate the changes proposed by AEMO and the NGF, if it takes the view that the issues identified are sufficiently related. To this end, the Commission considers that the additional submissions, and the agreed position reached between AEMO and the NGF, warrant further consultation on a number of specific issues prior to proceeding to a draft Rule determination.

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See especially Refer to the Revised Access Arrangements proposed by Jemena Gas Networks (NSW) Ltd Initial Response to Australian Energy Regulator's (AER) Draft Decision for the period 1 July 2010 to 30 June 2015.

See esp. **Appendix 3b.9-Metering forecast capital expenditure—19 March 2010 Clause 1.8 and 1.8.1 pages 5 and 6 of 17 pages**; and conflicting reports associated with outsourcing, perceptions of *“arm's length operations”* and the like.

Though the latter is about electricity, the issues raised affect both gas and electricity where these are supplied in multi-tenanted dwellings to heat a single boiler tank reticulating not energy but a composite water product after being centrally heated, to multiple parties deemed to be receiving energy on the basis of distortion of the meaning of sale and supply of energy; inappropriate imposition of contractual status on the wrong parties in respect of alleged sale and supply of energy; and inappropriate trade measurement practices.

Such arrangements are commonly known as the “bulk hot water arrangements” operating discrepantly in several jurisdictions without regard to the precepts of the common law; of contract law; of acceptable trade measurement practices (also bearing in mind the spirit and intent of existing and proposed trade measurement provisions and the requirement to show legal traceability of goods and services.

Beyond these issues, there is the question of alleged inflated prices using outsourced data

More difficult is the situation where gas or electricity is deemed to be supplied under either standard or deemed model contracts or coerced market contracts where no supply of such a commodity is made at all to the end-consumer, who receives instead a heated water product reticulated in water pipes (see submission by Madeleine Kingston and separate submission by Kevin McMahon to the NECF2 2nd Exposure Draft 2010).<sup>33</sup>

Kevin McMahon is a Queensland resident living in public housing, as a direct victim of the *“bulk hot water policies”* as they impacted on Queensland residential tenants utilizing centrally heated boiler tanks supplying heated water reticulated in water pipes to end-users.

Mr. McMahon's independent submission substantiates many of the concerns that I have been expressing

On p2 of his submission Mr. McMahon said under the heading “Past Sale of Assets” refers to the second reading speech on 11 October 2006 made by “the then Treasurer and now Premier of Queensland speech in regards to

*“Energy Asset (Restructuring and Disposal) Act 2006”, re; “No.42 - 2006”. This speech also mentions un-contestable assets of an energy entity being up for sale.*

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<sup>33</sup> A direct Queensland victim of the existing *“bulk hot water provisions”* living in public housing apparently under energy laws – also discusses many other issues including competition matters See Submission Kevin McMahon to National Energy Customer Framework NECF2 March 2010 [http://www.ret.gov.au/Documents/mcel\\_documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/Kevin%20McMahon.pdf](http://www.ret.gov.au/Documents/mcel_documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/Kevin%20McMahon.pdf)

*This bill details the sale of energy retailing and gas distributing assets of Energex, Ergon and Allgas. The sale of retail assets had been re-badged under Sun Retail (electricity) and Sun Gas Retail (natural gas). Details of both contestable gas and electricity are apportioned to these new companies and were sold to the host retailers, AGL and Origin.*

*In this speech, “Selected Contestable and Non-Contestable” retail and distribution assets were sold. This privatization of assets over-ran any challenge by third parties in regards to confidential consumer details, distribution networks assets, master gas meter ownership and hot water flow meter ownership, that were sold to energy entities.*

*It also mentioned details of commercial rights that may be affected, most note-worthy was “the disclosure of confidential information without third parties’ consent”. Therein she threw away the consumer rights, warranties and equities of BHW consumers, and the affected landlords/agents/entities who had past dealings and arrangements with, the Government Owned Corporations involved.*

*It mentions that this was done in Victoria and South Australia, among others, but fails to mention that in those jurisdictions, there were provisions regarding BHW.”*

The question of precisely what arrangements were made, how this impacted on end-consumers of utilities apparently “sold as a group of “cash cow” assets to a single gas supplier in Queensland, Origin Energy, and apparently similar arrangements in Victoria and South Australia needs to further investigated.

What scrutiny was applied? What can be done now to restore the enshrined rights of those impacted. Why should these groups suffer detriment simply because inappropriate arrangements impacting on their rights were determined by jurisdictions apparently without due regard to the precepts of contract or common law provisions and rights under existing generic provisions?

Remembering that these parties never did receive gas, and

This matter has not been clarified in the proposed energy laws and there is insufficient inclusion within the generic laws to cover such a situation. The public expected that the commitment to ensure complementary non-conflicting generic and industry-specific laws to be adopted, eliminating any confusion.

Though Model Terms and Conditions for both Deemed and Standard Contracts are proposed within the NECF these are not consistent with the spirit, intent and letter of drafted provisions within generic laws, which remain the subject of enquiry and report by the responsible Senate Committee.

In addition, the proposed energy laws have decreed that a deemed contract will only exist for the cycle of two billing periods after which a market or standard contract must be adopted.

In the case of dispute as to who the correct contractual party should be (for example Owners Corporation or end-user of a composite water product – heated water in the absence of any legal traceability or “*flow of energy*” to the “residential premises” (SCL and NMA term) or “premises (NECF2) term of the presumed deemed customer (NECF2 term) consumer (ACL term) (termed residential customer), this raises instant problems for which urgent clarification is required – but which the MCE has apparently refused to consider covering within its proposed national energy laws.

The term “*residential customer*” is substituted for consumer in the NECF. That term is defined as “*a customer who purchases energy principally for personal household or domestic use at premises.*”

I have put forward that failure to distinguish between “*residential premises*” and “*other premises*” (such as the common property areas of multi-tenanted dwellings under the control of privately or publically rented multi-tenanted dwellings has resulted in unjust imposition of deemed contractual status on the wrong parties and distortion of rights under proposed revisions to statutory and implied warranty protections under generic laws.

Examples of such distortions of fair and just protections under either standard form of “*deemed contracts*” are provided in my various submissions to the public arena, most recently discussed in my submission to the Second Exposure Draft of the National Energy Law and Rules (NECF2).

I demonstrated in my submission to the NECF2 Package how looseness in the use of terminology, and failure to adequately address the issues of conflict and overlap with other regulatory schemes can cause confusion and detriment.

On page 143 of his Paper Professor Coronos

*“The rationale for eliminating privity and imposing liability on both the manufacturer and the retailer of goods was explained by Professor Vernon in terms of a ‘single enterprise theory’, according to which consumer sales are made possible by the cooperative efforts of everyone in the distribution chain and accordingly they should be jointly responsible:*

*Some retailers may object to shouldering the responsibility for defects. They may perceive their role simply as a conduit of a product manufactured and packaged by others in the distribution chain. Since these retailers play no role in creating the product, they may view themselves as blameless when the goods or services turn out to be badly designed or produced. In a very real sense, they are blameless unless they had reason to know of the defect prior to sale. Accepting as fact the retailers’ claim that they neither created the defect nor had any way of knowing prior to sale that it existed does not lead to the conclusion that they should be exempted from responsibility to consumers for the defect. It leads only to the conclusion that they should be reimbursed for their outlay by others in the distribution chain or that it is merely another cost of doing business.*

*The retailer, who sells the goods or services in an effort to make a profit, should not be permitted to retain the profit while rejecting responsibility for the very thing that produced it.*

*Indeed, no entity in the chain should be permitted to shelter itself from its obligation to the ultimate consumer by pointing a finger at someone else in the chain. It is beyond argument that all in the chain are engaged in a single enterprise. Since the enterprise functionally is a separate unit, the fault of one is functionally the fault of all.<sup>30</sup>” (this reference is to the Vernon Report).”*

On pages 147 and 148 of his Paper Professor Corones under the heading **VII CASE STUDY: DEFECTS IN THE QUALITY OF ELECTRICITY SUPPLIED**, Professor Corones discussed a recent decision of Miller J in *Contact Energy Ltd v Jones*<sup>50</sup> provides a good example of how the new consumer guarantees regime might work in Australia.

On page 150 under the heading **X LOSS SHARING BETWEEN THE RETAILER AND THE CONSUMER**, Professor Corones discusses

*Section 18(4) of the CGA (NZ), (which) provides that in addition to the remedies of repair, replacement or refund ‘the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure ... which was reasonably foreseeable as liable to result from the failure’.*

*Miller J held that the language indicated that the Court’s power to award the full loss was discretionary, and carried with it the power to award less, taking into account the consumer’s contribution to the loss.<sup>55</sup> His Honour held that the language of s 18(4) ‘evokes the common law, with its commonsense approach to causation and remoteness’.<sup>56</sup>*

Though Prof Corones discusses Miller J’s finding that

*“electricity retailing differed from other goods in that the retailer was not able to prevent or manage defects and that the consumer may be able to manage defects by installing surge devices.<sup>57</sup> Nevertheless, the consumer would be entitled to recover the full amount of the loss unless the retailer could establish that it was more likely than not that surge equipment would have avoided the loss.”<sup>58</sup>*

**MK comment:**

It is absolutely reasonable to expect both generic laws, energy laws and all others current and proposed to contemplate and take into account discretionary powers that enable *“evoc(ation) of the common law with his commonsense approach to causation and remoteness.”*

It is not good enough to allow monopoly providers, significantly vertically and horizontally structured with in-house non-arm’s length and other outsourcing models of operation to hold the market to ransom and artificially inflate prices.

I repeat the view that both smart meters and smart grids should be managed by a single authority - perhaps the Dept of Climate Change, Energy Efficiency and Water, who have already taken over smart meters.

The two cannot be logically or appropriately separated. These are highly technical matters involving innovation for which inter-operability and compatibility need to be considered by those with sufficient technical background and separation from sectoral interests.

I do believe that the input of the National Measurement Institute's role as sole authority on trade measurement should be emphasized, cross-referenced to all relevant instruments as State and National level current and proposed and re-examined in the light of current or future Codes and Guidelines relied upon which industry participants are required to abide by. If such instruments have the effect of eroding instead of enhancing consumer protection – what point is there in energy-specific protections

On reviewing the website recently I stumbled on a number of documents relating to regulatory cost allocations 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 powers of the National Measurement Institute as the sole legal metrology authority and their revised regulations 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).

In terms of metrology processes, outsourcing and data management, and related concerns that may be relevant to vertical and horizontal integration, outsourcing practices to related bodies or others as servants, contractors and/or agents of energy supplies, believing themselves under energy laws to be also operating unregulated water monopoly distribution and transmission businesses on the basis of perceived flawed energy policies enshrined in jurisdictional codes and guidelines implicitly endorsed by new national regulations, Rule Changes existing and proposed and the complicated area of embedded generation (a term that does not apply to those receiving heated water products reticulated in water pipes to individual abodes in the absence of flow of energy to each abode).

These and similar issues have been raised repeatedly with energy arenas including the MCE, AEMC, recently AEMO, and with the ACCC and AER.

I support CHOICE'S views in its submission to the current Senate Enquiry that:

*“The Australian Consumer Law should be applied as minimum, uniform standard across both states and industries. Any existing exemptions or exceptions under the Trade Practices Act 1974 should be subject to debate before being adopted in the new law.”*

On the question of **statutory and implied warranties**, I refer to page 2 of Energex's submission to the Senate dated 16 April which discusses under the heading Issue 2 Customer Guarantees (Div 1 of Part 3-2 of the Bill).

Similar issues were also raised in response to the NECF2 Second Exposure Draft, for which there is an enormous rush to have rubber-stamped through the South Australian Parliament in Spring 2010, with many issues still not clarified and the issue of consistency, appropriate interpretation compatibility and harmony with generic laws and with trade measurement provisions still in the balance.

Whilst it is understandable that retailers should be nervous about these consumer guarantees in relation to energy given the tripartite governance model adopted by the NECF2 package, the Courts have found both parties liable with the retailer responsible for reclaiming from the distributor.

Professor Stephen Corones has examined case law, and the New Zealand Model in relation to electricity (as an example only, but applicable to gas too) and has cited higher court decisions that are pertinent.

He concluded that”

*“The NEIAT study produced some surprising data about the statutory implied terms scheme.*

*There is a widespread lack of awareness on the part of consumers, retailers and manufacturers that consumers are entitled to remedies for faulty goods and service. The scope of protection offered by the implied terms is unclear. The cost of litigating to enforce the statutory implied terms is prohibitive. The result is that retailers and manufacturers have no incentive to comply with the current law and frequently play the ‘blame game’ with neither party prepared to take responsibility.”*

In the light of these findings and case law cited to show that common law provisions over-rode decisions by regulators and others, I refer again to professor Corones' discussion of the differences between generic and energy-specific proposed laws for Australia, beginning with a template model requiring rubber-stamping before the SA Australian Parliament, with the intention that the legislation of other States adopts the provisions, which ultimately become the National Energy Rules and Laws (noting that even the term consumer vanishes)

I refer again to his paper Consumer Guarantees in Australia: Putting an End to the Blame Game and in particular to the section IV **CONSUMER GUARANTEES**



As discussed on pages 21 – of my Main submission to the Senate, in his published paper of 2009 on Consumer Guarantees by Professor Stephen G. Corones<sup>34</sup> refers to the second exposure draft of the National Energy Customer Framework (NECF2), mentioning the original goal that

*“the operation of the NECF and the Australian Consumer Law would be consistent and complementary.”*

Professor Corones describes the focus of his article as being on the proposed consumer guarantee component of the ACL, referring to the review undertaken by the Commonwealth Consumer Affairs Advisory Council (CCAAC) in mid-2009, and the 33 written submissions received in response to the Issues Paper and to the National Education and Information Taskforce (NEIAT) paper *“Baseline Study for Statutory Warranties and refunds.”*

See

[http://www.treasury.gov.au/documents/1682/RTF/Report\\_CCAAC\\_091029.rtf](http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf)

Part 3 of Professor Corones’ paper examines as an example only

*“what the new consumer guarantees will mean for consumers and traders in Australia by reference to defects in the quality of electricity supplied.”*

especially in situations where outage or fluctuation has occurred and highlights decisions made in the New Zealand High Court in this regard.

Prof. Corones observes the CCAAC recommendation that statutory consumer guarantees:

*“should apply to all products and services supplied in domestic consumers, including electricity gas and telecommunications.”*

I refer to novel references to unspecified “other services” where cost recovery proposals under Rule changes are sought on a regular basis without cross-reference of regulations under other regulatory schemes, including trade measurement and generic laws, current and proposed.

As to how those” *“other services”* are covered under consumer guarantees – how would one make a guess at this when they are not covered or discussed during multiple Rule Change proposals by the AEMO or AEMC or MCE or market participants in decisions that appear to be made, forgive me, in vacuum conditions with what is generally believed to be inadequate inter-body collaboration or effective collaboration with stakeholders, perhaps excluding market participants,

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<sup>34</sup> *“Consumer guarantees in Australia: putting an end to the blame game.”* Queensland (Vol 9 No. 2 (QUTLJJ) <http://eprints.qut.edu.au/31091/1/c31091.pdf> (last accessed 21 April 2010)

See for example the Rule Change Proposal underfoot through the AEMC. I would discuss further if time permitted. See my brief submission to the AEMC at

<http://www.aemc.gov.au/Electricity/Rule-changes/Open/Provision-of-Metering-Data-Services-and-Clarification-of-Existing-Metrology-Requirements.html>

There have been far too many discussions behind locked doors. I refer again to the damning November 2009 report of the Victorian Auditor General concerning the ill-conceived Victorian smart meter roll out in course of implementation, intending to represent the template provisions. This would in my opinion be the worst possible scenario.

Already the Victorian Auditor-General has condemned the hastily and ill-considered mandated Victorian roll out of smart meters. His damning November 2009 report

Victorian Auditor-General's Report (2009) *"Towards a 'smart grid – the roll-out of Advanced Metering Infrastructure"*

A damning report which examines the role played by Victoria's Department of Primary Industries in the Victorian smart meter roll-out, being the guinea pig State to trial cursorily and then proceed with implementation of the roll-out

Des Pearson as Victorian Auditor-General said in his November Report

The AMI is a

*"large and complex project aiming to record and measure electricity use in more detail than current meters allow. The decision taken by the Government aimed to install between 2009 and 2013 all accumulation meters in 2.4 million homes and small businesses with smart meters. The report examines whether the advice and recommendations provided to the Government are sound,"*

Des Pearson's findings were (Intro 2.1):

*"DPI's approach to project governance has been inconsistent with the nature and scale of the significant market intervention made by the project. DPI did not allocate adequate or sufficient resources to provide appropriate review mechanisms for the economic and technical assessment of the project, stakeholder consultation and risk management."*

See Victorian Auditor-General (2009) *"Towards a smart grid: the roll put of Advanced Metering Infrastructure"* Victorian Auditor-General's November Report

[http://download.audit.vic.gov.au/files/111109\\_AMI\\_Full\\_Report.pdf](http://download.audit.vic.gov.au/files/111109_AMI_Full_Report.pdf)

Under the provisions of section 16AB of the Audit Act 1994 Des Pearson, the Victorian Auditor-General's damning November 2009 Report was tabled in Parliament after discussions with the Department of Primary Industries.

The Audit Summary (pvii) explains the Government's decision to approve the AMI project in February 2006 as attempting to achieve energy efficiency and a corresponding reduction in carbon emissions by reducing energy waste and demand; promoting efficient use of household appliances whilst promoting inefficient use of others; and shifting consumptions of consumers (a rationale does not consider the inelasticity of demand for electricity amongst consumers) with the aim of maximizing the efficient use of power generating assets and smooth out peak consumption periods which cause spikes in the cost of electricity and rate inefficiencies in the allocation of capital to new generation capacity.

Auditor-General Des Pearson's findings were (Intro 2.1):

*"DPI's approach to project governance has been inconsistent with the nature and scale of the significant market intervention made by the project. DPI did not allocate adequate or sufficient resources to provide appropriate review mechanisms for the economic and technical assessment of the project, stakeholder consultation and risk management."*

*"There has been insufficient analysis to fully understand potential perverse outcomes, risks, and unintended consequences for consumers. This means that there is no clarity whether the distribution of costs and benefits between electricity businesses and consumers will be consistent with the intended outcomes of the program, and equitably allocated through the mandated cost recovery regime."*

*"These inadequacies can be attributed to DPI's misapprehension of the extent of its fundamental governance accountability in a non-state-funded project."*

The auditor-General's Main Findings (pvii) were:

1. The department's project governance has not been appropriate for the nature and scale of the market intervention the project poses. In particular:
2. Its advice to government on risk assessment has been inadequate
3. The level of community engagement has been inadequate, given the significant effect on consumers
4. DPI has engaged with the project in only a limited way as an 'observer' during its implementation phase.
5. As there were not enough staff assigned by the DPI to the project, it has not been able to adequately engage with such a large scale and complex project. This highlights a gap in the department's understanding of its governance and accountability role in a *"non-budget funded project"*

The Auditor-General has also commented on flawed assessment of the economic case for the project, noting

*"significant unexplained discrepancies between the industry's economic estimates and the studies done in Victoria and at the national level. These discrepancies suggest a high degree of uncertainty about the economic case for the project."*

Perhaps it will always be a state-run system with nominal Federal oversight - a bit like the monarchy's role in Commonwealth affairs.

The apparent lack of effective decision-making and transparency in the smart meter roll out has implications for the entire economy.

The Centurian Metering Technologies solution may have delivered a workable solution for a fifth to a third of the price paid for arrangements sanctioned under an Order in Council process where \$2.4 billion was spent. Behind-the-scenes workshops between distributors appear to have been the norm without at least adequate governance accountability and oversight evident. The people involved in making these decisions need to be made much more accountable more so in a situation where Victoria is seen to be taking a lead with national energy reform measures.

What would have happened if a competitive outcome formed the basis of final outcome rather than an imposed monopoly decision? The egg cannot be unscrambled.

In relation to smart meters, it is not that there are not compelling reasons to move metering into the 21<sup>st</sup> Century.

In his 2007 PowerPoint Presentation Metering *“Allocating Risks in a Gross Pool Market,”* John Dick President of Energy Action Group commented on how disappointing it was to see *“lack of concrete information on the table”*; *“lack of real time customer load and behavioural data,* (thus) making modeling difficult. He has long held that *“cost smearing does absolutely nothing for the user/causer pay principle under pinning the market.”*

John Dick has also said:

*“We appearing to be grasping at a number of straws based on estimated values in the analysis of Advanced Meter Roll Out without adequately thinking through the issues.*

*“It is a risky strategy to compare the NEM with other countries given the disparate Australian climatic conditions, opportunistic generator bidding behavior, the various idiosyncrasies and massive asymmetric risks of our unique merit order dispatch gross pool energy market and Ancillary Service Payment markets, along with the very weakly interconnected transmission system and radially based distribution systems.”*

It is no secret that the MCE is Victorian-dominated. This was mentioned by industry in the February 2010 workshops that I attended and in at least one formal industry submission (of the 41 submitted). I concur having observed this at first hand. It may be time for higher authorities with more independence to begin to question how decisions are being made and the quality of governance and leadership.

In addition it is common knowledge that assurances arrangements and warranties were made, at any rate in Queensland, that deserve scrutiny. Victoria put into place the bizarre and inappropriate bulk hot water arrangements

Prior to rubber stamping of the proposed Energy Retail Law and Rules I ask the following challenging question:

Is there a case for a public enquiry on certain issues - including the common knowledge that the disaggregation of energy and water assets and "*hot water clientele receiving no energy*" as if this segment of the community without either protection redress recourses of any kind within statutory provisions were a commodity.

That this occurred and warranties were provided to those inheriting retail arms of previously publicly owned assets is a matter of record - already briefly discussed in my submission to the Senate and to the NECF2 and reiterated by the single individual writing independently to the NECF2 Package (Kevin McMahon, private citizen, Queensland).

I refer again to my discussion in the Main Submission to the Senate under the heading "*Participation of Consumers in Fostering Effective Competition, pages 57-78*" and reproduce a segment of that here:

In Queensland energy providers have successfully overturned in court attempts to maintain fair energy prices.

## SOME PERTINENT COMPARATIVE LAW CONSIDERATIONS

I would like to discuss some comparative law matters that are relevant and should be taken into account, not just for this enquiry, but for all enquiries that may be impacted, whether under the umbrella of the AER, AEMC, MCE, AEMO; other bodies

### Overview of Australian Consumer Law Matters

**The ACL is a generic law applying to all sectors of the economy.**<sup>35</sup>

I refer to the Forum for Consumers and Business Stakeholders hosted by the Standing Committee of Officials of Consumer Affairs (SCOCA) held on 27 November 2009, the date that coincided with the publication of the Australian Treasury's Unconscionable Conduct Issues Paper; and with the publication of the Second Draft Exposure of the National Energy Retail Laws and Rules (NERL and NERR) together known as the National Energy Consumer Framework (NECF2),

The Ministerial Council on Energy expects to have this instrument rubber-stamped through the South Australian Parliament this Spring, albeit that all 41 responders to that arena have expressed disappointment in the context of slant, focus and workable detail within the operational design.

Finally, I remind the AER, AEMC, MCE, and AEMO of the changes to generic laws and the Media Release issued on 15 April 2010. The first part of the Australian Consumer Law (replacing the TPA) is now in force.

When the operational details and further matters are considered and finalized by the Senate Economics Committee, these will be incorporated also. At that stage the existing *Trade Practices Act 1974* will be renamed the Consumer and Competition Law.

At this stage there are a number of issues as yet unresolved as discussed in the 670 page Explanatory Memorandum for the *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* and in the 288-page Bill(2) under consideration.

Matters still under consideration by the Senate relate to misleading and deceptive conduct; unconscionable conduct; unfair contract terms; unfair practices; consumer guarantees; unsolicited selling; lay-by sales; safety of consumer goods and product related services (note that gas and electricity are goods not services, and their supply is part of a continuous process under tripartite governance contractual model proposed under the NECF2 Package provisions; information standards; liability of manufacturers for goods with safety defects; offences; enforcement.

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<sup>35</sup> Note there are further explanations about financial products and services as covered by Corporations Agreement 2002

See

<http://www.accc.gov.au/content/index.phtml/itemId/923837>

*“This will provide greater protection from unscrupulous operators*

*The ACL gives the ACCC new enforcement powers to protect consumers, including the ability to seek or issue:*

- *civil monetary penalties*
- *banning orders*
- *substantiation notices*
- *infringement notices*
- *refunds for consumers, and*
- *public warnings.*

*Under the new legislation the ACCC can seek financial penalties of up to \$1.1 million for corporations and \$220,000 for individuals in civil cases for unconscionable conduct, pyramid selling and sections of the law dealing with false or misleading conduct.*

*“Further the ACCC will be able to deal with 'repeat or serious offenders' by seeking court orders banning them from managing corporations,” he said. “This will now be available in cases involving unconscionable conduct, and breaches of various consumer protection and product safety provisions.*

*“The ACCC will now be able to use substantiation notices to require traders to justify claims they make about products they promote. These will provide a fast-track way to identify if a potentially harmful misrepresentation has been made. Examples could include was/now advertising and claims about food, health, environmental impact and business opportunities.*

*“Where the ACCC has reasonable grounds, it may now issue an infringement notice in cases of suspected unconscionable conduct, some false or misleading conduct, pyramid selling and various product safety provisions. Infringement notices will enable the ACCC to respond quickly to alleged breaches of these parts of the law and help facilitate a quick resolution of ACCC concerns with traders.*

*“Infringement notice penalties for false or misleading, unconscionable conduct, pyramid selling and breaches of product safety provisions are \$6,600 for corporations and \$1,320 for individuals.*

*“Vulnerable and disadvantaged consumers will particularly benefit from the ACCC's new ability to seek redress through the courts for consumers who are not included in a particular legal action. For example, the ACCC could ask the court to order an unscrupulous trader to provide refunds to consumers affected by misleading conduct.”*

*Unfair contract terms are also covered in the new legislation with provisions applying to standard form consumer contracts. These come into effect on 1 July 2010 and public guidance will be circulated to major business and consumer organisations before then.”*

Stakeholders making submissions to the Senate Economics Committee have raised a number of pertinent matters.

For example the submission of ACAN has encouraged Senators

*“...to seize this opportunity to create real reform that comprehensively addresses future consumer concerns, including key digital rights issues. The introduction of a prohibition on unfair conduct, a reform which we believe is long overdue, would be one step in providing comprehensive, future-looking consumer protection.*

I support this view wholeheartedly.

In addition, I discuss the issue of unfair substantive terms encapsulated into sanctioned Codes and/or industry-specific Guidelines, given the expectation that providers of goods and services abide by these. The intent behind this is to enhance not dilute consumer protection.

If a policeman entered someone's abode and asked the occupant to shoot a man across the road, if the party so instructed complied, what protection does anyone suppose the courts would grant to the offender against a charge of murder? How would the policeman stand with in facing a likely charge of aiding and abetting such a murder.

Similarly, in the open courts, those who may be viewed as possibly conspiring to strip end-consumers of their enshrined rights may find themselves in a position of vulnerability if cited as co-respondents. There are already litigious proceedings in hand in the open courts challenging the validity of imposed contractual status on end-users of utilities who deny contractual responsibility and have also challenged other related matters in connection with what is commonly referred to as “embedded” provision of energy.

I refer to the Ministerial Order in Council of 2002 (see attachment) relating to Exempt Selling, referring to those parties who are exempted from licence for the sale and supply of electricity. The Orders were exclusive to gas and were never intended to extend beyond those situations where incidental supply of energy was provided. There had never been any intent for these practices to be extended to a large number of providers of energy whether or not embedded.

In the case of gas, it is a myth that those living in multi-tenanted dwellings receiving heated water supplies are “*embedded consumers of energy.*” This creative term is always inapplicable to gas.



I am particularly concerned about aspects of existing Codes and/or Guidelines that appear to either implicitly or explicitly direct providers of utilities to adopt certain practices, especially in relation to contractual imposition on the wrong parties of deemed status; using instruments that represent incorrect use of instruments for the purposes designed; measurement of the wrong commodity (water instead of the alleged energy being allegedly sold and supplied under deemed ENERGY contracts, deemed to be operative under energy provisions.

It is unclear under what powers contained in the proposed NECF2 Package authorize suppliers policy makers such as the MCE and AEMO and rule makers such as the AEMC to allow retailers of gas and electricity to either sell water, water as a composite product (heated water), or the heated component of water from which the heating component cannot be measured or calculated in a legally traceable manner.

Indeed there is no mention at all of water or authority by providers of heated water or the heating component of water to effect disconnection of decommissioning of water suppliers using methods that clamp hot water flow meters to prevent supply of heated water.

It is certainly most unclear whether the provisions are operating under energy or water provisions. Also unclear is what “*other services*” may be offered as referred to under the proposed AEMC rule change; what the implications would be for consumer protection if “*bundled*” services; what leverage a supplier may have if a consumer facing hardship default on payment for one product in the “bundled package” but not the other; what the implications would be for credit rating and the like, and whether access to both or all services may be lost if only one of several is the subject of overdue payments.

None of these issues has been appropriately aired and discussed.

The AEMO (formerly known as NEMMCO) has proposed a rule change that seeks to make changes to Chapter 7 of the National Electricity Rules) which deals with metrology.

The trend to use frequent Rule Change initiatives to substitute for a more robust scrutiny through robust meaningful stakeholder input and subject to Parliamentary sanction of matters to be given the weight of law means continuing erosion

In addition, there are numerous other current AEMC initiatives and AER issues that impact on some of the matters I have raised.

It is not my view that bodies responsible for policy, rule and regulation should rely solely on chance inputs from interested stakeholders, but rather that independent and robust independent and accountable research and enquiry should rest with those bodies before incorporating rules and regulations.

It is regrettable that these matters did not receive robust and transparent examination at the time that the NECF2 Package was on the table for discussion and consultative input, which appeared to represent no more than cursory attempts to consider consumer perspectives, notwithstanding the 14 years that the MCE has been examining revised energy regulations, apparently in vacuum conditions without due regard to conflict and overlap with other schemes and impacts.

Similar considerations will impact on AER and other AEMC current matters and should be taken into account. It really should not be necessary for stakeholders to submit time after time after time material that is pertinent to other arenas.

This material is readily available in the context of other submissions or upon the undertaken of relatively cursory research. The responsibility lies with policy makers regulators and legislators to make sure that matters receive appropriate attention in the light of all available information.

I am disappointed and disturbed that safety and technical issues in relation to fungible commodities such as gas electricity and water energy policy and regulation appear to be well below appropriate levels. I have drawn attention to some of these - rodents and massive wear and tear to essential infrastructure have the potential to cause serious damage. Instead of such issues being addressed as they should, ad hoc suggestions are being made by parties with vested interests to maintain infrastructure that:

- a) are not necessary for the distribution and transmission of energy at all
- b) maintenance of which may not comply with the expectations of the new sole authority of legal metrology;
- c) procedures and practices are apparently being proposed for rubber-stamping without transparent and appropriate levels of stakeholder inputs at all levels or the benefit of Parliamentary sanction

Before the ink pad and paper have connected in relation to proposed national energy provisions, changes are already being contemplated that will have far reaching impacts well beyond consumer protection.

The trade measurement instruments in current use in specified circumstances can calculate neither heat nor volume of gas supplied (or electricity) to individual abodes. Most receive poor quality heated water - leaving aside that energy suppliers, despite owning water infrastructure, do not own the water and therefore cannot sell the water).

The grey areas are how the generic laws and energy laws can be relied upon when the issue of accountability for fitness of purpose and guarantee remain unaddressed.

The new proposed energy laws appear to carefully skirt around this by failing to even mention that suppliers are following instructions under codes to distort the principles of sale and supply, and of contractual, guarantee and fitness for purpose principles encapsulated within generic laws, leaving aside the neglected issue of unfair substantive provisions encapsulated into Codes and Guidelines, by implication sanctioned by the MCE and others.

I have discussed this issue in extraordinary in my Submission 25 to the Senate Economics Committee's Inquiry TPA-ACL-Bill2, and its several supporting appendices and in other arenas to no avail so far.

Similar material was included in my response to the National Energy Law and Rules Second Exposure Draft (NECF2) Package in early March, and to the Gas Connections Framework Draft Policy Paper, as well as to the NECF1 Consultation RIS, and the Essential Services Commission Review of Regulatory Instruments in 2008.

I urge the AER, AEMC, MCE and AEMO to consider these matters and for more detail study the numerous submissions already made on these issues. I particular draw attention to the case study material contained in appendices submitted to the Senate Economics Committee; the NECF1; NECF2 Packages and the major Deidentified Case Study also published with by November 2009 submission to the Commonwealth Treasury's Unconscionable Conduct Issues Paper.

My sustained attempts to raise these issues for proper consideration and transparent discussion have been thwarted. In particular at the recent February 2010 NECF2 Workshops I was informed in no uncertain terms that the matters that I wish to raise would not be addressed within the NECF2 package, however meritorious.

Given that the NECF2 arena through the MCE was considering matters relating to contract and interpretation thereof and many of the procedural aspects of the proposed law, it astonishes me that this whole matter was not given proper exposure and discussion, including in relation to consumer protection and clear conflicts and overlap with other schemes.

Rule Change was proposed by the AEMO regarding metering data services under current consideration by the AEMC has direct impacts on the Revised Jemena Gas Networks (NSW) Ltd. Gas Access and on numerous other matters including any current or future cost determinations and regulatory decisions impacting on either in-house or outsourced services, whether or not deemed to be "*at arms length.*"

Industry participants complained in submissions to the 2009 Productivity Commission's Review of Regulatory Burden: Social and Infrastructure that they were required to submit the same material repeatedly to the same arena, even when dealing with the same matter under review.

Where there is overlap, there is a reasonable expectation that bodies achieve a higher level of collaboration, such that information is appropriately shared and discussed in a timely manner not only to avoid duplication of effort but importantly to avoid the prohibited regulatory overlap and conflict between schemes, something that was undertaken and guaranteed under the Intergovernmental Agreement of July 2009, and appears not to have been taken seriously.

## Consistency

### Regulatory Reform

COAG had noted that good progress is being made on the Seamless National Economy agenda, with significant progress on a number of initiatives, including nationally-uniform occupational health and safety laws that reduce employers' costs; a national licensing system for specified occupations to improve flexibility and reduce licence costs; and, a single Commonwealth managed consumer credit system, reducing regulation and enhancing consumer protection.

COAG endorsed a series of reforms, recommended by the Business Regulation and Competition Working Group (BRCWG), for further progress on regulatory reform. To this end, COAG signed an Intergovernmental Agreement (IGA) to underpin the establishment of national Australian Consumer Law, based on existing consumer protection provisions and new product safety regulation and enforcement regime, and a further IGA covering national business names registration, which will result in lower costs of registering a business.

The CoAG Inter-government Agreement guaranteed that there would be no inconsistencies – yet these have already crept in before the rubber stamp and ink have connected.

A new era of confusion and uncertainty will be heralded in despite all attempts to get things right this time if these matters are not addressed.

Especially in relation to energy and water there appears to be apparent failure of responsible bodies to apparent failure to undertake at least adequate inter-body collaboration in the design of new policies and regulations.

At the ACL Forum mentioned above, Dr. Steven Kennedy, General Manager, Competition and Consumer Policy Division of the Australian Treasury introduced the proposed ACL as

*“the largest overhaul of Australian Consumer law in 25 years” intended to introduce a single national consumer law that will apply consistently in all Australian jurisdictions.”*

Dr. Kennedy spoke of the template scheme implemented in the 1980s based on Part V of the TPA 1974 as an attempt to address the identified need and benefits of a national approach to consumer law.

However, Dr. Kennedy observed that

*“earlier attempts to embrace the benefits of consistency were short-lived since the individual state and federal governments “all pursued their own improvements to consumer laws leading to divergence, duplication and complexity.”*

That approach led to confusion to businesses and consumers; increased time and monetary costs and compromised market confidence.

On the brink of adoption of a new improved national generic law reflecting significant amendments to the TPA, divergence from the concept of “*a single law, multiple jurisdictions*” is evident in both individual state and federal jurisdictions in attempts to formulate and implement a national energy consumer law adopting a tripartite governance model (distributor-retailer-customer).

The goal of adopting a unified national consumer protection objective reflected in both generic and industry-specific laws appears to be already fading into the distance. One example is the proposed National Energy Law and Rules (NERL and NERR) encapsulated into the Second Exposure Draft of the National Energy Customer Framework Package (NECF2) published on 27 November 2009 with submissions published in mid-March 2009 following workshops/information sessions held on 3 and 4 February 2010.

I further discuss specific utility matters shortly in relation to both end-consumers and businesses

I refer to the ACL Explanatory Memorandum which accompanied the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010

This Bill was referred to the Senate Economics Committee which will

Chapter 5

Unfair contract terms

Comment on context of amendments

In Chapter 5 of the Second Bill, p52 the context of amendments is discussed, explaining as follows

5.2 on 2 October 2007 the Council of Australian Governments (COAG) agreed to establish a national also addressing unfair contract terms, as proposed by the Ministerial Council on Consumer Affairs (MCCA) on 15 August 2008

The explanatory memorandum for the second Bill on page 4 the 2 July 2009 COAG Intergovernmental Agreement for the Australian Consumer Law (IGA)

I wish to highlight and discusses the following matters with direct reference to Chapter 1 of the explanatory Bill, especially as contained on pages 4 and 5

I start with more general concerns and move on to discussing more specific issues in relation to comparative law with energy provisions in mind current and proposed and the extent to which these do not sit comfortably with generic provisions; trade measurement provisions current and proposed and other protections.

**The ACL is a generic law applying to all sectors of the economy.<sup>36</sup>**

I refer to the Forum for Consumers and Business Stakeholders hosted by the Standing Committee of Officials of Consumer Affairs (SCOCA) held on 27 November 2009, the date that coincided with the publication of the Australian Treasury's Unconscionable Conduct Issues Paper; and with the publication of the Second Draft Exposure of the National Energy Retail Laws and Rules (NERL and NERR) together known as the National Energy Consumer Framework (NECF2), which the Ministerial Council on Energy expects to have rubber-stamped through the South Australian Parliament this Spring, albeit that all 41 responders to that arena have expressed disappointment in the context of slant, focus and workable detail within the operational design.

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<sup>36</sup> Note there are further explanations about financial products and services as covered by Corporations Agreement 2002

## STATUTORY WARRANTIES AND GUARANTEES

### SOME CONSIDERATIONS

In his published paper by Professor Stephen G. Corones, "*Consumer guarantees in Australia: putting an end to the blame game*. Queensland (Vol 9 No. 2 (QUTLJJ) <http://eprints.qut.edu.au/31091/1/c31091.pdf> (last accessed 21 April 2010

refers to the second exposure draft of the National Energy Customer Framework (NECF2), mentioning the original goal that

*"the operation of the NECF and the Australian Consumer Law would be consistent and complementary."*

He shows how this has not occurred in practice with reference to current proposals at Second Draft stage. Under Section XII Prof Corones observes that though the *"marketing rules under the NECF will align with the ACL, Part 7 of the NECF will establish a small compensation claims regime."*

Professor Corones describes the focus of his article as being on the proposed consumer guarantee component of the ACL, referring to the review undertaken by the Commonwealth Consumer Affairs Advisory Council (CCAAC) in mid-2009, and the 33 written submissions received in response to the Issues Paper and to the National Education and Information Taskforce (NEIAT) paper *"Baseline Study for Statutory Warranties and refunds."*

See

[http://www.treasury.gov.au/documents/1682/RTF/Report\\_CCAAC\\_091029.rtf](http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf)

Part 3 of Professor Corones' paper examines as an example only

*"what the new consumer guarantees will mean for consumers and traders in Australia by reference to defects in the quality of electricity supplied."*

especially in situations where outage or fluctuation has occurred and highlights decisions made in the New Zealand High Court in this regard.

Prof. Corones observes the CCAAC recommendation that statutory consumer guarantees

*"should apply to all products and services supplied in domestic consumers, including electricity gas and telecommunications."*

More difficult is the situation where gas or electricity is deemed to be supplied under either standard or deemed model contracts or coerced market contracts where no supply of such a commodity is made at all to the end-consumer, who receives instead a heated water product reticulated in water pipes (see submission by Madeleine Kingston and separate submission by Kevin McMahon to the NECF2 2nd Exposure Draft 2010.<sup>37</sup>

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<sup>37</sup> A direct Queensland victim of the existing *"bulk hot water provisions"* living in public housing apparently under energy laws – also discusses many other issues including competition matters



This matter has not been clarified in the proposed energy laws and there is insufficient inclusion within the generic laws to cover such a situation. The public expected that the commitment to ensure complementary non-conflicting generic and industry-specific laws to be adopted, eliminating any confusion.

Though Model Terms and Conditions for both Deemed and Standard Contracts are proposed within the NECF these are not consistent with the spirit, intent and letter of drafted provisions within generic laws, which remain the subject of enquiry and report by the responsible Senate Committee.

In addition, the proposed energy laws have decreed that a deemed contract will only exist for the cycle of two billing periods after which a market or standard contract must be adopted.

In the case of dispute as to who the correct contractual party should be (for example Owners Corporation or end-user of a composite water product – heated water in the absence of any legal traceability or flow of energy to the presumed consumer (termed residential customer), this raises instant problems for which urgent clarification is required – but which the MCE has apparently refused to consider covering within its proposed national energy laws.

The term “*residential customer*” is substituted for consumer in the NECF. That term is defined as “*a customer who purchases energy principally for personal household or domestic use at premises.*”

I have put forward that failure to distinguish between *residential premises* and *other premises* (such as the common property areas of multi-tenanted dwellings under the control of privately or publically rented multi-tenanted dwellings has resulted in unjust imposition of deemed contractual status on the wrong parties and distortion of rights under proposed revisions to statutory and implied warranty protections under generic laws.

Examples of such distortions of fair and just protections under either standard form of “*deemed contracts*” are provided in my various submissions to the public arena, most recently discussed in my submission to the Second Exposure Draft of the National Energy Law and Rules (NECF2).

I demonstrated in my submission to the NECF2 Package how looseness in the use of terminology, and failure to adequately address the issues of conflict and overlap with other regulatory schemes can cause confusion and detriment.

On page 143 of his Paper Professor Coronos

*“The rationale for eliminating privity and imposing liability on both the manufacturer and the retailer of goods was explained by Professor Vernon in terms of a ‘single enterprise theory’, according to which consumer sales are made possible by the cooperative efforts of everyone in the distribution chain and accordingly they should be jointly responsible:*

*Some retailers may object to shouldering the responsibility for defects. They may perceive their role simply as a conduit of a product manufactured and packaged by others in the distribution chain. Since these retailers play no role in creating the product, they may view themselves as blameless when the goods or services turn out to be badly designed or produced. In a very real sense, they are blameless unless they had reason to know of the defect prior to sale. Accepting as fact the retailers' claim that they neither created the defect nor had any way of knowing prior to sale that it existed does not lead to the conclusion that they should be exempted from responsibility to consumers for the defect. It leads only to the conclusion that they should be reimbursed for their outlay by others in the distribution chain or that it is merely another cost of doing business.*

*The retailer, who sells the goods or services in an effort to make a profit, should not be permitted to retain the profit while rejecting responsibility for the very thing that produced it.*

*Indeed, no entity in the chain should be permitted to shelter itself from its obligation to the ultimate consumer by pointing a finger at someone else in the chain. It is beyond argument that all in the chain are engaged in a single enterprise. Since the enterprise functionally is a separate unit, the fault of one is functionally the fault of all.<sup>50</sup> (this reference is to the Vernon Report.)*

On pages 147 and 148 of his Paper Professor Corones under the heading **VII CASE STUDY: DEFECTS IN THE QUALITY OF ELECTRICITY SUPPLIED**, Professor Corones discussed a recent decision of Miller J in *Contact Energy Ltd v Jones*<sup>50</sup> provides a good example of how the new consumer guarantees regime might work in Australia.

On page 150 under the heading **X LOSS SHARING BETWEEN THE RETAILER AND THE CONSUMER**, Professor Corones discusses

*Section 18(4) of the CGA (NZ), (which) provides that in addition to the remedies of repair, replacement or refund 'the consumer may obtain from the supplier damages for any loss or damage to the consumer resulting from the failure ... which was reasonably foreseeable as liable to result from the failure'.*

*Miller J held that the language indicated that the Court's power to award the full loss was discretionary, and carried with it the power to award less, taking into account the consumer's contribution to the loss.<sup>55</sup> His Honour held that the language of s 18(4) 'evokes the common law, with its commonsense approach to causation and remoteness'.<sup>56</sup>*

Though Prof Corones discusses Miller J's finding that

*"electricity retailing differed from other goods in that the retailer was not able to prevent or manage defects and that the consumer may be able to manage defects by installing surge devices.<sup>57</sup> Nevertheless, the consumer would be entitled to recover the full amount of the loss unless the retailer could establish that it was more likely than not that surge equipment would have avoided the loss."<sup>58</sup>*

**MK comment:**

It is absolutely reasonable to expect both generic laws, energy laws and all others current and proposed to contemplate and take into account discretionary powers that enable *“evoc(ation) of the common law with his commonsense approach to causation and remoteness.”*

It is not good enough to allow monopoly providers, significantly vertically and horizontally structured with in-house non-arm's length and other outsourcing models of operation to hold the market to ransom and artificially inflate prices.

I repeat the view that both smart meters and smart grids should be managed by a single authority - perhaps the Dept of Climate Change, Energy Efficiency and Water, who have already taken over smart meters.

In my view it is neither logical nor appropriately separated. These are highly technical matters involving innovation for which inter-operability and compatibility need to be considered by those with sufficient technical background and separation from sectoral interests.

I believe that the input of the National Measurement Institute's role as sole authority on trade measurement should be emphasized, cross-referenced to all relevant instruments as State and National level current and proposed and re-examined in the light of current or future Codes and Guidelines relied upon which industry participants are required to abide by. If such instruments have the effect of eroding instead of enhancing consumer protection – what point is there in energy-specific protections

I cite directly from and support the recently published views of Associate Professor Frank Zumbo (*“Australian consumer law reforms fall short”* Business Dynamics, 18 March 2010), to whom I have previously written in connection with concerns about consumer law provisions.

*“University of New South Wales Associate Professor Frank Zumbo has come out swinging at proposed national consumer laws that water down existing legislation in Victoria.*

*While moves to a national consumer law framework are to be welcomed, it's very disappointing that the new national law dealing with unfair contract terms has been watered down from the longstanding Victorian legislation in the area.*

*The Victorian legislation, modelled on legislation in the United Kingdom, represents best practice in dealing with unfair contract terms and should have simply been copied at the Federal level.*

*Instead, changes to the new national unfair contract terms law making it much harder to prove the existence of an unfair contract term will disadvantage consumers.*

*It's also disappointing that the Federal Government did not accept proposals for the availability of "safe harbours" under the new national unfair contract terms law. The provision of safe harbours under national law would have enabled businesses to voluntarily approach the ACCC for approval of consumer contracts or terms.*

*If obtained, the ACCC approval would have operated to safeguard businesses from legal action in relation to the approved contract or term. Safe harbours would have provided businesses and consumers with certainty about the use of approved contracts or terms.*

*Finally, the last minute removal of small businesses from the operation of the new national law dealing with unfair contract terms will disappoint those small businesses on the receiving end of unfair contract terms used by larger businesses. Unfair terms in retail leases, franchise agreements and supply agreements will escape scrutiny under the new national law and give unscrupulous larger businesses the green light to continue using unfair terms in contracts with small businesses."*

As an individual stakeholder, I wish to add my disappointment to those of numerous community organizations about outcomes.

*Madeline Kingston*

Madeline Kingston

Individual Stakeholder