

4 June 2010

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Dear Mr. Buckley

Further Comment JGN Gas Access Proposal Draft Decision (and beyond)¹

Notwithstanding that the deadline for submissions has elapsed I hope the AER will consider publishing this addendum submission in the light of the dismissive comments made by Jemena in referring to the numerous issues that I have raised, including but not limited to competition issues.²

Following publication of Jemena's (JGN)'s further submissions to the AER dated 18 May, made available on 22 May, and immediately upon my return from an interstate trip, I attempted to reach relevant AER staff to seek consent for provision of counter-arguments, especially in view of the dismissive manner in which JGN discounted the essence of my published April submission³ to the AER's Draft Determination in this gas access dispute.

¹ The same disclaimers apply as for my original submission of April 2010 already published on the AER website

Madeleine Kingston (2010) Submission to AER's Draft Decision Jemena (JGN) (NSW) Revised Gas Access Proposal

[http://www.aer.gov.au/content/item.phtml?itemId=736651&nodeId=e2bf7cc4d1eb4698d69e6cd85f114f1c&fn=JGN%20further%20submission%20\(18%20May%202010\).pdf](http://www.aer.gov.au/content/item.phtml?itemId=736651&nodeId=e2bf7cc4d1eb4698d69e6cd85f114f1c&fn=JGN%20further%20submission%20(18%20May%202010).pdf)

See also other submissions

<http://www.aer.gov.au/content/index.phtml/itemId/736190>

² JGN access arrangement revision proposal: JGN response to public submissions on the JGN revised access arrangement revision proposal 18 May 2010 34-pages including 5-page covering letter

³ JGN access arrangement revision proposal: JGN response to public submissions on the JGN revised access arrangement revision proposal (34 pages)

[http://www.aer.gov.au/content/item.phtml?itemId=736651&nodeId=e2bf7cc4d1eb4698d69e6cd85f114f1c&fn=JGN%20further%20submission%20\(18%20May%202010\).pdf](http://www.aer.gov.au/content/item.phtml?itemId=736651&nodeId=e2bf7cc4d1eb4698d69e6cd85f114f1c&fn=JGN%20further%20submission%20(18%20May%202010).pdf)

I advise that further to my published submission to the JGN Gas Access Draft Determination (April 2010), I have undertaken further cursory research and have considerably more comment and information to proffer.

If too late for consideration for the final decision, which has now been delayed till 11 June, I hope that upon receipt of this further more extended submission, the material will be taken into account since it has impacts and is of particular relevance to a number of other determinations, especially in relation to practices and procedures that claim to require the use of water infrastructure, either cold water meters or hot water flow meters allegedly part of the gas distribution (or electricity distribution) network.

Though JGN has claimed that NSW rules are different to those in Victoria and Queensland (failing also to include SA), their cursory reference simply to their understanding of competition matters and their dismissal of the range of issues I have raised either fails to understand the point of my submission, or else has chosen to ignore the crucial components.

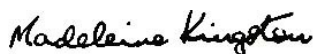
In my view increased monitoring and vigilance across the board is required to ensure that consumer interests are protected and that best practice is adopted. I also re-emphasize the importance of taking into account comparative law considerations since there are many non-energy provisions that are pertinent including tenancy laws; trade measurement provisions (which extend beyond accuracy of meters as measuring instruments used for trade but also apply to correct use of instruments for the purpose intended); OC laws; and current and proposed generic laws.

I have discussed this matter this week with the NSW Dept of Industry and Investment (NSW DII); with the NSW Dept of Fair Trading and other arenas, and believe that the AER should take into account a host of matters in its determination and those related.

I refer to the further submissions made by Jemena Gas Networks NSW Ltd (hereinafter referred to as JGN) on 18 May, notification of which I only received a few days ago.

Please also accept this as a formal submission to the AER in a broader context of highlighting anomalies and discrepancies across the board that have impacts on a number of determinations and inquiries by the AER, ACCC, the AEMC, tenancy and planning authorities. Other organizations are also targeted. Please forgive repetition. Each section is intended to stand alone if need be, with the index guiding selection of appropriate sections applicable for each organization, but the document is best read in context as a whole with its several appendices

Yours sincerely



Madeleine Kingston Private Stakeholder

[http://www.aer.gov.au/content/item.phtml?itemId=736652&nodeId=dea014515519350384275dccc6b56018&fn=JGN%20further%20submission%20on%20gamma%20\(18%20May%202010\).pdf](http://www.aer.gov.au/content/item.phtml?itemId=736652&nodeId=dea014515519350384275dccc6b56018&fn=JGN%20further%20submission%20on%20gamma%20(18%20May%202010).pdf)

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Jemena (JGN) Revised Gas Access Proposal 2010-2015
Further open s comment and supporting data with several appendices
re JGN's further submission(s) of 18 May 2010
and principles behind AEMC's Rule Change Proposal ERC 0092 under the NER
(with possible extrapolation to NGR) – and other related determinations
Prepared also for multiple other arenas
Madeleine Kingston, Individual Stakeholder

**AUSTRALIAN ENERGY REGULATOR
REVISED GAS ACCESS PROPOSAL
JEMENA GAS (PTY) LTD
MADELEINE KINGSTON
OPEN SUBMISSION⁴ –
FURTHER COMMENT⁵
May 2010**

**Available to be freely quoted with appropriate citation
Contact details to be retained on submission please.
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⁴ Intended also for Australian Consumer and Competition Commission (ACCC), ASIC (in view of possible caps in corporations law); AEMC; AEMO; National Measurement Institute; NSW Fair Trading; NSW Dept of Industry and Investment; Consumer Affairs Victoria; other State Fair Trading Offices; tenancy unions; State Parliamentary Offices; Department of Energy and Resources South Australia; Dept of Energy Qld; others including the Senate Fuel and Energy Enquiry

⁵ Follows up to JGN's further submission of 18 May 2010 commenting on aspects of new submissions including my own of April 2010

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^{6/9} 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

⁶ ⁹ 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

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⁷ Updated from version submitted to Senate Economics Committee’s Consumer Enquiry (TPA-ACL-Bill 2) (2010). Report completed. Bill passed. *Trade Practices Act 1974* to be renamed Competition and Consumer Law; and earlier versions submitted to the NECF2 Package and published on the MCE website

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⁸ This instrument was intended as for short term transitory provision of electricity only embedded situations where actual flow of energy was effected to the party deemed to be receiving it, but where network ownership and/or operation changed hands and distribution was not effected by the original distributor. This raises liability issues and reinterpretation of the tripartite governance model. The AER will make piecemeal exemptions as requested

INTRODUCTION

As mentioned, this further belated submission was triggered by the dismissive manner in which Jemena (JGN) has chosen to discount my earlier April 2010 submission, with particular focus on the *“bulk hot water policy arrangements”* contractual, billing, outsourcing of metering data services and metrology practices either tacitly or explicitly endorsed and discrepantly operating in a number of jurisdictions.

This is certainly not the first time that I have called attention to these issues in various public submissions and communications with numerous parties and entities including Ministers, government departments both state and federal; community organizations, academics in various institutions and other arenas. The matters have been conveniently swept under the carpet for decades. It is my intent to raise awareness and continue to highlight unacceptable policy flaws causing detriment and malfunctioning of the market.

I appreciate the decision of the AER to accept this further late submission and publish it, notwithstanding that timelines will preclude proper examination of its contents in the light of an imminent decision to be made regarding the JGN Gas Access Dispute for the regulatory period 2010-2015. I had in any case provided a draft version much shorter and a submission in April 2010 which is already published. This extensive further material adds detail to the arguments already presented.

Nonetheless inclusion on the AER website may provide convenient access to the AER and others in relation to a host of related issues and concerns about policy and regulatory practice and market conduct which may also have impacts on numerous other determinations and investigations by the AER, AEMC, MCE and others. I ask for some indulgence over repetition as this extended submission is intended for a number of other arenas also, some referred to on the cover sheet.

In my usual way of endeavouring to think outside the square and considering multiple inter-related factors that are rarely taken into account in any single consultative arena I have expanded this additional submission for open publication incorporating many matters that JGN and the AER may consider irrelevant to the current gas access dispute determination.

If such a perception arises, may I stress again my view that adoption of best practice regulation policy and legislation and of at least adequate monitoring in consumer protection relies on the willingness of responsible authorities, however structured, and regardless of political pressure, to more comprehensively consider the implications of regulatory practice and the policies that guide these, with particular emphasis on comparative law considerations, triple bottom line considerations; and consumer protection parameters that go beyond tokenism.

With that in mind, I hope that this document and its multiple attachments will be received in good faith published and retained and used when referring to regulatory and policy determinations for which many of the issues may also have relevance.

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My aim is to lift awareness of issues that have been neglected and swept under the carpet for decades – and need to be addressed in the interests of demonstrating a commitment to best practice public policy and respect for comparative law; the requirement to avoid duplication, conflict and overlap with other schemes, and a true commitment to consumer protection. I do not address hardship issues here but feel that there are many unaddressed issues.

In relation to the bizarre legally and scientifically unsustainable “*bulk hot water arrangements*” outsourcing of metering data services and their implications for those arrangements, the victims are those unjustifiably imposed with contractual status for alleged sale and supply of energy that simply does not occur.

This has implications for operating and expenditure costs as discussed briefly in a dedicated section, especially in view of JGN’s proposal to replace water meters, erroneously claiming that they are part of the “gas distribution” infrastructure”. Elsewhere in this and public submissions I have expressed concern about arrangements and warranties that may have been provided to energy providers by State Government(s) with emphasis on Queensland arrangements) by which whole groups of consumers apparently insufficiently protected under current policies and practices, became captive to

I believe it was Peter Kell, since 2009 Deputy Chair of the ACCC, but previously CEO of CHOICE, who observed that regulators are often made the scapegoats of poor public policy. I recognize that this may well carry weight particularly in the light of all the reforms underway.

Nonetheless I do believe that regulators also carry an onerous responsibility to effectively monitor the marketplace and negotiate with policy makers and politicians the adoption of improved policies where the marketplace is shown to be unsettled or cause detriment.

Stephen Kennedy’s 2009 speech to the ACCORD Industry in August 2009⁹ made these observations:

“Interestingly, while some governments’ lax approaches to regulation have been identified as a major cause of the global financial crisis by many economic commentators, this is not necessarily the case among the broader public.”

It is not good enough to suggest that if the market is allowed to function without “*interference*” the goals of achieving long-term benefits for consumers will automatically be met.

⁹ Kennedy, Stephen (2009) “*The future of consumer policy – should we regulate to protect homo economicus?*” Address to the ACCORD Industry. Old Parliament House 13 August 2009

I remind all responsible that the revised objectives of proposed generic laws following major revisions to and renaming of the *Trade Practices Act 1974*.¹⁰

The simple objective of the already operational revised *Trade Practice Act 1974* Act 51 of 1974 as amended is as follows:

2 Object of this Act

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

In addition I refer to inconsistency between all of these similar objectives and those of the national consumer policy objective are discussed with particular reference to the address by Dr. Steven Kennedy (2009)

“In considering consumer policy, this approach is reflected in the national consumer policy objective: ‘To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.’”

As an end-user of utilities I do not see the NECF2 package as having achieved the degree of empowerment required to foster effective competition in the manner described above.

*The Australian Consumer Law represents the largest reform to Australia’s consumer laws in a generation and will take full effect on 1 January 2011. It will introduce a single, national law for fair trading and consumer protection, which applies equally in all Australian jurisdictions, to all sectors of the economy and to all Australian consumers and businesses.*¹¹

The National Consumer Policy Objective¹²

On 15 August 2008, MCCA agreed to the national consumer policy objective:

‘To improve consumer well being through consumer empowerment and protection fostering effective competition and enabling confident participation of consumers in markets in which both consumers and suppliers trade fairly.’

This is supported by six operational objectives:

- *to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;*

¹⁰ *Trade Practices Act 1974* Act No 51 of 1974 as amended (compilation prepared on 19 April 2010 [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/3E27D6086B701185CA2577150002214A/\\$file/TradePrac1974Vol1_WD02.doc](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/3E27D6086B701185CA2577150002214A/$file/TradePrac1974Vol1_WD02.doc))

¹¹ Joint Communique Ministerial Council on Consumer Affairs Meeting Friday 4 December 2009

¹² Refer also to the address in August 2009 to the ACCORD Industry by Dr. Stephen Kennedy of the Commonwealth Treasury in which he discusses the broad goals of consumer policy reforms and legislative changes; *ibid* Kennedy, S (2009)

- *to ensure that goods and services are safe and fit for the purposes for which they were sold;*
- *to prevent practices that are unfair;*
- *to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;*
- *to provide accessible and timely redress where consumer detriment has occurred; and*
- *to promote proportionate, risk-based enforcement.*

Competition is not end in itself and this is something frequently when economic efficiency models dictate how laws and subsidiary regulations are formed.

The objectives of other laws appear not to be modeled on the generic laws, especially with regard to the well-being of consumers and effective participation in the marketplace. Preoccupation with economic efficiency goals has resulted in serious dilution of consumer rights. This matter too is discussed.

I now comment in relation to energy provisions, especially those that are discrepant with other provisions including generic and trade measurement regulations and the spirit and intent of those provisions.

It has been my impression that the matters I continue to raise are inadequately addressed apparently because of incompletely understood by multiple parties including policy-makers, regulators and community organizations alike; the differences between gas and electricity markets; the implications for adopting provisions that lack sufficient clarity; or else deliberate omissions in the hope that the problems will simply disappear. They will not. Instead at some stage they will come back to haunt those who would most like to see this matter addressed once and for all and enshrined in well-considered strategically planned consumer law protections (or not).

On page 5 of the TPA (ACL) Bill(2) Explanatory Memorandum states that:

“Commonwealth State and Territory industry-specific legislation will continue to apply in some areas to the extent that it does not duplicate or is inconsistent with the ACL. Under the IGA the Australian Government and the governments of the States and Territories are to repeal or modify any laws which duplicate or are inconsistent with the ACL.”

Whilst I see that unnecessary and burdensome regulation needs to be discarded, I hold the view that some policies and regulations are retained despite these attributes and despite multiple consumer detriments and evidence of market dysfunction.

Having set the tone for this submission and its specific and broader goals I turn to more specific matters by quoting directly from page 1 of JGN's 34-page further submission (2) dated 18 May 2010.

"JGN's initial response to the AER draft decision¹ outlined our expectation that JGN will have a reasonable opportunity to respond to all materials relevant to the access arrangement revision process, including any new information the AER intends to take into account or any change in thinking on issues upon which the AER has not previously consulted JGN¹³/².

In this letter JGN responds to a selection of issues in relation to:

- *cost of equity – raised by the Energy Networks Association (ENA) and WA Gas Networks Pty Ltd (WAGN)*
- *benchmarking – raised by the Energy Users' Association of Australia (EUAA)*
- *demand forecasts – raised by AGL Energy Limited (AGL)*
- *productivity adjustments – raised by Energy Markets Reform Forum (EMRF)*
- *JGN's Reference Service Agreement (RSA), liability and other issues – raised by EnergyAustralia (EA), AGL and other stakeholders*
- *unaccounted for gas (UAG) – raised by Origin Energy Retail Ltd (Origin)*
- *bypass – raised by EMRF*
- *hot water billing – raised by Ms Madeleine Kingston.*

In addition to responding to the above issues, (JGN) also address related matters in relation to benchmarking and productivity adjustments that the AER has raised in its final decisions for ActewAGL and for Energex and Ergon."

I now quote from page 5 of the covering letter with JGN's further submission, as signed by Ms Sandra Gamble, Group Manager, Regulatory, JGN¹⁴

Hot water billing

Issues raised by stakeholder/s

Ms Kingston raised some concerns relating to centralised (bulk) hot water billing arrangements that operate in Victoria and Queensland¹⁵/¹¹.

JGN response

The NSW market works in a different manner to Victoria and Queensland. In NSW, each individual consumer in an apartment block has the opportunity to choose its gas retailer.

¹³ ¹ JGN, *Initial response to the draft decision*, 19 March 2010 (**initial response**).

² Initial response, p. 15.

¹⁴ JGN Further submission

¹⁵ ¹¹ Ms Kingston, *Open submission*, April 2010.

In Victoria and Queensland, a single energy retailer supplies an entire apartment block. Consequently, Ms Kingston's comments on this issue are not directly relevant to JGN."

JGN's response to my detailed submission with supporting data and case study seems to have ignored entirely the range of issues that are raised that are far from irrelevant to the JGN Revised Gas Access Proposal for 2010-2015.

JGN has chosen to focus entirely on a single aspect – that of apparent differences in which competition is seen to apply in NSW, compared with Victoria and Queensland (without mentioning SA, where the BHW arrangements also apply in some form.

In my view JGN (and other energy distributors and/or retailers) should be asked to explain exactly why they believe things are different in NSW, apart from a requirement in the *Gas Supply Act 1996* that all consumers have a choice.

Except for installing infrastructure at their own expense, which is unviable and normally not permitted by Lessors or within tenancy provisions, it is impossible to see how choice is available to those in multi-tenanted dwellings in terms of heated water, or how in the first place it is deemed that gas (or electricity) is delivered sold or supplied when what is received is heated water as a composite product without any flow of energy demonstrated.

The charges for metering data services, billing, supply and other costs, including replacement costs belong fairly and squarely with the Landlord of Owners' Corporation as the proper contractual party in these circumstances. NSW DII say that retailers may not sell the water; nor may they charge for the gas used in centrally heating the water – so what is being done and who is being billed. On what basis has massive and expensive upgrade to water meters been justified, and if they need replacement and if energy suppliers have turned themselves into water infrastructure specialists, their contract for these tasks and all expenses belong with the OCs with whom they have made arrangements to maintain such common property infrastructure.

Both the AER and local energy regulators or policy makers should make robust enquiries to establish how the market is functioning. It is not sufficient simply to point to a legislative instrument that requires competitive choice by all users.

The AER is fully aware that in these circumstances choice simply does not exist for renting tenants in multi-tenanted dwellings, nor for strata owners without the consent of the OC. I have discussed this further when looking more closely at existing tenancy provisions, including within NSW.

The AEMC has a number of related matters before it with regard to data metering services, and I have already made a submission to that arena which will be considered at the time that further submissions are received in response to the Draft Decision issued on 6 May 2010.

There should be robust inter-body collaboration over these issues with fair and equitable decisions being made that reflect a commitment to upholding consumer rights and protections and the proper functioning of the market.

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Jemena (JGN) Revised Gas Access Proposal 2010-2015
Further open s comment and supporting data with several appendices
re JGN's further submission(s) of 18 May 2010
and principles behind AEMC's Rule Change Proposal ERC 0092 under the NER
(with possible extrapolation to NGR) – and other related determinations
Prepared also for multiple other arenas
Madeleine Kingston, Individual Stakeholder

I will briefly comment on the competition issue, I would also like to highlight other issues within my submission that includes competition issues, operating and expenditure costs (unnecessary in terms of water meters) (OPEX and CAPEX) trade measurement issues; comparative law considerations; implications of generic laws current and proposed (Competition and Consumer Law – to supersede TPA) Each of these is discussed below under appropriate headings.

The result is discrepant Fair Trading provisions in each relevant State, another unacceptable anomaly as regulations head for nationalization across the Board. The States have until the end of this year to bring their provisions into line with proposed generic laws replacing the *Trade Practices Act 1974*.

It would be such a pity if mere harmonization becomes a focus rather than adoption and retention of what represents best practice. In any case the unfair contract provisions and standard contract provisions inherent in the proposed national generic laws will need to be heeded and accommodated in any additional provisions that the States and Territories adopt.

It would also be a good time to review tenancy provisions, which are currently hampered by the perennial and unaddressed conflicts and overlaps with other schemes. Victorian provisions for tenancy currently offer the most consumer protection in relation to utilities. However, what is missing is proper jurisdictional power to deal with creeping anomalies in relation to utility provision by energy providers purporting to be selling energy (or providing third party data metering and billing services as their servants, contractors and/or agents in-house or externally outsourced).

In fact these parties appear merely to be arranging for existing tenancy protections to be eroded through the introduction of collusive arrangements between Landlords and Owners' Corporations (OCs), apparently with either the tacit or explicit endorsement of certain State and territory authorities, including energy policy-makers, regulators and rule makers, to impose deemed or standard term contracts on those who receive no direct energy at all; no not have the choices that they are deemed to have; and are stuck with unfair substantive terms in model contracts that do not in spirit or letter mirror the required protections under proposed generic laws or uphold protections elsewhere either.

Such anomalies have existed for decades being conveniently swept under the carpet.

Many stakeholders hold the view that compromised leadership governance appears to have characterized what should have represented proper inter-body collaboration, to say nothing of robust stakeholder consultation in all arenas by all relevant bodies.

Since no single body or jurisdiction has been empowered to deal efficiently and collaboratively with all overlapping arenas, and since to the eyes of many observers seeking adoption of best practice policies and legislation outcomes, there is room for serious concern about what is termed as the “*accountability shuffle*.”¹⁶

It would seem that many responsible jurisdictions may be shifting responsibility and accountability to the extent that the very problems that lead to a decision to nationalize provisions appear to be heading for worse outcomes with continuing perpetuation of conflict and overlap between schemes.

I have discussed the matters of comparative law gaps in my Submission (25 and appendices to the Senate in hits recent Consumer Law Inquiry (TPA-ACL) Bill2; to MCE arenas and other bodies, but have repeated some of these here in the hope of influence not only the current JGN Gas Access Dispute on the brink of a published decision by the AER, but also all related determinations for cost determinations; rule changes (AEMO/AEMC/MCE).

None of this is relevant to the sale and supply of energy. In the absence of flow of energy such supply is not effected.

Unsolicited services, including those for metering data services, meter reading (or not) of either cold water meters or hot water flow meters, neither of which measure gas or electricity or heat supplied to a communal water tank reticulating water to end-users of such a commodity.

The *Trade Practices Act 1974* (TPA) as it stands and prior to further amendments and change of name to Competition and Consumer Law describes unsolicited services as follows:

“unsolicited services means services supplied to a person without any request made by him or her or on his or her behalf.”

Many grey areas remain regarding the policies and practices adopted by energy suppliers in connection with centrally heated water in multi-tenanted dwellings. These should be clarified in a fair and equitable manner, with due regard to changed and changing provisions at national level.

¹⁶ Refer for example to the three consecutive speeches at National Consumer Congresses by Peter Kell, formerly CEO of CHOICE and now Deputy Chair at the ACCC – see the following citations
Kell, P (2005) Kell, Peter (2005). “*Keeping the Bastards Honest*” Speech delivered by Peter Kell, as) CEO ACA (CHOICE) at the National Consumer Congress 2005
Kell, P (2006) “Consumers Risks and Regulation” Speech delivered by peter Kell at the National Consumer Congress 17 March 2006 <http://www.choice.com.au/files/f124236.pdf>
Kell, P (2007) “*Holding Corportions to Account*” Speech delivered by peter Kell at the National Consumer Congress 2007, Luna Park Sydney 29-31 October

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.

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).

I hope the AER will excuse the additional issues raised since this document is intended for multiple purposes and parties because of inter-body had cross-relevance to each.

I recognize that many issues raised here for completeness are outside the direct regulatory role of the AER. They have been included to place matters in a broader context in relation to other provisions in the hope of achieving in the future better inter-body collaboration.

Also, since this document is intended for a number of other arenas some of which may not have a robust grasp of consumer or energy governance arrangements or legislative arrangements, I have collated sections from other recent submissions to make it easier for those interested to gain a bird's eye perspective of specific and broader concerns.

In concluding this introductory section, I note from the AER's Strategic Plan and Work Program for 2009-2011 published by the Australian Consumer and Competition Commission the following:¹⁷

"The Australian Energy Regulator (AER) is Australia's independent national energy market regulator"¹⁸. It began operation on 1 July 2005. The AER is an independent statutory authority and administratively part of the Australian Competition and Consumer Commission (ACCC) under Part IIIA of the Trade Practices Act 1974.

¹⁷ Australian Energy Regulator Strategic Plan and Work Program 2009-2011
<http://www.accc.gov.au/content/item.php?itemId=882100&nodeId=97e6ed47a9206ce5b162c338642ab5f9&fn=AER%20Strategic%20plan%20and%20work%20program%202009%E2%80%9311.pdf>

¹⁸ The term independent used in this context refers merely to incorporation under Corporation Law, as undertaken by a number of statutory authorities for the purposes of limiting liability. However, as openly acknowledged on the ACCC website, the AER is an integral part of the ACCC

Our vision is to be recognized as a world's best practice energy regulator. Our overall goal is to promote efficient investment and prices in the Australian energy sector to benefit the long-term interests of energy consumers.

The 2009–11 Strategic plan and work program sets out our corporate goals and priorities to achieve this vision and our expected work program for the period 1 July 2009 to 30 June 2011.”

Given the AER's developing role at national level including assumption of

“responsibility for non-price retail and distribution monitoring and compliance and enforcement functions as part of the national energy customer framework, the scope of responsibility being subject to definition in legislation”

it is timely to bring forward these concerns in an open albeit belated additional submission in this matter, as the impacts are far reaching and will impact also on other arenas.

I also note that

“Reforms in 2009 have also seen the National Energy Market Management Company (NEMMCO) rolled into a new organization—the Australian Energy Market Operator (AEMO)—which operates gas and electricity markets in southern and eastern Australia.

The new body has acquired the functions of the Victorian Energy Networks Corporation (VENCorp), the NSW and ACT Gas Market Company, South Australia's Electricity Supply Industry Planning Council and the South Australian functions of the Retail Energy Market Company (REMCo).”

Further information on participants and instruments in the energy market is set out in Appendix B.”

I note also

“On 8 June 2001, the Council of Australia Governments (COAG) established a Ministerial Council on Energy (MCE) to drive energy reform, including the potential to harmonise regulatory arrangements. Following an independent review of energy market directions, COAG entered into the Australian Energy Market Agreement (AEMA) on 30 June 2004.

The AEMA established two new institutions to oversee Australia's energy market. The AER was established as the national economic regulator and the body responsible for monitoring and enforcing national energy legislation. The AER is an independent legal entity located within the ACCC. The Australian Energy Market Commission (AEMC) was established to undertake rule making and energy market development.

The AEMA provided for a new national legislative framework for electricity and gas. The National Electricity Law (NEL) and new National Electricity The AEMA established two new institutions to oversee Australia's energy market.

The AER was established as the national economic regulator and the body responsible for monitoring and enforcing national energy legislation. The AER is an independent legal entity located within the ACCC. The Australian Energy Market Commission (AEMC) was established to undertake rule making and energy market development.

The AEMA provided for a new national legislative framework for electricity and gas. The National Electricity Law (NEL) and new National Electricity.”

I understand that the outgoing Chairperson of the AER Steve Edwell has completed his 5-year term of office and will be replaced by Andrew Reeves. It is also my understanding that the AEMC has a role in selecting the AER Chair, although the AER is an integral part of the ACCC.

As a matter of principle some have questioned whether this arrangement gives the AER sufficient independence, given that the AEMC is the policy-maker. I hope these remarks will not be misunderstood but I have read reservations on this issue raised in the course of studying public submissions, so am just reflecting the concern.

Despite all these governance arrangements in place, it is disappointing that so much remains unclear and uncertain and the perception is sustained in many quarters that sufficient clarity or fairness has not been reflected in some of the energy provisions envisaged that are intended to provide robust consumer protection and certainty to the marketplace generally.

I raise some of these concerns, yet again, within the context of this submission.

OPEX AND CAPEX COSTS¹⁹

Trends in gas and electricity are similar in terms of massive expected increases to operating and capital expenditure. This is in part due to failure to maintain aging infrastructure.

The AER State of the Energy Market publication 2009 (p8) observes as follows:

“Access arrangement revisions for gas distribution networks in New South Wales and ACT encompass significant increases in investment. Jemena has proposed a 63% increase in investment for its New South Wales gas networks and ActewAGL proposed a 227 per cent increase for the ACT network.”

I am not clear how much of this is intended to replace water meters or hot water flow meters with RF heads, but this is a subject of significant concern, given that water infrastructure is not and cannot ever be considered part of either a gas or electricity distribution network.

In addition I can see nothing in the proposed metrology procedures for either gas or electricity that sanction or cover the use of water meters in the context of energy laws. I again stress the trade measurement considerations, the intent to lift remaining utility exemptions under revised provisions and the strict liability penalties that will apply through other regulatory schemes. See also revised generic laws.

It has been formally declared inappropriate to sanction or require market participants to adopt practices and procedures that will have the effect of requiring breach of other laws or violation of best practice. The use of water meters effectively to pose as either gas or electricity meters represents worst practice and it either tacitly or explicitly endorsed, with on the one hand market participants required to embrace all applicable laws, and on the other to abide by codes and guidelines (presumably meaning written or unwritten).

The Victorian and Queensland bulk hot water provisions are more explicit, but on closer look at the licences issued by Victorian regulator to the host retailers it seems clear in connection with ownership of water infrastructure that the intent was to hold the Owners Corporation responsible as the customer, not the end user. This is contradicted within the *Energy Retail Code v7* (February 2010).

I return to the issue of huge increases in **CAPEX** and **OPEX** costs, and the absence of any justification for any part of these to be allocated to upgrade of water meters of any description purported to be part of the gas distribution (or electricity) network.

¹⁹ Operating Expenditure and Capital Expenditure

JGN has spoken of rodent activity and safety risks. JGN proposes to replace RF heads in order to facilitate remote communication and readings and have left the door open regarding how costs may blow out, referring to “*conservative estimates*” and using other disclaimers.

I discuss shortly the implications of proceeding with sunk costs for such purposes. Importantly water meters and other water infrastructure that are non-network items and their associated costs in terms of maintenance, replacement, and other costs are entirely irrelevant to measuring gas consumption. The necessity for incurring any costs for maintaining water meters on behalf of Owners Corporations (Body Corporate entities) or Landlords/Lessors when energy consumption is the reason behind the non-network charges must be questioned as a flawed policy in the first place. It is only necessary to read a single gas meter (or electricity) meter in cases where water is centrally heated in multi-tenanted dwellings.

Both **CAPEX** and **OPEX** considerations are discussed within my original submission of April 2010 already published and highlighted again below briefly, arms-length and non-arms length arrangements as they apply to the bulk hot water arrangements – employing water meters to effectively and unjustifiably pose as gas (or electricity meters).

This is a particularly pertinent issue in principle given that the AEMC is already advanced with its Rule Change Proposal under the NER (Project ERC0092, Draft Decision 6 May 2010), which may at a future stage also be extrapolated to the National Gas Rules (NGR).

I have already raised with the AEMC current anomalies and implications in relation to the use of water meters and associated costs, especially when additional costs are incurred through data metering services and metrology procedures that are outsourced to third parties or in-house to related bodies dedicated to such procedures and to be named **Metering Data Service Providers (MDS)**.

JGN does have some in-house MDS entities under its umbrella as illustrated in one of the slides recently presented public meetings associated with the current AER Gas Access Dispute Determination. See for example Public Meeting on 17 December 2009 and PowerPoint presentation by JGN and others as available on the AER website.

The use of water meters and additional pass-on costs associated with metering data processes and metrology procedures either tacitly or explicitly sanctioned, is entirely **unnecessary and irrelevant to the measurement the gas supplied** to a single gas meter by arrangement between Body Corporate entities (OCs) either public or private and gas providers, normally made at the request of Developers or subsequent Body Corporate Controllers of Premises.

JGN has proposed a water meter replace program and has projected high **CAPEX** and **OPEX** costs, based on what they claim to be “*conservative*” estimates.

I leave aside momentarily the issue of the type of meter (water or hot water flow meter as opposed to gas or electricity) should be covered under energy laws, but also that these instruments despite best practice considerations and the spirit and proposed letter of national measurement laws, pending the lifting of remaining utility exemptions.

Cost blow-out risks

One can only hope that should unwarranted expenditure on water meter upgrades and associated metering data costs whether not outsourced based on such conservative estimates by JGN (or others submitting similar proposals for either gas or electricity) do not blow out in the way that costs blew out in relation to the ill-fated and ill-considered Victorian smart meter mandated roll-out which was criticized so strongly by the Victorian Auditor-General in his damning November 2009 Report.²⁰ I will return to this topic shortly.

JGN has referred to the installation of RF heads for **WATER METERS** noting that associated **CAPEX** costs projected are conservative

Since a third category of provider that of **Metering Data Provider** is expected to replace Metering Data Agents there are further implications for adequate monitoring, service responsibilities and liabilities, issues that this submission only skims over.

The issues raised suggest the possibility of re-examination of Corporations Law provisions by both ASIC and ACCC to identify and close loopholes that may exist in relation to how arms-length and non-arms length relationships are views; the impacts of horizontal and vertical integration; and the inter-relationships between generators, distributors and retailers, many united by single ownership by bodies such as the Singapore Power Consortium or the China Lighting and Power Consortium.

It becomes confusing when retailers, who purchase gas from the generators asset management to distributors or vice versa.

In any case under the tripartite model of contractual governance proposed by the national Retail Energy Laws and Rules (NECF2 Package) sale and supply of gas become a single exercise for which both the distributor and retailer (and impliedly also any servants contractors and/or agents, in-house or externally outsourced) are deemed to have a contractual relationship with those who directly receive gas or electricity through flow of gas.

Whilst many efficiencies may be achievable through vertical and horizontal integration, so too do these measures raise competition issues that may lead to consumer detriment. Enhanced vigilance is needed.

I have discussed aspects of JGN's structure in my earlier submission of April 2010.

²⁰ Victorian Auditor-General (Des Pearson) (2009) *Towards a smart grid the roll-out of Advanced Metering Infrastructure.* (AMI) (Nov)

Business customers such as OCs or Landlords receiving gas to a single meter used to power a single communal boiler tank are the proper contractual parties tenanted dwellings; whilst if direct supply is effected through flow of energy to residential premises for either the heating of water or for domestic heating, cooling, lighting or cooking, are the proper contractual parties where separate meters exist and flow of energy can be demonstrated.

I share concerns of others 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 JGN 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. This is explained later and in my multiple submissions to energy and other arenas.

That report found that neither the economic nor the technical case had been made out for, and also criticized the quality of consultation on the issue of the roll-out. This is discussed further elsewhere and was included in my original published submission of April 2010.

On 19 May 2010 Sarah Collins report in The Age²¹ that

“Last year an Auditor-General's report said the cost of smart meters could blow out to \$2.25 billion, and criticised the government's handling of the issue, saying it had failed to secure value for consumers.”

The rollout of smart energy meters to 2.5 million Victorian homes and businesses - dubbed the "myki of metering" by the state opposition - will cost half a billion dollars more than the government first thought.

Energy Minister Peter Batchelor told an estimates committee yesterday smart meters would cost about \$1.6 billion over 20 years, \$500 million more than the starting estimate of \$1.1 billion.”

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 upon which other jurisdictions could build. This would in my opinion be the worst possible scenario.

That mandated roll-out and the distributor roll-outs elsewhere were endorsed by the Ministerial Council on Energy.

To my way of thinking neither the MCE nor its advisers, or the State entities involved had a clear idea of what the implications were of such decisions, the economic, technical, nor consumer implications and impacts. It is no use blaming one Government or another. The institutions involved have been in existence across Governments.

For example the Council of Australian Government (COAG) was first met in 1992 following agreement between the then Prime Minister, Premiers and Chief Ministers. Chaired by the Prime Minister, it consists of three tiers of government, it meets to debate and co-ordinate government activities at all three tiers. A related organization is the [Loan Council](#), which coordinates borrowing by the federal and state and territorial governments of Australia.

²¹ The Age 19 May 2010 *“Power bill pain as smart meter cost blows out”* Reporter Sarah-Jane Collins. People are using phrases like “the smart meter (debacle) [polite substitution of actual phrase] See also \$500 million smart meter blowout ABC News Updated Tue May 18, 2010 2:02pm <http://www.abc.net.au/news/stories/2010/05/18/2902711.htm> see Herald Sun Families may face huge bills after smart meter cost blow-out Stephen McMahon 19 May 2010. Estimated electricity bills of \$2000 per annum within 2 years predicted. What will this mean for proposed grid technology or other communications technology associated with proposed use of water meters for the alleged purpose of estimating gas and electricity usage – see JGN’s **CAPEX** and **OPEX** proposal AER Gas access dispute 2010-2015 <http://www.heraldsun.com.au/news/families-may-face-huge-bills-after-smart-meter-cost-blow-out/story-e6frf7jo-1225868383913> JGN together with UED is *“leading the rollout of the Advanced Meter Infrastructure program to just on 1 million homes and businesses in Melbourne and the Mornington Peninsula”*

David Adams holds that CoAG²² is a creature of Governments for Governments. Elsewhere and in other submissions I cite his views further, taken from his award-winning essay Poverty – a Precarious Public Policy (not that the focus of this submission is about poverty).

The Ministerial Council on Energy established the Australian Energy Market Commission in 2005 under the [Australian Energy Market Commission Establishment Act 2004](#). The AEMC has two roles in relation to national energy markets - as Rule maker and as a provider of advice to Ministers on how best to develop energy markets over time. The AEMC actively considers market development when it considers Rule change proposals and energy market Reviews.

The [Australian Energy Regulator](#) enforces these rules that the Australian [energy market](#) is to abide by.

Already the Victorian Auditor-General has condemned the hastily and ill-considered mandated Victorian roll out of smart meters. His damning November 2009 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 2009 November Report²³

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,”

²² *Current Membership* source: www.wiki.com.au

- The Hon. [Kevin Rudd MP, Prime Minister](#) of [Australia](#)
- The Hon. [Kristina Keneally MLA, Premier](#) of [New South Wales](#)
- The Hon. [Anna Bligh MP, Premier](#) of [Queensland](#)
- The Hon. [Mike Rann MHA, Premier](#) of [South Australia](#)
- The Hon. [David Bartlett MHA, Premier](#) of [Tasmania](#)
- The Hon. [John Brumby MLA, Premier](#) of [Victoria](#)
- The Hon. [Colin Barnett MLA, Premier](#) of [Western Australia](#)
- The Hon. [Jon Stanhope MLA, Chief Minister](#) of the [Australian Capital Territory](#)
- The Hon. [Paul Henderson MLA, Chief Minister](#) of the [Northern Territory](#)
- Councillor Geoff Lake, President of the [Australian Local Government Association](#)^[1]

²³ 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

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."

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 Victorian 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 phrase.*

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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."

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.

Nonetheless there have been cautions about immature technology. Much further work would have been of benefit – but the egg cannot now be unscrambled at least in relation to the mandated Victorian roll-out, for which cost-recovery will take many years.

The same pitfalls need to be avoided with other telecommunications technology.

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 21st 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 appear 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.”

Professor Robin Eckerman, who has been repeatedly quoted by me since 2007 in various energy-related and consumer policy public submissions (e.g. AEMC, MCE, Productivity Commission).

See Prof Eckermann’s submission to the Chair MCE 1 November 2007 re National Smart Meter Roll Out as cited below and also his submission to the Fuel and Energy Senate Select Committee

“...a complete assessment of the AMI business case in Australia needs to take account of the risk that moving prematurely will either:

- deny Australia the benefits that Smart Grids can offer for the next 15 years or so; or*
- inflict the burden of another costly meter upgrade program in a 5-10 year timeframe if those benefits are to be harnessed.*

I believe that factoring these risks into the modelling work would yield significantly different results than those that have been presented to date.

I appreciate the pressure to meet tight deadlines – and recognise the possibility that this submission will be set aside because it does not conform to the relatively specific guidelines within which feedback has been invited.

However, in the words of Lord Chesterfield “Whoever is in a hurry shows that the thing he is about is too big for him.” There is no better time than right now to pause and check that nationally we are setting our sights on the right goals.

The health of the planet that we will leave to our children and to our grandchildren depends on seizing every opportunity – especially the big ones such as are on offer through the overhaul of ageing electricity supply networks.²⁴

I raise the smart meter issues here to illustrate how easily blow out of costs could occur, and how much caution should be exercised when a sunk cost forecast is predicted in advance to be little more than a guesstimate.

²⁴ Prof Eckermann (2007) Submission to the Chair MCE 1 November 2007 re National Smart Meter Roll Out
<http://www.mce.gov.au/assets/documents/mceinternet/Eckermann%5Fand%5FAssociates20071119104053%2Epdf>

Clause	Submission	JGN Response
15.11	Repair of Basic Metering Equipment – Origin proposes that there should be 2 days to repair basic metering equipment – not “within a reasonable time”.	<p>It is not efficient or practical to specify a simplistic time for repair. Reasons include:</p> <ul style="list-style-type: none"> • “Basic Metering Equipment” comprises the whole meter set including meters, regulators, filters etc. The scope of the activity of “repair” is not as simple as changing a meter like for like. The scope of repair may vary from a simple adjustment through to a complete rebuild of a meter set. • JGN has a large number of different configurations of meter sets in service (as would be expected from the age, history and complexity of the network). It is not possible to stock “replacement kits” for all types. Meter sets that have been customised to meet customers’ specific requirements (eg: special delivery pressures, flow characteristics or physical site constraints) could not be stocked. <p>Origin’s proposal would significantly increase JGN’s costs in order to maintain stores to be prepared for 2 day repair time for all configurations of meter set, all locations and all scope of repairs.</p> <p>*“Within a reasonable time” provides an obligation on JGN to conduct repairs in a timely fashion (to meet user and customer needs), however it also allows JGN to manage repair and network logistics efficiently.</p>

Comment MK

It is unclear whether it is JGN’s intent to apply these considerations to the water meters and hot water flow meters that they inaccurately claim are part of the “*distribution network*.”

The National Gas Rules in place from May 2010²⁵ includes the following metering definitions amongst others

meter means a device that measures and records quantities of gas by reference to volume, mass or energy content.

metering means measuring and recording the quantity of gas by reference to volume, mass or energy content.

metering communications procedures means the Procedures made under rule 308.

metering data means the data obtained or derived from a metering installation.

metering database means the database kept by AEMO pursuant to rule 308.

metering installation means the meter and associated equipment and installations installed as required under Division 3, Subdivision 4 for connection points.

metering point means the point of physical connection of a meter to a pipeline.²⁶

²⁵ Australian Energy Market Operator (AEMO) (2010) Current National Gas Rules
<http://www.aemc.gov.au/Gas/National-Gas-Rules/Current-Rules.html>

This consolidated version of the National Gas Rules was last updated on 26 May 2010 as a result of the commencement of the following amendments:

National Gas (Short Term Trading Market) Amendment Rules 2010 which commenced operation on 7 May 2010.

²⁶ Only one such physical point exists where a single gas meter is used to centrally heat a communal boiler tank on common property. There is but one MORN number. Other numbers shown on bills issued by or on behalf of retailers seeking to claim costs from individual end-users of that heated water, though often shown under “*gas usage*” does not denote the presence of a separate gas meter for each party so unjustly imposed with contractual status. For settlement purpose the retailer pays the distributor for one energization at a single meter at the double-custody changeover point, one GST charge and any associated supply and metering data services charges. It is inappropriate to attempt to recover such costs from individual renting tenants or individual members of an Owners Corporation. It is necessary to read but a single gas (or electricity) meter in these circumstances. Water meters and hot water flow meters are extraneous to these processes. Their upgrade and associated proposed sunk costs are wasteful and unnecessary – see arguments elsewhere.

metering register means a register of information relating to metering installations kept by AEMO pursuant to rule 311 and forming part of the metering database.

metering register procedures means the Procedures made under rule 311.

metering substitution threshold means the metering error tolerance equal to twice the uncertainty limit fixed in accordance with the metering uncertainty limits and calibration requirements procedures.

metering uncertainty limits and calibration requirements

procedures means the Procedures made under rule 297.

minimum exposure – See rule 256.

MIRN means metering installation registration number.

I now refer to Div 1 Part 9 Preliminary 69, of the published NGR Price and revenue regulation., p49 in relation to capital base, capital expenditure and confirming capital expenditure as follows. All of these definitions relate to gas pipelines not water infrastructure of any description. I have been unable to locate any reference at all to water meters or water infrastructure or their maintenance or replacement, including in terms of capital or operating expenditure.

“In this Part:

capital base, in relation to a pipeline, means the capital value to be attributed, in accordance with this Part, to pipeline assets.

capital expenditure means costs and expenditure of a capital nature incurred to provide, or in providing, pipeline services.

conforming capital expenditure means capital expenditure that complies with the new capital expenditure criteria.”

depreciation means depreciation of the capital base.

new capital expenditure criteria mean the criteria stated in rule 79.

non-conforming capital expenditure means capital expenditure that does not comply with the new capital expenditure criteria.

operating expenditure means operating, maintenance and other costs and expenditure of a non-capital nature incurred in providing pipeline services and includes expenditure incurred in increasing long-term demand for pipeline services and otherwise developing the market for pipeline services.

pipeline assets, in relation to a pipeline, means capital assets that constitute the pipeline or are otherwise used by the service provider to provide services.

tariff class means customers for one or more reference services who constitute a tariff class under a full access arrangement.

I now refer to the operational National Gas Rules, **Division 2 Access arrangement information relevant to price and revenue regulation**

72 Specific requirements for access arrangement information relevant to price and revenue regulation

(1) The access arrangement information for a full access arrangement proposal (other than an access arrangement variation proposal) must include the following:

(a) if the access arrangement period commences at the end of an

None of these provisions appears to relate to expenditure incurred for water meters or their replacement or maintenance.

Further, bearing in mind the policy principles already encapsulated in draft form into the proposed NER Metrology Procedures pursuant to a current AEMC Change Determination, (ERC0092 for example) principles to also embraced within the gas markets under future proposed Rule Changes to National Gas Rules (NGR) as part of the NECF these questions need addressing:

If JGN and others have chosen to diversify and increase their product range or service by taking on data meter provision servicing and maintenance of water infrastructure, what does this decision have to do with applicable energy laws?

Why are gas bills being issued to those who do not receive gas at all, and why should the public pay deemed to be receiving energy pay for infrastructure and associated costs that is unrelated to their direct energy consumption?

These questions are pertinent

1. What recommendations can be made to rectify this matter within both generic and energy laws?
2. In the interests of restoring community faith and equity principles should reconsideration be given by Parliament to through the presentation of a new motion to overturn some of the inequities enshrined, including the staggering requirement to make attempt to make inaccessible any right of appeal (see discussion elsewhere)?²⁷
3. Whilst the assets cannot be unsold were disaggregation of infrastructure has occurred in some States such as Queensland, some matters may be redressed, which will presumably mean resurrecting the matter through the Queensland Parliament.?
4. On the other hand, since they effect national energy laws and rules their formation and implementation, should those particular matters be addressed at national level? The introduction of a new category of Metering Data Service Providers for Electricity under the proposed Rule Change Provisions to Ch7 of the NEL.
5. How can any authority regulating the energy industry under energy provisions have control in the first place of water provisions?
6. Who should or will take charge of this matter and ensure that fairness is delivered?
7. Will interpretation of “*joint metering installations*” be misinterpreted to include the following?

²⁷ Refer to To read the whole transcript the following Queensland Hansard pages are relevant: 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction) 231, 559. See views and concerns raised including from Dr. Flegg about the rushing of the debate of such importance; and of Mrs. Cunningham regarding the provisions regarding appeal and future sales without recourse to Parliament. See also the reservations of Dr. Cleeg (LP Mogill)
In my view those matters indquitably and ina[ppropriately impactng on end users of heated water products, whilst the matter related to diversment of enhergy infrastuture assets needs to be rexamined.
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf

Comment MK:

Having skimmed through the newly published National Gas Rules (NGR) and the proposed NER (see especially Ch 7 and mark-up revisions AEMC website) I cannot find reference to water meters or infrastructure in any of the existing or national provisions as instruments through which gas consumption may be measured.

Water infrastructure is being inappropriately and unnecessarily used to calculate alleged gas usage by those who do not receive gas at all (recipients water reticulated in water pipes only after being centrally heated by a single gas meter – multi-tenanted dwellings (or for that matter shopping centres).

The proper meaning of the terms metering installation and meter within energy laws have become blurred and now taken to mean instrument (such as a water meter or hot water flow meter) that can measure some commodity, as a substitute for the proper instrument of trade, using the right instrument for the proper purpose using the prescribed unit and scale of measurement.

The proper interpretation of the original and proposed deemed contract or standard contract have also become blurred on account of this, thus leading to imposition of contractual status on the wrong parties, leaving aside the trade measurement considerations.

Since this has direct contractual implications on the financially responsible customer or end-user (of heated water) this matter deserves serious attention.

8. If the answer to the above is yes, assuming that it is the policy intent to move on to gas and try to capture the gas market into these philosophies without recognizing the differences between gas and electricity markets (a common allegation made by market participants and others); then on what basis does the AEMO, AEMC, MCE, AER and other relevant bodies believe that this is reasonable under energy laws?
9. Again if the answer is yes to (1) above, how would such a philosophy be reconciled to the concept of *“direct flow of energy”* encapsulated within the proposed National Energy Retail Laws and Rules (NECF2 Package); the concepts of legal traceability and best practice; changes to national measurement laws; unfair contract terms that may be voidable under existing and proposed changes to generic laws (TPA – to be renamed Competition and Consumer Law).
10. On what basis could the principles of competition within the energy arena be justified by overlooking the fact that waster meters and hot water flow meters are being tacitly or explicitly permitted to post as gas or electricity meters?

Such a distortion of measurement and contractual practices need to be scrutinized

11. What was meant in the (then Treasurer's Second Reading Speech of 11 October 2006, "*Energy Assets (Restructuring and Disposal) Bill*"²⁸ regarding alleged:

"transfer process(es)...utilized in South Australia, Western Australian and Victorian legislation relation to the alleged "rationalization of their electricity entities."
12. On what basis have these arrangements and alleged warranties been taken to apply to the provision of gas (see reference to "rationalization of electricity entities)
13. On what basis did the then Treasurer of Qld (or any other players in facilitating sale of energy assets under similar circumstances in other States (the Qld then Treasurer cited South Australia, Western Australia and Victoria). It was in fact Victoria who first initiated the Bulk Hot Water Guidelines in the belief that consumer interests were being "*protected*"

Far from achieving prevention of price-shock, and notwithstanding the sanction of those participating at the time in the debate, consumers of centrally heated water faced high costs, metering data costs; inflated outsourcing costs; unwarranted supply and GST charges; inappropriate imposition of contractual status and unwarranted obligations such as conditions precedent and subsequent, all of which properly belong to the Developer or Owners Corporation making the arrangements in the first place and directly responsible for fitting, repair, maintenance and replacement of common property infrastructure.
14. On what basis could the then Treasurer of Queensland (now Premier) believe that the decisions made would be final and conclusive without the possibility of challenge, appeal, review, quash under the *Judicial Review Act 1991* (p1 second reading speech 11 October 2006) under Supreme Court or other action?

²⁸ Second Reading Speech The Hon Anna Bligh (then Treasurer now Premier of Queensland) "Energy Assets (Restructuring and Disposal) Bill, pages 1 and 2. Hansard Wednesday 11 October 2006. See also First Reading Speech August 2006. file name bli2006_10_11_38.fm
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_12_WEEKLY.pdf

Discussion was continued the next day 12 October

Refer the whole transcript the following Queensland Hansard pages are relevant: 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction) 231, 559. See views and concerns raised including from Dr. Flegg about the rushing of the debate of such importance; and of Mrs. Cunningham regarding the provisions regarding appeal and future sales without recourse to Parliament See discussion under "Competition Issues"

Refer also to Kevin McMahon's submission to the NECF2 Package as a victim of the bulk hot water policies and residential tenant of public housing authorities in Queensland. As also included as sub 46 to the Senate Standing Committee's Consumer Policy Inquiry TPA-TPA-Bill2, to which I have referred in several submissions and communications

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To make presumptions about the decisions of the open courts on issues of presumed unaccountability is to undermine the power and strength of the courts and the enshrined confidence in fairness and the neutrality of the legal system.

I directly quote from the some comments by Independent Member Mrs. Cunningham in this regard – and share her views, more particular in relation to the matter of endeavouring to quash appeal of any sort, thus making the decision-making process unaccountable, unchallengeable and apparently above the law.

The Bill had also sought to ensure that future asset sales would not require the sanction of Parliament, thus challenging community expectation of the checks and balance that exist in the current constitutional system.

I would like to see re-examination of the issues and some explanation.

This is beyond the scope of the AER and AEMC enquiries but does have impacts on policy and regulatory implementation of those policies, now that nationalization of energy policy is to become a reality in the near future.

“Mrs CUNNINGHAM (Gladstone—Ind) (12.53 pm): I rise to speak to the Energy Assets (Restructuring and Disposal) Bill 2006 and in doing so at the outset put on the record my general opposition to the sale of strategic infrastructure.

This has been my position when I was elected and prior to being elected to this parliament, including when negotiations occurred for the sale of the power station in Gladstone, only because I firmly believe that strategic assets should be retained by government for the security of supply and availability for the people in the community. I thank the minister for the briefing we were given on the bill prior to the election, and of course the bill dropped off the list after the parliament was prorogued. However, there are a few issues of concern that I want to raise. There is a clause in this legislation that removes the ability of decisions made under this legislation to be reviewed, including judicial review. In our original briefing I was advised that that in part was to have regard to the caretaker convention should an election occur before this bill was fully enacted. Given that the election has been completed, I question why that condition has to be reinserted to the same extent as it was previously or whether there are other purposes for that non-reviewable clause to be included.”

15. Were similar arrangements made in other States?

Clarification of the question – MK comment

The (then) Treasurer of Queensland, The Hon Ann Bligh, MP, now Premier and also MP for South Brisbane on page 2 of here Second Reading Speech Energy Assets (Restructuring and Disposal) Bill Hansard 11 October 2006 referred to gazetted “*transfer processes*” available for public inspection at an office stated in the transfer notice.

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The matter was continued on 12 October²⁹

In this paragraph the (then) Treasurer referred to

“similar transfer processes that were utilized in the South Australian, Western Australian and Victorian legislation in relation to the rationalization of their electricity entities.”

In addition, the Treasurer referred to her empowerment (in that Office – 2006) to

“give a direction of an energy entity (as defined by the bill) requiring it do something considered necessary or convenient for effectively carrying out the project.”

At this point, the Treasurer noted that in that Office her

“...powers in this regard will cease on commencement of FRC). For example a direction may be issued to the Board of Energex to execute a sale agreement and dispose of its shares in Sun Retail, a third party purchaser.

Further the (then) Treasurer The Hon Anna Bligh, stated that

“The Bill does not require the Treasurer to publish the direction and operates in the same way as the directions power under section 299 of the Electricity Act.

Of greater concern was mention of the provisions of Clause 50, of which the Treasurer said in that speech

“Clause 50 provides that a decision under this Act is final and conclusive, cannot be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way, under the Judicial Review Act 1991 or otherwise by Supreme Court, another court, a tribunal or another entity); and is not subject to any writ or order of the Supreme Court, another court, a tribunal or another entity, on any ground.

However, the clause may effect contestable gas and electricity customers and persons (other than customers) in relation to any commercial agreements between them and energy entities.

²⁹ To read the whole transcript the following Queensland Hansard pages are relevant: 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction) 231, 559. See views and concerns raised including from Dr. Flegg about the rushing of the debate of such importance; and of Mrs. Cunningham regarding the provisions regarding appeal and future sales without recourse to Parliament
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf

There are three circumstances in which third parties' otherwise commercial rights may be affected by the Bill:

- *The disclosure of confidential information without third parties' consent*
- *The transfer of business assets and liabilities between the energy entities without third parties' consent; and*
- *The issue, amendment, transfer, cancellation and surrender of retail and distribution authorities under the Gas Supply Act and Electricity Act in relation to any subsequent sale of Ergon Energy' Pty Ltd by the purchaser to another person.*

Given the State's proposed timeframe and the need for certainty and speed in which things need to be done for this project, any legal proceedings could adversely affect sale process."

16. Exactly what arrangements were made, or will be made?

- In Queensland
- In South Australia
- In Western Australia – which is not yet part of the NECF
- In Victoria

Note that Victoria was the first to formalize and initiate the bizarre, scientifically and legally unsustainable “bulk hot water policy arrangements” now encapsulated into its *Energy Retail Code* which energy retailers are apparently required to abide by under proposed Energy Laws, albeit that its provisions are discrepant with all other provisions, and the concept of “*flow of energy*” as also encapsulated into the proposed National Energy Retail Laws and Rules and proposed AEMC MDS metrology procedures, though the exempt selling regime will produce its own challenges in this regard

- In **New South Wales** on the brink of selling its electricity assets?
- **In ACT?** Who will be the next after NSW to be assessed for retail energy competition, presumably as before without due regard for the wholesale market
- In **Tasmania?**
- In **Northern Territory?**

17. How often have the impacts of these arrangements been monitored through RIS processes and what has been done to correct problems identified?

MK Comment:

Having studied the Licencing provisions for each of the host retailers as issued by the Victorian ESC, it is clear that ownership of water meters and their re-sale in the event that an Owners Corporation (the customer) wished to change retailers, implied that the intended “*customer*” of metering and data services, including water meter data collection, management, reading and billing was intended to be the OC, not the end-user of heated services.

Whilst distribution a monopoly, change of retailer is a theoretical option for individual renting tenants, but rather for the OC entities seeking to change retailers responsible for sale and supply of energy to a single gas or electricity meter firing a communal water tank centrally heating water that is then reticulated in water service pipes (not gas service pipes or electrical conduits) to individual renting tenants or other occupants in strata titled property (multi-tenanted dwellings).

TRUenergy (wholly owned by the China Lighting and Power Consortium); separated from the distribution arm of SPI.

AGLE (a retail arm separated from the generation and distribution businesses, but nevertheless with a common parent owner in the Singapore Power International (SPI) Consortium.

The AER State of the Energy Market (SEM) publication 2-09 reports that

- *“AGL energy is the leading energy retailer in Queensland, New South Wales and Victoria*
- *Is a major electricity generator in eastern Australia*
- *Is increasing its interests in gas production –beginning by acquiring CSG interests and Queensland in Qld and NSW in 2005”*

In my 2007 analysis of the market at the time of my public submission to the AEMC’s Review of the competition in the electricity and gas markets in Victoria I analyzed some of the structure and impacts of vertically and horizontally integrated energy providers with emphasis on the host gentailers and impacts on second-tier retailers

The AER’s SEM (2009) on p23 tables unpublished data from EnergyQuest (2009) showing AGL’s market share of domestic gas production, by basin in Surat-Bowel Qld to be 5.1%; 50% in NSW; and in all basins 1%.

(UED, Alinta, Agility and other bodies including Trust companies and holding companies are all part of the Singapore Power (SPI) consortium). The Jemena Group of companies also has in-house data metering agents and some unspecified outsourced arrangements regarding metering data services, as briefly discussed elsewhere and in my original submission to the AER of April 2010

Origin Energy (separated from the original Owner Boral)

18. On what basis do the current practices known “*bulk hot water arrangements*” and associated metering data provisions consisted the requirement within the now operational National Gas Rules,³⁰ (p323) to adopt the following:
“good gas industry practice means the practices, methods and acts that would reasonably be expected from experienced and competent persons engaged in the business of providing natural gas services in Australia, acting with all due skill, diligence, prudence and foresight and in compliance with all applicable legislation (including these rules), authorizations and industry codes of practice.”
19. On what basis will embracement of either explicit or implied industry codes be consistent with good industry practice (leaving aside best practice or trade measurement requirements) if those codes permit the use of, or overlook the use of water meters effectively posing as gas meters for the purposes of imposing contractual status or calculated deemed gas (or electricity usage)
20. Could such endorsement, (for example 3.2 of the Victorian *Energy Retail Code v7* February 2009) bulk hot water billing, transferred from the Bulk Hot Water Charging Guideline(2)(1) (now repealed) be construed as facilitating poorest practice rather than good or best practice, or the requirement to ensure consistency with other regulatory provisions by providing non-conflicting instructions that embrace the principles of best practice?
21. Though the Victorian ERC is intended to relate to retailers of energy (not includes what is termed as “delivery of gas or electricity hot water, using metering terminology inconsistent with every other current or proposed definition, the intended *National Energy Law and Rules* (NELR) are clear about sale and supply of energy being intended through direct flow of energy to the party deemed to be contractually obligated and also allows through the tripartite governance model for similar responsibilities and liabilities to apply to either distributor or retailer .
22. The question of liability of third parties is determined on the basis that whether the distributor or retailer procures these services, ultimately, liability rests with either the distributor or retailer, with one or other expected to reclaim from the other any liabilities determined by a customer or end-consumer.

³⁰ AEMC National Gas Rules, published 27 May 2010, operational since 7 May 2010, Part 30 Short Term Trading Market Rules Division 1, clause 364, Definitions p 323

- See case studies cited by professor Stephen Corones regarding liability, statutory and implied warranties and findings in open courts, including the New Zealand experience
23. What do policy makers, rule makers and regulators intend to do to correct this anomaly
 24. How will these matters impact on consumer confidence and proper market functioning?
 25. Will interpretation of “*joint metering installations*” be misinterpreted to include the following?

Comment MK:

Having skimmed through the newly published National Gas Rules (NGR) and the proposed NER (see especially Ch 7 and mark-up revisions AEMC website) I cannot find reference to water meters or infrastructure in any of the existing or national provisions as instruments through which gas consumption may be measured.

Water infrastructure is being inappropriately and unnecessarily used to calculate alleged gas usage by those who do not receive gas at all (recipients water reticulated in water pipes only after being centrally heated by a single gas meter – multi-tenanted dwellings (or for that matter shopping centres).

Incidentally, at the second day Queensland Parliamentary Debate on Restructuring of energy assets (October 11 and 122 2006 Hansard), the question of water rebates arose as a separate issue.

Mrs. Cunningham (Independent Member) said

“Mrs CUNNINGHAM: My question without notice is directed to the Premier. Access to water rebates in the south-east corner has rightly generated significant interest and action. Prior to the election I wrote to the Premier seeking extension of the rebates to all Queenslanders, and under the hand of his adviser during the election campaign I received a letter advising that, if re-elected, the Premier would roll out the rebate scheme across Queensland. As interest in this rebate is high in my electorate, can the Premier clarify what the dates are for the rollout of the scheme to all of Queensland?”

The proper meaning of the terms metering installation and meter within energy laws have become blurred and now taken to mean instrument (such as a water meter or hot water flow meter) that can measure some commodity, as a substitute for the proper instrument of trade, using the right instrument for the proper purpose using the prescribed unit and scale of measurement.

The proper interpretation of the original and proposed deemed contract or standard contract have also become blurred on account of this, thus leading to imposition of contractual status on the wrong parties, leaving aside the trade measurement considerations.

26. Since this has direct contractual implications on the financially responsible customer or end-user (of heated water) this matter deserves serious attention.
27. If the answer to the above is yes, assuming that it is the policy intent to move on to gas and try to capture the gas market into these philosophies without recognizing the differences between gas and electricity markets (a common allegation made by market participants and others); then on what basis does the AEMO, AEMC, MCE, AER and other relevant bodies believe that this is reasonable under energy laws?
28. Again if the answer is yes to (1) above, how would such a philosophy be reconciled to the concept of *“direct flow of energy”* encapsulated within the proposed *National Energy Retail Laws and Rules* (NECF2 Package); the concepts of legal traceability and best practice; changes to national measurement laws; unfair contract terms that may be voidable under existing and proposed changes to generic laws (TPA – to be renamed Competition and Consumer Law).
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30. What was meant in the (then Treasurer's Second Reading Speech of 11 October 2006, "*Energy Assets (Restructuring and Disposal) Bill*"³¹ regarding alleged:
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Exactly what arrangements were made? How often have the impacts of these arrangements been monitored through RIS processes and what has been done to correct problems identified?

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See case studies cited by professor Stephen Corones regarding liability, statutory and implied warranties and findings in open courts, including the New Zealand experience

40. What do policy makers, rule makers and regulators intend to do to correct this anomaly
41. How will these matters impact on consumer confidence and proper market functioning?

Hot water flow meters and cold water meters measure water volume, not gas or heat. They also do not withstand heat well and are not designed to provide accurate measurements of any kind.

These instruments are irrelevant to the measurement of gas consumption (or electricity consumption) especially as applied to the current bulk hot water arrangements adopted in several states and notwithstanding the cursory argument presented by JGN in its additional submission of 18 May 2010.

I have already argued in my original submission to the AER or April 2010 that in it inappropriate for JGN to seek capital expenditure costs (CAPEX) in relation to the alleged requirement to replace existing hot water flow meters or cold water meters” in the misconception that they are part of the distribution system for gas – except perhaps in the minds of policy-makers, rule makers and others who have authorized adoption of codes and guidelines that are inconsistent with proper trade measurement practices showing legal traceability of consumption; using the correct instruments of trade for the correct commodity.

This raises issues of where the contract lies – in the case of multi-tenanted dwellings of any description, leaving aside the trade measurement considerations, the proper contract lies with the developer or owner or “*Controller of Premises*” not with individual occupants, especially those who are renting, and who have neither flow of energy to their individual residential premises nor separate gas (or electricity) meters through which consumption of energy associated with centrally heated water provided in water pipes, may be properly measured.

I note again the intent of the *National Measurement Institute*, as sole metrology authority which from 1 July 2010 will fully implement all legislative measures current and proposed; to lift existing utility exemptions; to changes in generic laws current and proposed;³³ to the fact that gas and electricity are commodities for the purposes of interpretation of sale of goods, and therefore subject to the full suite of protections under the law.

Suppliers of energy are required to abide by all laws, not merely those that are energy-related. See further discussion under comparative law considerations.

Policy-makers and regulators are required to ensure that no instructions tacit or explicit undermine other regulatory schemes or the unwritten laws; violate the *CoAG Intergovernmental Agreement (IGA)* of July 2009; or otherwise undermine existing and proposed consumer protections under all laws. They are also required to adopt best practice – the BHW provisions represent examples of worst practice policy, incur unnecessary costs through the use of and maintenance of water meters that neither measure gas or energy consumption.

As previously mentioned if an enforcement law officer instructed a person to shoot a man across the street and that person complied he or she would be guilty of murder and the policeman of aiding and abetting.

The same principles should apply if policy makers and regulators inappropriately provide tacit or explicit instructions that leave industry participants at risk of litigation; or that will render liable those instructing authorities under the law, regardless of any restrictions that may be placed within statutory provisions.

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 proposal 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.

³³ Competition and Consumer Law 2010 (renamed and considerably altered *Trade Practices Act 1974*) Following finalization and adoption of the Trade Practices (Australian Consumer Law) Amendment Bill2) the TPA will be renamed Competition and Consumer Law 2010, and is expected to be fully operational by 1 January 2011

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](http://www.smartgridaustralia.com) website³⁴ 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

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.

JGN³⁵ describes its services in this regard as follows:

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.”

By the way smart grid operations raise a host of privacy issues both for water and other utilities that have not been explored and addressed in terms of consumer protection.

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.

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

³⁴ www.smartgridaustralia.com

³⁵ *Jemena* <http://www.jemena.com.au>

“1.8 Water Meters: JGN has a population of hot water meters, usually located in apartment buildings that are used for network purposes.³⁶”

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.”

³⁶ 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.

Comment MK

These comments are of huge concern. It is unclear what safety precautions are being taken or why alleged end-consumers of water are considered to be “*embedded gas customers.*” There is no such thing. Either gas is directly provided or it is not. The term embedded applies solely to electricity where direct flow of energy is demonstrated to the deemed recipient’s premises

JGN proposes replacement of RF heads to replace **cable data logging systems associated with cold water and hot water meters (which do not measure gas or heat but simply water volume)** to continue remote readings, presumably of water consumption, through which guestimates are deemed of deemed gas usage for gas that is not delivered at all to the parties deemed to be contractually responsible – normally renting tenants who receive heated water not gas or electricity.

Since JGN is discussing water meters and hot water flow meters in the same breath as RF heads, it is assumed that a **water grid** remote billing system similar to smart meter communication is envisaged for those water meters in the mistaken belief that they form part of the gas distribution (or electricity distribution) system.

They do not form part of any energy distribution system, except for anomalous and unjust procedures that involve massive pass-on costs that are unnecessarily incurred. This type of telecommunications facility raises privacy issues and data management issues that have not been publicly aired and discussed with consumer protection in mind. The poorly considered consumer implications associated with smart meters have not been resolved and there are many discussions and changes on foot, of late behind locked doors that raises issues about adequacy of consultation.

The Auditor-General had found that technology was too immature for the operability functions envisaged for smart meters. Perhaps the same is true also for any water grid communications system envisaged, leaving aside the huge sunk cost implications.

These issues and their implications for consumers have not been discussed at all in the context of the NECF2 package or to my knowledge anywhere else in a transparent manner. I am not aware of any consumer impact consultation or any other form of public consultation of this matter. If there has been and I have missed it, I would like to be provided with links so I can look up details.

Mere ownership of water infrastructure or any other infrastructure does not create a contractual relationship with any party, especially if water meters are extraneous for the measurement of gas or electricity consumption.

Tenancy laws protect consumers and the extent to which they may, if at all, be charged for water supplies hot or cold. In Victoria s69 of the *Residential Tenancies Act 1997* declares that unless water efficient devices are supplied by the Lessor, no charge may be made.

When charges are made they must be for consumption costs only based on actual volume of water consumed, not for other charges.

If water is heated centrally and no separate gas or electricity meters exists associated with that heating, no charge applies. ACT provisions are the clearest and explicit about Lessor responsibility.

(c) any other substance that the regulations declare to be a gas for the purposes of this Act.

Comment MK

Gas does not mean water hot or cold. Gas does not pass through cold water meters or hot water flow meters. Gas volume or heat (energy) cannot be measured through legally traceable means using a hot water or cold water flow meter.

gas appliance means any gas burning appliance that is manufactured, adapted or designed for connection to a gas installation, whether by means of a gas outlet socket or otherwise.

Comment MK

A boiler tank, water meters, cold or hot water flow meters are not gas appliances

gas installation means the gas pipes and associated equipment that are used to convey and control the conveyance of gas within premises to which gas is supplied, whether from a distribution system or otherwise, but does not include anything connected to and extending or situated beyond a gas outlet socket.

No part of water infrastructure can be said to be part of a gas distribution system. Nor can capital or operating expenditure on gas be justified in the circumstances where a single boiler tank is supplied by a single gas meter.

One meter reading only of the gas meter is required and the bill presented to the Lessor or Owner of the multi-dwelling facility where such a system operates (the bulk hot water arrangements).

If energy suppliers are using water meters – their use needs to be regulated and justification provided as to their employment under existing or proposed energy instruments.

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, licenced or unlicenced of “*metering and billing services*” each seeking to hold contractually responsible for inflated energy costs those end-users receiving wate. Not only are “*free retail competition charges*” included, but also massive supply and meter reading fees included in inhouse or outsourced 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 (NECF2) to be rubber-stamped through the South 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 v7* (Vic) (Feb2010) 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.

I have repeatedly raised relatedf concerns in varous public submisisions

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 (2008)

(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

Gas Connections Framework Draft Policy Paper (2009)

http://www.ret.gov.au/Documents/mce/_documents/Energy%20Market%20Reform/ec/Madeleine%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/_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

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

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 SCO Network Policy Working Group

Economic Regulation

http://www.ret.gov.au/Documents/mce/_documents/Energy%20Market%20Reform/ec/Madeleine%20Kingston.pdf

Commonwealth Treasury Unconscionable Conduct Issues Paper (2009)

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

AER Draft Decision Jemena (JGN) Revised Gas Access Proposal for 2010-2015

<http://www.aer.gov.au/content/item.phtml?itemId=736206&nodeId=345c45e72e13c0e49cbd5cff588a0135&fn=Madeleine%20Kingston.pdf>

Part 1 – published – Part 2 herewith belatedly for open publication if acceptable also (421 pages plus several appendices)

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

www.pc.gov.au/projects/inquiry/consumer/submissions/subdr242part5

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

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

The current submission to the AER has updated some material, borrowing from company reports, websites and the AER's 2009 State of the Energy Market to illustrate the monopoly-like nature of the energy market.

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

<http://www.aemc.gov.au/Media/docs/Madeleine%20Kingston%202nd%20Sub%20Part%202-9253e33d-3fb9-4862-935d-08170f3b6504-0.pdf> (Part 2) (pp101-221)

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Jemena (JGN) Revised Gas Access Proposal 2010-2015

Further open s comment and supporting data with several appendices

re JGN's further submission(s) of 18 May 2010

and principles behind AEMC's Rule Change Proposal ERC 0092 under the NER

(with possible extrapolation to NGR) – and other related determinations

Prepared also for multiple other arenas

Madeleine Kingston, Individual Stakeholder

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, published and originally solicited as late submissions to the original decision – but will be considered at the time of publication of the Final Decision. The Draft Decision was published on 6 April 2010.

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

To be augmented by a substantially similar submission as the current package of some 421 pages plus several appendices) addressed to the AER not only for this determination but other current and future determinations by both bodies and by the MCE.

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 posing 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.

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Jemena (JGN) Revised Gas Access Proposal 2010-2015
Further open s comment and supporting data with several appendices
re JGN’s further submission(s) of 18 May 2010
and principles behind AEMC’s Rule Change Proposal ERC 0092 under the NER
(with possible extrapolation to NGR) – and other related determinations
Prepared also for multiple other arenas
Madeleine Kingston, Individual Stakeholder

I refer to p17 of Jemena's (JGNs) 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;³⁷ to various MCE arenas, including NECF1 and NECF2³⁸; (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 review³⁹.

In addition, I refer to my limited belated submissions 16 and 27 April 2010⁴⁰ 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 my 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.

³⁷ 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>

³⁸ 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

³⁹ 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 McMahan, 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

⁴⁰ 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>

METERING DATA SERVICE AND METROLOGY PROCEDURES

The proposed introduction of a new category of service provider – that of Metering Data Providers to replace the existing deed arrangements for Metering Data Agents through a proposed AEMC Rule Change at the instigation of the AEMO, and already endorsed in principle by the AEMC raises a number of issues relating to additional capital expenditure and operating costs, as well as liability issues.

It is unclear exactly how many operators there are in the market, under what conditions they are operating, and what the consequences may have been of apparently indiscriminate sanction by energy policy-makers and regulators under Orders in Council originally only intended to capture short-term transitory arrangements for the provision of energy. See for example Appendix 10,⁴¹ Reproduced Order in Council Victoria 2002 and separate discussion in this submission and others under the heading “*Exempt Selling Regime*”

In that section I discuss some concerns relating to the Small Scale Licencing feasibility study undertaken by the Victorian industry-specific complaints scheme Energy and Water Ombudsman (EWOV) around the time of the 2006 Small Scale Licencing enquiry undertaken by the ESC (Vic). As appendices I have included some responses and case studies that are relevant as provided by the Tenants Union Victoria in direct response to that consultation,⁴² and by others such as Consumer Utilities Advocacy Centre (CUAC); and one from the NSW Government (Fair Trading).

I have endeavoured to separate the issues and discuss very broadly under a separate heading the AEMC proposal.⁴³ Despite objections raised by market participant stakeholders dating back to 2009, this proposal has been endorsed by the AEMC in principle and expected changes already incorporated into the Draft Decision published on 6 May and into the draft NER Rule Change Chapter 7.

Terminology and analysis of the technicalities are further discussed in appendices, some of them similar to those submitted in my submission to the National Energy Customer Framework 2nd Exposure Draft in March 2010 (see also response to NECF1 Consultation RIS (2008).

⁴¹ Appendix 10 Reproduced Exemption Order under (Vic) Electricity Industry Act 2000 under Sec 17 Ministerial Order in Council (Victoria-DPI) See <http://www.esc.vic.gov.au/NR/rdonlyres/9EC969C8-B301-4BD9-8E62-4A8042085616/0/MinisterLetterMarch06.pdf>
<http://www.esc.vic.gov.au/NR/rdonlyres/E0479D36-BC99-4563-9D1B-58D064BCBE13/0/GeneralOrderMay02.pdf>

⁴² Tenants Union Victoria (TUV), 2006a, 2006b {further comment}; 2007 Response to Draft Decision, Essential Services Commission Small Scale Licencing Review 2006-7 –includes several case studies as reproduced with consent and attached with this submission as appendices (similar to those sent to the Senate Economics Committee TPA-ACL-Bill2 Enquiry MK sub25)

⁴³ AEMC Draft Decision (6 May 2010) ERC0092 Proposed Rule Change Provision of MDS and Metrology Requirements Section 107 Notice (response date 1 July 2010)

Updated analysis of some of these matters is included within this submission to the AER intended also for other entities and parties, updated discussion of tenancy issues, and technicalities with a focus on NSW provisions and those in States other than Victoria.

These procedures and associated data metering services provided, whether or not outsourced, impose **massive** passed on additional costs to the contractual party.

The question of who that contractual party should properly be is a subject of dispute as Developers or Owners' Corporations under contract and common law are the proper financially responsible customer, not the end-consumer.

This distinction was recognized by some market participants attending in the NECF2 Public Workshop Fora on 3 and 4 February 2010, under the auspices of the MCE and hosted by its Secretariat, the Federal Department of Resources and Energy.

I have already copiously argued elsewhere why the contractual party for any such services, and however the calculations are made, should be the Developer or the Lessor, usually an OC or Landlord as Controller(s) of Premises where hot water services form an integral part of leasing arrangements to tenants, and wherein no direct flow of energy is achieved at all to the premises of those tenants – that is no form of gas or electricity infrastructure, and irrespective of change of ownership or operation takes place.

The current anomalies encapsulated in what are commonly known as the “*bulk hot water arrangements*” and operating discrepantly in several states with either implicit or explicit endorsement by policy-makers, rule makers and regulators – are recognized by all components of the market, and are continuing to cause unnecessary detriment and costs to end-users of utilities – yet nothing has been done to either monitor or stem the impacts.

Therefore what has developed is an un-monitored monopoly-like situation wherein under the guise of facilitation of competition goals a market has opened up under so-called energy provisions to allow the water market to develop whilst claims and costs for alleged provision of energy, (but in the absence of any flow of energy to the end-user of heated water); and associated data metering costs.

The metering data services, billing procedures and alleged reading (remote or otherwise) of **water meters and hot water flow meters** where such readings and services are inflated and entirely unnecessary when calculating actual gas or electricity usage, and irrespective of who the proper contractual party should be.

Again for settlement purposes only a single gas meter (or electricity meter) exists and the retailer or other third party purchasing the gas used to fire communal water tanks pays only one GST charge and for gas usage for that single meter and its associated metering data costs.

Whilst also discussed in detail elsewhere, including under the heading Exempt Selling Regime, I stress again that there is no such thing as an embedded gas consumer. The parent-child concept introduced into metrology procedures refers to situations where unmetered supplies occur during changeover of network ownership or operation, but wherein direct flow of electricity (not gas) takes place to the party deemed to be the financially responsible contractual party for sale and supply of electricity.

Such a scenario is entirely different where gas is supplied to a single meter that is used to fire a communal boiler tank, from which water is reticulated in water pipes.

There is no such thing as an embedded gas consumer – either gas is directly provided or it is not. For safety and other reasons, it was previously determined by the MCE that distributors would be directly responsible for transmission of gas. The tripartite model holds both distributor and retailer responsible and liable also under consumer guarantee provisions and civil penalties were appropriate.

The provision under the proposed National Energy Laws and Rules (NECF2 Package) not yet finalized of small claims procedures for civil penalty.

If I have understood this correctly, in the context of energy regulations (not water), and specifically in relation to gas under the current Gas Access Dispute for 2010-2015, JGN has proposed upgrade to **water meter infrastructure** through the fitting of RF heads as a communication means through which remote reading of **water consumption** can be achieved. This is similar in concept to the smart meter concept since radio communication or other technology is used to effect remote readings.

These services are intended to be provided through outsourcing arrangements discussed by JGN, which will have a significant effect on raising unwarranted costs not simply to those who are unjustly deemed to be directly receiving gas or electricity but instead receive a composite water product in water pipes.

The inappropriate use of water meters or hot water flow meters as if they represented substitute gas or electricity meters, and which JGN propose at enormous cost to all end-consumers to replace or upgrade with the aim of implementing (presumably without going through the processes of dealing with such a matter through normal public consultation channels), claiming that water meters are part of the gas distribution system – a scientific impossibility.

These matters will have direct impacts on the matters under the consideration of the AEMC, including ERC0092 Proposed Rule Change Provision of MDS and Metrology Requirements Section 107 Notice, to which I made a submission, and which has been published though the AEMC has not had the time to consider this yet.

The AEMC on 23 April had specifically asked if the two letters that I sent in dated 16⁴⁴ and 27 April respectively may be included as part of the consultation process.

The AEMC Rule Change Draft Decision speaks of procedures and processes relating to connection requests. In the case of those negotiating with distributors, retailers or others to provide metering services for water infrastructure, either **cold water meters** or **hot water flow meters** these are matters between developers, OCs or other Lessors of residential premises in multi-tenanted dwellings

By the same token, if connection involves the installation and connection for the supply of gas (or electricity) to fire a single communal boiler tank supplying heated water to individual residential premises in multi-tenanted dwellings; these arrangements and the contract for supply fit and maintain such infrastructure is a contractual arrangement between energy providers and Developers; OCs and/or other Lessors.

The question of sale and supply costs for the energy used to power a single boiler tank on such property also belong to those parties not to a succession of individual renting tenants. Unless direct flow of energy is demonstrable no consumption costs should be apportioned for energy to end-uses of centrally heated water as residential tenants.

Water costs may only be re-claimed from residential tenants by Owners' Corporations or other Lessors (Landlords) in terms of actual consumption costs of the water, not supply or other charges, and not maintenance costs or capital replacement costs. Such infrastructure is the direct responsibility of Owners' Corporations not tenants.

Refer to further discussion elsewhere concerning residential tenancy provisions.

Refer also to changes to generic laws concerning unfair substantive contract terms, and to the national measurement provisions regarding the proper use of instruments for the correct purpose in the proper manner, using the right units of measure and scale of measurement.

Hot water flow meters cannot possibly measure gas volume of electricity consumption, nor heat. They also do not withstand heat well.

⁴⁴ Madeleine Kingston (2009) letter to AEMC ERC0092 Proposed Rule Change Provision of MDS and Metrology Requirements Section 107 Notice

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

Further correspondence dated 27 April 2010

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

See other relevant documents

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

Ownership and contracts to maintain water meters of any description does not create a contractual right to deem an end-user of heated water contractually obligated for the deemed gas or electricity, notwithstanding the Victorian provisions that are explicitly included within the Energy Retail Code v7 February 2010 or the various instruments that the Queensland Government has chosen to rely upon following the sale and disaggregation of energy assets (discussed more fully elsewhere); and practices that are otherwise endorsed in other States, each operating discrepantly.

Though discussed elsewhere, I mention here that those receiving gas-fired centrally heated water in multi-tenanted dwellings are not embedded customers at all. The term is exclusive to electricity, and the original Victorian provisions for exempt selling under an OIC was intended for electricity only, and to capture only short-term and transient end-users.

Is either directly provided or it is not. There are safety and other considerations with any embedded arrangement.

For settlement purposes only a single gas or electricity meter exists on common property infrastructure. Attempts to double charge by apportioning both consumption, supply, meter reading and other costs to individuals who receive no energy whatsoever is an absurd and unjust and unnecessarily costly processes.

This raises the issue of the proper definition and interpretation of Multiple Delivery Points (MDP).

I refer to JGN's further comments to the AER of 18 May 2010 in the current determination as below.

30	Need non-contentious triggers within clause as to when JGN can draw on credit support provided by a user.	The AER considered this submission in its draft decision and formed the view that clause 30 is consistent with the NGL and the national gas objective. ¹⁰⁹ JGN submits that this is correct. In addition, JGN notes that clause 30 is the same as the security provision which is included in JGN's existing contracts, for example, clause 16 of the standard Multiple Delivery Point Services Agreement.
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Note that by the end of 2010 all states will need to bring their generic laws into line with generic provisions. There have been specific changes in relation to sale of goods act, ownership of the goods deemed to be sold and a host of other issues to be taken into account.

Electricity and gas are goods (commodities). They therefore attract the full suite of protections available.

The services that are provided to Owners Corporations should in terms of any supply charges, metering data charges and the like are undertaken as a result of a direct non-transferable contract with the energy provider through whichever servant contractor or agent is employed. The proposed new category for the provision of such services in terms of electricity will be called Metering Data Provider. Nonetheless if these parties are engaged as outsourced contractors to either the developer or retailer or other third party, the contract for sale and supply of gas is with the energy provider not the MDS.

Therefore in the event of dispute, the en-user customer (if body corporate) or end-user only if directly supplied with energy through its direct flow into the premises deemed to be receiving energy (rather than heated water) will be able to take an action against either retailer or developer. The subsequent apportionment of liability between those parties is a matter between them.

It has been my direct experience and on the basis of anecdotal information provided to me that various parties endeavour to escape responsibility for directly resolving issues arising out of actions taken by servants contractors and or agents in relation to metering data services that are in fact contractual matters between Developers or Owners' Corporations, not end-users who are victimized by unnecessary and unjust imposition of contractual status for alleged sale and supply of energy that is not delivered at all through flow of energy.

For settlement purposes only a single gas or electricity meter exists and that is installed and maintained at the request of Developer or Owners' Corporation.

These principles need to be properly understood, especially with the formation of a new category for metering data service provider (electricity) which may also be incorporated into further gas Rule Changes and be extended to smart metering arrangements – though the strategic planning for area is now under the Department of Climate Change, Energy Efficiency and Water.

Comment MK

Only a single gas (or electricity) meter reading needs to be achieved quarterly of the gas or electricity meter and the bill with applicable GST costs provided to the OC or Landlord/Lessor, who may only reclaim what tenancy provisions allow if separate meters exist for the calculation of water costs, but not for the energy used to heat a single boiler tank that reticulates centrally heated water. Those costs belong to the OC or Landlord.

It is not the prerogative of energy policy makers, rule makers or regulators to re-write tenancy or trade measurement laws, or contractual or common law and unjustly sanction the imposition of contracts, deemed, standard or others on end-users of utilities (in this case heated water) in the absence of any flow of energy.

I briefly discuss here a related matter (for electricity – that could be extrapolated to gas in the future) under consideration by the AEMC concerning a Rule Change Proposal at an advanced stage of determination consideration.

The proposed *National Energy Retail Laws and Rules* are very clear that flow of energy is a central concept in establishing the sale and supply of energy.

There is increasing awareness of the anomalies and unacceptable practices that exist and what is seen as exploitation of enshrined consumer rights. There is more than one matter before the open courts, including a Victorian matter initiated by the members of an OC (not renting tenants). This is discussed elsewhere and has been highlighted in other open submissions to MCE, Treasury, Senate and so on.

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It would seem that it is the intent of JGN (and perhaps others) to create or install communication facilities that would allow the reading of water meters by remote. If this is in connection with the hot water flow meters and cold water meters that are effectively posing as either gas or electricity meters; and if inflated costs are envisaged for meter reading and data collection, grid or otherwise in the circumstances described, these practices need to be carefully scrutinized before a justification can be made for cost allocations involving massive increases for maintenance and replacement of unnecessary water infrastructure in connection with energy supply.

Those increases on top of all other increases envisaged would be passed on to all consumers not just those in multi-tenanted dwellings. In many cases living in poorly maintained older buildings can least afford the additional costs.

A glimpse at tariffs indicates that retailers are charging more for remote meter reading than manual readings, including in relation to *“bulk hot water tariffs”* where no flow of energy to end-users of the heated water is effected.

There are meter reading charges for both the water meters and the gas. Even where no gas is used for heating lighting or cooking, *“free retail contestability – FRC –* charges are being applied.

To these charges, presumably the costs of outsourced meter reading and billing procedures; including for the purpose of reading manually or remotely water meters and hot water flow meters; GST costs, other bundled or unbundled charges; and the costs of their maintenance and replacement or upgrade are envisaged as suitable costs to impose on those who receive no energy at in connection with heated water supplies.

In Victoria the decision was made that actual meter reading of the water meters allowed to pose as gas meters or electricity meters was too inconvenient and expense and was likely to impose price shock on end-consumers.

Instead, the practices in place have inflated costs for unwarranted deemed contracts that have systematically over decades exploited the enshrined rights of consumers. The impacts have remained unchecked.

The number of complains made does not reflect the extent of those impacts. In any case complaints about these matters are pointless. Industry-specific complaints schemes have no power to deal with these matters and coercive conflicts of interest, and all policy makers, rule makers and regulators involved to date would rather place the problem in the too hard basket than address it.

In my view these practices are not about competition but consumer exploitation.

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) Bill(1) and Bill(2)*, 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 in relation to trade measurement and correct use of instruments 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.

In relation to the bulk hot water arrangements, the current Energy Retail Code v7 (February 2010) is discrepant with those provisions in relation to explicitly requiring retailers to apportion individual bills to recipients of heated water supplies reticulated in water pipes. The supply address is the single meter that fires a communal water tank centrally heating water. It is not a geographical term.

JGN has proposed a geographical delivery point presumably rather than the traditional MIRN method of identifying meters. Only one MIRN applies, whilst bills issued by retailers refer to an alternative number, and use the term :gas usage" when referring to alleged supply of gas to individual residential premises who receive no gas at all.

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These technical distinctions are central to metrology definitions, procedures and standards.

Supply

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)¹⁸⁸

Gas supply is through facilitation of the flow of gas (or electricity) between the network and the premises through the connection; and services relating to the delivery of energy to the (alleged)

- connection to customer’s premises, using a gas fitting that “includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas”

Connection Point/Supply Point/Energization Point

Connection (VGDCV9)/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 OC. 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 party unjustly held contractually obligated.

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.*

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 VENC Corp 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 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 2010.⁴⁵

⁴⁵ 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>

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).⁴⁶

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.

⁴⁶ 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

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.

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?

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 OC 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.

Some Accountability and Liability Issues Impacting on certain categories of service providers, including Metering Data Providers (new proposed category)

I discuss these issues in more detail under the policy section Statutory and Implied Warranties but raise them here specifically in response to JGN's response to the AER Determination contained in a further submission of 18 May 2010.

In the section to follow I also include brief comment regarding the principles raised by the AEMC in its Draft Decision and published draft mark-up changes to Chapter 7 of the National Electricity Rules 2010, a current proposal for which responses to the Draft Decision are open till 1 July 2010.

Though recognizing that it is the NER to which these changes are proposed, it is worth exploring here very briefly the implications for any similar changes that may be proposed under the National Gas Rules.

These considerations are pertinent not only in relation to the direct provision of gas and electricity as facilitated by the flow of gas to the actual premises (including residential premises of tenants or strata owned property) but to arrangements in place whereby by sleight of hand methodologies in place that have for decades remained unmonitored as to impacts and implications for conflict and overlap with other schemes.

The AEMO through a Rule Change request to the AEMC has proposed that current deed arrangements for Metering Data Agents be replaced by *“a new category of service provider – a Metering Data Provider are to become a specific category under, to be created under the NER.”*

In addition the AEMO has proposed that the responsibility for remotely read metering data services be transferred from itself to a Financially Responsible Market Participant (FRMP) or the Responsible Person.

“Currently, AEMO is responsible for remotely read metering data services while the services for the collection and processing of remotely read metering data are provided by Metering Data Agents. These Metering Data Agents are regulated under a set of deeds. AEMO considers that these deeds arrangements are complex and costly to administer and lack transparency and clarity. AEMO proposes that the deeds arrangements be removed and that in its place, a new category of service provider – a Metering Data Provider - be created in and regulated under the National Electricity Rules (Rules). AEMO proposes that the responsibility for remotely read metering data services be transferred from itself to Financially Responsible Market Participant (FRMP) or the Responsible Person.

(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.”

Clause	Submission	JGN Response
15.12	JGN should be liable for its negligence or willful misconduct	The indemnity in this clause is limited to damages arising from the <u>cessation or termination of delivery of gas</u> which occurs due to user requests or other acts by the user over which JGN has no control (namely, disconnection or cessation of supply by, or at the request of, the user, pursuant to the events set out in clauses 15.8 and 15.9). The indemnity, as amended in the revised access arrangement proposal, does not extend to the sorts of damage that JGN might cause in effecting the disconnection or any other activities to effect the requested cessation of delivery of gas, for example, damage to a customer's letter box caused by the negligence of JGN employees in attending the premises and physically carrying out the work required to decommission a delivery point. The general indemnity given by JGN in clause 28.2(b) covers any damage that arises as a result of such a negligent act or omission by JGN.
28.2(b)	Add explicit wording allocating to JGN liability related to JGN's negligence in dealing with user requests and/or carrying out acts of decommissioning, disconnection or suspension	The concern the AER raised in its draft decision in relation to clauses 15.2(a) and 24.3(b) was that, as originally drafted, these clauses imposed indemnity liability on users for JGN's negligent conduct. ¹⁰⁵ The amendments put forward by JGN in response to the draft decision ¹⁰⁷ limit the indemnity liability of users to Damages resulting from the cessation of delivery of gas in the circumstances referred to in these clauses. Such cessation of delivery of gas arises only as a result of action or inaction on the part of the user or AEMO. JGN has no control over risks arising from the cessation of delivery of gas in the circumstances to which these clauses apply (user/AEMO instruction to cease supply). The AER has previously accepted the principle that liability for negligence can only arise where the matters to which the liability relates are within the party's control (see AER Final Decision - Public - March 2010 Wagga Wagga natural gas distribution network: access arrangement 1 July 2010 - 20 June 2015, p81). This principle applies to these clauses. These clauses, as amended by JGN, do not extend to any damages resulting from JGN's negligence in carrying out the work required to give effect to a user request or carrying out actions of decommissioning etc to which these clauses apply, for example, damage to a customer's letter box caused by the negligent acts of a JGN employee in attending the site to do the necessary work. The general indemnity given by JGN in clause 28.2(b) covers such damage.

MK Comment

JGN has clarified its intent regarding liability in answer to concerns raised by others.

I note that the AEMC has proposed certain civil penalties within the revisions proposed by Rule Change to the National Electricity Rules (NER), and may also proceed to similarly amend the National Gas Rules (NGR).

I would particularly like to raise the issue of liability of third parties, whether as in-house but separately incorporated bodies or externally outsourced as meter data providers.

The tripartite governance model of the NECF allows for an end-user receiving gas or electricity to take an action either against the retailer or supplier and the distributor.

If the distributor is found to be negligent or guilty of willful misconduct, the tripartite contractual model will allow direct action against either party. If action is taken against the retailer, it must, where appropriate make a counter-claim against the distributor to recover costs.

In his published paper by Professor Stephen G. Corones,⁴⁷ 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.”

⁴⁷ Corones, Prof Stephen (2009) *“Consumer guarantees in Australia: putting an end to the blame game.”*⁴⁷ Queensland (Vol 9 No. 2 (QUTLJJ) <http://eprints.qut.edu.au/31091/1/c31091.pdf> (last accessed 21 April 2010)

Professor Corones 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.”*

He 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 refunds⁴⁸”*.

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 2010.⁴⁹

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.

⁴⁸ http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf

⁴⁹ 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

In the case of dispute as to who the correct contractual party should be (for example OC 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.

**LIMITED DISCUSSION OF IMPLICATIONS OF AEMC'S RULE CHANGE
PROPOSAL (Ch7) ERC0092 Proposed Rule Change Provision of MDS and
Metrology Requirements Section 107 Notice**

In the event that the draft proposed Rule Change proposals contained in Ch7 of the NER are contemplated in the future for gas I raise this matter here also whilst intending to send a similar submission to the AEMC.

The issues are pertinent on the basis of the general principles raised as to the role and responsibilities of a new category of provider known as a Metering Data Service Provider (MDS) and the clarification of metrology procedures.

Whilst the MDS Rule change proposals do not at this stage include smart metering, there is discussion of interval and remote read meters.

With the possibility that developing technology or new policy initiatives, it cannot be out-ruled that gas provisions will be similar despite the original decision by the MCE not to include gas in coverage as if it were embedded. In the case of electricity in some circumstances an end-consumer who actually received flow of electricity directly may be deemed embedded without separate metering, though there are implications for the tenancy provisions.

The Proposed NER Rule changes under Chapter are proposed for electricity raise selected issues here in terms of the general principles proposed by the AEMC as they will impact on the provision of Metering Data Services and clarification of existing metrology requirements (Ch 7). that may in the future

The mark-up version of the draft Rule Change published by the AEMC in its Draft Decision delivered on 6 May 2010 is available on its website.⁵⁰

In a version subject to further change published on the AEMC website as at 6 May 2010 the National Electricity Rules version 35 represents a consolidated version of the NER which includes a Draft National Electricity Amendment (Provision of Metering Data Services and Clarification of Existing Metrology Requirements) Rule 2010

If similar procedures are envisaged also for gas connections where multi-tenanted developments have a single gas meter firing a boiler tank, the objections raised remain valid. Where the meter is an electricity meter, which in Victoria may soon may changed to a smart meter – the same issues arise.

There are also privacy concerns about grid usage and many other unresolved consumer issues that have not been transparently discussed and aired and were not exposed during the extensive NECF consultations. Instead residual matters are being handled by extensive Rule Change processes without the benefit of RIS assessments or robust public consultation.

⁵⁰ ² www.aemc.gov.au

Page 595 of 1164 pages of the AEMC Proposed Rule Change to the National Electricity Rules v25⁵¹ refers to Pricing methodologies (in relation to electricity, but may be intended in the future to apply also to gas) and to transmission determinations

Chapter 7 p 633-725 of the draft marked-up document relating to data meter provision, recoverable costs and metrology procedures outlines the principles being proposed and are raised here because of concerns that similar principles may be adopted for gas in the circumstances described.

This chapter includes the metering data management and metrology practices to be incorporated. These do refer to electricity rules, whilst the matter in hand for the AER relates to a gas access determination. However, the principles are important to raise in case these policies and practices are seen as those that could equally apply to gas.

It is not possible in the time available to examine the implications of the AEMC's Draft Rule Change or comment on the principle as these proposals may in the future relate to gas.

I quote directly from the Draft Decision published on 6 May 2010:

"The Australian Energy Market Operator (AEMO) requested that the Australian Energy Market Commission (Commission or AEMC) to consider a Rule change to address the existing arrangements for the provision and responsibility for remotely read metering data services.

Currently, AEMO is responsible for remotely read metering data services while the services for the collection and processing of remotely read metering data are provided by Metering Data Agents. These Metering Data Agents are regulated under a set of deeds. AEMO considers that these deeds arrangements are complex and costly to administer and lack transparency and clarity. AEMO proposes that the deeds arrangements be removed and that in its place, a new category of service provider – a Metering Data Provider - be created in and regulated under the National Electricity Rules (Rules). AEMO proposes that the responsibility for remotely read metering data services be transferred from itself to Financially Responsible Market Participant (FRMP) or the Responsible Person.

Furthermore, AEMO proposes to clarify the definition and usage of terms used in Chapter 7 of the Rules and to ensure that these terms are clearly and consistently applied throughout this Chapter. AEMO has also proposed some re-structuring of Chapter 7 of the Rules to enhance the clarity and interpretation of these Rules.

⁵¹ Draft Mark-up Version Draft Rule Change National Electricity Rules v 35 – see especially Chapter 7 Metering
<http://www.aemc.gov.au/Media/docs/Markup%20of%20Draft%20Rule%20-%20ERC0092%20-%205%20May%202010%20-%20for%20publication.pdf-7e4dda8e-ee8b-4186-919c-0891c1d522b9-0.PDF>

On 27 August 2009, the Commission published a notice under section 95 of the National Electricity Law (NEL) advising of its intention to commence the Rule change process and the first round of consultation in respect of the Rule Change Request.

A consultation paper was prepared by the AEMC staff identifying specific issues or questions for consultation was also published with the Rule Change Request.

Submissions closed on 16 October 2009.

The Commission agrees with the substance and issues raised in the Rule Change Request and has decided to make a draft Rule. The draft Rule adopts, in part, the solution proposed by AEMO while also incorporating suggestions provided by stakeholders to clarify the operation of the Rules.

In brief, the Commission determines that:

- Metering Data Providers will be a new category of service provider regulated under the Rules;*
- the responsibility for the provision of metering data services for metering installation types 1-4 will be the FRMP unless it receives and accepts an offer from the Local Network Service Provider (LNSP). For metering installation types 5-7, the LNSP will be responsible for the provision of metering data services as consistent with current practice;*
- there will be separate Service Level Procedures in the Rules;*
- terms used in Chapter 7 of the Rules and the structure of Chapter 7 of the Rules has been modified to enhance the clarity of the Rules.*

The Commission proposes to transfer the responsibility for the provision of metering data services from AEMO to market participants. In light of this transfer of responsibility, the Commission is interested in views as to whether, compared to current arrangements, there would be a material increase in aggregate costs that would be incurred by market participants while discharging their responsibilities relating to the quality assurance of metering data services. The Commission is thus interested in views as to the efficiency of transferring the responsibility for the provision of metering data services from AEMO to market participants.

Furthermore, the Commission welcomes views on the efficiency of making the party responsible for the provision of metering data services for metering installation types 1-4 the Financially Responsible Market Participant (with the option of accepting a voluntary offer from the LNSP). The alternative arrangement is to extend the Responsible Person framework, which currently applies to metering installations, and apply this to the provision of metering data services across all metering installation types.

In accordance with the notice published under section 99 of the NEL, the Commission invites submissions on this draft Rule determination, including the draft Rule, by 1 July 2010.

In accordance with section 101(1a) of the NEL, any person or body may request that the Commission hold a hearing in relation to the draft Rule determination. Any request for a hearing must be made in writing and must be received by the Commission no later than 13 May 2010.

1 AEMO Rule Change Request

1.1 The Rule change proposal

On 18 June 2009, the Australian Energy Market Operator (AEMO) made a request to the Commission to make a rule regarding the provision of metering data services (Rule Change Request).

1.2 Rule Change Request Rationale

In this Rule Change Request, AEMO seeks to address the deeds arrangements that it administers to engage Metering Data Agents for the collection and processing of remotely read metering data. AEMO considers that these deeds arrangements (that exist outside of the Rules) lack transparency and clarity and are complex and costly to administer.

AEMO also seeks to address the lack of clarity in the usage of terms in Chapter 7 of the Rules and proposes that these terms are clearly and consistently applied throughout this Chapter. Such examples include, AEMO proposing to clarify the definition of metering installation and ensuring that there is consistent usage of the term ‘energy data’ so that it is not confused with the term ‘metering data’. AEMO has also proposed some restructuring of Chapter 7 to aide the interpretation of the Rules.

1.3 Solution proposed by the Rule Change Request

In this Rule Change Request, AEMO proposes that there be:

- the creation of a new category of service provider in the Rules called a Metering Data Provider (which replaces metering data agents) and thus abolishes the deeds arrangements; and*
- a transfer of responsibility for the collection and processing of metering data from Type 1, 2, 3 and 4 metering installations from AEMO to the Responsible Person or the Financially Responsible Market Participant.*

Furthermore, AEMO proposes to:

- extend the existing dispute resolution process in clause 8.2 of the Rules to include disputes between Metering Data Providers and other parties, including Registered Participants;*

- *Establish service level procedures for Metering Providers¹ and Metering Data Providers in the Rules;*
 1. *Metering Providers are already recognized as a service provider (refer to Rule 7.4).*
 2. *Provision of Metering Data Services and Clarification of Existing Metrology Requirements vary, delete or introduce definitions in the Rules to clarify the roles and obligations of service providers, improve the clarity of, and reduce duplication within, the Rules, and standardize terminology across all metering installation types;*
- *restructure Chapter 7 to ensure each clause deals only with one substantive matter, correct errors and improve clarity, and take into account of the substantive changes proposed in AEMO's Rule change proposal; and*
- *make consequential amendments to Chapters 3, 5, 6, 8, 9 and 11 of the Rules.*

1.4 Consultation

On 27 August 2009, the Commission published a notice under section 95 of the National Electricity Law (NEL) advising of its intention to commence the Rule change process and the first round of consultation in respect of the Rule Change Request. A consultation paper prepared by the Commission's staff identifying specific issues or questions for consultation was also published with the Rule Change Request.

Submissions closed on 16 October 2009.

The Commission received eight submissions on the Rule Change Request as part of the first round of consultation. They are available on the AEMC website.⁵² A summary of the issues raised in submissions and the Commission's response to each issue is contained in Appendices A and B.

1.5 Extensions of Time

On 10 December 2009, the Commission published a notice under section 107 of the NEL to extend the publication date of the draft Rule determination to 1 April 2010. The Commission considered that this extension of time is necessary because the Rule Change Request raised issues of sufficient complexity.

On 1 April 2010, the Commission published a second notice under section 107 of the NEL to extend the publication date of the draft Rule determination to 22 April 2010.

The Commission considered that this extension of time is necessary because the Rule Change Request raised issues of sufficient complexity.

⁵² www.aemc.gov.au

On 15 April 2010, the Commission published a third notice under section 107 of the NEL to extend the publication date of the draft Rule determination to 6 May 2010. The Commission considered that this extension of time is necessary due to a material change in circumstances that affects this Rule Change Request.

5.1 Rule change proponent's view

In proposing this Rule Change, AEMO has not dealt specifically with the impacts of smart metering arrangements. AEMO recognizes that this Rule Change is not intended to foreshadow or restrict specific Rule Changes for smart meters.

However, AEMO states that this Rule change takes into account the general introduction of smart meters. AEMO's view is that this Rule change request would be beneficial to the MCE's National Smart Metering Program because it clarifies the role of the Responsible Person and provides transparency as to the role of metering service providers.

5.2 Stakeholder views

Stakeholders were concerned about the possible interaction or overlap between this Rule Change proposal and the developments in the national smart metering program.⁵³

Further clarity was sought on how this Rule Change would interact with the smart meter program.

EnergyAustralia and Integral Energy's view was that this Rule Change should not preempt or propose changes for smart metering because the minimal functional specifications for smart metering had not yet been finalized.⁵⁴ AGL and Jemena's view was that this Rule change would introduce reforms that would support or provide a basis for the smart metering program.⁵⁵

Some stakeholders made comments against specific clauses in this Rule change where there would be, in their view, significant national smart meter infrastructure implications.⁵⁶

5.3 Analysis

The policy position adopted by the Commission is that this Rule Change should not address smart metering issues. The Commission considers that it is appropriate that this Rule Change be kept separate from smart metering developments currently undertaken by the MCE. The MCE's National Smart Metering Program is likely to involve future Rule changes that may deal with specific issues that were raised by stakeholders.

5.4 Conclusion

Accordingly, the Commission has decided not to address any issues raised in this Rule change that have implications for the MCE's National Smart Metering Program.

⁵³ ⁷ SP AusNet, Integral Energy, Jemena, EnergyAustralia and United Energy Distribution.

⁵⁴ ⁸ EnergyAustralia submission p 3; Integral Energy submission p 2.

⁵⁵ ⁹ AGL submission p 1; Jemena submission p 2.

⁵⁶ ¹⁰ SP AusNet submission p 1; Jemena submission p 5.

SOME SPECIFIC COMPETITION ISSUES

JGN claims that my concerns regarding “*bulk hot water arrangements*” (which they perceive as being merely about billing matters) are irrelevant to the current JGN (NSW) Gas Access Arrangement Proposal on the basis that:

“The NSW market works in a different manner to Victoria and Queensland. In NSW, each individual consumer in an apartment block has the opportunity to choose its gas retailer.”

It is unclear whether this statement refers to choice of gas retailer for domestic supply of gas or for what is loosely known as “*delivery of bulk hot water.*”

If JGN is referring to the “*bulk hot water arrangements*” given that no energy of any description ever enters the abode of individual tenants where water is centrally and reticulated in water pipes – why should they in any case be involved at all in choosing an energy retailer, who has no entitlement to sell water, and is not delivering energy at all or arranging for such to be delivered through the gas retailer?

This goes to the fundamentals of contract law; protections under the common law; and new provisions under the revised generic laws known as the Consumer and Competition Law, for which the Senate has just completed an enquiry.⁵⁷

Even if it is the case that each individual tenant or occupant in an apartment block in NSW (or elsewhere for that matter) may theoretically “*choose*” a retailer, and even if the central dispute over where the contractual responsibility lies, especially for the “*metering and data arrangements*” associated with bulk hot water provision, were for the sake of argument be momentarily set aside; it is my understanding that such a theoretical choice is normally pointless, since only one distributor is involved where one gas meter is supplied for the purpose of supplying a single boiler tank with heat.

Whichever retailer may be chosen, the application of the arrangements remains the same.

⁵⁷ Senate Economics Committee Inquiry into the *Trade Practices (Australian Consumer Law) Bill(2)*
See my submission to that arena. The Bill has now been passed Found at:
http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm
Sub 25 Ms Madeleine Kingston ([PDF 1533KB](#)) Attachment 1([PDF 1146KB](#)) Attachment 2 ([PDF 135KB](#)) Attachment 3 ([PDF 74KB](#)) Attachment 4 ([PDF 81KB](#)) Attachment 5 ([PDF 78KB](#)) Attachment 6 ([PDF 40KB](#)) Attachment 7 ([PDF 28KB](#)) Attachment 8 ([PDF 128KB](#)) Attachment 9 ([PDF 104KB](#))
See also within that submission reference to the submission by Kevin McMahon as a Queensland victim of the bulk hot water practices – now published on the Senate website as submission 47, and also directly submitted to the NECF2 Package – MCE SCO National Energy Consumer Framework2 in March 2010
Mr Kevin McMahon ([PDF 343KB](#))
See all 47 submissions at
http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm

Retailers do not set prices, but pass on the costs and prices imposed by distributors, plus whichever margin is determined by them for costs associated with middlemen responsibilities. In cases where data and metering provision is farmed out to third parties, either via distributor or retailer arrangements – the outcomes are exactly the same – regardless of retailer choice.

It is my understanding that arguments relating to choice of energy retailer become complicated since distributors have settled arrangements, normally with a single energy retailer; are reluctant to make alternative arrangements and are not obliged to do so; and the cost of installing a separate meter in order that such a choice may be exercised is prohibitive, making the value of such a choice questionable.

In the case of the bulk hot water arrangements in all states, including NSW, the wrong parties are held contractually responsible for a commodity that they do not receive – i.e. gas; and for which no contract exists or ought to exist, since consumption cannot be calculated by legally traceable means; the wrong instruments are used for calculation; the wrong scale of measurements are applied; and flow of energy, which is central to the concept of sale and supply of energy is unachievable.

Neither the gas volume nor the amount of heat can be measured with hot water flow meters as discussed at great length within my original submission to the AER of April 2010.

The perceived irrelevance of the matters I have raised to the JGN Gas Access Proposal, JGN appears to have missed the central issue that those residing in multi-tenanted receiving heated water that is centrally heated and reticulated in water pipes are not *“embedded customers of gas”* – they receive no gas of any description to their respective abodes and therefore cannot under contractual and common laws be deemed to be contractually obligated for the sale and supply of energy.

There is no such thing as an *“embedded gas network”* – either gas is supplied directly to the party deemed to be contractually obligated for energy or it is not.

These central contractual matters have impacts on all other aspects of the existing arrangements, and also for proposed capital expenditure and operating costs relying on maintenance and replacement of water meters under the misconception that they form part of the gas distribution network.

Such an apparent distortion of facts could readily lead to the wrong conclusions about access arrangements and regulatory cost determinations not only in this case, but across the board, for all states and for both gas and electricity in relation to the *“bulk hot water arrangements.”*

As I understand it is the perception of JGN and of the Department of Industry and Investment (NSW DII) that competition goals are being met under existing energy provisions in NSW by the mere existence of a requirement that choice exists that those receiving gas through its sale and supply under the NSW *Gas Supply Act 1996*, with several revisions incorporated including on 23 March 2010, and the intent to transfer these provisions to NEMMCO, or more accurately the Australian Energy Market Operator (AEMO).

Meanwhile the plan appears to be to offload certain responsibilities to Metering Data Service Providers, licenced or unlicenced who will presumably apply deemed provisions, trade measurement, tenancy and generic laws at their discretion possibly without adequate monitoring or supervision.

In view of the apparently ill-conceived and un-clarified exempt selling regime proposed under national energy laws, and the singular lack of adequate consumer protection under industry-specific complaints schemes most with charters too limited to deal with the issues raised; some transparently admitting to conflicts of interest.

I dispute that real choice exists, now that it has been explained that the NSW DII believes this is covered by alleged retailer choice by renting tenants or other occupants to decide at their own cost to install separate gas or electricity meters for the purpose of heating water. I discuss this further shortly.

I refer to my conversation of 25 May 2010 with the Manager Supply and Networks Policy, NSW DII mainly about the contractual, trade measurement and billing practices known as the bulk hot water arrangements, operating discrepantly in different states but in all States apparently operating in such a way as to undermine the existing rights of consumers under multiple provisions.

Forcing individual tenants into expensive litigation; or waiting for decades for case law to change ongoing practices that undermine consumer rights and contribute towards overall dilution of market function is hardly a responsible way in which to consider reform in the multiple arenas impacted which include energy and water policy; planning (buildings), climate change initiatives;⁵⁸ residential tenancy; trade measurement; generic laws on the brink of formalization under revised TPA provisions – to be known as *Competition and Consumer Law 2010*.

⁵⁸ Stationery boiler tanks represent a considerable health and safety risk with Legionnaire's disease being an issue – one Qld person has already paid the ultimate price of death through acquisition of this disease acquired through use of tepid water from a boiler tank colmunally heating water for multiple tenants residing in an apartment block.

I have had direct contact with many recipients of centrally heated water – all with negatibve stories about water qauality, maintenance, and dispute over contractual and maintenance and safety matters. Pipesd are not lagged, water rtemperature is variable and there is huge wastage3 of water when supplied in this way.

The issue of apparent failure by States, Territories, and of inter-related Federal provisions to heed the implications of comparative law is of concern.

As I understand it is the perception of the Dept of Industry and Investment NSW that competition goals are being met under existing energy provisions in NSW by the mere existence of a requirement that choice exists that those receiving gas through its sale and supply under the NSW *Gas Supply Act 1996*, with several revisions incorporated including on 23 March 2010, and the intent to transfer these provisions to NEMMCO, or more accurately the Australian Energy Market Operator (AEMO).

I dispute that choice exists, now that it has been explained that the NSW DII believes this is covered by alleged choice of renting tenants or other occupants to decide at their own cost to install separate gas or electricity meters for the purpose of heating water. I discuss this further shortly.

Renting tenants do not in fact have such choices, and certainly cannot proceed with the fitting of separate gas meters for the purposes of heating water in individual apartments. Refer to tenancy laws.

Alteration of premises to install utility infrastructure

Interpreting the *Gas Supply Act 1996* in such a way as to imply that an end-user renting tenant has a choice of gas retailer in relation to heated water provided represents a distortion of intent. Such an end-user is governed by Landlord or OC entity (body corporate) decisions, and also by the decision to accept a “*new connection*” by any retailer or distributor.

NSW tenancy provisions

NSW DII has put forward the view that choice as referred to in the GSA means the freely exercised option by an individual occupant of a single apartment in multi-tenanted dwellings to have a separate individual gas meter fitted to heat water in each apartment in a multi-tenanted dwelling where water is normally heated for other tenants.

The South Australian *Residential Tenancies Act 1995* contains very similar provisions to those in most other states including Victoria and ACT regarding **alteration to premises** – for which Landlord prior consent is always required – and in the case of attempting to fit gas meters and other such infrastructure such consent is almost always likely to be refused as discussed.

Therefore using this as evidence that “*choice*” exists in order to fit infrastructure and receive direct supply of gas for water heating – which would also require a boiler tank would be ridiculous and unjust in the case of residential tenants. If this is what is meant by JGN in relation to choice of energy retailer, then the rationale needs to be vigorously challenged.

It certainly seems that it is what the Dept of Industry and Investment NSW means.

The fitting of such infrastructure is always at the discretion of an OC or Landlord. It has been my direct experience that such entities habitually refuse permission for an individual tenant or owner to exercise the type of choice referred to.

NSW tenancy laws hold that:

*“If a tenant is willing to meet the costs and repair any damage when they leave the review can see no justification for a Landlord having an absolute right of refusal, **unless it involves alterations of a structural nature.**”*

Excising the alleged choice to have a separate gas meter to heat water in individual residential premises situated in multi-tenanted dwellings represents a structural change such as referred to.”⁵⁹

Similarly, the South Australian Residential Tenancies Act 1995⁶⁰ refers to alternation to premises as follows:

70—Alteration of premises^{61/62}

(1) It is a term of a residential tenancy agreement that a tenant must not, without the Landlord's written consent, make an alteration or addition to the premises.

(2) A tenant may remove a fixture affixed to the premises by the tenant unless its removal would cause damage to the premises.

⁵⁹ Elsewhere I discuss the clarity with which the ACT Residential Tenancies Act explicitly apportioned to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone. Similar provisions apply in Victorian provisions. NSW permits water charges for excess water only if metered; or additional water charges by consent only. Electricity and gas charges need to be metered to show consumption. Queensland tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Qld Govt at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

⁶⁰ *Residential Tenancies Act 1995* (SA), clause 70
<http://www.legislation.sa.gov.au/LZ/C/A/RESIDENTIAL%20TENANCIES%20ACT%201995/CURRENT/1995.63.UN.PDF>

⁶¹ The South Australian *Residential Tenancies Act 1995* contains very similar provisions regarding alteration to premises – for which Landlord prior consent is always required – and in the case of attempting to fit gas meters and other such infrastructure such consent is almost always likely to be refused as discussed. Therefore using this as evidence that “choice” exists in order to fit infrastructure and receive direct supply of gas for water heating – which would also require a boiler tank would be ridiculous and unjust in the case of residential tenants. If this is what JGN means – and it certainly seems that it is what the Dept of Industry and Investment NSW means – in relation to choice of energy retailer – then the rationale needs to be vigorously challenged.

It is not the prerogative of other jurisdictions to attempt to re-write laws under other jurisdictional control, including the enshrined protections of tenancy acts, generic laws, trade measurement laws and generic laws current and proposed, not to over-ride enshrined rights in the unwritten laws = the common law including the rights of natural and social justice.

⁶² Tasmanian tenancy provisions under the Residential Tenancies Act 1997 (TAS) have similar provisions about alteration to property without Landlord consent.

(3) If a tenant causes damage to the premises by removing a fixture, the tenant must notify the Landlord and, at the option of the Landlord, repair the damage or compensate the Landlord for the reasonable cost of repairing the damage.

In addition, requirements imposed on a renting tenant under any circumstances to supply and fit at own cost water or any other utility infrastructure, including gas or electricity, would represent unreasonable and substantive unfair terms, especially if this is the justification provided for the misleading statement that “*competition*” exists in that a renting tenant or other occupant is at liberty to create a legitimate contract for sale and supply of energy or water by installing his own infrastructure.

Such infrastructure and their maintenance are always the responsibility of the OC or other third party appointed to maintain these assets.

Most residential tenancy provisions in various states and territories contain very similar provisions regarding alteration to premises for which Landlord prior consent is always required. Structural alteration is normally not permitted especially if this involves fitting of utility infrastructure of any description.

The **ACT** tenancy provisions are explicit that such responsibility is always Landlord responsibility and cannot be imposed of residential tenants.

The **ACT** *Residential Tenancies Act* explicitly apportions to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone.

Similar provisions apply in Victorian provisions.

I discuss cost-recovery by Landlords and/or OCs under tenancy provisions elsewhere.

The collusive arrangements made that are apparently tacitly endorsed by energy policy-makers and regulators appear to have the effect of facilitating, through the use of third party contractors “*see-through tax advantages*” for Landlords that are not passed on to consumers; that cause ongoing detriment and erode enshrined rights under multiple provisions including tenancy rights; unfair contract terms under generic laws current and proposed; trade measurement practices and enshrined consumer protections therein – subject to the lifting of remaining utility exemptions as is the intent; common law rights including the rights of social and natural justice.

Reliance on the option of residential tenants to simply fit a individual boiler system or gas or electricity meter in order to “*opt-out*” of arrangements for central heating of water for all occupants in multi-tenanted dwellings as evidence of competitive choice is fundamentally flawed and is leading to widespread exploitation of the enshrined rights of individual consumers.

Even in the case of individual strata title owners, there are many matters of dispute, some before the open courts, based on current practices that form part of collusive arrangements between Landlords and/or OCs and energy providers including those fitting the description of either in-house or third-party external outsourced arrangements for data metering services.

I will not dwell here on interpretations of what constitute arms-length or non-arms length arrangements, but have cursorily discussed the structure of the Jemena Group and relationship to Singapore Power International.

In relation to competition issues as they impact on Queensland end-consumers of utilities, especially those impacted by the “bulk hot water arrangements” based on warranties and guarantees provided by the Queensland Govt to energy providers – in the case of BHW to Origin Energy, Kevin McMahon as a public housing tenant directly impacted summarizes the situation as follows:

“LACK OF COMPETITION POLICY and pass through cost

There is:

No Safety Net

No Public Benefit Test

No Competition Policy Test

No Regulatory Impact Statement

No Community Service Obligation in Queensland regarding BHW. The Government here has left tenants in the clutches of a grasping monopolist,

Origin, without any form of regulation or oversight. Queensland is the only state in the Commonwealth that allows BHW to be supplied “BY THE LITRE”. No ascertainment or conversion factor, or any other regard is used in Queensland, and Origin can charge what they like! They have done so.

The dominance of the original host retailers, who also have BHW consumers, is an unjustifiable barrier to entry for 2nd Tier retailers who wish to enter the market. The failure of Jackgreen, who collapsed in December 2009, did not have the benefit of BHW consumers. It is appalling that Origin is now seeking to penalize the ex-Jackgreen customers for now being the “Retailer of Last Resort”. Jackgreen did not have the ability to survive the harsh hedging environment or the oppressive market power dominance of the host retailers. The host retailers have entrenched consumers who can never trade their BHW account, and consumer payments to the host retailers distort the energy market.

This amounts to having a cash cow monopoly that discriminates against the new retailer. Host retailers have the ability to cross subsidize their other gas retail consumers, with cheaper gas and supply charges. This is a complete barrier to entry for other new retailers.”

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On pages 6 and 7 of his 19 page submission to the NECF2 Package, also published on the Senate website (sub46) Kevin McMahon a Queensland consumer said:

“FRC FEES WRONGLY APPLIED

Another grave problem is FRC trading system, with the Queensland Government placing the FRC trading system burden on gas consumers.

In Queensland the FRC fee is supposed to be used to build a database system, to be used by gas retailers and distributors, so as to facilitate the ability to trade accounts (MIRN and Addresses). VenCorp is the market referee for this data system.

This data-base building costs is attached to all gas consumers bills for the first 5 years after the FRC date, and will be phased out in mid 2011 . It will raise about \$20million over that 5 year period.

I have several neighbours that have a disability, including cerebral palsy, downs syndrome, learning difficulties, blindness, or are aged or infirm.

They do not have open flamed stoves.

They have electric stoves. They have a “BHW ONLY” account with Origin.

These disabled tenants can never trade their account, but this FRC trading cost is unfairly added to their invoices by energy retailers in Queensland. This is an absolutely shocking state of affairs. I have written to the above-named MP’s complaining of this matter. This is probably why they never wish to return my correspondence, among other things.

This is a case of having a supply point that is not being used. The consumer is made to bear the cost, even though it is not used, because it just exists. The master gas meter must have its own network charges, but how they are applied us unknown.

Though this submission is predominantly about Jemena (JGN) and its NSW gas access proposal under AER consideration, a broader look at what is happening in the marketplace generally in those states where the BHW arrangements are in place is important to gain an understanding of what may need to be scrutinized in the future.

For those using hot water services supplied in multi-tenanted dwellings there is no choice at all even of energy provider. The Owners’ Corporation makes that choice for bulk energy supplies and the tenant has to wear that whether or not the supplier’s conduct is acceptable or whether he feels that a reasonable relationship can be maintained with that supplier or whether the services provided are fit the purpose designed – provision of energy that will provide consistently hot water at the right temperature and ambience and taking all things into consideration.

A residential tenant occupying premises that are sub-standard and poorly maintained, and still using archaic bulk hot water facilities is often forced to accept facilities as part of his tenant-landlord agreement. But he does not also expect to accept contractual relationships that properly belong to the landlord for supply of the heating component of often mediocre quality hot water supplies. The matter is not restricted to older buildings as many new buildings are being erected with similar inherent problems impacting also on safety, efficiency and maintenance concerns.

As observed by Tenants Union Victoria⁶³, though there are some circumstances where some *limits on consumer's free retail choice* may be considered reasonable (*such as to facilitate community development of embedded generation initiatives or to allow a consumer to sign a long-term contract*), there is consensus that *it is essential that consumers are able to exit the network should participation in the network prove materially disadvantageous*"

The AER of its own volition in its published response to the NECF2 Package comments as follows in terms of choice:

"However, the ability of customers to choose their own retailer in the competitive market depends on network configuration and metering, which are usually determined at the time a building is constructed. Planning and building laws do not mandate the provision of individual meters for each dwelling in multi-tenanted dwelling complexes, and technical and safety regulations do not take a uniform approach to meter placement. We recognize that this issue is not one that can or should, be addressed in the National Energy Retail Law or Rules. However to facilitate customer choice of retailer in new developments, jurisdictions should consider changing planning and building laws to mandate the provision of accessible metering for each dwelling in multi-tenanted complexes, to ensure that electricity metering arrangements are conducive to full retail contestability. Individual gas metering may also be required if significant gas usage will occur.

Host retailers are normally associated with specific distributors in certain geographical supply remits for the provision of energy in multi-tenanted dwellings where that energy is used to supply a communal water tank with heat reticulated in water pipes nor energy. Connection is described within the proposed NECF Package Second Exposure Draft as *"a physical link between a distribution system and a customer's premises to allow the flow of energy"* No such facilitation of the flow of energy occurs at all when water delivers heated water of varying quality to individual abodes (residential premises) of tenants or owner-occupiers or strata development abodes. In the case of the latter they make their own arrangements to apportion share of bills issued to an (OC).

⁶³ Tenants Union Victoria (2006) Further Comments on the Small Scale Licencing Framework Issues Paper (ESC) (29 September), p2

There is no question that participation in choice and competition is effectively denied those who are collectively regarded as embedded end-consumers of utilities, whether of gas, electricity or other utilities

For the sake of convenience I have included those covered under the jurisdictional “*bulk hot water policies*” who receive not energy but heated water, the heating component of which cannot be measured by legally traceable means.

However these recipients of centrally heated water are not embedded consumers of energy. The term embedded is strictly applicable to electricity where, despite any change of ownership or operation, energy is distributed in electrical conduits directly to the end-premises deemed to be receiving it – that is ownership or operation does not interfere with the concept of direct flow of energy, as is embraced within the proposed national energy laws and rules under the NECF2 package.

Nowhere in any of the formal energy provisions is heated water provision or disconnection of heated water on the basis of alleged breach of deemed energy contract contained, barring Version 7 of the Victorian Energy Retail Code⁶⁴ (Feb2010) to which the Victorian Bulk Hot Water Charging Guideline 20(1) was transferred. Since those provisions, originally adopted by Victoria and implemented in March 2006, and subsequently copied in varying degrees by other States, the concept of legal traceability and direct “*flow of energy*” has been formally been introduced to legislation or proposed legislation.

⁶⁴ Essential Services Commission (Victoria) (2010) Energy Retail Code v7 February 2010, Clause 3.2 Bulk hot water charging
<http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf>
See discussion in a separate attachment

3.2 Bulk hot water charging

A retailer must issue bills to a customer for the charging of the energy used in the delivery of bulk hot water in accordance with Appendix 2 of this Code.

Where a retailer charges for energy in delivering either gas bulk hot water or electric bulk hot water to a relevant customer, the retailer must include at least the following information (as applicable) in the relevant customer's bill:

- *the relevant gas bulk hot water rate applicable to the relevant customer in cents per litre;*
- *the relevant electricity rate(s) being charged to the relevant customer for the electricity consumed in the electric bulk hot water unit in cents per kWh;*
- *the relevant electric bulk hot water conversion factor for electric bulk hot water in kWh/kilolitre;*
- *the total amount of gas bulk hot water or electric bulk hot water in kilolitres or litres consumed in each period or class of period in respect of which the relevant gas bulk hot water rate or electricity tariffs apply to the relevant customer and, if the customer's meter measures and records consumption data only on the accumulation basis, the dates and total amounts of the immediately previous and current meter readings or estimates;*
- *the deemed energy used for electric bulk hot water (in kWh); and*
- *separately identified charges for gas bulk hot water or electric bulk hot water on the customer's bill.*

Yet the existing unjust practices for metering billing and imposition of deemed contractual status persist and are implemented at will by energy providers using methodologies that appear to remain unmonitored and for which no complaints redress is available. Since the bills are issued by on behalf of energy providers not Landlords only very diluted protection is offered under tenancy laws and there are many impediments to effecting reimbursement even when provisions allow for this.

This is discussed elsewhere The Victorian industry-specific complaints scheme misleadingly known as Ombudsman has too limited a charter to deal with these matters, and has openly admitted to conflicts of interest in so doing. See further discussion under *“Exempt Selling Regime.”*

Gas is measured in cu meters (volume) and expressed in megajoules (energy) Water is measured in litres. Hot water flow meters measure neither gas no joules (energy). They are unsuitable instruments through which to measure or calculate energy consumption either gas or electricity. Victoria and other States appear to have devised their own metrology system that is discrepant with the best practice principles of legal traceability. Upon the lifting of remaining utility exemptions under national metrology provisions, the current practices will in any case become formally invalid on the basis of incorrect use of utilities, to measure the wrong commodity, using the wrong unit and scale of measurement.

Therefore sanction of massive water meter upgrade costs as proposed by Jemena in order to perpetuate practices and procedures that should long have been banned would be inappropriate regardless of which party is seen to be contractually responsible.

The Queensland monopolistic and unjust provisions the unjust provisions are discussed elsewhere. Their regulations were specifically altered to cater for the warranties and guarantees that were made at the time of sale and disaggregation of energy assets.

Retailer choice is generally determined on the basis of retailer supply remit, though Developers and OCs may have some choice at the outset over which retailer to choose to supply gas to fire up a single communal boiler tank. The building, metering and utility infrastructure choices are normally determined at the time that a building is erected and is the subject of direct contractual dealings with developers or owners, not renting tenants.

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

In Queensland are those living in public housing, most disadvantaged. Even when they receive no gas at all they are required to pay FRC fees.⁶⁵

Meanwhile, the Queensland Competition Council's (QCA) November 2009 report omitted to identify the following:

- Precisely how much gas was being transported via pipelines to heat communal water tanks (many in public housing; others in owner/occupier dwellings; others possibly in the private rental market without owner occupation.
- How much gas in total was being used to heat communal "*bulk hot water tanks*" in multi-tenanted dwellings. How calculations regarding gas consumption (using hot water flow meters that measure water volume not gas or heat) were made regarding the alleged sale of gas to end-users of heated water, and on what basis under the provisions of contractual law, revised generic laws under the *TPA* (which by the end of 2010 must also be reflected in all jurisdictional Fair Trading Laws); and the *Sale of Goods Act 1896 (Qld)*⁶⁶ or residential tenancy provisions; and what is likely to happen with the existing utility exemptions under National Trade Measurement provisions are lifted as is the intent, making the current practices directly invalid and illegal with regard to trade measurement.
- How such a contractual basis is deemed valid and will be consistent with the provisions of the Trade Practices (Australian Consumer Law) Act 2009, effective 1 January 2010, given that the substantive terms of the unilaterally imposed "*deemed contract*" with the energy supplier its servant/contractor and/or agent.
- How the calculations used, which may be loosely based on the Victorian "BHW" policy provisions (based on what seem to be grossly flawed interpretations of s46 of the *GIA*).
- Whether and to what extent a profit base is used to "*cross-subsidize*" the price of Origin's gas sales.

⁶⁵ FRC means "*Freedom of Retail Contestability*" is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place. In Qld It is imposed on natural gas customers accounts, and is about \$25 per year for the first 5 years after the FRC date : 1st June 2007. It accumulates over this first 5 years as a "pass through cost" of about \$20 million and will be phased out in a couple of years. Vencorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

⁶⁶ Sale of Goods Act 1896 (Qld) (reprinted and as in force as at 29 August 2007)

- What barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market⁶⁷ is captured by an incumbent retailer who apparently purchased in its entirety the “BHW customer base” in 2007, based not on the number of single gas master meters existed in multi-tenanted dwellings (which for Distributor-Retailer settlement purposes represent a single supply point, there being no subsidiary gas points in the individual abodes of those unjustly imposed with contractual status in terms of sale and supply of gas.
- On what basis massive supply, commodity, service and FRC charges are imposed on end users of gas so supplied for the heating of a communal water tank, when the services and associated costs properly belong to the Owners’ Corporation

The Victorian *Residential Tenancies Act 1997* (RTA) prohibits charging for water, even when meters exist other than at the cold water rate, so the question of charging for heating is inappropriate.

Under Victorian *RTA* provisions utility supply charges or charges for anything other than actual consumption charges where individual utility meters (gas electricity or water) do exist, is also prohibited under RTA provisions.

This is a vast improvement on Qld provisions.

Nonetheless loopholes allow third parties and energy suppliers not party to landlord-tenant agreements to exploit the system with the apparently collusive involvement and active instruction of policy-makers and regulators.

Despite the existence of these arrangements and both implicit and explicit endorsement of discrepant contractual governance and billing and charging practices associated with the “*BHW arrangements*” none of the policy-makers or regulators seem to be willing to clarify within market structure assessments; competitive assessments or reports that such arrangements exist, must be taken into account, and must be covered by appropriate consumer protection arrangements.

Regardless of whether these matters are considered of a predominantly “*economic-stream*” interest, there are consumer protection issues that have been entirely neglected with jurisdictional and proposed national energy consumer protection frameworks in areas where it is mostly the most vulnerable of utility end-consumer, in a captured monopoly-type market with no chance of actively competing in the competitive market.

⁶⁷ A misnomer since it is not water that is charged for but the heating component of a composite product where only a single gas (or electricity) meter exists which is used to heat a communal water tank from which water is reticulated in water pipes to the individual abodes of renting tenants either in private or public housing.

Yet current regulations in three jurisdictions permit improper imposition of contractual status on end-users of communally heated water, as well as massive apparently unregulated and unmonitored supply, commodity and/or unspecified bundled charges on individual tenants, thus recovering many times over what represents a single supply charge for the master gas or electricity meter – that should be apportioned to landlords/owners. In Queensland an additional FRC charge is applied also to end-users of centrally heated water.

The term applies to “*freedom of retail condensability*” which does not apply to those who are trapped in a non-contestable situation with heated water supplied by a landlord who chooses a retailer for the supply of gas used in the central heating of water supplied to tenants in multi-tenanted dwellings. The FRC charge is imposed on natural gas customer accounts at around \$25 a year for the first 5 years after the FRC date (in Queensland 1 June 2007).

FRC means “*Freedom of Retail Contestability*” is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place.

It accumulates over this first 5 years as a “*pass through cost*” of about \$20million and will be phased out in a couple of years.

VenCorp (now AEMO) was to build this system, and is also the referee on this market using the MIRN meter numbering system.

There are no (meter identification registration numbers (MIRNs) for end-users of heated water in multi-tenanted dwellings and no means of calculating in a legally traceable manner the amount of gas used in the heating of individually consumed gas (or electricity) used to heat a communal boiler tank supplying water to multiple tenants.

Yet bills often imply the existence of a separate gas meter (or electricity) by allocating a unique number that is not an MIRN but rather a number plucked from the air, presumably to identify the hot water flow meter that is theoretically used for the purposes of applying a formulae by which water volume in total is used to calculate the quantity of gas is used for individual portions of heated water reticulated in water pipes to residential premises in the absence of any flow of energy. The bills also show a heating value and pressure factor for alleged individual proportions of heated water cannot possibly be gauged using a hot water flow meter, which measures water volume, not gas volume, or heat. These instruments are not in any case designed well to withstand heat..

National and jurisdictional competition policies in relation to both government and non-government-controlled monopolies are discrepantly applied in jurisdictions, especially in relation to the ill-considered technically, scientifically and legally unsustainable “*bulk hot water provisions*” adopted, in which the MCE has apparently made a policy decision without explanation, not to intervene or consider this matter of sufficient importance to make sure that the national provisions are consistent with what is happening at jurisdictional level, and that the provisions are also consistent with numerous other impacted provisions under either statutory provisions or the common law.

For example, in Victoria site reading of any meters, including the hot water flow meters or cold water meters inappropriately used as suitable trade instruments through which to calculate and determine both consumption and price of gas or electricity, with the full sanction of the State regulator ESC and policy-maker DPI.

In Queensland the “*hot water*” market appears to be undecided whether it is operating as an energy or water market, but nonetheless relies upon energy provisions to impose contractual status on end-users of heated water.

In Queensland Origin Energy has a complete monopoly of the “*hot water market*” as an energy supplier who benefitted as monopolist at the time of sale and disaggregation of energy assets, wherein arrangements to purchase state-owned assets that had been re-badged as corporate entities at the time of sale⁶⁸

The provision of heated water to individual residential apartments is in some ways regarded as a water market and in others as an energy market, whilst at the same time energy providers with an undisputed monopoly in the provision of heated water supplies (see fact sheet Qld Govt; sale and disaggregation of energy assets Qld in 2007 and the 2nd reading Parliamentary speech of the Qld Premier; see also Dept of Infrastructure and Planning Plumbing Newsflash (*re sub-meter requirements in community titles and buildings re bulk hot water services*)).

The latter publication disregards the principles of legal traceability in the supply and measurement of commodities and makes the following statements

“Water supplied from a community bulk hot water service to either a lot of a sole occupancy unit is not a water supply for the purposes of the Queensland Plumbing and Waste Water Code and the code does not require this supply to be individually metered.”

Individual sub-meters used by energy retailers to measure hot water supplied to sole occupancy units or lots from a central water heating service (such as the ones supplied by Origin or Energex) are owned and maintained by the energy provider.

⁶⁸ See Queensland Government Fact Sheet *Sale of the Queensland Government’s Energy Retail Businesses.*” 2006 blig2006_1-_11_38.fm
See also Second Reading Speech by The Hon Anna Bligh (then Treasurer now Premier Qld) “*Energy Assets (Restructuring and Disposal) Bill*” Hanward Wednesday 11 October 2006

Where a community bulk hot water service has been installed, the body corporate, under the BCCM Act, section 195 (1), may either, –

(a) proportionally charge the individual lot owners on the basis of lot entitlement through the requirement to maintain an administration fund for recurrent expenditure; or

(b) where the energy retailer has installed hot water supply sub-meters, apportion costs of water use according to the hot water use information provided by the energy retailer's sub-meters.”

Refer to Qld Govt Fact Sheet “Sale of the Queensland Government’s Energy Retail Businesses, p2 “However, around 2,500 gas customers will now receive two bills if they are both serviced hot water (Origin) and natural gas (AGL) customers.

This is because ENERGEX’s former natural gas business was sold separately as Sun Gas Retail. Some of these 2,500 customers with low rates of usage may experience an increase in their bills if both accounts attract minimum usage charges. However, the introduction of full retail competition in gas will allow such customers to manage this situation by charging their gas retailer.” This last comment means transfer from AGL to Origin to compound the monopoly situation so that supply charges for the actual supply of gas for heating and cooking purposes is not duplicated on the basis of alleged supply of gas from Origin for the purposes of centrally heating a communal boiler tank, but not providing any direct flow of gas to the recipients of the heated water. See Kevin McMahon’s submission to the NECF2 Package, also published on the Senate’s website (TPA_ACL-Bill2).

Refer also to the Second Reading Speech by the then Treasurer The Hon Anna Bligh (now Qld Premier) and Member for South Brisbane) ‘Energy Assets (Restructuring and Disposal) Bill’ Hansard Wednesday 11 October 2006, especially penultimate paragraph page 1, and first paragraph p2 in which extraordinary guarantees seem to have been made regarding exemption from challenge. Perhaps Part 3 Statutory Orders of Review as contained in the Queensland Judicial Review Act 1991 need to be evoked – since one monopoly – the state Government sold energy assets (and implicitly packaged these with water assets) to another monopoly Origin in order that Origin could claim retail sale of energy to its guaranteed monopoly market where no sale or supply of energy through flow of energy is effected.

Refer also to comments made by the law firm instructed to act on behalf of Energex, though the vendor instructions were handled by the Government in what appeared to be complex arrangements

In my view the circumstances, warranties and guarantees so made deserve scrutiny, as also arrangements in other states during sale and disaggregation of energy assets. Such scrutiny may provide the key to understanding why these bizarre, scientifically and legally unsustainable provisions have been retained despite detriment and unworkability, as arrangements that appear to be fanning market dysfunction and consumer detriment.

There is a fair and just way of a fairer system of addressing the issues.

Some solutions:

- Withdraw existing the BHW arrangements from energy provisions.
- Redefine within the national energy laws and any residual state provisions exactly how contractual obligations should be met – by directly billing Owners’ Corporations for the sale and supply of gas or electricity to a single master meter on common property.
- Owners’ Corporations need incentives to upgrade and inefficient systems that also pose health risks. Refer to my submission to the National Energy Efficiency (NFEE2) Consultation Paper⁶⁹; that of Queensland’s Council of Social Services (QCoSS) and others.
- Revisit departmental local authority Infrastructure and Planning arrangements that allow perpetuation of the BHW arrangements (see for example Qld Dept of Infrastructure and Planning sanctions Fact Sheet under Building Codes Queensland).
- Make sure metering databases and service compliance is undertaken
- Apply appropriate trade measurement practices using the right instrument to measure the right commodity in the correct unit of measurement and scale – refer to revised national trade measurement laws (2009) which will take full effect from 1 July 2010. Further utility exemptions are pending and further utility provisions may be contemplated.
- Ban communal hot water systems and install individual utility meters for gas electricity and water in all new buildings.
- Assist existing OCs and Landlords to upgrade and retrofit with individual meters and instantaneous hot water systems in each residential abode - meeting efficiency and health risk issues in one fell swoop and enabling proper application of metrology procedures that are transparent.

The current system of apportioning deemed gas usage for individuals supplied with communally heated water will become invalid when utility restrictions are lifted, and are likely also to be voidable under changes to generic laws concerning substantive unfair contract terms. If additional guidelines and non-exhaustive lists regarding unconscionable conduct are incorporated in Codes and other places, this will also impact on prohibited circumstances for disconnection regardless of the law.

⁶⁹ Kingston, M (2007) Submission to MCE SCO National Framework for Energy Efficiency (NFEE2) Discussion Paper
http://www.ret.gov.au/Documents/mce/energy-eff/nfee/_documents/e2wg_nfee_stag24.pdf

The question of the proper contractual party has not been resolved, and neither the regulator or policy makers who imposed these unjust terms are willing to take any action even when the insistence of an energy retailer in seeking disconnection of heated water supplies can be regarded as unconscionable.

I also note the AER's comments on access to complaints schemes by those considered to be "*exempt customers*" under exempt selling schemes.

The same applies to those receiving communally heated water that is either gas-fired by a single master gas meter or an electricity meter supplying a non-instantaneous boiler tank. These are not exempt customers. There is no such thing as a gas network. Gas is either directly supplied and directly received through flow of energy – or it is not.

For electricity an embedded network may exist if ownership and/or operation of the network changes hands from the original transmission source.

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

In Queensland, there are questions being asked about sale of energy assets and the types of arrangements and warranties that may have been made, especially in relation to the captured monopoly market for "*bulk hot water*" consumers, meaning those who are held contractually obligated for alleged sale and supply of energy where no flow of energy can be demonstrated and where recipients of heated water deemed unjustly to be receiving energy are forced to pay Free Retail Charges (FRC) even when they receive no gas at all to their residential premises, even for cooking (this group includes those who are disabled and cannot for safety reasons use gas because of safety hazards with naked flames).

In connection with the Queensland sale of energy assets in 2007, the key legal adviser to ENERGEX published a news item online discussing disaggregation of the electricity and gas retailing bus units and their conversion into stand alone businesses capable of being sold separately.

The document refers to "*complex challenges*" in the sale of Sun Retail and Sun Gas Retail – "*including a complex regulatory regime; an abbreviated sale timetable and a governance arrangement whereby the State ran the sale process but ENERGEX was the major vendor and provided warranties under the various sale contracts.*" The nature of the warranties was not identified.

Provision of energy to those in embedded situations or those receiving heated water that is centrally heated (not embedded as the term refers to electricity only where this is directly supplied through flow of energy, regardless of changeover of ownership or operation), whether receiving that energy for domestic heating and cooking, or for heated water, are captured end-consumers where fair and just arrangements do not exist at all. The grey areas of contractual law remain oblique in the proposed national framework for Distribution and Retail Regulation. Unless these issues are addressed and utility issues

Disclosure and Informed Consent Issues

The disclosure issues raised in the narrow context of bulk hot water service provision under existing seriously flawed policies are two-fold:

One is the extent to which proper disclosure of the intent to strip end-users of their fundamental and enshrined rights under contractual law should be a requirement in the interests of transparency. Instead of using creative phrases such as that shown below:

“We supply the bulk hot water services for your apartment block as agreed with your Owners’ Corporation or landlord” “your hot water consumption is being individually monitored.”

“So that we can bill you we need all your personal details and if possible direct debit details for everyone’s convenience.”

Unless you agree to this we will have to cut off your hot water supply within seven days. We only need to give you three warning before we can carry out this threat”

Perhaps this more hypothetical more extended negotiation for an explicit contract with an end-user of bulk energy not legally the contractual party, and not bound to accept such a contract, could be undertaken in order to comply with informed consent provisions:

“The regulator has allowed us to use water meters to pose as gas meters. It would take too long to explain to you the confusing practically unintelligible algorithm formula used to calculate the deemed heating component of your heated water consumption.

I don’t understand the Guidelines myself, which are now contained in the Energy Retail Code. I don’t have any copies with me but the Regulator will confirm that this practice is fine.

Even though gas does not pass through water meters we have been allowed to make a magical calculation by dividing this number by that.

Through complicated algebraic formulae can figure out with some creative guesswork how much heat is used in your portion of the heated water supplied from the communal water tank. We were even told that we don’t need to read the meters, but we’ve installed water meters just in case which are either leased or purchased outright by retailers, and can apply a water meter reading charge, and meter maintenance charges, either bundled or unbundled directly or through our contracted metering and billing service every two months. These services are known as backroom tasks and are generally arranged through Distributors.

The Guideline that the Regulator provides says we don’t have to actually do any meter reading because site visits are too expensive for us and mean two trips to read the gas meter on the wall of the car park and also the water meters in the boiler room. We need the water meters so that if we find that a tenant is not really cooperative about signing up we can threaten to disconnect his hot water supplies. That is a strategy that normally works.

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Sometimes we go ahead with the disconnection of heated water by clamping the hot water flow meters. In those cases unless a tenant signs up and pays a reconnection fee, hot water services are permanently suspended. I read about a case like that not so long ago, but can't remember where I saw it.

The energy laws say disconnection refers to gas or electricity, but it is overlooked if we choose to suspend the heated water supplies instead. It is not practical to cut off the gas or electricity in these cases as there is only one master gas meter and it would affect all the other tenants.

You probably would not buy a bag of apples if someone tried to weight in an oil funnel but this is just hot water and there are many ways to find out how much as you use that don't rely on a separate gas meter for you or any party uses in multi-tenanted dwellings. We are using one of those ways and we need you to agree to a contract if you want your hot water supply to be continued.

We have concluded that as there are ten apartments on this block. We arranged to purchase satellite hot water flow meters so that we could claim that we are monitoring your gas consumption for the water volume used. We just divide amount of water used by the number of tenants on the block and that is how we can make estimates how much deemed gas was actually used to heat the water you actually receive.

These arrangements were adopted prevent price shock to you. They won't guarantee to prevent rent hikes, and there is the question of additional charges for water meter reading fees, commodity and other supply costs and water meter maintenance costs which will bump up your bill. It must be confusing for you to figure out whether this is a water or energy market but those are the Rule or Codes.

Just for our protection we need you to take contractual responsibility for paying all gas consumption charges that we can individually monitor through your water meter.

Even if you have an arrangement with the landlord and your mandated lease arrangement indicates that hot and cold water are included in your rent, those are matters for your and your landlord.

We just act as metering and billing agents and have the Landlord's or Owners' Corporation blessing to bill you directly under pain of disconnection of your heated water services. The energy retailer and distributor believe that if they own or lease the water infrastructure hot water or cold flow meters), a contact with you is immediately determined even if you receive no flow of energy to your apartment.

The energy regulator says it is OK for us to bill you a second time for water because the Tenancy Act does not cover it, so we are in the clear with that.

If you have a problem with this you can always ask you landlord to refund you, but if he does not agree you can reclaim costs through VCAT after paying a filing fee. You need to give your landlord 28 days to decide whether he will reimburse you before you can go to VACT to reclaim the money, so we know it's inconvenient and costly and your filing fees over several visits might diminish the value of reimbursement. Sometimes even VCAT Orders for reimbursement don't work out as the Landlord refuses to pay.

It's just that we don't have the time to chase up the landlord and he is never around when we require to get to the meter, so we need to hold someone responsible. Therefore once you sign up with us and provide your details, we will hold you responsible to provide us with safe unhindered and convenient access to the water meters, even if they are locked up and you don't have the key. The energy laws call this a "condition precedent."

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

Even though we don't have to take a meter reading, we are entitled to charge each tenant on the block for water meter reading. This is because the gas (or electricity) distributor charges us. The charge for manual reading is much lower than for remote reading, but we only have to worry about manual reading if your meter was installed before July 2003.

Even though there is only one gas bulk meter supplying the single boiler tank that sends water to each tenant on the block, we can charge for water meter reading costs we can charge each tenant for calculating their gas consumption. That is part of the deal.

No-one has taught us much about contract law, substantive unfair terms or principles of legal traceability in calculating consumption of measurable commodities, but if you need a lawyer I am sure Legal Aid or one of the community agencies can get you the advice you need about that. Poor funding may mean a long wait or no assistance at all, so I urge you to sign up if you want your heated water supplies to continue.

The reason that we prefer also to have landlord details is that if anything goes wrong and you are unable to pay up for energy that you don't receive in the first place, we can always shift the contract back to the Owners' Corporation who permitted us to install the water meters and requested the installation of the single gas meter used to heat the single boiler tank at the time that the building was erected.

The good thing about deregulation and cost-recovery policies is that we just cannot lose, especially in areas where retail choice is denied to individuals, they are a captured market, live in poorly maintained facilities, have few options for alternative rental property, and find the redress options, if they exist at all intimidating, expensive and stressful.

So the bottom line is that you need to form a contract with us or risk having your water cut off. I shouldn't be saying this but you won't get far with any complaints made and the Regulator usually takes no action over these matters because we are following guidelines codes or Rules made.

If you don't sign up and don't pay then we will consider you to be a bad debtor under a deemed contract. At least that is what I believe the regulations will allow, but no-one is clear enough about the contract law part. I am just doing as instructed because of the guidelines. As far as I know the deemed contract expires after two bills, so after that we have an entitlement to disconnect your water supplies under energy Codes and you will in any case be forced to sign a market contract and a re-connection fee to have your water supply reinstated.

Are there any other services that we can offer you today whilst we are discussing your deemed contract with us for deemed use of gas for heating the apartment block's bulk hot water?"

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

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

Structure of JGN –

For convenience I reproduce sections of my earlier submission of April regarding aspects of the Jemena Group 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 information⁷⁰ and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009⁷¹ 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)⁷² 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 tenderer⁷³ UED's website describes its OSA as follows:

⁷⁰ <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>

⁷¹ Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009

⁷² Source: <http://www.duet.net.au/duet/about-duet/structure.htm>

⁷³ 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 1997⁷⁴. 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.

⁷⁴ <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 Multinet⁷⁵ 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. I support the following comments by EA:

“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 note that there have been a number of changes to the Trade Practices Act 1974, which pending further major revisions contained in the Trade Practices (Australian Consumer Law) Amendment Bill(2), will be renamed Competition and Consumer Law 2010 and become effective on 1 January 2011.

⁷⁵ *“Multinet Group Holdings is a Victorian gas distribution company with a network covering 1,940km² 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.”*

I do not pretend to be competent in the interpretation of corporations law matters but note the new provisions from the TPA currently in operation as follows:

4A Subsidiary, holding and related bodies corporate

- (1) For the purposes of this Act, a body corporate shall, subject to subsection (3), be deemed to be a subsidiary of another body corporate if:
 - (a) that other body corporate:
 - (i) controls the composition of the board of directors of the first-mentioned body corporate;*
 - (ii) is in a position to cast, or control the casting of, more than one-half of the maximum number of votes that might be cast at a general meeting of the first-mentioned body corporate; or*
 - (iii) holds more than one-half of the allotted share capital of the first-mentioned body corporate (excluding any part of that allotted share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or**
 - (b) the first-mentioned body corporate is a subsidiary of any body corporate that is that other body corporate's subsidiary (including any body corporate that is that other body corporate's subsidiary by another application or other applications of this paragraph).**
- (2) For the purposes of subsection (1), the composition of a body corporate's board of directors shall be deemed to be controlled by another body corporate if that other body corporate, by the exercise of some power exercisable by it without the consent or concurrence of any other person, can appoint or remove all or a majority of the directors, and for the purposes of this provision that other body corporate shall be deemed to have power to make such an appointment if:
 - (a) a person cannot be appointed as a director without the exercise in his or her favour by that other body corporate of such a power; or*
 - (b) a person's appointment as a director follows necessarily from his or her being a director or other officer of that other body corporate.**
- (3) In determining whether a body corporate is a subsidiary of another body corporate:
 - (a) any shares held or power exercisable by that other body corporate in a fiduciary capacity shall be treated as not held or exercisable by it;*
 - (b) subject to paragraphs (c) and (d), any shares held or power exercisable:
 - (i) by any person as a nominee for that other body corporate (except where that other body corporate is concerned only in a fiduciary capacity); or***

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- (ii) *by, or by a nominee for, a subsidiary of that other body corporate, not being a subsidiary that is concerned only in a fiduciary capacity;*
shall be treated as held or exercisable by that other body corporate;
- (c) *any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned body corporate, or of a trust deed for securing any allotment of such debentures, shall be disregarded; and*
- (d) *any shares held or power exercisable by, or by a nominee for, that other body corporate or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other body corporate if the ordinary business of that other body corporate or its subsidiary, as the case may be, includes the lending of money and the shares are held or the power is exercisable by way of security only for the purposes of a transaction entered into in the ordinary course of that business.*
- (4) *A reference in this Act to the holding company of a body corporate shall be read as a reference to a body corporate of which that other body corporate is a subsidiary.*
- (5) *Where a body corporate:*
- (a) *is the holding company of another body corporate;*
 (b) *is a subsidiary of another body corporate; or*
 (c) *is a subsidiary of the holding company of another body corporate;*
that first-mentioned body corporate and that other body corporate shall, for the purposes of this Act, be deemed to be related to each other.
- (5A) *For the purposes of Parts IV, VI and VII:*
- (a) *a body corporate that is a party to a dual listed company arrangement is taken to be related to the other body corporate that is a party to the arrangement; and*
- (b) *a body corporate that is related to one of the parties to the arrangement is taken to be related to the other party to the arrangement; and*
- (c) *a body corporate that is related to one of the parties to the arrangement is taken to be related to each body corporate that is related to the other party to the arrangement.*
- (6) *In proceedings under this Act, whether in the Court or before the Tribunal or the Commission, it shall be presumed, unless the contrary is established, that bodies corporate are not, or were not at a particular time, related to each other.*

Examination of aspects of the NSW Gas Supply Act 1996 (with amendments to 23 March 2010)

The objects of the NSW *Gas Supply Act 1996*⁷⁶ include

The objects of this Act are as follows:

(a) to encourage the development of a competitive market in gas, so as to promote the thermally efficient use of gas and to deliver a safe and reliable supply of gas in compliance with the principles of ecologically sustainable development contained in section 6 (2) of the Protection of the Environment Administration Act 1991,

Comment MK

Competitiveness, efficiency and sustainability are not met by imposing contractual status on the wrong parties; using the wrong trade instruments for the wrong commodity, thus applying inaccurate use of trade measurement instruments; heating water in archaic poorly maintained stationery water-tanks centrally heating water in multi-tenanted dwellings; forming collusive arrangements with Landlords and/or Owners' Corporations; and inflating costs artificially by requiring outsourcing of metering data services that unnecessary read two forms of meter – water and gas or water and electricity, where a single reading of the energy meters and production of bill for gas supplied to a D Developer/Landlord/Owners' Corporation is all that is required. The central goals of national competition as examined as far back as a decade ago in 2010 appear to have been forgotten.

(b) to regulate gas reticulation and gas supply, so as to facilitate open access to gas reticulation systems and promote customer choice in relation to gas supply,

Comment MK:

This and other enactments current and proposed say nothing about reticulation of water, delivery of heated water services; or distortion of trade measurement practices and enshrined consumer rights in order to (allegedly) promote customer choice in relation to gas supply

For the purpose of enabling the objects of this Act to be achieved, the Minister, the Tribunal and any review panel each have the duties set out in subsections (3)–(6).

In relation to persons involved in the reticulation of gas (authorised reticulators and licensed distributors), the duties are as follows:

(a) to ensure that such persons satisfy, so far as it is economical for them to do so, all reasonable demands for the conveyance of gas;

⁷⁶ <http://www.legislation.nsw.gov.au/fullhtml/inforce/act+38+1996+cd+0+N#pt.1-sec.3>

Comment MK

Gas is not conveyed to end-uses of heated water that is centrally heated in a communal water tank on the common property infrastructure of Lessors as Developers/Landlords of Owners' Corporations (body corporate entity)

b) to take proper account of the business interests of such persons and the ability of such persons to finance the provision of gas reticulation services,

Comment MK

Taking care of business interests can surely not mean policy decisions the effect of representing conflict and overlap with regulatory schemes; undermining the terms of the CoAG Intergovernmental Agreement of 2009 to avoid duplication and conflict and overlap or the principles of best practice; or making inaccessible enshrined consumer rights and protections. For competitiveness to result all components of a marketplace need to be well-functioning.

(c) to consider the development of efficient and safe gas distribution systems,

(d) to promote the efficient and safe operation of gas distribution systems,

(e) to take proper account of the interests of gas users in respect of transportation tariffs and other terms of service.

Comment MK

These considerations certainly do not appear to have characterized the distorted interpretations made of alleged deemed provision in relation to gas or electricity when neither is supplied directly through flow of energy in the bulk hot water arrangements when a central boiler tank is heated by a single gas or electricity meter in order that heated water may be reticulated in water service pipes to end-recipients not of energy but heated water as a composite product

Dr. Stephen Kennedy had observed in his address to the ACCORD Industry in September 2009,

“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).

I refer again to discussion in the Introduction regarding the Objects of the *Trade Practices Act 1974*, to which further amendments will be made under the Second Bill, and which time it will be re-named *Consumer and Competition Act 2010*

2 Object of this Act

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

In addition I refer to inconsistency between all of these similar objectives and those of the national consumer policy objective are discussed with particular reference to the address by Dr. Steven Kennedy of the Domestic Economy Division of the Commonwealth Treasury (2009)

“In considering consumer policy, this approach is reflected in the national consumer policy objective: ‘To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.’”

Returning to the *Gas Supply Act 1996* NSW:

In relation to persons involved in the supply of gas (authorized suppliers and licensed distributors), the duties are as follows:

(a) to ensure that the public receives the benefit of a competitive gas market

Comment MK:

The public cannot possibly benefit from an alleged competitive market that distorts enshrined consumer protections; holds the wrong parties responsible contractually for a commodity not delivered or received at all under the terms of sale of goods act or any other terms; uses the wrong instruments of trade, for the wrong commodity; applying inaccurate and inappropriate use of instruments; or inflating costs because of trade measurement practices that are cumbersome, unnecessary and inappropriate

The operating and capital costs of maintaining and/or replacing unnecessary infrastructure for the alleged delivery of gas or electricity cannot be justified in the public interest. The “bulk hot water arrangements, operating discrepantly in several states represent legally and scientifically unsustainable, inappropriate practices that are causing detriment; unjustified suspension of heated water supplies that are an integral part of residential tenancy leases

As to the embracement of the National Consumer Policy Objective as agreed by the Ministerial Council on Consumer Affairs as again shown below, how can these objectives be met under current provisions discrepantly operating in several states, seemingly either tacitly or explicitly endorsed by policy-makers, rule-makers and regulators alike who have a role to ensure that the whole marketplace is functioning well.

The bulk hot water arrangements can be numbered under some of the worst conceived in this regard.

The National Consumer Policy Objective⁷⁷

On 15 August 2008, MCCA agreed to the national consumer policy objective:

'To improve consumer well being through consumer empowerment and protection fostering effective competition and enabling confident participation of consumers in markets in which both consumers and suppliers trade fairly.'

This is supported by six operational objectives:

- *to ensure that consumers are sufficiently well-informed to benefit from and stimulate effective competition;*
- *to ensure that goods and services are safe and fit for the purposes for which they were sold;*
- *to prevent practices that are unfair;*
- *to meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;*
- *to provide accessible and timely redress where consumer detriment has occurred; and*
- *to promote proportionate, risk-based enforcement.*

(b) to take proper account of the interests of tariff customers in respect of gas pricing and other terms of gas supply,

Comment MK

See comments above and case studies to show detriment from the application of current bulk hot water arrangements

(c) to take proper account of the business interests of persons supplying gas to the tariff market,

See comments above. taking care of business interests can surely not mean policy decisions the effect of representing conflict and overlap with regulatory schemes; abandoning principles of best practice; or making inaccessible enshrined consumer rights and protections. For competitiveness to result all components of a marketplace need to be well-functioning.

⁷⁷ Refer also to the address in August 2009 to the ACCORD Industry by Dr. Stephen Kennedy of the Commonwealth Treasury in which he discusses the broad goals of consumer policy reforms and legislative changes; *ibid* Kennedy, S (2009)

(d) to encourage the development of competitive gas supply in the non-tariff market, with a focus on free and fair trade.

Gas is not supplied to those receiving centrally heated water in water pipes in the absence of any flow of gas or meter to demonstrate the right to apply sale of and supply of gas contractual obligations of end-users as occupants of a multi-tenanted dwelling served by a single gas meter heating a single boiler tank on common property infrastructure. The proper contractual party is the Developer/Lessor/Owners' Corporation, and only a single process of reading a gas meter and calculating total gas usage by the Lessor is required to minimize costs and effort

No part of this instrument or other legislative instruments mention water infrastructure or the right of energy suppliers to use water infrastructure to substitute for gas infrastructure in the proper deliver of gas to end-users.

JGN's application for capital and operating costs in connection with water meters and infrastructure and associated outsourced costs is unjustified

In relation to gas users, the duties are to promote the efficient and safe use of gas.

In relation to both persons involved in the reticulation of natural gas (authorised reticulators) and persons seeking third party access rights to gas distribution systems (system users), the duties are to ensure that those rights are given effect to in accordance with the access code adopted by this Act.

Nothing in subsections (2)–(6) gives rise to, or can be taken into account in, any civil cause of action.

Comment MK

This is an extraordinary clause. Endeavouring to second-guess the open courts and judges. If a contract dispute arises in relation to alleged sale and supply of gas when what is provided is heated water reticulated in water pipes the open courts under contract and common law would be just the place – perhaps in time there will be large class actions to prove the point. Already there are some matters on foot.

I'm all for reasonable competition – but when it involves the sorts of distortions that are inherent in the application of the bulk hot water provisions a central theme in this and other submissions – things have already gone too far and remain unchecked.

This is not the first time that I have sighted attempts to restrict the course of justice and the jurisdiction of the courts.

How can consumer confidence build?

I refer to some definitions from the *Gas Supply Act 1996* (NSW) which make in quite plain that all references to metering and equipment are related to gas not water infrastructure either upstream or downstream:

gas installation means:

- (a) any pipe or system of pipes used to convey or control gas, and any associated fittings and equipment, that are downstream of the gas supply point, but does not include anything beyond the gas installation end point, and
- (b) any flue that is downstream of the gas supply point, but does not include an autogas installation.

gas installation end point means:

- (a) in the case of a gas installation to which gas is supplied from a gas network—the gas outlet socket, or
- (b) in any other case—the control valve or other connection point of a gas appliance or of another gas container.

gas network means a distribution pipeline or a distribution system.

gas supply point means:

- (a) in the case of a gas installation to which gas is supplied from a gas network—the outlet of the gas meter at which the gas is supplied, or
- (b) in any other case—the control valve or other connection point of a gas container.

gasfitting work means any work involved in:

- (a) the installation, alteration, extension or repair of a gas installation, or
- (b) the installation, alteration, extension, removal or repair of a flue, or
- (c) the connection of a gas installation to, or the disconnection of a gas installation from, a gas supply point, or
- (d) the connection of a gas appliance to, or the disconnection of a gas appliance from, a gas installation (otherwise than where the point of connection is a gas outlet socket), or

Likewise the proposed National Energy Retail Laws and Rules contained in the NECF2 Package are clear that supply of gas (or electricity) is effected by flow of energy directly to the premises deemed to be receiving it. Gas Supply, connection or energization points are technical terms normally referring to the outlet of a gas meter but can mean inlet of a gas mains or inlet of a meter.

No supply takes place at a water meter or any other part of water infrastructure.

The use of these instruments as if they were gas or electricity meters, and the expense involved in having different types of meters read, and maintained is unjustifiable.

Where a single gas meter exists on common property infrastructure a single gas reading at prescribed intervals is all that is necessary.

Selected Market Structure facts and observations

Distributors and Gentailers

Some impacts of vertical and horizontal integration

The concept of competition is said by some to be artifactual in the energy industry.

The AER's publication State of the Energy Market (2009) recognizes that the prevalence of high sunk costs and the relatively small numbers of Australian gas fields means that the supply of natural gas is concentrated in the hands of a small number of producers. It is common for oil and gas companies to establish joint ventures to manage risk. For example, the AER observes that Santos (majority owner) Beach Petroleum and Origin Energy are partners in the Cooper Basin ventures.

TRANSMISSION (Distribution)

The AER recognizes a natural monopoly⁷ industry structure

Source AER State of the Energy Market 2009

There are **four** major distribution players

Singapore Power International

The SPI consortium owns two holding companies belonging to the Jemena Group, which includes several trust companies and other businesses

APA Group (associated with Envestra)

Babcock and Brown Infrastructure (20% interest Dampier to Bunbury Pipeline acquired for Alinta in 2007)

Its management service business is WestNet Energy. B & B also own the Tasmania Gas pipeline and has minority interests in Western Australia's Goldfields Gas Pipeline

Hastings Diversified Utilities Fund, management by a fund acquired by Westpac in 2005. This company acquired Epic Energy's gas transmission assets in 2000 and is seeking to sell all or part of Epic

HDEU owns assets in South Australia, Western Australia and Queensland

Source: AER State of the Energy Market 2009 p260

Smaller transmission players include

DUET (UED) – Singapore Power International

International Power and the Retail Employees Superannuation Trust, each with interests in the SEA Gas Pipeline

AGL Energy – owns one pipeline Berwyndale to Wallumilla which it seeks to sell

Origin Energy - Owns Wallumbilla to Darling Downs Pipeline (commissioned in 2009)

DISTRIBUTORS AND ASSET MANGEMENT OPERATORS

Structure of Jemena Gas Networks (NDW) Ltd (JGN)

For convenience I reproduce sections of my earlier submission of April regarding aspects of the Jemena Group 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 information⁷⁸ and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009⁷⁹ 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)⁸⁰ referred to as energy diversity trusts.

⁷⁸ <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>

⁷⁹ Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009

⁸⁰ Source: <http://www.duet.net.au/duet/about-duet/structure.htm>

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 tenderer⁸¹
UED's website describes its OSA as follows

“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 assess 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 1997⁸². 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.

⁸¹ Ibid

⁸² <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 Multinet⁸³ 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 **Metering 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. I support the following comments by EA:

“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 note that there have been a number of changes to the Trade Practices Act 1974, which pending further major revisions contained in the Trade Practices (Australian Consumer Law) Amendment Bill(2), will be renamed Competition and Consumer Law 2010 and become effective on 1 January 2011.

I do not pretend to be competent in the interpretation of corporations law matters but note the new provisions from the TPA currently in operation as follows:

⁸³ *“Multinet Group Holdings is a Victorian gas distribution company with a network covering 1,940km² 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.”*

ENVESTRA

Envestra Limited (ENV) is the largest distributor of natural gas in Australia, with networks in South Australia, Victoria, Queensland, NSW, and the Northern Territory. ENV listed in August 1997 as a spinoff of Origin Energy's (ORG) SA, QLD and NT gas distribution networks. Envestra securities are stapled securities, comprising a share and a loan note. Revenues are derived from haulage and services through its networks.

Envestra's Annual Report 2009 lists 20 major shareholders, with the largest two being Australian Pipeline Ltd and Cheong Kong Infrastructure Holdings Malaysia.

One of the smaller shareholders in Queensland Investment Corporation.

Envestra operates in five states.

Its 2009 annual report states that about 85% of its operations are in Victoria (46%) and South Australia (39%), and the remainder in Queensland (14%), New South Wales (1%) and NT (1%) he company delivers natural gas to more than one million consumers and connects over 20,000 new consumers each year.

Gas volumes to the domestic market, from which we generate around 90% of our revenue, have on average, increased by about 2% annually, despite being impacted in recent years by warmer than normal winter weather in the south-eastern states.

The major contractor, APA, has over 1,100 employees and subcontractors working for Envestra.

Source: APA website

***APA Group (APA)** is comprised of the Australian Pipeline Trust and APT Investment Trust. A major ASX-listed gas transportation business with interests in gas infrastructure across Australia, including 12,000 km of natural gas pipelines, over 2,800 km of gas distribution networks and gas storage facilities. APA is Australia's largest transporter of natural gas, delivering more than half of Australia's annual gas use through its infrastructure.*

APA also has investments in other energy infrastructure through its minority interest in companies, including Envestra, the Ethane Pipeline Fund, and Energy Infrastructure Investments. APA's involvement also extends to the provision of Commercial, Accounting, Corporate operations and maintenance services to these companies

GENTAILERS

AER's 2009 publication State of the Energy Market (p17) is aware that the three host gentailers AGL Energy, Origin Energy and TRUenergy "*collectively account for most retail market share in Victoria, South Australia and Queensland. However, Simply Energy, owned by International Power⁸⁴ has acquired a significant customer base in Victoria and South Australia.*"

The publication acknowledges on p295 (11.1) that the retail market structure has historically been one of integration with gas distributors.

In the eastern states, the AER observes that the largest gas retailers are AGL Energy, Origin Energy and TRUenergy.

It is these three host retailers (also generators – hence gentailers) that have monopolies over the "*bulk hot water*" provisions that operate discrepantly in various states.

The re-structuring and privatization of energy assets in Queensland somehow resulted in the creation of a monopoly "*bulk hot water clientele*"

Whilst AGL acquired ENERGEX'S former natural gas businesses as Sun Gas Retail; Origin Energy "*inherited*" those supplied with heated water supplied in water pipes to multiple captured "*cash cow*" end-users of heated water who receive no energy at all through flow of energy to their individual apartments. These are not embedded" consumers at all. There is no such thing as an embedded gas consumer. Either gas is supplied directly or it is not.

It is a mystery how the bulk hot water arrangements came about considering that water is water, measured in litres and gas is gas and the instruments, units and scales of measurements are entirely unrelated. Gas is measured in cubic metres and expressed in either joules, megajoules, gigajoules, terajoules or petrajoules, but most commonly in megajoules.

There is no scientific basis for converting water volume (litres) into joules or megajoules or into Kw/H (electricity).

⁸⁴ The website and 2009 Annual Report of International Power describes itself as "a growing, independent power generation company with interests in over 50 power stations and some closely linked businesses around the world. Its interests include 32.358MW of power generation capacity across five core regions including North America, Europe, Middle East Australia and Asia.
<http://www.ipplc.com/>
<http://annualreport2009.ipplc.investis.com/>

These methods are a bogus system of calculating alleged energy use using water meters or hot water meters, the latter not withstanding heat well, as the instrument of measurement and providing many excuses to incorporate unwarranted costs including capital and operating costs that include water meter maintenance and replacement (on behalf of OCs, but imposed on end-users of heated water who receive no energy at all; metering data services; metrology processes including measurement of cold and hot water consumption erroneously believed to deliver accurate results about individual consumption of heated water by occupants in multi-tenanted dwellings.

In the same way, electricity has to be directly supplied by flow of energy, regardless of change of ownership or operation.

The water is not owned by the energy suppliers and therefore cannot be sold by them.

The energy supplied by a single gas (or electricity) meter is not supplied or consumed by the end-user of water as a composite product, but is sold and supplied to Owners' Corporation entities or Developers.

The arrangements made allegedly in the name of competition are fundamentally flawed; are legally and scientifically sustainable; and bring the energy industry into disrepute.

The policies that permit these practices either implicitly or explicitly need to be reviewed in the public interest

The AER's publication State of the Energy Market (2009) recognizes that the prevalence of high sunk costs and the relatively small numbers of Australian gas fields means that the supply of natural gas is concentrated in the hands of a small number of producers. It is common for oil and gas companies to establish joint ventures to manage risk. For example, the AER observes that Santos (majority owner) Beach Petroleum and Origin Energy are partners in the Cooper Basin ventures.

In commenting on vertical integration the AER's latest State of the Energy Market (date) SER publication (2009) notes that:

[“The increasing use natural gas as a fuel for electricity generation creates synergies to manage price and supply risk through equity in gas production and gas-fired electricity generation.”⁸⁵](#)

⁸⁵ Congratulations to Origin. But could these co-generation opportunities and vertical (as well as horizontal) synergistic integrations be facilitating un-monitored practices causing unacceptable market conduct and consumer detriment. Examine for example the “bulk hot water” polocyarrangements adopted in several states to seek an answer.

ORIGIN ENERGY

Source: wikipedia

Origin, based in Sydney, NSW was formed in 2000 following demerger from Boral Ltd. Boral had interests in energy and building and construction materials. The building materials side was spun off; Origin formed as an energy company, and a Boral Ltd was listed as a new public Australian company

Parts of Origin may be traced back to the 19th century whilst it was part of Boral

Origin Energy is active in a number of sectors in the energy business:

- Oil and gas exploration and production - Origin has conventional oil and gas reserves in the Cooper Basin of [South Australia](#) and [Queensland](#) and in the Bass strait between [Victoria](#) and Tasmania and [coalbed methane](#) reserves in Queensland. Outside Australia, Origin is developing the Kupe gas field in the [Taranaki](#) Basin of [New Zealand](#)
- Retail - over three million retail customers of gas or electricity in Australia, New Zealand and the south Pacific, inclusive of the 800,000 customers of Sun Retail in QLD that were acquired in February 2007.^[2]
- Generation - generating electricity from [natural gas](#) including Osborne, Ladbroke Grove and Quartantine Power Stations in South Australia, [Uranquinty](#) in [New South Wales](#), Mount Stuart Power Station in [Townsville](#) and Roma Power Station [Queensland](#). Origin does not own any coal-fired power stations.
- Contact Energy - Origin owns 51% of [New Zealand](#) electricity generation and retail company [Contact Energy](#).
- Gas transportation and distribution - Origin had significant shareholdings in [Envestra Limited](#) (17%) and [SEAGas pipeline](#) (33%). These shareholdings were sold to [APA Group](#) during 2007, along with the assets of Origin Energy Asset Management. OEAM's major asset was its contract with Envestra for the maintenance of the Envestra natural gas distribution network

Source: AER's State of the Energy Market 2009:

Origin Energy is described on p236 of the latest AER publication "as follows:

- *the leading energy retailer in Queensland, Victoria and South Australia*
- *a significant gas producer, and is expanding its electricity generator portfolio*
- *...expanding its generation portfolio*

It held a minority interest in the gas production in the Cooper Basin for some time and since 2000 has expanded its equity in CSG

The AER's 2009 SER publication shows figures obtained from unpublished data of EnergyQuest (as at May 2009) as follows

Origin's gas market share by basin (p237, sourced from EnergyQuest's unpublished data to be 48.8% in WA; 14.5% in the Cooper Basin (SA/Qld) 34% in the Surat-Bowen Basin (Qld); 13.1% in the Owtay Basin (Vic); and 42.4% in the Bass Basin (Vic).

Discussing mergers and acquisitions on page 239 of the AER's SEM (2009), AER reports the details of recent mergers and acquisitions and notes that Origin Energy has a joint venture with ConocoPhillips

Origin had rejected BG Groups bid to acquire Origin Energy in 2008

Origin is a leading energy retailer in Queensland, Victoria and South Australia, Like AGL Origin has a substantial interests in gas production and electricity generation. (p236

TRUENERGY

Source: CLP website

TRUenergy is jointly owned by China Lighting and Power (Hong Kong) (40%) and Exxon Mobil Energy (60%) - Castle Pak Power Company

TRUenergy (previously TXU) is the retail arm of the company from which it separated – Singapore Power International, which owns the Jemena Group, including Jemena Ltd and Jemena Group Holdings, several trust companies and asset management companies including those providing metering data services, and some outsourced companies.

The Australian distribution arm of Texas Utilities (TXU) was purchased by Singapore Power International (SPI); whilst the retail arm became TRUenergy as a trading name for CLP, which wholly owns TRUenergy.

TRUenergy shares wind farm assets in Tasmania, Brown Coal and Electricity generation assets at Yallourn; electricity generation plants at Hallett and Tallawarra (Vic) and the Iona Gas storage facility (Vic)

Entering the Australian market in 1995, TruEnergy is company is wholly owned by the China Lighting and Power (CLP) Hong Kong Consortium. It is a gentailer with both gas and electricity generation and retail interests as described below on its website as well as a brown coal plant and a wind farm (roaring 40s) jointly owned with the Tasmanian Government.

Source: TRUenergy Website

Direct quote from TRUenergy website

TRUenergy is one of Australia's largest integrated energy companies, providing gas and electricity to over 1.3 million household and business customers throughout the country.

With a \$5 billion portfolio of generation and retail assets, we are the third largest private energy business in Australia, having grown steadily since we entered the Australian energy market in 1995.

Energy generation

TRUenergy owns and operates a 3046 megawatt (MW) portfolio of electricity generation facilities, including:

- o the Yallourn coal-fired power station and mine in the Latrobe Valley, Victoria*
- o the Tallawarra gas-fired power station in Yallah, NSW*
- o Hallett power station, a 180MW gas-fired power station in north-east South Australia*
- o A 966MW hedge agreement with Ecogen Newport and Jeeralang power stations in Victoria*
- o The 12 petajoule Iona gas processing plant near Port Campbell, Victoria.*

In addition, TRUenergy manages a 50 percent share in wind farm development business Roaring 40s on behalf of its parent company, CLP. Roaring 40s is Australia's leading renewable energy developer, with three wind farms in operation across Australia and several other developments approved or in planning in a number of states.

TRUenergy also has made a number of strategic investments in joint venture operations, in order to move towards cleaner forms of energy generation. These include:

- \$57 million joint venture with Petratherm to develop the Paralana geothermal power project in South Australia*
- \$15 million investment in GridX to accelerate cogeneration and 'tri-generation' projects*
- \$292 million commitment towards the development of a concentrated solar power station in Mildura, Victoria*

Retail

TRUenergy Retail offers straightforward, cost-competitive gas and electricity plans as well as accredited GreenPower products to household and business customers.

To help customers reduce their own carbon footprint, we also offer energy efficiency advice and clean energy appliances, like solar hot water. “

Truenergy's gas plants are located in

Port Campbell – the Iona Gas Plant (1999) capacity 320 TJ per day of natural gas to Victoria and South Australia during peak periods or supply shortages

AGL Energy (AGLE)

AGLE is the retail company that was separated from Agility which was acquired by Alinta, who was then acquired by Singapore Power International. This company is a host retailer that has begun to acquire CSG interests in Queensland and New South Wales in 2005. It has continued to expand its portfolio through mergers and acquisitions

AGLE is a leading energy retailer in Queensland, Victoria and South Australia, Like Origin Origin has a substantial interests in gas production and electricity generation. (p236)

As discussed under analysis of the Jemena Group structure, AGLE (a retail arm separated from the generation and distribution businesses, but nevertheless with a common parent owner in the Singapore Power International (SPI) Consortium

The AER State of the Energy Market (SEM) publication 2-09 reports that

- AGL energy is the leading energy retailer in Queensland, New South Wales and Victoria
- Is a major electricity generator in eastern Australia
- Is increasing its interests in gas production –beginning by acquiring CSG interests and Queensland in Qld and NSW in 2005

In my 2007 analysis of the market at the time of my public submission to the AEM'C's Review of the competition in the electricity and gas markets in Victoria I analyzed some of the structure and impacts of vertically and horizontally integrated energy providers with emphasis on the host gentailers and impacts on second-tier retailers

The AER's SEM (2009) on p23 tables unpublished data from EnergyQuest (2009) showing AGL's market share of domestic gas production, by basin in Surat-Bowel Qld to be 5.1%;; 50% in NSW; and in all basins 1%

(UED, Alinta, Agility and other bodies including Trust companies and holding companies are all part of the Singapore Power (SPI) consortium). The Jemena Group of companies also has in-house data metering agents and some unspecified outsourced arrangements regarding metering data services, as briefly discussed elsewhere and in my original submission to the AER of April 2010

SIMPLY ENERGY

Simply Energy (ABN 67 269 241 237) is a partnership comprising IPower Pty Ltd (ACN 111 267228) and IPower 2 Pty Ltd (ACN 070 374 293)

Simply Energy is owned by International Power Pcl

Source: Annual Report IP⁸⁶

International Power has a wind generation plant in South Australia (Canunda)

Gas plants in Pelican Point (CCGT) and Synergen (gas distillate) South Australia

Coal Hazelwood and Loy Yang Victoria

Kwinana Western Australia (Gas CCGT)

The website⁸⁷ and 2009 of International Power describes itself as “a growing, independent power generation company with interests in over 50 power stations and some closely linked businesses around the world.

Its interests include 32.358MW of power generation capacity across five core regions including North America, Europe, Middle East Australia and Asia. (Annual Report)⁸⁸

AER’s 2009 publication State of the Energy Market (p17) is aware that the three host gentailers AGL Energy, Origin Energy and TRUenergy “*collectively account for most retail market share in Victoria, South Australia and Queensland. However, Simply Energy, owned by International Power has acquired a significant customer base in Victoria and South Australia.*”

I note that in his recent correspondence with the Essential Services Commission of South Australia,⁸⁹ Simply Energy has expressed disappointment over credit support arrangements mentioning that

“with the level of consideration that has been given to alternative types of credit support. While it is acknowledged that the retailer may nominate an alternative method of credit support which provides equivalent credit assurance (new paragraph 14.1 (n) of the Coordination Agreement), experience has shown that it is easy for a distributor to refuse alternatives on the basis that such alternatives are not 'equivalent'.”

The proposed NECF is not a reason for the Commission to delay implementing improved credit support arrangements. Rather, making the proposed changes to the credit support arrangements now means that the benefits of credit support reform - an important part of the NECF package - can be brought forward.

⁸⁶ <http://annualreport2009.ipplc.investis.com/overview/ourportfolio.asp>

⁸⁷ <http://www.ipplc.com/>

⁸⁸ <http://annualreport2009.ipplc.investis.com/>

⁸⁹ Simply Energy Response to ECOSA’s Review of Credit Support Arrangements 16 April 2010
<http://www.escosa.sa.gov.au/library/100416-ElectricityCreditSupportArrangementsSubmission-SimplyEnergy.pdf>

The present circumstances - limited access to capital (and corresponding increase in the cost of capital), the attitude of distributors in seeking credit support without regard to the specific default risks presented by individual retailers, and the need to encourage a competitive electricity retail market by reducing barriers to entry and expansion - are good reasons for pushing ahead with changes to South Australia's electricity credit support arrangements as soon as possible. In any event, there is no certainty as to when the NECF will commence operation (it has been delayed several times in the past)."

Similarly, as far back as 2008, Simply Energy had written to the AEMC discussing market structure conditions in South Australia and condition for entry expansion and exit. The barriers identified included credit support requirements and liquidity (for electricity)

In relation to gas, Simply Energy claimed in that 2008 correspondence to the AEMC⁹⁰ mentioned the four major factors as

1) Large fixed costs in a contract carriage market model that require new entrants to share contract with

- Gas producers for commodity and plant capacity
- Gas pipeline companies for access to capacity and
- Envestra for access to the gas distribution pipeline

2) Credit support requirements

3) Significant risk

4) Access to delivery points

Retailer rivalry is also discussed for both gas and electricity

The views of The Hon Patrick Conlon, MP on behalf of the South Australian Government is responding to the AEMC's Review of the effectiveness of retail competition in the gas and electricity markets in South Australia, and its Response to the AEMC's decision to find for such competitiveness are discussed elsewhere and have been raised by me and cited in several of my submissions to other arenas.

By the same token, the extent to which competition was effective in Victoria was questioned by many. Given more recent recognition of market dominance and other factors. These issues are important in considering how effective the market is and the extent to which light-handedness is warranted.

The issue of credit support is raised here as it seems to be a recurring issue of concern to retailers and to second-tier retailers in particular. This matter was raised at the recent NECF Workshop Fora on 3 and 4 February 2010, at which I was present.

⁹⁰ Simply Energy South Australian Retail Review Response to Issues Paper 15 April 2008

I also note that many market participants did not believe that end-users as customers of energy should have to bear the credit support costs, but rather this should be covered by adequate insurance cover.

It is my understanding the further delays are expected with the implementation of the NECF which may not take place till mid-2011. The revised national generic law will result in the renaming of the TPA as Competition and Consumer Law once the details of the second bill are finalized and included, Meanwhile changes already effected are operational under the revised Trade Practices Act 1974 which will hve significant implications for all components of the market, as will revised national measurement regulations and pending lifting of utility exemptions.

Simply Energy in correspondence to the NECF has request a draft implementation plan and proper consultation,.

The issue of consultation continues to concern many, especially as so many decisions are being made at Rule Change level without robust prior discussion in the context of NCF2 proposals

I mention these matters here in recognition of how hard it is for second-tier retailers to survive against the obvious market dominance of the host gentailers, and pressures from the wholesale end.

Source: AER State of Energy Marget 2009p17-18

In NSW the Energy Reform Transaction Strategy will lead to the sale its three State-owned energy retailers, EnergyAustralia, CountryEnergy and Integral Energy.

Bidders for EA will have the opportunity to bid for its electricity gas or both.

Sale processes may be completed by mid-2010.

BROADER COMPETITION ISSUES

PARTICIPATION OF CONSUMERS IN FOSTERING EFFECTIVE COMPETITION

This further material, though containing discussion of wider consumer policy matters and citations is included here because a more robust understanding and interpretation of retail choice and competition is imperative.

Its inclusion, and the section above on some specifics in the section above has been triggered by JGN's dismissive comments and erroneous conclusions regarding the existence of so-called competitive "*choice*" in the "*bulk hot water arrangements*." The same perceptions appear to be held by the NSW Dept of Industry and Investment, who suggested that end-consumers who were unhappy with current policy and practice arrangements could always install their own water or gas infrastructure so that a more accurate assessment of their consumption of gas used to heat water could be effected.

Such suggestions have been made without an understanding of tenancy laws and other provisions and the position faced especially by residential tenants and also some who are strata owners in multi-tenanted dwellings.

In again refer to inconsistency between the single national energy objective in the context of Dr. Steven Kennedy's (2009) address

"In considering consumer policy, this approach is reflected in the national consumer policy objective: 'To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.'"

Many community organizations and individuals including me have referred to exploitive practices in the provision of utilities becoming even more prevalent in numerous settings, with prices being charged for unregulated "embedded" water networks and for "*heated water pricing*" than those not considered to be "*embedded*."

Retail choice and informed consent are central issues impacting on an end-consumer's ability to participate effectively in the marketplace. I deal first with choice

Retail choice:

On the issue of choice, discussion in the context of fungible commodities can be brief. The Foundation for Effective Market Governance in their submission to the Productivity Commission⁹¹ somewhat cynically has suggested that they may be:

"...hint of untested ideology in the Commission's statement that effective market competition is the most important safeguard for consumers (Vol 1 p2)"

⁹¹ Foundation for Effective Markets and Governance (FEAMG) (2008) Response to Productivity Commission's Draft Report (Jan),ssubdr121p11.

The FEAMG submission subdr121 discusses consumer choices and cost benefit analyses, but draws the line with water and electricity – since there are fungible commodities who ever has a company name on the bill. The FEAMGC Submission refers to “*skilled intermediaries*” and discusses the possibility that the government may be that skilled intermediary to provide water and electricity at reasonable prices.

Whilst speaking of competition and perceptions of its effectiveness in two jurisdictions, with the third – ACT targeted on schedule, whilst the following observations may not seem relevant to the legal architecture of the proposed drafts, I resurrect some of the issues that I had raised in my two-part submissions to the AEMC’s Review of the Effectiveness of Competition in Victoria and subsequent reference in submissions to the MCE and other arenas concerning the submissions and responses received from The Hon Patrick Conlon, MP and member of the MCE, who will be the responsible Minister for the instrument now in hand – the National Energy and Retail Laws and Rules.

The reason for making passing mention of this is that the philosophical climate of deregulation and light-handedness has developed in tandem with what has been seen as flawed assessment of the energy markets as to competitiveness.

This is more so in relation to gas. There is general market unrest. Complaints figures are rising and these are the tip of the iceberg given the relatively small proportion of the population as a whole who actually complain.

A framework, for example of licence exemption, poor monitoring generally, and especially of the 100+ Rule Changes that have been undertaken by the AEMC which have not been subjected to retrospective regulatory impact; the long-standing failure to consider regulation in the context of the internal energy market and rapid changes and a climate of general regulatory uncertainty in the face of so many changes; are all issues that impact on consumer well-being and ability to participate in the competitive.

For the sectors discussed throughout this submission – their choices are non-existent. Though numbers may be relatively small, these considerations illustrate beyond any doubt the impacts of policy and regulation in developing residual markets; marginalized groups and those left without protection altogether perhaps because it is seen as all too burdensome to address the issues that have remained in the too-hard-basket for so long.

Consumer and regulatory policy generally that is formulated in vacuum conditions with a focus on process rather than in the context of the internal energy market, blatant evidence of market failure in many areas and poor understanding of the differences between the electricity and gas markets may be destined for repeated re-evaluation as to the effectiveness of those policies.

So for the sake of an historical glance back to the time that the AEMC prepared itself for what appeared to be pre-determined decisions to find for competitiveness, and remembering the distortions that appear to have been made of data on the basis of poor understanding of behaviour economics; and on reliance on the poorest possible data availability, as freely admitted in CRA's Price and Profit Margin Report (discussed at some length in my 2007 AEMC submissions – I repeat the following, remembering that two more RoLR events have occurred, and the market has become very tough for second-tier retailers. Assessment of the retail market, and regulatory focus on retail outside the context of volatile wholesale conditions appears to be a short-sighted approach.

Gas and electricity retailers are not normally licenced to sell water, water products or value-added products and are bound by the legislated definitions of the term meter, meaning an instrument through which gas (or electricity) passes to filter, control and measure the flow of gas (or electricity) through that meter and is associated metering installation.

Following total price deregulation, there is no safety net available, and even without any choice at all of energy provider, suppliers will continue to exploit the interpretation of the energy-specific law regarding meters and products and services fit the purpose sold.

There will be no incentive to pass on any to end-consumers any savings in monopoly markets, leaving aside all of the contractual considerations.

Leaving aside bulk hot water providing and the energy used in that supply, those who are unattractive customers will simply not be offered products that are attractive and reasonably priced.

It is enough of a worry that remote reading of meters is more costly than manual reading, according to tariffs published for 2008 (see for instance Origin Energy's explicitly phrased tariff provisions).

In relation to the sale and disaggregation energy assets in various states and Queensland in particular I have discussed in more detail elsewhere the arrangements as outlined in the First and Second Reading Bills presented by the then Hon Anna Bligh, new Premier of Queensland. The Bill was read on 11 and 12 October 2006.⁹²

⁹² Legislative Assembly Parliament of Queensland Hansard pp 53, 61, 62, 64 (resumed) 164, 167-178 178 (First and second readings reintroduction) 231, 559.
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_12_WEEKLY.pdf
See views and concerns raised including from Dr. Flegg about the rushing of the debate of such importance; and of Mrs. Cunningham regarding the provisions regarding appeal and future sales without recourse to Parliament

I am particularly concerned about the reservations raised by Mrs. Cunningham, Independent Member. I share the same concerns with special emphasis on the extraordinary clauses evidently removing the right of appealing decisions made under that legislation – extending to judicial review and Supreme Court jurisdiction.

It seems to me that this could be interpreted as over-reach of powers and disrespect for the judiciary and their own powers in determining whether or not a matter should be heard before them.

Could this again be a question of the tail wagging the dog – or is there some other explanation? Should there be a public enquiry to find out? Should the arrangements of other States also be scrutinized, especially with regard to the legally and scientifically unsustainable “*bulk hot water*” arrangements, apparently capturing a captured monopoly group of residential tenants, especially those in public housing, all of whom were inherited by Origin Energy as one of three host retailers operating in several states.

The issue of the provisions regulated by Queensland Competition Council and by the NCP appear to have been disregarded in relation to both government and non-government monopolies. It appears to be fashionable to make such arrangements in the name of competition, even where there is not a scrap of evidence for this or evidence that the arrangements are associated with the correct commodity or assets and measured in a legally traceable way using an instrument designed for the purpose; in the right unit and scale of measurement.

This leaves aside the contractual and tenancy rights that have been eroded, and now inconsistency with proposed national energy laws in respect of flow of energy; and the new generic laws, which by 2011, after all implementation processes are in place will be re-named *Competition and Consumer Law 2010*.

I quote a snippet of Mrs. Cunningham’s concern expressed during the Queensland Parliamentary debate on 12 October 2010:

“Mrs CUNNINGHAM (Gladstone—Ind) (12.53 pm): I rise to speak to the Energy Assets (Restructuring and Disposal) Bill 2006 and in doing so at the outset put on the record my general opposition to the sale of strategic infrastructure. This has been my position when I was elected and prior to being elected to this parliament, including when negotiations occurred for the sale of the power station in Gladstone, only because I firmly believe that strategic assets should be retained by government for the security of supply and availability for the people in the community. I thank the minister for the briefing we were given on the bill prior to the election, and of course the bill dropped off the list after the parliament was prorogued. However, there are a few issues of concern that I want to raise. There is a clause in this legislation that removes the ability of decisions made under this legislation to be reviewed, including judicial review. In our original briefing I was advised that that in part was to have regard to the caretaker convention should an election occur before this bill was fully enacted.”

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Given that the election has been completed, I question why that condition has to be reinserted to the same extent as it was previously or whether there are other purposes for that non-reviewable clause to be included.”

I now cite snippets of the debate as entered into by Dr. Flegg (Mogill – Lib on 12 October 2006; and by (Charters Towers—NPA)

There were 29 opposed to the Bill – a significant number that should have slowed down the decision-making which appears to have been made in such a manner as to appear unusually rushed, almost “desperate” some would say. In terms of what is continuing to happen the same apparent desperation and rush seems to be characteristic of the processes being undertaken.

***Dr FLEGG** (Moggill—Lib) (11.58 am): I rise to speak to this bill, which relates to the privatization sale of extensive energy assets held by the state of Queensland. At the outset, I want to say that the government, by applying the guillotine to the debate of this vital bill, is insulting the people of Queensland. In fact, to borrow an expression that was used yesterday in the House by the Treasurer, it is ridiculous and more so because it was unnecessary given that we had already indicated that we would be supporting the bill. The speaking list was appropriate to that indication. The Treasurer has already thanked us for our support of the bill. In my view, to then suspend the rules of this House and apply this rigid restriction to the debate is a very bad start to the parliamentary term.*

I say to the Leader of the House that it does not matter very much whether it is a gagging or a guillotining of this debate; this is a debate of a major bill. This is not a minor bill in any sense. It deals with in excess of \$2 billion of taxpayers’ money, it involves the setting up of a future fund and it represents a major change in the government’s approach in terms of the funding of infrastructure and other expenditures. Yet this government wants to ram this bill through the House. It does not want a public debate of this bill. I think the people of Queensland should be insulted and offended by that.

***Mr KNUTH** (Charters Towers—NPA) (12.35 pm): The Energy Assets (Restructuring and Disposal) Bill 2006, introduced by the Treasurer, deals with emerging issues within the Energy portfolio.*

It gives me great pleasure to address this bill as I rise for the first time as shadow minister for the Energy portfolio.

The energy industry restructuring process has been a complex and staged process that has previously involved the separation of the electricity generation transmission and distribution components of the industry from the government owned monopolies that previously ran the whole system.

The point of this process is for the government to prepare the energy distribution components of the industry for privatisation and ultimate sale. The bill will allow for the preparation of the packaging process to occur within a time frame that is intended or supposed to achieve the maximum financial return for the state.

172 Energy Assets (Restructuring and Disposal) Bill 12 Oct 2006

In expressing concern on a number of issues associated with the privatisation of Queensland's electricity retail supply industry, I am very keen to seek the Treasurer's assurances on a number of matters, especially those involving ordinary electricity consumers in rural and regional electorates such as mine. For the most part, they will be among the 600,000 or so consumers not serviced by the new privatised energy entities that will operate in the full retail competition market after 1 July 2007. The government has recognised that some parts of the retail energy market are simply never going to be profitable enough to be attractive or viable for private sector operators.

From the briefing on the bill provided by Treasury, my understanding is that there will remain approximately 600,000 retail energy consumers who are mostly current Ergon customers whose retail energy needs will continue to be met by an energy entity that is a government owned corporation. By necessity, this GOC will need to be funded as part of the government's community service obligation. It will not be in the position to deliver a profit to the government for reinvestment in its infrastructure base.

I respectfully ask the Treasurer, in her summing-up on the debate of the bill, to outline for the House how she will ensure that those 600,000 electricity consumers who will need to depend on the government's own electricity entity will be adequately provided for. This is a major issue for constituents in my electorate of Charters Towers and, I am sure, for many others in remote parts of the state. In raising this issue I convey to the Treasurer in the strongest and most sincere terms that I am not over-dramatising or exaggerating the importance of this matter to people in rural, regional and remote parts of the state.

There is a world of difference between the profitable electricity market of the southeast corner of the state which, through this bill, is being groomed for privatisation and the market provided by my constituents.

For the benefit of this House, I would like to inform members firsthand of some of the harsh and expensive realities involved in being connected to an electricity supply in rural and regional Queensland.

I shall share the experience of one of my constituents who resides on a property in Hidden Valley. This constituent received a letter from Ergon Energy dated 29 September 2006 thanking him for his request for Ergon Energy's network connection service to provide an electricity supply to his premises. The letter includes a quotation for this connection service, which requires a customer contribution of \$225,000.

That is not an amount one would expect to pay when moving house somewhere in south-east Queensland. However, the quotation does include an Ergon Energy contribution of a lousy \$11,000.

Certainly, those who have an acute interest in infrastructure and privatisation have been deprived of the opportunity to participate in this debate.

—
In discussing the application of behavioural economics to its rationale for consumer protection, FEAMG made the following observations, which are just as relevant to the AEMC. I quote directly

Extract from FEAMC Submission to Productivity Commission, p9

“2.5. Producer exploitation of consumer biases

“The (PC) Commission was obliged to consider empirical evidence in its terms of reference to:

“the need for consumer policy to be based on evidence from the operation of consumer product markets, including the behaviour of market participants”

The Report has a section on behavioral economics, but it tends to be dismissive of any policy prescriptions based on behavioral findings. The Commission’s reasoning is that most findings of behavioral economics are based on laboratory studies rather than field observations.

(By contrast, conventional economics is based on an axiomatic faith, but that has never given economists a great deal of trouble.) And it suggests that we tend to overcome our behavioral biases over time and when significant amounts are involved in our transactions.

Therefore apart from reference to considering behavioral responses to disclosure (Vol 1 p. 47) the document is light on behavioral policy responses.

This is in spite of evidence of poor decision-making as a result of behavioral biases. The report notes that many consumers are unaware of the implied warranty provisions of the TPA, and therefore buy unnecessary protection cover.

Behaviorally such over-insurance may result not from ignorance but, rather, from behavioral biases (vividness, hypersensitivity to loss). In the Report’s section on behavioral economics and public policy there is reference to irrational over-insurance (Vol 2 p. 313), the influence of “shrouded attributes” (Vol 2 p. 313), suboptimal risk appraisal (Vol 2 p. 355).

It reports on four biases (overconfidence, endowment effect, choice overload and present bias) that may have “particular policy interest” (Vol 2 p. 320), but does not develop these. (In the process it overlooks the massive policy interventions of mandated superannuation and heavily subsidized private health insurance, which clearly have a behavioral origin.)

Debates on empirical sciences are always subject to their own confirmation bias. Apart from the pure academic theoretician (perhaps an extinct species), advocates are prone to fall victim to confirmatory biases. It would be surprising if the Commission staff provide an exception to this rule.^{93/[4]}

The behavioral issue missing in this report is the extent to which regulators should intervene in the practices of marketers, particularly advertisers. There is an acceptance that “bait” advertising should be proscribed, but there are many other advertising practices designed to lead consumers away from welfare-improving decisions, such as:

- *frames around anchor points – “normally \$200, now just \$179”.^{94/[5]}*
- *exploitation of utility curves – the cashback offer is attractive because it is seen as a “gift”. “\$1000 with \$100 cashback” is much more attractive than “\$900”.*
- *exploitation of the present bias – teaser offers, “nothing to pay for 6 months”.*
- *vividness – use of fearful images in selling insurance.*

It may be difficult for the Commission to make categorical recommendations on marketing practices which exploit consumer biases. That is a major topic in its own right. But it warrants mention, and inclusion in the Commission’s work program.”

There are no such offers with provision for the energy component bulk hot water, either to the proper contractual party, the Owners’ Corporation, or the renting tenants, for the most part of low income given the quality of accommodation that normally has bulk hot water services in the first place, unjustly imposed with contractual status.

⁹³ ⁴ We note the Commission does not include the confirmation bias in their section on behavioral economics (*citation 4 from FEAMG submission122) c/f FEAMGC Submission to Productivity Commission p9*

⁹⁴ ⁵ A retail manager explained to us that most “Manchester” (sheets, towels etc) sales are made in post-Christmas and end of financial year promotions. Full price sales are the exception. Have we ever seen an advertisement for bed sheets “normally \$60, now \$139”?

Other Competition, issues and impacts on consumers – a retrospective glance

Firstly I raise again here but not in the detail discussed elsewhere in this and other public submissions some ongoing concerns that may be rooted in arrangements made during the disaggregation of utility assets in some states,

Further to my emailed correspondence, I would like to highlight the following concerns - which I have already made public. I intend to raise my concerns widely in this and related matters not only in relation to the Queensland situation but what may be happening in other States.

I have referred to some of these issues in my draft submission I sent a courtesy copy on 6 May to the NSWACTGas Division (Northern Region) AER) on 6 May with courtesy copies to the Senior Adviser Infrastructure Competition and Policy at the Commonwealth Treasury and to the Senate Economics Committee of my original submission to the AER in the JGN Gas Access Dispute as well as a copy of my correspondence to the AEMC regarding the Metering Data Services Provider proposal and revised Metrology Procedures under Ch 7 of the NER, ERC0092, consideration of which have been delayed till responses to the Draft Decision are examined

I have many concerns about privatization, sale and disaggregation of assets in Queensland, especially in relation to energy.

Some of these have been raised publicly in the context of formal submissions, principally to energy arenas. I will spare everyone the finer details here but would like to pursue the matter further – in arenas where I may expect action.

a) the Ministerial Council on Energy (MCE), notably Response to National Energy Customer Framework (NECF2), to be rubber-stamped through the South Australian Parliament as the proposed national template legislation to be known as National Energy Rules and Laws.

b) Australian Energy Regulator (AER) (current deliberation on Jemena's Revised Gas Access Proposal for the 2010-2015 regulatory period a decision which will have major impacts in terms of a precedent-type decision). Similar concerns relate to asset management arrangements by other providers of energy in several states.

See also my submission to the Senate Economics Committee's current Inquiry into Consumer Law: Trade Practices Amendment (Australian Consumer Law) Bill2), currently under consideration.

I have in addition written to each Member of the MCE and believe that the SA Parliament, who will be asked to pass proposed national energy laws this Spring should scrutinize certain aspects of these provisions carefully.

I would like to advance my concerns in other ways besides these formal consultations, especially in view of material that is in the public domain concerning arrangements and assurances and/or warranties that were made at the time of the sale of energy assets which apparently also included water infrastructure and a captured clientele receiving heated water supplies but no energy at all.

These end-recipients of heated water supplies are being unjustly held contractually liable for alleged sale and supply of energy, in efforts to distort contractual, common law, generic and other provisions.

The metering and data services, principally referring to billing IT and backroom services in unjustifiable and bizarre practices calculated to artificially inflate prices, are the subject of collusive arrangements between energy providers, Owners Corporations (Body Corporate entities either public or private) in what has been described by one corporate lawyer as taking the best advantage of “see-through tax advantages.”

The arrangements are sanctioned under jurisdictional policies – but other concerns have been pinpointed.

The effect is that water meters have been permitted to pose as gas and electricity meters; outsourcing arrangements for “data meter service provisions” and adoption of metrology practices calculated to make any self-respecting metrologist blush.

There are concerns about overlap and direct conflict with the intent, spirit and letter of proposed revised generic laws; the undermining of the role of the National Measurement Institute’s role as sole metrology authority; and attempts to uphold the principles of legal traceability in the measurement of consumables and certain services.

Monopoly and competition concerns as well as systematic erosion of enshrined consumer rights represent merely the tip of the iceberg of the range of concerns which deserve more public airing.

There are implications also for the entire economy, for proposals to upgrade ageing water infrastructure allegedly part of energy distribution and transmission networks a scientific impossibility; for smart meters and smart grid technology, for public confidence generally and for market stability and certainty.

The situation is compounded by flawed jurisdictional policies, originally adopted in Victoria under what are commonly known as the “bulk hot water arrangements” purporting to be legitimate under Codes and Guidelines, about to be further sanctioned under national energy policies.

Other states followed Victoria’s suit adopting these legally unsustainable provisions and applying them discrepantly in different states.

Cursory research has produced some hard evidence to substantiate my concerns generally – which I believe should be made the subject of a public enquiry, both in relation to the adoption of the guidelines and what may lie behind them.

See also the public submission of a Queensland citizen impacted by flawed policies (Kevin McMahon, Qld victim of BHW policies) published as Sub 46 on the Senate Economics Committee's website (TPA-ACL Bill2), called to that Committee's attention in my own submission 25 plus attachments, but originally intended by the author a Queensland resident, on the NECF2 MCE SCO site in relation to the Second Draft Exposure.⁹⁵

This may be found as one of two individual stakeholder submissions to the NECF2 Package in March 2010, the other being mine. (March 2010).

It is of great concern that the NECF2 Package to represent the proposed Energy Retail Laws and Rules have been finalized without robust consultation (despite all appearances) following the public workshops held on 3 and 4 March 2010 which I attended, and which my attempts to robustly discuss issues of concern were repeatedly squashed, under instruction from those in authority.

My attempts to dialogue directly with the Minister for Mines and Energy Queensland were abortive and unsatisfactory, as also were attempts to dialogue with each and every member of the MCE.

My concerns are not restricted to Queensland but I have more direct evidence of issues of concern and have publicly highlighted these as the material is in the public domain including the then Treasurer of Queensland's Second Reading Speech Hansard 11 October 2006. Energy Assets (Restructuring and Disposal) Bill (Qld).

⁹⁵ Refer also to Body Corporate and Community Management and Other Legislation Amendment Bill (Qld) 11 October 2009, pp 68-70 and implications.

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf

Page 70 states that The *Body Corporate and Community Management Act 1997* (BCCM) regulates some 33,000 community titles schemes containing over 303,000 lots of units. It was estimated at the time that well over 500,000 Queenslanders live in apartments or units. In addition a significant proportion of Queensland's estimated eighteen and a half million annual visitors and tourists choose to stay in community title apartments and units during their stay rather than hotels and motels.

Kevin McMahon's publically available story indicates that he has battled long and hard against the odds to achieve fairness in provision for access to centrally heated apartment managed by BCCM. The arrangements made as a result of the Energy Assets Restructuring Bill, which was rushed through in a desperate hurry and considered by those passing the Bill to be "unusual" because of this, have hampered any scope to obtain justice in the calculation of equitable charges. The matter raises issues of parity also and as discussed elsewhere the legal and scientific unsustainability of the provisions for "*delivery of bulk hot water.*"

In Queensland changes to other provisions including under the Planning Department's regulations permit water to be sold as a commodity, whilst energy charges are imposed, calculations made in cents/litre and redress options non-existent

The Bill referred to is weighted in favour of the BCCM. Public tenants have little say and certainly with regard to the BHW arrangements no accessible rights at all.

That speech referred to similar arrangements in Victoria, South Australia and Western Australia though it is not clear whether mere sale is referred to or the extraordinary warranties and guarantees that accompanied the Qld sales, ostensibly on behalf of Energex, but instructed by the Qld Govt. See Minister Ellison site^{96,97}

I believe a public enquiry regarding the manner in which disaggregation of utility assets is undertaken and the implications is justified.

The implications for consumer protection and market confidence across the board are central to my continued efforts to call public attention to these matters. Close scrutiny is warranted.

The National Consumer Roundtable on Energy (NCRE)⁹⁸ had suggested that more confidence on the national regulators, AEMC and AER before they would feel comfortable about supporting the national framework Their concerns about confidence in the proposed rule-makers are shared by many.

⁹⁶ See Minister Ellison: Sale of Queensland Government's retail energy assets
[http://www.minterellison.com/public/connect/Internet/Home/Expertise/Track+Records/TR+-+Sale+of+Sun+Retail+\(1+of+2\)+28/09/2009](http://www.minterellison.com/public/connect/Internet/Home/Expertise/Track+Records/TR+-+Sale+of+Sun+Retail+(1+of+2)+28/09/2009) last accessed 2 June 2010

⁹⁷ Please note that the Energy Assets (Infrastructure Disposal) Bill 2006 process spanned two days 11 and 12 October 2006, having been reintroduced after Parliamentary changes
To read the whole transcript the following Queensland Hansard pages are relevant: 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction following a caretaker period and reconstitution of Parliament) 231, 559.
See views and concerns raised including from Dr. Flegg about the rushing of the debate of such importance; and of Mrs. Cunningham regarding the provisions regarding appeal and future sales without recourse to Parliament
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf

⁹⁸ National Consumer Roundtable on Energy (2008) (NCRE) Response to PC's Draft Report, p7

I cite directly from the South Australian Government's submission dated 5 November 2007 to the AEMC's Second Draft Report⁹⁹:

"I do not propose to comment on issues and findings that are specific to Victoria. Rather this submission concentrates on those matters pertinent to the overall approach that may set a precedent for future reviews, noting that the AEMC is due to undertake a similar review for South Australia in 2008."¹⁰⁰

"Whilst the AEMC has provided a detailed report there would appear to be some gaps in the analysis, and areas where the evidence does not unambiguously support the conclusions reached. The AEMC has the important task of determining whether a market has achieved effective competition, which is a step above gathering evidence that a market is developing well.

In its April 2007 Statement of Approach, the AEMC advised that it would examine market concentration indices and noted the availability of a number of economic tools for assessing the likely impact the number of firms and their market shares has on the competitive nature of a market. I would therefore have expected analysis along the lines of the top four-firm concentration ratio analysis, which would be performed by the Australian Competition and Consumer Commission (ACCC) in its market assessment for purposes of merger applications. I can see no evidence in the First Draft Report of such analysis having been performed.

The AEMC has concluded that the gas retail market is effectively competitive though less so than electricity."

The AEMC's conclusion that the gas retail market is competitive also relies in part on evidence of retailers in the electricity market pursuing opportunities to secure gas customers in conjunction with marketing electricity, given the limited availability of gas only offers.

This raises the general question as to what degree a market is sufficiently effectively competitive to enable consideration of the removal of price controls.

⁹⁹ Submission by South Australian Government to AEMC's Second Draft Report 5 November 2007. found at

<http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/submissions/014Minister%20for%20Energy,%20the%20Hon%20Patrick%20Conlon%20MP.pdf>

¹⁰⁰ This has already commenced. The same conclusions are likely to be drawn, despite the evidence or lack of it to support such conclusions.

Confidence in the AEMC's ability or willingness to undertake robust and objective enquiry is shown to be eroded on the basis of the various submissions made questioning the decision made both to find retail competition successful in Victoria, and secondly to recommend removal of the only remaining price control (not price gap) in the form of the safety net default option. T

This is not merely a blunt tool for addressing hardship, but has many applications in ensuring customer choice and participation in the market and in contributing to some balance

It is the State Government's view that more evidence would need to be presented as part of future reports to support a conclusion that rivalry between retailers was sufficiently strong, along the following lines:

The level of, and changes in, the number of market shares (both customer numbers and energy volumes) of each electricity and gas retailer since the introduction of full retail contestability.

The level of, and changes in, the market concentration of the electricity and gas retail markets since the introduction of full retail contestability;

Standing-offer and market-contract retail energy prices since the introduction of full retail contestability;

The nature of, and changes in, differentiated and innovative products and services being offered in the electricity and gas retail markets.

This additional evidence would draw out the extent that new entrant retailers were competing amongst themselves rather than just against the regulated standing contract of the incumbent retailer.

It is also important that customers have an understanding of the retail offers available and are engaged in the process. The evidence in the AEMC's First Draft Report could be seen to indicate that customers generally appear only to respond to direct advances from retailers and accept the information provided to them by the retailer.

Whilst the South Australian Government looks forward to effectively competitive energy markets occurring around Australia, it is important that the evidence be unambiguous that such markets exist, rather than providing further evidence that markets are continuing to develop”

Signed The Hon Patrick Conlon, MP, Minister for Energy 5 November 2007

These concerns were reflected in numerous other submissions to the AEMC, including that of St Vincent de Paul Society.¹⁰¹

One of the most significant direct contributions to questioning the AEMC's conclusions was that from Victoria Electricity both to the AEMC Issues Paper and to the AEMC's Second Draft Report (9 November 2007¹⁰²) and First Final Report 1 February 2008.

¹⁰¹ Victoria Electricity (Infratil Ltd) (2008) and (2007) Response to Australian Energy Market Review of Effectiveness of Competition in the Gas and Electricity Retail Markets in Victoria, Second Draft Report (November 2007)' and to First Final Report (1 February 2008)

¹⁰² Victoria Electricity (Infratil Ltd) (2007) Response to AEMCs Review of the Effectiveness of Competition of Gas and Electricity Markets in Victoria (9 November)
Found at
<http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/submissions/021Victoria%20Electricity.PDF>

“Victoria Electricity along with other ‘second tier’ and new entrant retailers strongly contends threat the new rule requiring the procurement of physical gas for injection at Longford is a major barrier to entry and growth. Continuing with this new rule will only support incumbency domination and risk the collapse of new entrant competition (Response to AEMC First Final report 1 feb2008 p2)

We do not intend providing details of the reasoning in this submission, having discussed this previously in earlier submissions. However, we are available to revisit the core issue if required. Suffice to say that little has changed since those earlier submissions, except that, in order to protect itself, Victoria Electricity (and possibly others) has already had to take steps that will have the effect of reducing our ability to compete for Victorian energy customers” (Response to AEMC First Final report 1 Feb2008 p2)

AEMC has been misinformed

Victoria Electricity is disturbed that the AEMC “understands that steps are being taken to address” the “amendments to the rules governing the operation of the wholesale gas market which... have unintended consequences for the future competitiveness of gas retailing in Victoria.”

“This is simply not the case. A great many parties, including the AEMC, have expressed concern about the serious threat to retail competition. However, no arm of the Victorian Government with the authority to remedy the situation has commenced changes to market rules regarding injection dependency of AMDQ.”

(Response to AEMC First Final report 1 Feb2008 p2)

If the AEMC has made errors of this magnitude in verifying impressions before relying on them, what other errors have been made of omission or commission?

In fact, it can be demonstrated that a huge range of relevant internal market factors have either not been examined at all or insufficiently examined and considered before drawing the conclusion about alleged effectiveness of competition (in Victoria), repeated like a mantra from one report to another, regardless of stakeholder challenge or objection and in the face of blatant evidence that the conclusions would benefit from reconsideration.

The Victoria Electricity submission to the AEMC First Final Report goes on in more detail on page 6 to discuss the review of VoLL Gas – a report that had been finalized by MMA for consideration, and a general “Top End Review” – always on the CRA agenda for commissioning, but not considered by Victoria Electricity to be sufficient to deal with longer term exercise with uncertain outcomes and in any case not likely to be completed before Winter 2008.

“As a result, new entrants and second tier retailers face extensive risks going into this year. “The most important item remains unaddressed – an interim solution that will allow smaller retailers to compete for customers over 2008 and the following 2-3 years.”

“There is disagreement between market participants – it is hardly surprising that dominant retailers that have benefited from a market rule change would disagree with smaller competitors who are severely disadvantaged by it.

If VENCopr is waiting for consensus, it will never be in a position to act....” “VenCorp management has decided to take a position that favours those dominant retailers.”¹⁰³

In its earlier submission to the AEMC Second Draft Report during November 2007, Victoria Electricity (VE) (Infratil) had made the following observations about competition and about residential customer outcomes from current conditions and the implications of the AEMC’s conclusions, considered by many to be seriously flawed, but relied upon by the Productivity Commission.

“No prudent new entrant retailer will be able to grow in the Victorian gas market for many years to come if injection dependency of AMDQ is allowed to remain in place. For those not yet active, that means not entering. For those already in the market and able to hedge their current customer base, expansion is simply not worth the risk. As Victoria is a dual fuel market, this also means a major reduction of retail competition in electricity.”

Since that time two further RoLR events have occurred. All end-consumers are required to pay for the cost of those events. I have recommended that at least those facing hardship be spared the cost-smearing exercises undertaken on this and other regards.

The picture for residential customers is not appealing. They face reduced competition at the retail level and higher underlying wholesale gas prices. The money for the windfall gains to some has to come from somewhere, and that will inevitably be from residential customers, the customers with the least ability to respond to the very strong price “signals”. To date, this problem has remained relatively low profile. However, losses sustained through the winter of 2007 are unlikely to remain below the radar in coming months. AGL has recently announced a profit downgrade and attributed that in part to wholesale gas issues. Simply Energy has recently decided to pass cost increases on to residential customers.

As far back as April 2002, PIAC had made same salient points about consumer protection and energy costs in their public submission to the Independent Pricing and Regulatory Tribunal (IPRT), NSW as quoted below.¹⁰⁴

¹⁰³ This is a general concern in the community – that the tail has for some time been wagging the dog and that the Tier 1 retailers have government advisers, the government; and the direction of regulatory control, in their power – this enhancing further market dominance factors.

This cannot be good for the overall economy, for the implications for anti-competitive outcomes and for consumers generally, who according to Louise Sylvan, deputy Chair, ACCC in her recent submission (DR253) to the Productivity Commission believes that consumers not only benefit from competition but actually drive it. The detrimental impacts on consumers are innumerable and will not be resolved by cursory tweaking of existing provisions or over-reliance on compromised complaints redress

¹⁰⁴ PIAC (2004) Submission to Independent Pricing and Regulatory Tribunal (IPRT), NSW, Mid Term Review of Regulated Retail Tariffs

1. Competition and consumer protection

PIAC repeatedly has expressed the view that those consumers who are not likely to receive direct benefits from full retail competition (FRC) should not be expected to bear the costs of its implementation. As the Tribunal will be aware, this concern has been focused particularly on low-income and disadvantaged households in NSW.

From this position we see the assessment of the claims made concerning the appropriate level of retail margin within the current determination of the regulated or 'standard' electricity tariff as focusing on two main sets of issues. The first is the viability of second tier retailers seeking to undercut the standard retailers and the regulated tariff.

The second is the legitimate costs incurred by the incumbents who supply energy at the regulated maximum price.

During the public consultations prior to the current determination a number of prospective second tier retailers proposed that the regulated tariff contain, in addition to an allowance for a standard retail margin, a 'retail headroom' or premium. This was conceived with the purpose of driving significant numbers of households to churn away from the incumbent suppliers.

Interestingly, demands for similar headroom have been aired more recently in Victoria in response to decisions by the State Government to hold increases in domestic tariffs below the levels sought by retailers.^{105[1]}

Assertions by some Victorian market participants of the need for significant increases in retail prices have coincided with predictions that the industry is on the verge of a period of consolidation.

One senior industry executive has been quoted as stating that a reduction in the number of competing retailers, perhaps by half, is 'inevitable'.^{106[2]}

Yet, a number of submissions made to the Tribunal's mid-term review have based the proposals for the inclusion of greater headroom on the view that competition rather than regulation can be relied upon to provide the most effective protection for consumers.

Not surprisingly, the second tier retailers such as TXU and AGL again appear to be leading the argument. The doctrinaire Institute of Public Affairs also has commented on the development of retail competition being dependent on a larger retail margin within the regulated tariff.

¹⁰⁵ <http://www.ipart.nsw.gov.au/files/Public%20Interest%20Advocacy%20Centre%20-%20S4970.pdf>
Thomson, J. 'High-voltage hardship' in *Business Review Weekly* 28 February 2002 c/f PIAC (2004) Submission to IAPRT (2004) citation 1

¹⁰⁶ Clegg, B. 'Energy shake-up on \$1.5bn sale' in *The Australian Financial Review* 5 February 2002, c/f PIAC (2004) Submission to IPART (2004) citation 2

Unfortunately, the IPA has made a rather confused attempt to illustrate their point, arguing that a higher retail margin is necessary for the growth of competition while asserting that very tight profit margins are inherent to effective competition.

However, PIAC finds it astonishing that this argument has been taken up even by the publicly owned, standard retailer¹⁰⁷³ in disregard for both current NSW Government policy and one of the key purposes of the Electricity Supply Act 1995.

For example, Integral Energy has quoted the view of the supposed architect of competition reform in the UK utilities industries, Professor Stephen Littlechild, that facilitating competition is so much more important than the prices paid by consumers that:

“it may be more appropriate to set the initial price controls at a level that encourages new entrants into the market rather than at the estimated efficient cost level.”^{108/41}

The United Kingdom’s national electricity markets regulator, Ofgem, has only recently decided to adopt the approach advocated by Professor Littlechild, announcing last February that it will remove the remaining direct controls over retail prices in that market.

Yet, it is difficult to see why NSW should embrace a similar approach at what is a comparatively much earlier stage in the development of the local market. To date the vast bulk of NSW households have seen little in their new market other than demands for higher prices and uncertainty over the strength of competition.

It also needs to be understood that Ofgem has not embraced an open market entirely. Importantly, the regulator has announced that it will continue to investigate retail prices offered to low-income consumers and the relationship between these and the cost-to-serve^{109[5]}. Further, in order to continue to address ‘fuel poverty’ in the United Kingdom Ofgem have determined that retailers must target such households for a minimum of 50% of their spending on the mandated ‘Energy Efficiency Commitment’.

Another view of the proposals from the incumbents is that they are less interested in facilitating customer churn than maximising their revenue from those households remaining in a quasi-monopoly relationship with their respective standard retailers. The standard retailers accept that the majority of residential customers are not commercially attractive to their second tier competitors.

¹⁰⁷ Australian Inland Energy and Water is the notable exception, having concentrated instead on their distinct cost base. Thomson, J. ‘High-voltage hardship’ in *Business Review Weekly* 28 February 2002 c/f PIAC Submission to IPART (2004), citation 3

¹⁰⁸ Integral Energy, Submission to Mid Term Review : Regulated Retail Prices for Electricity to 2004, March 2002,p5 c/f PIAC (2004) Submission to IPART (2004) citation 2

¹⁰⁹ Office of Gas and Electricity markets (UK), Review of domestic gas and electricity competition and supply price regulation : Conclusions and final proposals, February 2002, pp.60-61

Yet they appear unwilling to acknowledge that this is the reason for the introduction of a regulated standard supply tariff after significant efforts by organisations such as PIAC. It seems that what consumers regard as price exploitation is viewed by some businesses as a legitimate commercial strategy.

EnergyAustralia, for example, has proposed a double whammy of price increases aimed at achieving the current profit target and yet further rises to meet a revised target. PIAC can only wonder at the difficulties of explaining to the community the need for EnergyAustralia to raise its profit performance by some 400%.

A number of submissions have cited the level of customer transfers between retailers in NSW as if this alone demonstrates a link between the original determination and the extent of retail competition. In at least one case the data on churn rates has been misrepresented in order to support the assertion that retail competition is failing under the current regulated tariff.

The issue of cherry picking and its impact on the customer base of the incumbent retailers has been raised by EnergyAustralia. The claim is that the loss of wealthier, higher-volume customers from standard supply contracts needs to be addressed by increasing the revenue earned from the remaining low-income households. However, it is the understanding of PIAC that the significant activity in the new retail energy markets is not the movement of consumers to the second tier retailers but the attempts by the incumbents to secure the more commercially attractive of their existing customer base with their own long-term, market-based retail contracts. In other words, it is EnergyAustralia and the other incumbent retailers who are responsible for the bulk of the cherry picking in the NSW market.

Even with the knowledge of this internal cherry picking, Integral Energy has asserted that it is the current standard retail tariff which will restrict the churning of customers to second tier retailers to perhaps only 20% of the total customer base.¹¹⁰⁽⁶⁾ In truth, such a level of activity would compare favourably with international experience.

However, PIAC long has held the view that this may be a generous estimate of the extent to which NSW households will embrace the concept of ‘retailer of choice’. This arises from the structure of the local market and the realities of introducing competition to a commodity such as electricity. It was largely for these reasons that PIAC pursued the issue of a regulated tariff prior to the commencement of FRC.

PIAC has for over three years been expressing its concerns for the weakness of electricity retail competition and drawing attention to the problems of the majority of residential consumers being excluded from the new market. It is extremely galling to find now that these same weaknesses and flaws in FRC are being seized upon in an attempt to force low-income households to pay more for what is an essential service.

¹¹⁰ Integral Energy submission, p.9 c/f PIAC Submission to IPART (2004) citation 6, p

The activity of the incumbent retailers in churning the wealthier of their existing customers will result in their existing customer base being divided into two classes – on the one hand the more commercially desirable group who are targeted to receive the benefits of FRC in product innovation and, perhaps, lower prices; and on the other hand the bulk of their existing standard customers who are expected to pay higher prices for electricity in order to fund the benefits enjoyed by the wealthy few.

There appears to be wide support from retailers for the standard tariff to reflect the prices being charged in other jurisdictions. Particular reference has been made to the higher retail margin allowed by the Essential Services Commission (formerly the Office of the Regulator-General) for the Victorian retailers. Once again, this argument ignores the realities of the residential consumer market NSW. In particular, it fails to recognise that the incumbent NSW retailers remain far more profitable than their privately-owned counterparts in Victoria. More importantly, it ignores the fact that Victoria does not provide for the existence of ‘standard’ retailers who are guaranteed a greater than 80% share of the small volume market segment.

The industry needs to understand that the standard retail supply options for small volume users exist to protect poor and vulnerable consumers. Most importantly, the publicly owned retailers need to accept that they have been given this role not by the regulator but by the NSW Parliament. Rather than trying to divide their customers into winners and losers the standard retailers should note the responsibility given to them under the State Owned Corporations Act 1987 to balance their apparent commercial instincts with a measure of social responsibility.”¹¹¹⁽⁷⁾

David Adams^{112,54} refers to early hopes almost three decades ago as follows:

In the 1980s, the Council of Australian Governments (COAG) held out some hope for a truly national approach to key national issues. Poverty never made it onto the agenda. The closest were some attempts to reconfigure community services but these faded away and the ministerial council (Community Services and Income Security) never picked up the challenge.

As each of the various components of my submissions to the Productivity Commission’s Draft Report are intended to stand-alone if need be I again begin by emphasizing the findings of SSC in 2000 as a reminder to all concerned with upholding adequate levels of consumer protection.

¹¹¹ *State Owned Corporations Act 1989 s.20E c/f* PIAC (2004) Submission to Independent Pricing and Regulatory Tribunal (IPRT), NSW, Mid Term Review of Regulated Retail Tariffs, citation 7

¹¹² ⁵⁴ Adams, David (2001). Sir George Murray Essay Competition Winner “*Poverty – A Precarious Public Policy Idea.*” Australian Journal of Public Administration 69(4) 89-98 National Council of the Institute of Public Administration. Published by Blackwell-Synergy. Also found at <http://www.blackwellsynergy.com/action/showPdf?submitPDF=Full+Text+PDF+%2854+KB%29&doi=10.1111%2F1467-8500.00305>

The SCC had found the following:

- *Lack of understanding of NCP policies;*
- *A predominance of narrow economic interpretation of the policy rather than wider consideration of the externalities*
- *A lack of certainty between States and Territories as differing interpretations of the policy and public interest test, result in different applications of the same conduct;*
- *Lack of transparency of reviews; and*
- *Lack of appeal mechanisms*

Referring again to the 2002 Senate Select Committee findings more fully discussed in my PC subdr242part2, during its extensive examination of public concerns about the application of competition policy, reform agendas and community impacts, I deal with a few of these concerns briefly. Besides these findings I reiterate concerns that:

“The Senate Select Committee had found that social services were not shown to improve during NCP.

The SSC took seriously the suggestions in many submissions that some aspects of NCP and its administration would appear to be in conflict with the principles of good health community and social welfare service provision. That Committee’s findings in terms of competition policy and its impacts are further discussed elsewhere.

Whilst the Senate Select Committee did not seek to duplicate the work done by the Productivity Commission and the Committee confirmed that there were overall benefits to the community of national competition policy it found that those benefits had not been distributed equitably across the country. Whilst larger business and many residents in metropolitan areas or larger provincial areas made gains residents from smaller towns did not benefit from NCP.”

I hope the goals for productivity identified will be considered in reviewing the findings of the Senate Select Committee as far back as 2000 (see subdr242part2)

“An unintended consequence of changes to the way social welfare services are funded would appear to be these additional administrative costs. Further it is evident that narrow cost/benefit analysis is not capable of examining many of the social factors involved the application of NCP in the social welfare sector.”

I repeat that all regulatory reform needs to be considered in the context of corporate social responsibility and the public interest test. That includes any reform measures that either enhance or have the potential to hamper access to justice, or any regulatory measure that may, in the interests of lightening the burden on the courts for example, impose obligatory conciliatory demands on the public, and particular those most affected by the power imbalances that exist – the *“inarticulate, vulnerable and disadvantaged.”*

Meanwhile I return to other accountability considerations, and turn again to Peter Kell's three consecutive speeches at the National Consumer Congress events in 2005, 2006 and 2007 respective as referred to in the section above.

On topic of Mexican standoffs (a phrase used by David Adams in his awarding winning 2002 essay Poverty – a Precarious Public Policy) and turf wars, I quote from Peter's Kell's 2005 National Consumer Congress speech,¹¹³/51 during which he analyzed the Productivity Commission's Draft Report on the Review of National Competition Policy.

“Finally, it would be very disappointing, as I said earlier, if any national review was to be used as a vehicle for cynical and unproductive turf wars between different agencies. There are few things more depressing for consumer activists than seeing reform agendas hijacked by agency self-interest, so we have got to make sure that does not happen.”

Earlier in the same talk, Peter Kell cited directly from the PC's Review of National Competition Policy.

“The Australian Government, in consultation with the States and Territories, should establish a national review into consumer protection policy and administration in Australia. The review should particularly focus on: the effectiveness of existing measures in protecting consumers in the more competitive market environment; mechanisms for coordinating policy development and application across jurisdiction, and for avoiding regulatory duplication; the scope for self-regulatory and co-regulatory approaches; and ways to resolve any tensions between the administrative and advocacy roles of consumer affair bodies.”

At a broader level there is some concern about how principal objectives are described in the last annual report given reference to *“capturing the benefits of competition for consumers.”* One would hope that no enshrined consumer rights will be sacrificed in an endeavour to capture such benefits.

In Section 2 of my Part 2 Submission to the PC's Draft Report I discussed in some detail overarching objectives and their relationship competition policies and the various interpretations applied to them.

¹¹³ Kell, Peter (2005). *“Keeping the Bastards Honest”* Speech delivered by Peter Kell, CEO ACA (CHOICE) at the National Consumer Congress 2005

I refer to Kell, Peter¹¹⁴ (2006) “*Consumers, Risk and Regulation.*”¹¹⁵ Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006, Melbourne, Australia.

“From ACA’s perspective reducing regulatory burdens whilst still ensuring good market outcomes is an important objective. Consumers don’t benefit from poorly directed regulation or complicated rules that aren’t enforced. Reducing regulation that unnecessarily restricts market competition will also generate better outcomes for consumers.

For example there seems to be a notion that there is a wealth of self-regulatory initiatives that are not currently being given sufficient attention in this area. I am not so sure about that and I would like to put in a plea that we all be spared from more half-baked self-regulation. There are of course other players who would see such a review as a golden opportunity to wind back consumer protection.

At times this seems to be based on the idea that if we somehow develop more competitive markets then consumer protection should be stripped back. That sort of notion which is partly there in the Productivity Commission discussion is problematic for several reasons. I will mention three. One is that there seems to be at times in discussions around the outcomes of competition policy a premature celebration of competition in some markets before it has actually really arrived or had an impact.

The second reason why I think that that is an inappropriate approach comes from some of the work that Louise Sylvan has been doing. We should not be thinking of competition and consumer protection as somehow at odds with each other but rather we ought to be looking at the opportunity for integrating them and seeing them as complementary objectives in much of the regulatory arena.

¹¹⁴ ²³⁶ Peter Kell is the Chief Executive Officer of Choice (Australian Consumers' Association), having joined on 11 March 2004. ACA is Australia's leading consumer organization, and the publisher of CHOICE magazine. Prior to joining ACA, Peter was Executive Director of Consumer Protection, and NSW Regional Commissioner, at the Australian Securities and Investments Commission (ASIC). Peter joined ASIC in 1998 when it was given significantly expanded consumer protection jurisdiction, and was responsible for ASIC's approach to consumer protection regulation in the financial services sector. Peter's area developed and implemented successful regulatory campaigns in areas such as mortgage broking and financial planning, built ASIC's widely recognized consumer education and financial literacy programs, and developed policy and approval standards for consumer dispute resolution schemes. Peter was also responsible for establishing ASIC's Consumer Advisory Panel.

¹¹⁵ Kell, Peter (2006) “*Consumers, Risk and Regulation.*” Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006 Found at <http://www.choice.com.au/files/f124236.pdf>

Finally I think the notion that more competition means we can in some simplistic sense wind back consumer protection is based on a one dimensional and unproductive understanding of consumer behaviour. That is what I will return to a little later in my talk.

Having pointed out some risks I think it would be unfortunate if we let those risks stop us from seeking to improve consumer protection through such a review. I believe we can achieve a better and more coherent approach to regulation in this area and we have reached a stage in consumer protection regulation in Australia when a big picture examination could and should provide some important opportunities to rethink some of our current structures and approaches. There are a range of challenges we face and market developments that have arisen that warrant some fresh thinking.

If we are going to come up with any of the radically different approaches that are suggested in the program then such a review would provide an important vehicle for discussion and debate. Now I certainly do not want to suggest that I have all the answers in advance about what such a review should cover or what the outcome like to raise a few issues that I think should be considered in such a review and some of the things frankly that should be avoided.

A third area suggested by the Productivity Commission is the scope for self-regulatory and co-regulatory approaches. Well, okay, this is worthy of examination, if only to confirm the generally limited use of such regulatory mechanisms in consumer protection. There have been some successful examples but they are more the exception than the rule. The dispute resolution schemes, in some sectors, are some of the more promising examples, but they tend to work most effectively when they are incorporated into a broader statutory framework.

If this area was looked at, I would like to see an honest, empirical assessment of some of the key propositions used to support self-regulation such as its alleged flexibility, market friendliness in the face of changing market conditions, and ability to be more attuned to the way that industry is changing. My observation is that in most cases, self-regulation is no more flexible than the black letter law and, in many cases, considerably less flexible.

Another area that is dealt with, frankly, in a fairly desultory way in the Productivity Commission report is the role of consumer organizations. The Productivity Commission gives this subject a rather odd little break out box, and after outlining the significance of consumer organizations countering industry arguments and policy debates, they weakly concluded that any case for supporting consumer organizations is a very questionable one. I would expect that any such review would take a far more rigorous and thoughtful approach to that issue.

In terms of risk-shifting, those corporations who enter the energy industry enter with full theoretical knowledge of the risks to be borne. Retailers in fact occupy the principle role of managing risks through appropriate hedging instruments. They have far less control over actual prices than do wholesalers.

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A study of the retail market in isolation without realizing the impacts that wholesale and distribution prices have on the market is to fail to undertake a robust study.

Peter Kell provokes debate in the following words:

“Conclusions

The debate we need to have on consumer protection regulation in Australia is yet to come. A proper evaluation of the aims and structure of consumer protection is needed, so that regulation better serves consumers today and into the future. But this won't occur if we start from positions that suggest that consumers are already over-protected, and that regulatory developments in recent years are unreasonable attempts to further reduce the risks they face.

We also won't see key consumer protection regulators given the right tools and objectives.

As part of my review of consumer protection there is certainly scope to have a debate about the appropriate level of risk that consumers should carry in different circumstances. Indeed this should be one of the key questions that anyone with an interest in consumer policy needs to address.

But this needs to be informed by a realistic assessment of the types of risks that consumers face today in an increasingly globalized financial system, as well as an assessment of the impacts of these risks – both positive and negative.

It also needs to be informed by a more sober assessment of the way in which a range of major regulator developments in recent times actually shift risks to consumers away from government and firms. We've yet to see this work take place in the current round of regulatory review.

“From ACA's perspective reducing regulatory burdens whilst still ensuring good market outcomes is an important objective. Consumers don't benefit from poorly directed regulation or complicated rules that aren't enforced. Reducing regulation that unnecessarily restricts market competition will also generate better outcomes for consumers.”

I have previously discussed in other arenas in the context of Peter Kell's speech at the 2006 National Consumer Congress the implications of his proposal to question the rationale for heavier reliance on *“half-baked self-regulation.”*

I support the views of Peter Kell discussing the importance of effective regulators – properly resourced and independent regulators without political pressure essential.

As to adding complicated layers of cost and administration such as contained in existing and proposed Meter Data Services and Metrology Procedures (see JGN 2010-2015 Gas Access Dispute and AEMC's Rule Change Proposal:

ERC0092 Proposed Rule Change Provision of MDS and Metrology Requirements
Section 107 Notice.

The bulk hot water arrangements operating discrepantly in several states add cost and complication but have been supported for decades with or without specific ancillary provisions and guidelines; and certainly without robust monitoring of consumer impacts if any.

These scientifically and legally unsustainable provisions need to be reassessed in the light of changes to the laws current and proposed, consumer rights and community expectations.

If flawed regulations such as these are retained perhaps the whole question of consumer protection should be abandoned on the basis that no matter what representations are made; what community expectations there may be; what changes are made to individual laws; there is likely always to be unacceptable conflict and confusion arising seemingly because of lack of adequate levels of governance, leadership and accountability or proper understanding of the implications of failing to consider comparative law and consumer protection issues.

See also

Kell, P (2007) Consumers International Conference *Holding Corporations to Account*
Luna Park, Sydney Australia 29-31 October

I reiterate from pp79-80- of my submission to the PC's Consumer Policy Review by quoting Kildonian's submission to the Issues Paper in May 2007

“Consumer protections are needed to reduce consumer detriment. Consumer Affairs Victoria (CAV) Consumer Detriment in Victoria: a survey of its nature, costs and implications estimates that in 2005- 2006 consumer detriment cost Victoria \$3.15 billion and is slightly higher in impact than figures from the United Kingdom. CAV includes physical harm, monetary loss, time loss and loss of satisfaction in describing consumer detriment. Consumer detriment is a loss suffered by consumers as a result of an adverse market transaction and includes the consumers loss in seeking redress. Consumer detriment does not only affect consumers the industry's reputation may also suffer through adverse word of mouth.

In a competitive market both consumers and business depend on each other through the exchange of supply and demand. Market failure occurs both through business practices and through consumers difficulties in exercising choice. In order to achieve a balance government needs to intervene to level the playing field to avoid market failure. Market failure results in higher prices and reduced choice. Stronger consumer protections are required to address market failure and provide redress to consumers.

Recommendations:

Review existing consumer and small business protections and strengthen the current system by addressing the gaps as proposed in Appendix B.

APPENDIX B

Gaps in Existing Consumer Protection addressed

Current Consumer protections at commonwealth and state level work well^{116/108}. A report by the OECD³⁴ found that Australia compared favourably to European countries. There are some gaps in the current system may be addressed by the following:

¹¹⁶ ¹⁰⁸ There is divided opinion of this perception and [perhaps it does depend heavily of client groups with financial hardship cases receiving possibly a slightly better outcome where the issues relate to such hardship and effective hardship policies. Complex systemic cases are poorly resources and addressed in my opinion and outcomes far from even barely satisfactory. No policy tools can work without effective enforcement commitment and political will, which in my view is the largest stumbling block

SELECTED CONTRACTUAL ISSUES

In my original submission to the AER in this JGN Determination (Gas Access 2010-2015), and in other open submissions, including the NECF2 Package (March 2010) I raised selected contractual issues and the proper interpretation of where the contract lies for provision of gas and electricity to a single gas or (electricity) meter supplying a central boiler tank.

These matters are directly related to certain aspects of the JGN proposal and others similar and would be pertinent to gas as well as electricity – notably with reference to non-energy distribution infrastructure, maintenance, upgrade, replacement, servicing and licencing; metering data provision and all associated costs, metering reading costs supply charges, administrative costs, transportation, and other bundled or unbundled costs.

These considerations impact not only on who the correct contractual party should be and how unnecessary costs for non-energy costs may be minimized and appropriately apportioned (Owners' Corporation or Body Corporate customer vs end-user as consumer (or heated water not energy, without flow of energy effected as required under all provisions barring the implicit or explicit flawed Codes and Guidelines representing the "bulk hot water policy arrangements.

See for example the Victorian *Energy Retail Code v7* (February 2010); apparently similar provisions using water meters effectively as substitute gas or electricity meters for the purposes of calculation of deemed gas or electricity consumption and associated costs, where no energy of any description is directly supplied to the abodes of the end-users unjustly imposed with contractual status for alleged sale and supply of energy

The provisions in Queensland operating as an exclusive monopoly "niche" market in which the sole incumbent host retailer Origin Energy operates under local sanction to charges end-users for "provision of hot water services" in the absence of any provision of energy, whilst including alleged gas consumption supply and FRC costs. Elsewhere I discuss competition issues, the implications of arrangements and warranties made at the time of sale and disaggregation of energy assets and how this has impacted on end-users supplied with utilities in captured monopoly or monopoly-like markets.

As for suggesting that NSW is set apart simply because there is a requirement within the *Gas Supply Act 1996* (last updated 23 March 2010) for choice to be provided to all consumers, that such choice in practical terms exists for those in multi-tenanted dwellings receiving centrally heated water reticulated in water service pipes (non-system distribution apparatus; absence of flow of energy as required within the NECF provisions and under generic national sale of goods provisions and trade measurement provisions.

In this section discuss in detail some of the tenancy provisions that are pertinent especially in relation to restrictions on residential tenants to make structural changes such as replacement or fitment of utility infrastructure; which in any case are the responsibility of Lessors.

This leaves aside the question of affordability and the often iterant and short term nature o residential tenancy. Even if these two major obstacles did not exist the fact of the matter is that no energy in any form is sold supplied or consumed by those held contractually responsible residing in multi-tenanted dwellings such as flats and apartments where the heated water is centrally heated and reticulated in water pipes.

Therefore, as discussed under the section Capital and Operating Costs (OPEX and CAPEX) I deal with the unnecessary costs requested by JGN (and possibly others) to maintain, upgrade and/or replacement water meters or any description (cold water or hot water flow meters); metering data services associated with the reading of water infrastructure that most certainly does not form part of the gas distribution network, despite the statement made in JGN's proposal; transport and administrative costs associated also with water infrastructure. These costs are intended to represent expenditure incurred for gas provision (not water) under energy laws (which do not mention or extend to water).

Other stakeholders have also raised the issue of non-system costs and this is discussed elsewhere.

The apparent failure of existing and proposed laws to adequately address the issues of substantive unfair contract terms that are inherent in existing *“bulk hot water arrangements and policies”* which are not restricted merely to billing procedures, but cut across a wide range of consumer-related issues and infringement of rights.

JGN claims that my concerns regarding *“bulk hot water arrangements”* (which they perceive as being merely about billing matters) are irrelevant to the current JGN (NSW) Gas Access Arrangement Proposal on the basis that:

“The NSW market works in a different manner to Victoria and Queensland. In NSW, each individual consumer in an apartment block has the opportunity to choose its gas retailer.”

It is unclear whether this statement refers to choice of gas retailer for domestic supply of gas or for what is loosely known as *“delivery of bulk gas or electric hot water.”* This is a nonsensical phrase. Water is reticulated in water services pipes, in these cases from a communal water tank on common property the direct responsibility of the Lessor public or private.

Gas is delivered in gas pipes and measured in cu metres (volume), whilst expressed in joules or megajoules.

Electricity is delivered in electrical conduits and measured in KwH. The supply connection or energization point is not a geographical term, or one referring to the space enclosed or unenclosed by walls, but rather is a technical term referring to the point at which gas leaves the distribution system and (normally) enters the outlet of the meter, as in this case (though sometimes the inlet of the gas meter or the mains).

In Queensland pretenses are dropped with the term “hot water services” being used and charges quoted in cents per litre, whilst gas charges and unwarranted free retail competition(FRC) charges are included for alleged gas use, necessitating two gas bills and two lots of gas charges if freedom to at least choose the provider for domestic supply of gas (by direct flow) for the purposes of cooking lighting (or heating where applicable).

As mentioned on page 4, within the bulk hot water (BHW) arrangements discrepantly applied in various states no energy of any description ever enters the abode of individual tenants where water is centrally and reticulated in water pipes.

Therefore there is no necessity at all for them to “*choose*” an energy retailer or other third party provider, who has no entitlement to sell water, and is not delivering energy at all through legally traceable means.

Either separate gas or electricity meters exist associated with individual residential abodes, at the expense of Landlords and/or OCs – or they do not.

If individual water meters exist it is difficult to see why energy providers become involved at all. In any case ownership of water infrastructure does not create a contractual relationship with renting or other occupants of multi-tenanted dwellings. In the absence of direct flow of energy into those residential abodes, no sale or supply of energy occurs.

One would not expect to pay a metal manufacturer for individual parts of a car; or a leather upholster for the seats. The car is purchased as a composite product and a price agreed.

Common property infrastructure, including hot water services, public lighting, grounds, car parks, boiler rooms and the like, are similar part of a total renting package and the collective responsibility of an OC.

In the case of centrally heated water it is necessary only to read a single gas or electricity meter, provide a bill to the OC and permit Landlords and tenants to resolve their differences in the event that a either OC or Landlord tries to escape responsibility for those utility charges, in particular in the case of multi-tenanted dwellings where water supplied to individual abodes is centrally heated by a single gas or electricity meter.

There is no necessity to have a water meter reading agent, a billing agent or anyone else – one meter read of the energy meter suffices; reduces costs all round and provides a fairer calculation of legally traceable costs.

Mere instruction from energy providers does not mean that all laws are being embraced. Energy providers are required to embrace them all – including the unwritten laws and the rules of natural justice and to ensure also that unconscionable conduct does not occur.

Water meters posing effectively as gas or electricity meters are being used as tools of coercive threat of unwarranted disconnection of heated water supplies – entirely disallowed by any energy provisions, and in many cases unconscionable, as illustrated in my extensive case study submitted to the NECF2, to the Senate and other arenas and government departments.

This goes to the fundamentals of contract law; protections under the common law; and new provisions under the revised generic laws known as the Consumer and Competition Law, for which the Senate has just completed an enquiry.¹¹⁷

See my comments above on how the concept of “*choice*” appears to have become distorted in referring to the alleged option of renting tenants in particular to choose, at enormous expense, and subject only to Landlord consent (rarely if every provided) to install in their individual residential abodes infrastructure in order that a valid contact may be deemed to exist for direct supply of gas to heat water.

No mention of course has been made of separate boiler tanks and how the existence of such a meter would operate in heating directly heated water consumption.

Even if it is the case that each individual tenant or occupant in an apartment block in NSW (or elsewhere for that matter) may theoretically “*choose*” a retailer, and even if the central dispute over where the contractual responsibility lies, especially for the “*metering and data arrangements*” associated with bulk hot water provision, were for the sake of argument be momentarily set aside; it is my understanding that such a theoretical choice is normally pointless, since only one distributor is involved where one gas meter is supplied for the purpose of supplying a single boiler tank with heat.

Whichever retailer may be chosen, the application of the arrangements remains the same. Retailers do not set prices, but pass on the costs and prices imposed by distributors, plus whichever margin is determined by them for costs associated with middlemen responsibilities. In cases where data and metering provision is farmed out to third parties, either via distributor or retailer arrangements – the outcomes are exactly the same – regardless of retailer choice.

¹¹⁷ Senate Economics Committee Inquiry into the Trade Practices (Australian Consumer Law) Bill(2)
See my submission to that arena. Found at:
http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm
Sub 25 Ms Madeleine Kingston (PDF 1533KB) Attachment 1 (PDF 1146KB) Attachment 2 (PDF 135KB) Attachment 3 (PDF 74KB) Attachment 4 (PDF 81KB) Attachment 5 (PDF 78KB) Attachment 6 (PDF 40KB) Attachment 7 (PDF 28KB) Attachment 8 (PDF 128KB) Attachment 9 (PDF 104KB)
See also within that submission reference to the submission by Kevin McMahon as a Queensland victim of the bulk hot water practices – now published on the Senate website as submission 47, and also directly submitted to the NECF2 Package – MCE SCO National Energy Consumer Framework2 in March 2010
See Mr Kevin McMahon’s submission to the NECF also included in the Senate’s TPA-ACL Bill2 enquiry as sub 46
See all 47 submissions at
http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm

It is my understanding that arguments relating to choice of energy retailer become complicated since distributors have settled arrangements, normally with a single energy retailer; are reluctant to make alternative arrangements and are not obliged to do so; and the cost of installing a separate meter in order that such a choice may be exercised is prohibitive, making the value of such a choice questionable.

In the case of the bulk hot water arrangements in all states, including NSW, the wrong parties are held contractually responsible for a commodity that they do not receive – i.e. gas; and for which no contract exists or ought to exist, since consumption cannot be calculated by legally traceable means; the wrong instruments are used for calculation; the wrong scale of measurements are applied; and flow of energy, which is central to the concept of sale and supply of energy is unachievable.

Neither the gas volume nor the amount of heat can be measured with hot water flow meters as discussed at great length within my original submission to the AER of April 2010.

I point out that isolating the issue of choice from the all the other arguments with which this issue is inextricably bound is to fail to understand or else to fail to acknowledge the trust of the arguments presented in my original submission.

Therefore, in referring to the perceived irrelevance of the matters I have raised to the JGN Gas Access Proposal, JGN appears to have missed the central issue that those residing in multi-tenanted receiving heated water that is centrally heated and reticulated in water pipes are not “*embedded customers of gas*” – they receive no gas of any description to their respective abodes and therefore cannot under contractual and common laws be deemed to be contractually obligated for the sale and supply of energy.

There is no such thing as an “*embedded gas network*” – either gas is supplied directly to the party deemed to be contractually obligated for energy or it is not.

These central contractual matters have impacts on all other aspects of the existing arrangements, and also for proposed capital expenditure and operating costs relying on maintenance and replacement of water meters under the misconception that they form part of the gas distribution network.

Such an apparent distortion of facts could readily lead to the wrong conclusions about access arrangements and regulatory cost determinations not only in this case, but across the board, for all states and for both gas and electricity in relation to the “*bulk hot water arrangements.*”

I refer to my conversation of 25 May 2010 with the Manager Supply and Networks Policy, NSW Dept of Industry and Investment (NSW DII), mainly about the contractual, trade measurement and billing practices known as the “*bulk hot water arrangements*” operating discrepantly in different states but in all States operating in such a way as to undermine the existing rights of consumers under multiple provisions.

The issue of apparent failure by States, Territories, and of inter-related Federal policy-makers to heed the implications of comparative law.

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.

Energy retailers their servants contractors/or agencies (which include any data metering provider including that which may be provided by a distributor or its associated or outsourced contracting entities, whether or not at arm's length).

Again, I am at a loss to reconcile the statements that made on behalf of the NSW Dept of Industry and Investment (NSW DII) with other material that I have sourced, including The Basix Cogeneration Report prepared for the NSW Dept of Planning with some input from DII NSW.

I quote below directly from that 2006 report known as the "*Basix cogeneration for residential apartment buildings in NSW – challenges and opportunities*". That report was prepared with the direct input of the following organizations:

NSW Department of Planning;

NSW Dept of Energy, Utilities and Sustainability;

Agility; (owned by the Singapore Power International Consortium

EnergyAustralia;

Integral Energy;

Country Energy;

Ecothermal Solutions;

Landcom;

Mirvac;

Packaged Environmental Solutions;

Strata Title Management Pty Ltd;

MPI Consultants Pty Ltd.

Before I go further, may I state my understanding that the Basix Model has many fundamental flaws in principle since it is based on an ideal theory for energy ratings that may not be implemented in practice or may alternatively be changed.

I note with some confusion the statement about alleged choice of energy provider that is mandated under s33 of the *Gas Supply Act 1996*.

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Jemena (JGN) Revised Gas Access Proposal 2010-2015

Further open s comment and supporting data with several appendices

re JGN's further submission(s) of 18 May 2010

and principles behind AEMC's Rule Change Proposal ERC 0092 under the NER

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(b) to regulate gas reticulation and gas supply, so as to facilitate open access to gas reticulation systems and promote customer choice in relation to gas supply,

JGN in their further comment of 18 May 2010 in endeavouring to dismiss as irrelevant my concerns about contractual, trade measurement and billing arrangements also referred to freedom of choice in the choice of gas retailer, claiming that arrangements in NSW are different to those in Victoria and Queensland.

Confusion arises here since there is no pre-existing contract for sale and supply of gas with individual residential tenants or for that matter individual members of a body corporate where only a single gas meter exists and a boiler tank centrally heats water that supplies multiple individual parties. Neither is there any requirement to form such a contract.

There is no “*flow of energy*” to the individual residential apartments of each end-consumer of heated water so centrally heat; and therefore no legal claim can be made that gas as a commodity is sold or supplied. Gas is a commodity as is electricity and therefore subject to the full suite of protections.

Since no pre-existing contract exists, and notwithstanding common misguided interpretations of deemed provisions in relation to either gas or electricity in such circumstances; the question of choice becomes not only redundant but unnecessary. Why should a person choose to “*change a gas retailer*” when none exists in the first place and no direct flow of gas to an individual apartment is demonstrable.

The concept of “*flow of energy*” is dealt with within the proposed National Energy Consumer Framework2 – expected to be rubber-stamped through the South Australian Parliament in Spring this year as the new Energy Retail Laws and Rules.

Most submitters to the NECF2 Package identified unaddressed flaws¹¹⁸. Meanwhile Rule Changes are being pushed through at the pace of naughts without the robust exposure that should have formed part of the NECF consultation process.

¹¹⁸ Madeleine Kingston (2010) Submission to National Energy Framework(2) Package (NEF2) 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/_documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/Madeleine%20Kingston.pdf
see also submission to NECF2 by Kevin McMahon, private citizen, as a victim of the "bulk hot water policy arrangements" in Queensland as also included as submission 46 to the Senate TPA-ACL Enquiry
and of Dr. Leonie Solomons Director of failed second-tier retailer Jackgreen International
Covered much of the relevant ground concerning the comparative law gaps and some issues seeking additional inclusion in the ACL.
See similar but dedicated submission to the Senate (2010))TPA-ACL)

In the absence of such “*flow of energy*” the claim about sale and supply of gas, regardless of changeover or management of infrastructure ownership, operations or contracted billing services provided, and therefore in the absence of any contractual obligation or necessity to “*choose a gas retailer.*”

Page 30 of my original submission I said:

“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.”

On page 30 and 31 I had said:

“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 posing 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.”

Please refer to p17 of Jemena’s Appendix 12.2

Please refer to p34 of my original submission

“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.

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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.”

This section is followed by discussion of definitions, discrepancies, misinterpretations.

Where billing and metering services are provided as apparently sanctioned by both state and federal provisions, these are provided to a Body Corporate entity as a business, not the end-consumer of a communally heated water product.

Ownership of water infrastructure does not create a contractual relationship with an end-user of a heated water product that is centrally heated in a communal water tank in multi-tenanted dwellings. A single gas or electricity meter exists on the common property of the Controller of Premises (see revised Trade Measurement provisions and within Schedule 1 of the operational ACL (Part 1) in such circumstances, which for billing purposes is a single settlement.

Under the ACL(1), Chapter 1, 2 Definitions, p23 Premises means:

- (a) an area of land or any other place (whether or not it is enclosed or built on); or
- (b) a building or other structure; or
- (c) A vehicle, vessel or aircraft; or
- (d) part of any such premises

A similar definition of Premises is included within the revised National Measurement Regulations which take full effect from 1 July 2010. Remaining exemptions for utilities is pending, but the lifting of these exemptions is intended and will apply to water gas and electricity as commodities.

Failure to distinguish between premises and residential premises, and the expectation that delivery points are geographically determined instead of on the basis of the flow of energy at the double custody changeover point, which is the point at which gas is withdrawn, normally at the outlet of the gas meter, not ever at the outlet of any water meter, hot or cold.

The failure of existing and proposed energy laws to properly clarify the distinction between common property and the residential premises of the end user of heated water has resulted in unsolicited and unwarranted services (metering and billing) being imposed on the wrong parties instead of the Body Corporate responsible.¹¹⁹

¹¹⁹ See detailed analysis of this matter in my several submissions to the ESC, MCE arenas and the Commonwealth Treasury including case study material

This has implications for interpretation of business-to-business; the proper contractual party, and all consumer protection considerations.

This matter is further discussed in the context of consumer transactions (referred to by proposed energy laws as “*customer*” with failure to distinguish between business customer and end-consumer of utilities in the circumstances described above, thus causing confusion and detriment as a systemic issue.

As to the issues of contractual and common law precepts, these are either not understood at all, or else ignored as policies and practices reflect what many may describe as regulatory capture (refer to my 2007 2-part submission to the AEMC’s Review of the effectiveness of retail competition in the electricity and gas markets in Victoria)

NSW has determined that competition electricity is too immature. Competition in the gas markets has been deemed adequate, yet there are unaddressed problems as identified in this and other submissions made by me and by others.

See comments above re disconnection of heated water supplies reticulated in water pipes.

See in particular

Kingston Madeleine (2009) Submission to Commonwealth Treasury Unconscionable Conduct Issues Paper: Can Statutory Unconscionable Conduct be better clarified?

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 and

Kingston, Madeleine (2010) Submission to Second Exposure Draft National Energy Consumer Framework (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/_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

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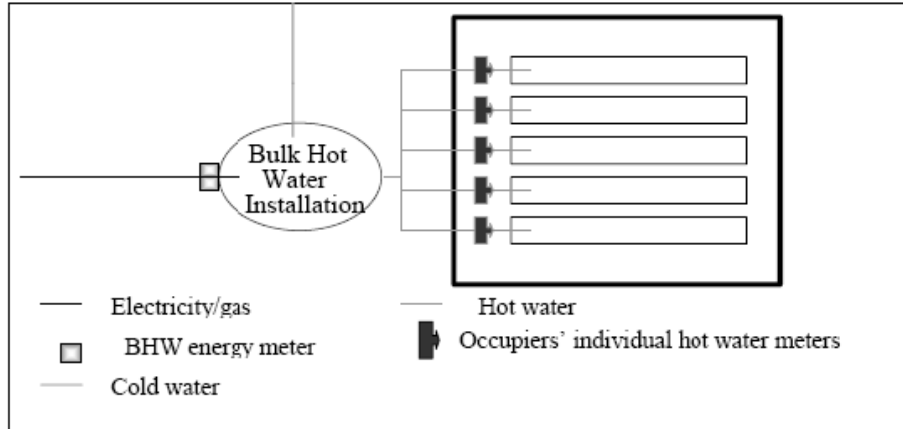
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Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

(taken from ESC Deliberative Document prior to adoption of the BHW pricing and charging provisions relying on readings of hot water flow meters, and converting volume of water used into a “deemed gas rate” as a fixed conversion factor requiring ho site readings at all)

The term hot water meter refers to a **hot water flow meter** not gas or electricity meters.

Only one gas meter exists with a Meter Identifying Number (MIRN_ shown. See diagram square marked BHW energy meter. This is either a single gas meter or a single electricity meter. It powers the boiler system marked as “bulk hot water installation” so that communally heated water can be transmitted in water service pipes to individual apartments. No separate boiler tanks exist in each residential premises, and no flow of energy to those premises is achieved.

These installations are normally made at the time building erection. Owners have little incentive to maintain the boiler system and associated equipment. In older buildings the water service pipes are rarely lagged.

In late 80’s and early 90’s public tenants on the corner units of 4 story used to have a 100 to 200 litre draw down before they actually got hot water and they paid for every drop that they ran through the tap. It is still the case that heating and service quality is usually sub-standard and consistency of temperature in the provision of heated water. If one is charging for the heated component of water at the very least some measure of quality needs to be in place.

There are grey areas around service quality for hot water meter maintenance, accuracy and safety issues associated with boiler tanks.

The term Bulk Hot Water Installation means boiler tank which is surrounded by hot water flow meters allocated to individuals.

Energy suppliers either lease or own these meters, but not the water supplied by the water authority. A supplier who does not own a product cannot sell it under generic laws current and proposed.

In **Queensland** apparently the relevant host energy supplier apparently leases these hot water flow meters from the distributor who arranges for a water meter reading. Massive water meter reading fees are charged to each resident. Only one gas meter exists, providing heat to the boiler tank. The existence of the water meters aids in justifying under “*cost-recovery*” pretexts but the meters if read at all simply exist to theoretically allow for a conversion factor formula to be applied so that deemed gas usage can be determined. See overleaf for formulae adopted by the Victorian ESC.

In **South Australia** it is more common for meter readings to occur – also using the Victorian model for conversion factors relying on water volume usage to calculate deemed gas usage.

Whilst intending the package to apply to all Australians the split of regulatory responsibility has created significant anomalies that result in application of the Package some but not all Australians, since the MCE has made a conscious decision not to deal with who are regarded as contractually obligated to both distributors and retailers, though they receive not an iota of energy in the form of gas or electricity demonstrated through flow of energy.

I note that there are already certain matters on foot before the open courts challenging the bulk hot water arrangements; perceptions of the existence of contract for sale and supply of energy based on arrangements originally entered into either with developers or Managers of s (OC), wherein each member of the OC was neither consulted nor was party to the alleged arrangements for delivery of or provision of either the heated water that is centrally heated; or the energy that is supplied for the purposes of the heating of that water.

One particular legal matter on foot relates to historical presumptions of the existence of energy contracts allegedly applying to members of an OC.

I remind all policy-makers and Ministers that energy providers are required to abide by all laws, not just those that are energy specific.

Failure by responsible bodies to clarify matters could be construed as tacit endorsement of inappropriate provisions and even sanction of breach of such laws or at the minimum of practices that cannot possibly be deemed best practice.

Overt instruction within the proposed national laws and rules to adopt the BHW policy provisions adopted in three jurisdictions could be seen as direct instruction to retailers and distributors to breach other laws, or else the intent and spirit of such laws (for example generic laws trade measurement provisions, tenancy laws; sale of goods provisions, OC provisions and the like).

I cite one major matter before the open courts to illustrate my points. It is a retrospective class action claim worth millions and is likely to drag on since energy providers, either licenced or unlicenced have much to lose if this precedent test case involved members of an OC in relation to alleged supply of energy.

This matter before the open courts is associated with heated water provision - the bulk hot water provisions operating discrepantly in three jurisdictions because of distortion of the deemed provisions and of appropriate trade measurement practice, impacting on contractual matters. Whilst this matter unfortunately does not deal with the issues from a residential tenant's viewpoint, the issues raised collectively by the OC is challenging a number of matters.

The action has been taken against the Developer, who made arrangements with a "*supplier of hot water services and Internet Services,*" namely ServiceLink and involving the input of an energy supplier. Whilst individual owners of an OC do have shared liability for utilities provided the matter raises issues that are pertinent to the plight of residential tenants in multi-tenanted dwellings where metrology practices do not rely on methods that show legal traceability of goods.

For the purposes of Sale of Goods Acts and generic laws current and proposed, electricity and gas are goods. Please also refer to revised national generic laws, which include reference to gas and electricity as commodities, or goods.

By utilizing loopholes in energy regulation in the form of Codes, and misinterpretation of the deemed provisions of gas under the Gas Industry Act 2001, (and equivalents in other jurisdictions), Landlords are escaping their mandated responsibilities by engaging host retailers as billing and metering agents – with those services frequently contracted to other third parties.

No-one is clear about responsibilities for maintaining the meters or infrastructure, the quality of the water supplied is frequently sub-standard and inconsistently hot; the health risks of using non-instantaneous boiler tanks remain unaddressed; energy efficiency concerns (water pipe lagging etc) never attended to; and implied and statutory warranty provisions entirely ignored.

As to continuing to uphold provisions that are legally unsustainable; cannot demonstrate a legal contract with end-users deemed to be receiving energy; persisting with conflict and overlap with other schemes, defying best practice trade measurement; ignoring unfair contract provisions; and upholding disconnection processes and procedures that are inconsistent with every aspect of current and proposed energy laws; this is an intolerable situation that reflects the poorest possible example of flawed policy and regulatory practice.

I again refute any perception that the current consumer protection system is working reasonably well, or any suggestion that cursory tweaking may bring desirable outcomes.

Particularly in the arena of energy at any rate within Victoria, complaints handling, compliance enforcement commitment has been so diluted as to bring into question whether a public enquiry may be justified on several grounds. None of the responsible regulatory or complaints handling agencies have taken a responsible and accountable action in matters specifically brought to their attention.

Flawed policies that have occasioned unacceptable consumer detriments remain in place unaddressed.

One of these may be deferring final decisions about how specified consumer protections should operate, especially in the arena of essential services, with energy being one of these.

Though my focus as an example of policy gaps is often on energy, this does not mean that the same concerns cannot be extrapolated for other arenas.

Further contractual issues – selected reference to NECF2 provisions for the proposed National Energy Retail Law and Rules (NERLR) expected to be passed in the South Australian Parliament as lead jurisdiction in September 2010.

One can only hope that due care will be taken to scrutinize this Bill before it is passed with respect to the numerous flaws and perceived gaps. All respondents to the NECF2 package raised matters of concern, many remaining unaddressed as the package is prepared for parliamentary sanction

Note whilst purporting to cover energy, it appears to be restricted only to two forms of energy – electricity and gas, both commodities not services. The additional metering data services and IT backroom tasks undertaken normally by third parties or in-house specialists.

I deal with certain clauses within the tripartite governance model adopted by the NECF2 Package pertinent to contractual matters impacting on those who receive no direct flow of energy. I also discuss the exempt selling regime in a separate section, along similar to the lines already included in response the NECF2 Package (March 2010).

207 Adoption of form of standard retail contract

(1) Adoption and publication

A designated retailer must adopt a form of standard retail contract and publish it on the retailer's website.

Note—This subsection is a civil penalty provision.

(2) Rules

The Rules may make provision for or with respect to the adoption, form and contents of forms of standard retail contracts, and in particular may provide for the manner of adoption and publication of forms of standard retail contracts by designated retailers.

(3) Adoption without alteration except as permitted or required

A designated retailer's form of standard retail contract—

(a) must adopt the relevant model terms and conditions with no alterations, other than permitted alterations or required alterations; and

(b) if there are any required alterations—must include those required alterations.

(4) Permitted alterations

Permitted alterations are—

(a) alterations specifying details relating to identity and contact details of the designated retailer; and

(b) minor alterations that do not change the substantive effect of the model terms and conditions; and

(c) alterations of a kind specified or referred to in the Rules.

(5) Required alterations

Required alterations are—

(a) alterations that the Rules require to be made to the retailer's form of standard retail contract in relation to matters relating to specific jurisdictions; and

(b) alterations of a kind specified or referred to in the Rules.

(6) Definition

In this section—

alterations includes omissions and additions.

208 Formation of standard retail contract

(1) A designated retailer's form of standard retail contract takes effect as a contract between the retailer and a small customer when the customer—

(a) requests the provision of customer retail services at premises under the retailer's standing offer; and

(b) complies with the requirements specified in the Rules as pre-conditions to the formation of standard retail contracts.

(2) A designated retailer cannot decline to enter into a standard retail contract if the customer makes the request and complies with the requirements referred to in subsection (1).

Division 9 Deemed customer retail arrangements

235 Deemed customer retail arrangement for new or continuing customer without customer retail contract

(1) An arrangement (a deemed customer retail arrangement) is taken to apply between the financially responsible retailer for energized premises and—

(a) a move-in customer; or

(b) a carry-over customer.

(2) The deemed customer retail arrangement comes into operation when—

(a) in the case of a move-in customer—the customer starts consuming energy at the premises; or

(b) in the case of a carry-over customer—the customer's previously current retail contract terminates.

(3) The deemed customer retail arrangement ceases to be in operation if a customer retail contract is formed in relation to the premises, but this subsection does not affect any rights or obligations that have already accrued under the deemed customer retail arrangement.

(4) Subsection (1) does not apply where the customer consumes energy at the premises by fraudulent or illegal means.

(5) If the customer consumes energy at the premises by fraudulent or illegal means—

(a) the customer is nevertheless liable to pay the standing offer prices of the financially responsible retailer for the premises in respect of the energy so consumed; and

(b) the financially responsible retailer may recover the charges payable in accordance with those standing offer prices as a debt in a court of competent jurisdiction; and

(c) payment or recovery of any such charges is not a defence for an offence relating to obtaining energy by fraudulent or illegal means.

(6) A move-in customer or carry-over customer is required to contact a retailer and take appropriate steps to enter into a customer retail contract as soon as practicable.

236 Terms and conditions of deemed customer retail arrangements

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- (1) The terms and conditions of a deemed customer retail arrangement are the terms and conditions of the retailer's standard retail contract.
- (2) The prices applicable to a deemed customer retail arrangement are the retailer's standing offer prices.
- (3) The Rules may make provision for or with respect to deemed customer retail arrangements, and in particular may supplement or modify the terms and conditions of deemed customer retail arrangements.

See definitions NECF2

Same comments as for 116 above

513 Form of energy authorized to be sold

- (1) A retailer authorization may authorize the sale of electricity or gas or both.
- (2) A retailer authorization cannot be varied to change or add to the form of energy that the applicant is authorized to sell to customers, as specified in the notice under section 507.
- (3) This section does not prevent an application for or the grant of another retailer authorization.

Comment MK

Neither gas nor electricity as commodities or supplied as services where heated water is heated by a single gas master meter firing up a non-instantaneous boiler tank

The ESC has previously erroneously used the phrase "*energy is consumed when energy is supplied to produce another good or service heated water.*"

This is a misguided and technically and legally unsustainable perception and at risk of being taken up (by default) by the MCE refusing to act on energy provisions that are patently unjust; deem the wrong parties to be contractually obligated; and imposing a host of contractual obligations upon end-users of heated water – under energy laws and associated provisions under jurisdictional control

Part 2 Relationship between retailers and small customers

Division 1 Preliminary

201 Application of this Part

- (1) This Part applies to the relationship between retailers and small customers.
- (2) This Part does not apply to or affect the relationship between retailers and large customers.

Division 2 Customer retail contracts generally

202 Kinds of customer retail contracts

(1) There are 2 kinds of customer retail contracts, as follows:

- (a) standard retail contracts;
- (b) market retail contracts.

(2) A retailer cannot provide customer retail services to small customers under any other kind of contract or arrangement.

(3) This section does not affect deemed customer retail arrangements under Division 9.

(4) This section does not affect RoLR deemed small customer retail arrangements under Part 6.

Comment MK

See comments elsewhere regarding the legally and technically unsustainable claim that a contract exists for sale and supply of energy where heated water that is communally heated by a single energy meter firing a boiler tank in a multi-tenanted dwelling.

Division 3 Standing offers and standard retail contracts for small customers

203 Model terms and conditions

The Rules must set out model terms and conditions for standard retail contracts (referred to in this Division as the *model terms and conditions*).

Comment MK

The standard retail model terms and conditions and those reflected under distributor-customer terms appear to have many gaps, especially in relation to revised generic laws. In the event of conflict the generic provisions will prevail, but it is pity to start a new set of laws with such discrepancies and place on the end-user of utilities the burden of disputing matters over which there should be no room for such dispute.

These new energy laws have an obligation to uphold the spirit intent and letter of generic and all other applicable laws and the provisions of the common law.

I remind the MCE of new provisions to include substantive unfair contract provisions within generic laws, enhancement of statutory and implied warranty provisions; changes to trade measurement provisions and pending lifting of remaining utility exemptions, as a starting point.

204 Standing offer to small customers

(1) A designated retailer must make an offer (a *standing offer*) to provide customer retail services to small customers—

Part 5 Relationship between distributors and retailers—retail support obligations

Division 1 Preliminary

501 Application of this Part

(1) This Part applies to a distributor and a retailer where they have a shared customer.

Comment MK

It is crucial to distinguish between customers and end-consumers of any utility. A customer may be a business customer such as an OC. An end-user of centrally heated water (using a communal water tank supplying multiple occupants in individual residential tenants), normally a renting tenant, is not an energy end-consumer, but is supplied with heated water reticulated in water pipes for which heat from a master gas meter is used to heat the communal tank.

The shared customer of the distributor and retailer is in such cases the OC or Developer who entered into a contract for the supply of energy infrastructure.

Mere ownership by either Distributor or Retailer or other energy provider of water infrastructure does not create a contractual relationship between the end-user of heated water and the energy distributor or retailer.

Neither the distributor or retailer owns the water, and therefore under the proposed generic laws would be hard-pushed to claim a right to sell the water. The right to sell the energy in the form of heated water that is centrally heated in a single boiler tank served by a single energy meter is a questionable method of establishing any contractual relation for either sale of energy (as a good or commodity) or the supply of energy, since there is no “*flow of energy*” demonstrable. See the NECF definitions for energization

(2) Where a distributor and a retailer have a shared customer, they are respectively referred to in this Part as “*the distributor*” and “*the retailer*”. Any third party arrangements made for “*metering and data services*” or other backroom tasks are part of their internal business or outsourcing arrangements whether or not in-house. If these tasks include maintenance of water meters that are entirely unnecessary for the sale and supply of energy or calculation of their consumption as goods with the full suite of protections.

502 Definitions

In this Part—

distribution charges means charges of a distributor for—

- (a) use of the distributor’s distribution system; and
- (b) if applicable, any charges payable by the distributor for use of a transmission system to which the distribution system is connected;

Comment MK

In the circumstances described above under 501, any distributor charges for use of the “*distributor system*” may legitimately be applied to the OC in multi-tenanted dwellings, but hardly the end user of heated water supplies. No “use of distribution system by the end-consumer of heated water occurs. The contract is properly between distribute-retailer and OC or Developer.

Notwithstanding the interpretation placed by retailers and distributors, either tacitly or explicitly endorsed by policy-makers regulators and/or Rule-Makers of deemed provisions, ignoring the precepts of contractual law and other provisions is at the peril of energy providers and those who sanction such questionable practices

Please note that no part of a water infrastructure or boiler system forms part of an energy distribution system. Regardless of who owns water pipes, water metering infrastructure and the like, mere ownership of such equipment cannot legally or technically create a contract for alleged sale and supply of energy.

Supply charges for any such metering or billing duties undertaken, including inappropriate (and often theoretical) meter reading of hot water or cold water flow meters (see the bizarre BHW provisions) are not charges that should be imposed on end-users of heated water that is communally heated in multi-tenanted dwellings.

NEM Representative means a related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) of an electricity retailer that is registered with AEMO as a market customer under the NER and that, directly or indirectly, sells electricity to the retailer for on-sale to customers.

Comment MK

If this is an indirect way of endorsing questionable interpretation of contract law and endorsing the provisions of the “bulk hot water policy arrangements adopted in three jurisdictions and discrepantly applied, then it is an unacceptable distortion of existing and proposed provisions under multiple enactments current and proposed.

The on-selling of electricity must rely on the “*flow of energy*” concept that is embraced by the NECF definitions. No such “flow of energy can be demonstrated within the BHW policy arrangements. If intended to mean change of ownership of electricity transmission (embedded customers) this has a different application, but does raise questions about governance of service obligations, implied and statutory warranty under the generic provisions proposed; licencing and servicing obligations imposed by trade measurement authorities and the like, and has implications also for tenancy laws.

- (a) at the standing offer prices; and
- (b) under the retailer’s form of standard retail contract.

Note—This subsection is a civil penalty provision.

(2) The Rules may provide for the manner and form in which a standing offer is to be made.

(3) Without limiting the power to make Rules relating to the manner and form in which a standing offer is to be made, a designated retailer must publish the terms and conditions of the standing offer on the retailer's website.

Note—This subsection is a civil penalty provision.

(4) A designated retailer must comply with the terms and conditions of the retailer's standing offer.

Note—

Section 213 provides for the satisfaction of a designated retailer's obligation to make a standing offer by making an offer to certain small customers to sell energy under a market retail contract.

205 Standing offer prices

(1) Publication of standing offer prices

A designated retailer must publish its standing offer prices on the retailer's website, and the standing offer prices so published remain in force until varied in accordance with this section.

Note 1—

A standing offer price may be a regulated price under jurisdictional energy legislation.

Note 2—

This subsection is a civil penalty provision.

(2) Variation of standing offer prices

The designated retailer may vary the standing offer prices from time to time, but a variation has no effect unless—

(a) it is made in accordance with the requirements (if any) of jurisdictional energy legislation; and

(b) the variation (or the standing offer prices as varied) is published on the retailer's website.

(3) Publication and notification of variation

The designated retailer must:

(a) publish the variation (or the standing offer prices as varied) on the retailer's website; and

(b) publish a notice about the variation in a newspaper circulating in the participating jurisdictions in which the retailer has customers, notifying customers that—

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- (i) there has been a variation; and
- (ii) the variation (or the standing offer prices as varied) are published on the retailer's website; and

239 Use of prepayment meter systems to comply with energy laws

(1) A retailer who provides customer retail services to a small customer using a prepayment meter system must comply with the provisions of the energy laws relating to the use of prepayment meter systems.

(2) Without limiting subsection (1), a retailer who provides customer retail services to a small customer using a prepayment meter system must ensure that the prepayment meter market retail contract complies with the requirements for a prepayment meter market retail contract set out in the Rules

102 Interpretation –

Comment MK

Discussed also elsewhere, dissecting selected terminology giving rise to confusion, lack of clarity; conflict and overlap with other schemes viz failure to consider implications of comparative law.

Other sections impacted:

105 Meaning of customer and associated terms

107 Classification and reclassification of customers

Division 2 Matters relating to participating jurisdictions

109 Participating jurisdictions (cf NGL s21)

110 Ministers of participating jurisdictions (cf NGL s22)

111 Local area retailers (monopoly considerations)

112 Nominated distributors (monopoly considerations)

114 MCE statements of policy principles (cf NEL s8; NGL s25) 30

Division 4 Operation and effect of National Energy Retail Rules

115 Rules to have force of law (cf NEL s9; NGL s26) 31

Division 5 Application of this Law, the Rules and Procedures to forms of energy

116 Application of Law, Rules and Procedures to energy 31

Each of the above sections is impacted by failure of the MCE to properly clarify the bizarre arrangements that currently exist wherein contractual status for sale and supply of energy is unjustly imposed on end-users of heated water that is centrally heated in a boiler tank and reticulated in water pipes to individual end-user residential premises.

The sale and supply of energy and any other services such as metering and billing are provided to business customers as OCs not to end users of heated water.

Leaving this matter to jurisdictional control in the mistaken perception that this is simply an economic matter or that it is appropriate to ignore enshrined rights under the generic provisions proposed; common law; tenancy provisions; OCs provisions; trade measurement best practice (noting that utility exemptions are pending under revised regulations)

Part 2 Relationship between retailers and small customers

Comment MK

These and numerous other provisions are impacted by the arguments previously put forward

Especially in relation to impacts on certain classes of end-consumers of utilities (as opposed to customers of energy) all components of deemed customer retail arrangements under **Div 9, 202 (3) Deemed Customer retail arrangements** NERL and corresponding detail under NERR; and **Div 6 Deemed small customer retail arrangements**, especially:

Part 2 Division 9 Deemed customer retail arrangements

235 Deemed customer retail arrangement for new or continuing customer without customer retail contract

235 (1) (a) move-in customer; 1(b) carry-over customer) viz. distortion of interpretation in respect to certain classes of end-consumers of utilities;

235 2(a) distortion of interpretation of alleged “*commencement of consumption of energy*” (implying flow of energy to premises and end-consumer deemed to be receiving) the case of certain classes of end-consumers of utilities

– distorted through tacit acceptance within the Framework through failure to acknowledge or clarify conflict between Framework and with other regulatory schemes and the common law of jurisdictional arrangements known as “bulk hot water (policy) arrangements”)

Part 2 Div 9 235 2(b) distortion of interpretation of alleged status as “carry-over customer” – similar distortion for same reasons as above

Part 2 Div 9 235 (3) – deemed provisions – failure to distinguish between business premises and residential premises with implications for interpretation of flow of energy to premises; and failure to appropriately distinguish between “customer (of energy)” and “end-consumer – since flow of energy is central to determining sale and supply of energy as goods and ongoing supply respectively (refer to Sale of Goods Acts and revised generic laws proposed)

Part 2 Div 9 235 (4) and (5 (a) – (c) – distortion of the interpretation of fraudulent or illegal consumption of energy as evidenced by direct flow of energy to the residential premises of end-consumers of utilities for certain classes of consumers – notably those referred to under the tacitly endorsed “bulk hot water policy arrangements” adopted by three jurisdictions which the MCE has steadfastly ignored in its deliberations in the full knowledge of the detrimental implications of these provisions; their conflict and overlap within existing and proposed energy provisions and with other regulatory schemes in intent spirit and/or letter; including proposed and generic laws and the common law

Part 2 Div 9 236 Terms and conditions of deemed customer retail arrangements

(1) An arrangement (a deemed customer retail arrangement) is taken to apply between the financially responsible retailer for energized premises and—

- (a) a move-in customer; or
- (b) a carry-over customer.

(2) The deemed customer retail arrangement comes into operation when—

- (a) in the case of a move-in customer—the customer starts consuming energy at the premises; or
- (b) in the case of a carry-over customer—the customer’s previously current retail contract terminates.

(3) The deemed customer retail arrangement ceases to be in operation if a customer retail contract is formed in relation to the premises, but this subsection does not affect any rights or obligations that have already accrued under the deemed customer retail arrangement.

(4) Subsection (1) does not apply where the customer consumes energy at the premises by fraudulent or illegal means.

(5) If the customer consumes energy at the premises by fraudulent or illegal means—

- (a) the customer is nevertheless liable to pay the standing offer prices of the financially responsible retailer for the premises in respect of the energy so consumed; and
- (b) the financially responsible retailer may recover the charges payable in accordance with those standing offer prices as a debt in a court of competent jurisdiction; and
- (c) payment or recovery of any such charges is not a defence for an offence relating to obtaining energy by fraudulent or illegal means.

(6) A move-in customer or carry-over customer is required to contact a retailer and take appropriate steps to enter into a customer retail contract as soon as practicable.

The above conditions should only be applicable if flow of energy is demonstrable. It is preposterous to suggest that energy is being consumed, alternatively illegally consumed; or that conditions precedent and subsequent apply in the context of energy laws – which is what the MCE is tacitly saying by supporting the on-going application of certain jurisdictional policies permitting end-consumers of heated water to be penalized, wrongly imposed with contractual status, and disconnected from heated water supplies that in Victoria represent an integral part of their mandated tenancy leases.

See Deidentified case study previously presented to the Gas Connections Framework Draft Policy Paper

236 (1) – (3) Terms and conditions of deemed customer retail arrangements

(1) The terms and conditions of a deemed customer retail arrangement are the terms and conditions of the retailer’s standard retail contract.

(2) The prices applicable to a deemed customer retail arrangement are the retailer’s standing offer prices.

(3) The Rules may make provision for or with respect to deemed customer retail arrangements, and in particular may supplement or modify the terms and conditions of deemed customer retail arrangements.

See definitions NECF2

Comment MK

See all arguments presented elsewhere regarding inappropriate imposition of deemed contractual obligation for alleged sale and supply of energy where end-users are only receiving water products – regardless of temperature.

The application and use of terms such as "delivery of gas bulk hot water" and "electric bulk hot water" is nonsensical, meaningless and exploitive.

The MCE has chosen to taken no action on these issues, knowing that certain jurisdictional arrangements are unjust, unfair, legally and technically unsustainable, inconsistent with its own definitions and provisions and with multiple other regulatory and common law provisions existing and proposed.

Part 2 Div 3 Relationship between retailers and small customers

235 Deemed customer retail arrangement for new or continuing customer without customer retail contract p46

236 Terms and conditions of deemed customer retail arrangements 47

(see 229 Customer Hardship; (p44) – focus only on de-energization or disconnection associated with hardship rather than disputes over the legitimacy of the existence of any contract under generic and common law provisions for deemed sale and supply of energy – for example under the inappropriate “bulk hot water policy arrangements” (as espoused under Victoria’s Energy Retail Code v6, and echoed but discrepantly applied in SA and Qld.)

238 Obligations of retailers

Part 2 Relationship between retailers and small customers

Division 1 Preliminary

201 Application of this Part

- (1) This Part applies to the relationship between retailers and small customers.
- (2) This Part does not apply to or affect the relationship between retailers and large customers.

Division 2 Customer retail contracts generally

202 Kinds of customer retail contracts

- (1) There are 2 kinds of customer retail contracts, as follows:
 - (a) standard retail contracts;
 - (b) market retail contracts.
- (2) A retailer cannot provide customer retail services to small customers under any other kind of contract or arrangement.
- (3) This section does not affect deemed customer retail arrangements under Division 9.
- (4) This section does not affect RoLR deemed small customer retail arrangements under Part 6.

Comment MK

The same considerations as above relate to those receiving heated water where no sale of energy can be shown to occur. Consumption and sale and supply of energy are contingent on flow of energy to the premises or party deemed to be receiving energy. This does not occur when heated water is reticulated in water pipes to individual abodes from a communal water tank in multi-tenanted dwellings.

(5) Restrictions on de-energization not affected

Nothing in this rule affects the operation of rule 610.

612 Request for de-energization

(1) If a customer requests the retailer to arrange for de-energization of the customer's premises (whether or not the customer requests a final bill), the retailer must use its best endeavours to arrange for—

- (a) de-energization in accordance with the customer's request; and
- (b) a meter reading; and
- (c) the preparation and issue of a final bill for the premises.

Division 5 Application of this Law, the Rules and Procedures to forms of energy

116 Application of Law, Rules and Procedures to energy

(1) This Law, the Rules and the National Energy Retail Market Procedures apply to—

- (a) the sale and supply of electricity or gas or both to customers; and
- (b) a retailer to the extent the retailer sells electricity or gas or both; and (c) a distributor to the extent the distributor supplies electricity or gas or both.

(2) References in this Law, the Rules and the National Energy Retail Market Procedures to energy are to be construed accordingly.

(3) Nothing in this section affects the application of provisions of this Law, the Rules or the *National Energy Retail Market Procedures* to persons who are neither retailers nor distributors.

The law refers to sale and supply of energy.

No sale and supply of energy occurs in relation to those receiving heated water supplies where a single master gas or electricity meter is used to communally heat a non-instantaneous boiler tank supplying heated water to multiple parties in their individual residential premises.

Yet the MCE is aware of inconsistent and bizarre arrangements whereby a contractual relationship is being imposed for alleged sale and supply of energy where no flow of energy occurs and no energy can possibly be said to be sold and supplied. The contractual relationship is being deemed to exist between end-consumers of heated water so supplied inappropriately and on account of distortion of the meaning of sale and supply of energy, consumption and illegal consumption

The neglect of the MCE to take this matter appropriately on board and re-direct current jurisdiction provisions to hold the proper parties contractually obligated for the sale and supply of energy used to heat communal boiler tanks, as supplied to Developers and OC can be interpreted not only as misguided but irresponsible.

Ignoring the fact that innocent end-users of heated water being held contractually obligated; potentially in arrears of alleged energy bills when none is supplied or consumed; potentially incurring debt records; being improperly accused of illegal consumption of energy' and being obligated for a host of conditions precedent and subsequent can hardly be considered responsible action by the MCE .

309 Deemed standard connection contract to be consistent with model terms and conditions

(1) The terms and conditions (whether original or varied) of a deemed standard connection contract have no effect to the extent of any inconsistency with the model terms and conditions as currently in force or any required alterations.

(2) If there is such an inconsistency, the model terms and conditions or required alterations (as the case requires) apply instead to the extent of the inconsistency.

310 Duration of deemed standard connection contract

A deemed standard connection contract between a distributor and a customer remains in force until—

(a) an AER approved standard connection contract or a negotiated connection contract in respect of the premises comes into force; or

(b) the deemed standard connection contract is terminated in accordance with the terms and conditions of the contract.

Comment MK

I strenuously object to the unilaterally imposition of contractual status by energy providers for contractual obligation for sale and supply of energy when it is water products that are supplied in water pipes, wherein the heat supplied to a communal water tank is supplied by a single gas or electricity meter, which for settlement purposes is a single supply distribution point or energization point.

On the basis of implying a deemed contractual relationship that would be unsustainable in law for alleged sale and supply of energy, end-users of heated water products are being held contractually obligated to retailers and distributors, with ripple effects for perceived over-dues of alleged bills; move-in and carry-over customer considerations; alleged denial of access to hot water flow meters that are irrelevant to the calculation of energy since they are technically had scientifically incapable of measuring anything more than water volume. Retailers do not own water volume, there it may be that philosophically bodies such as the ESC may believe that it is legitimate to endeavour to recover through either bundled or unbundled costs a proportion of water costs also.

It is preposterous to suggest that a move-in renting tenant may be illegally consuming energy when in good faith such a party relies implicitly on residential tenancy laws and inclusion within the rent and mandated terms of a lease that any utility that is not the subject of a separate meter and where no direct flow of energy can be demonstrated is solely the responsibility of the Landlord or OC.

If no flow of energy exists, no sale or supply of energy can be deemed to have occurred.

The failure of the MCE to acknowledge what is happening, and to go as far as saying that nothing will be done at all about these anomalies in the full knowledge of how certain jurisdictional instruments are operating can be taken to be an irresponsible and inappropriate act of omission impacting adversely on end-consumers of utilities.

Examination of the licence provisions for the three host retailers issued by the Essential Services Commission will confirm that the intent of the interpretation of customer was originally mean to be the OC with whom a direct contract is formed deemed or explicit for the sale and supply of energy, as well as a gas or electricity metering installation at the outset when connection is requested either by the original Developer, or implicitly by the subsequent OC.

Division 9 Deemed customer retail arrangements

238 Obligations of retailers

(1) As soon as practicable after becoming aware that a small customer is consuming energy under a deemed customer retail arrangement, the financially responsible retailer for the premises concerned must give the customer information about the following:

- (a) the retailer's contact information;
- (b) details of the prices, terms and conditions applicable to the sale of energy to the premises concerned under the deemed customer retail arrangement;
- (c) the customer's options for establishing a customer retail contract (including the availability of a standing offer);
- (d) the consequences for the customer if the customer does not enter into a customer retail contract (whether with that or another retailer), including the entitlement of the retailer to arrange for the de-energization of the premises and details of the process for de-energization.

(2) If the small customer is a carry-over customer of the retailer, the retailer does not have to give the customer the information required under subrule (1) if the retailer has already given the customer a notice under rule 237 relating to a market retail contract and containing that information.

Comment MK

See comments above and the consistent theme in this submission highlight the anomalies that the MCE has chosen deliberately to overlook in relation to the false claim by retailers and distributors, facilitated by jurisdictional sanctions to consider a move-in end-consumer of heated water supplies to be “consuming energy under a deemed customer retail arrangements.

This reflects failure to adequately interpret sale of goods provisions, implied and statutory warranty provisions; technical and scientific considerations; “flow of energy” concepts; unfair substantive clauses as contained in proposed generic laws and already included in Victorian unfair contract provisions; trade measurement best practice and the fundamentals of contractual law.

Energy that is supplied from a single master meter to fire a single communal boiler tank used to supply heated water is not consumed by end-users of that water and it is preposterous that energy retailers see fit to threaten disconnection of that heated water when becoming aware of a move-in tenant occupying a single dwelling in a multi-tenanted building. As illustrated in the Deidentified Case study already presented and reproduced with this submission, unjust and unwarranted disconnection of heated water supplies to a particularly disadvantaged and vulnerable tenant occurred as a consequence of practices sanctioned at jurisdictional level more explicitly; and tacitly endorsed by the MCE through failure to properly clarify the matter.

standard meter , in relation to a particular small customer, means a metering installation of the type that would ordinarily be installed at the premises of the customer.

Comment MK

This must surely need to be clarified as a gas or electricity meter – this is an energy law. Water meters are being relied upon to make guestimates of the heat used to heat a communal water tank. No flow of energy is effected to the premises of those deemed to be receiving as or electricity.

Problem: Denial of deemed contractual obligation for sale and supply of energy unless retailers can show the existence of contract through legal traceability of consumption of energy

It is these arrangements that are discussed in relation to the preposterous suggestion that an end-consumer of heated water in the absence of any flow of energy into the premises of the party deemed to be contractually obligated to both the retailer and distributor under the NECF2 Package tripartite governance model that has been extensively discussed in all previous submissions to MCE arenas, and in relation to this batch of proposed instruments mainly under Part 1 Division 1 – 3, to a large extent under Interpretation.

See also under objective.

An end-user of heated water in a multi-tenanted dwelling, notwithstanding policy arrangements and jurisdictional codes in place consumer heated water. In Victoria hot water services provided to renting tenants under residential tenancy laws are an integral part of mandated tenancy leases.

A renting tenant enters that agreement with a Landlord on the understanding that no utility bills will represent responsibility for the tenant unless a separate meter is supplied for each utility supplied. Further where water meters are available and have been sanctioned by the Water Authority and subject to suitable licencing and servicing arrangements, as well as complying with any applicable trade measurement provisions, heated water may only be charged to tenants at the cold water rate.

In the bizarre and inappropriate “*bulk hot water policy arrangements*” tacitly endorsed by the MCE through failure to address concerns about regulatory overlap within and outside energy provisions, retailers or their servants/contractors **or agents are issuing up** to several months after a legitimate tenancy is taken up under mandated lease provisions a “*vacant consumption letter*” that indicates “hot water consumption” is being monitored by or on behalf of the energy supplier, seeking now to charge for such consumption.

It is sometimes unclear from such correspondence whether it is water or energy that the energy supplier is endeavouring to allege contractual obligation.

The sale of goods acts and generic laws require ownership of any good (commodity) that Despite any ownership of satellite hot water meters associated with a communal boiler system, or access to cold water meters supplied water at the mains; and regardless of any deemed usage of gas to heat individual consumption of heated water that is communally heated, an energy retailer would in contract law and generic laws find it extremely difficult to prove that any contract exists at all.

It would be preposterous to suggest fraudulent or illegal supply of energy under circumstances where no energy of any description is received (associated with the “*bulk hot water arrangements*”), as facilitated by flow of energy into premises deemed to be receiving it.

A residential tenant enters into a direct contract with a Landlord or Owners/Corporation under mandated provisions, which in Victoria are unambiguous in relation to utilities.

It is the OC or Landlord who invites the supplier onto the property, requests a single gas master heater to be installed and makes arrangements for a communal water tank to be heated by that gas or electricity meter. That is where the contract lies for the connection installation, sale and supply of energy and any associated costs.

Host retailers are normally associated with specific distributors in certain geographical areas for the provision of energy in multi-tenanted dwellings where that energy is used to supply a communal water tank with heat reticulated in water pipes nor energy. Connection is described within the proposed NECF Package Second Exposure Draft as *“a physical link between a distribution system and a customer’s premises to allow the flow of energy”*

No such facilitation of the flow of energy occurs at all when water delivers heated water of varying quality to individual abodes (residential premises) of tenants or owner-occupiers. In the case of the latter they make their own arrangements to apportion share of bills issued to a Body Corporate.

The ESC’s BHW Guideline 20(1) was repealed by the ESC last year on the pretext that it no longer had policy control of the pricing and charging - which allegedly reverted to the DPI. Its contents were transferred to the Energy Retail Code under Clause 3.

Subsequently, the DPI handed back policy responsibility to the ESC. Under statutory and warranty provisions, gas and electricity are goods. The supply of gas and electricity constitute a service. No gas or electricity are provided within the BHW arrangements.

It is therefore difficult to know what recourses are available. What is being provided is a heated water product. The gas is simply used in its development as a composite product. This has been my consistent argument. Retailers are not licenced by Water Authorities to on-sell water. Landlords are not allowed on on-sell water without a licence.

In Victoria where separate hot water flow meters are used in the calculation of consumption of heated water only the cold water rate may be applied and no additional supplier other cost-recovery charges.

This is anomalous with the Qld provisions, which inadequately protect consumers - you should stress this discrepancy.

Note the analysis by the ESC in the Draft Report re recovery of costs by retailers for purchase of hot water flow meters and water meter reading costs over and above the reading of the single master gas meter.

In Victoria under the RTA Landlords are responsible for all costs including supply charges that are not related to actual utility consumption by end-users even when a separate meter exists for each residential tenant.

If cold water meters exist charges may only be made at the cold water rate - since the heating component cannot be measured.

Where no separate meters for each utility exists, no changes of any description have to be met by the residential tenant

This has been repeatedly upheld on a piecemeal basis by the Tenants Union - as I have pointed out on numerous occasions. The ESC knew this but persisted, believing that the RTA should be altered to reflect their philosophies not the other way round.

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The AER will inherit regulatory responsibility for energy retail shortly, and there is a risk that current anomalies will be perpetuated in the absence of explicit clarification and reconsideration of existing provisions.

It is not a good enough answer to regard these provisions and others as of economic import only and therefore irrelevant to non-economic consumer protection frameworks.

The arrangements directly impact on the tripartite governance model adopted by the NECF Package and on the consumer rights, especially those who are residential tenants in multi-tenanted dwellings.

The Tenants Union Victoria and other community organizations have been entirely unsuccessful in persuading policy makers, including the MCE of the issues that have also been repeatedly highlighted by me as an individual stakeholder in relation to the absence of protection for certain segments of the community, including tenants in multi-tenanted dwellings who can exercise no choice and who are entrapped in arrangements of either government or non-government monopolies wherein host retailers provide through a single gas or electricity meter energy used to heat a communal boiler tank, from which heated water is reticulated in water pipes to their respective abodes.

The lack of clarity with the proposed Energy Retail Law in terms of the differences between “*premises*” and “*infrastructure*” controlled and managed by Landlords and OCs and those occupied by end-users of heated water, coupled with terminology relating to “*move-in customers*” is likely to have the continuing effect of distortion of the intent and spirit of existing and proposed laws and will continue to represent conflict and overlap with other schemes, leaving energy providers at risk of breaching those provisions.

Yet the Essential Services Commission (Victoria) with the sanction of policy-maker Department of Primary Industries saw fit to incorporate into the revised Energy Retail Code provisions directly instructing retailers to adopt contractual models and billing practices that have had the effect of unjustly stripping end-users of utilities of their enshrined rights under multiple provisions.

Ignorance or unwillingness to consider the legalities and technicalities has resulted in inappropriate imposition of deemed contractual status on end users of heated water in multi-tenanted dwellings; with implications for perceptions of “*illegal taking of supply of gas or electricity*;” inappropriate disconnection of the wrong commodity (heated water by clamping of hot water flow meters), misinterpretation of the meaning of disconnection or decommissioning; harassment of end-users who should not be imposed at all with contractual responsibility, but rather the Landlord/OC.

Arguments to support the adoption of these provisions on the pretext of avoidance of price shock to end-users are invalid as the current arrangements have no impact on restricting rent hikes, and leave vulnerable end-consumers facing contractual responsibility through inappropriate risk shifting endorsed by Ministers, policy makers and regulators.

I update my comments on p 71 of my submission to the PC's Review of Australia's Consumer Policy Review (2008) subdr242part4, EWOV's publicly stated views about wrongful disconnection and ESC's role in determining when this should be undertaken by retailers¹⁰¹

Since that was written the Wrongful Disconnection Operating Procedures were repealed in the big sweep to reduce regulatory burden.

In any case the thrust of that document was related almost exclusively to hardship issues. No a single mention was made to wrongful disconnection in the context of suspending heated water supplies through clamping of hot water flow meters that measure not gas, electricity of heat, but water consumption. Such disconnection takes place at the instigation of host retailers responsible for supplying through a single master gas or electricity meter energy used to heat a communal water tank supplying in water pipes heated water that is centrally heated in multi-tenanted dwellings (e. g flats and apartments).

The threat of such inappropriate disconnection of heated water supplies is normally used in coercive attempts by energy retailers to forge a contractual relationship with tenants taking up occupancy in flats and apartments, where the proper contractual party is the Landlord or Owner.

For distributor-retailer settlement purposes a single supply point exists – a technical term that does not been the abode of an end-user of heated water, but rather the double custody changeover point where gas or electricity) leaves the infrastructure and enters the outlet of the meter, in such a case a single master gas or electricity meter that forms part of common property and therefore Landlord/Owner responsibility.

In Victoria tenancy laws are quite clear that where water meters of any description exist, only charges for water consumption can be made at the cold water rate, and that heat and that the Landlord/OC is responsible for all consumption charges of any utility that cannot be separately metered, including the heat used to centrally heat water supplies reticulated to apartments. VCAT has repeatedly ruled on this matter.

Yet current regulations in three jurisdictions permit improper imposition of contractual status on end-users of communally heated water, as well as massive apparently uncontrolled supply, commodity and/or unspecified bundled charges on individual tenants, thus recovering many times over what represents a single supply charge for the master gas or electricity meter – that should be apportioned to Landlords/owners.

In Queensland an additional FRC charge is applied also to end-users of centrally heated water.

The term applies to "*freedom of retail contestability*" which does not apply to those who are trapped in a non-contestable situation with heated water supplied by a Landlord who chooses a retailer for the supply of gas used in the central heating of water supplied to tenants in multi-tenanted dwellings.

The FRC charge is imposed on natural gas customer accounts at around \$25 a year for the first 5 years after the FRC date (in Qld 1 June 2007).

FRC is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place.

It accumulates over this first 5 years as a "*pass through cost*" of about \$20million and will be phased out in a couple of years.

VenCorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

There are no MIRNs for end-users of heated water in multi-tenanted dwellings and no means of calculated in a legally traceable manner the amount of gas used in the heating of individually consumed gas (or electricity) used to heat a communal boiler tank supplying water to multiple tenants.

The current system of apportioning deemed gas usage for individuals supplied with communally heated water will become invalid and illegal when utility restrictions are lifted.

The question of the proper contractual party has not been resolved, and neither the regulator or policy makers who imposed these unjust terms are willing to take any action even when the insistence of an energy retailer in seeking disconnection of heated water supplies can be regarded as unconscionable.

For further discussion see my published extensive Deidentified Case Study showing what can only be regarded as irresponsible and inappropriate on the part of policy-maker, regulator and industry-specific complaints scheme in condoning disconnection of heated water supplies to a particularly vulnerable end-consumer of heated water supplies who denied through his representatives that any contract for the supply of energy existed or ought to exist.

Ultimately after 21 months of abortive dialogue with the authorities and complaints scheme, that party had his heated water supplies indefinitely suspended through the clamping of a hot water flow meter that measures water consumption but not gas or heat. It was never reinstated. Despite medical evidence and reports that he would suffer detriment if he lost the continuity of his water supplies, such evidence had no impact on the discretion held by the energy regulator (Victoria) to forbid disconnection.

In this case the repeated coercive threats of disconnection of heated water were unconnected with overdue bills – none were ever issued.

The threats of disconnection were used as a strategy to force a contractual relationship between tenant and supplier as part of what can only be described as a collusive arrangement between Landlord, energy supplier, policy-maker and regulator.

Neither the complaints scheme nor the regulator publishes reports or details of complaints about disconnection that takes place under such circumstances – which is commonplace if contractual status is not accepted by the tenant for the reasons explained, or if bills issued by the energy supplier for the alleged consumption of gas are not paid.

The arrangements are inconsistent with all other provisions with existing and proposed energy laws, with best practice trade measurement, with existing rights under tenancy and generic laws and represent substantive unfair terms as well as breach of implied or statutory warranty on the basis that the commodity supplied – heated water – is not fit for the purpose in many cases since the quality of the heated water in terms of temperature is normally variable

In theory, the existing nonsensical algebraic conversion factors applied (See Victorian Energy Retail Code v6 Clause 3) previously incorporated under the now repealed Bulk Hot Water Charging Guideline 20(1) is theoretically based on the quality of gas supplied then averaged over the regulatory period involved in setting the conversion factor.

There is no such thing as an “*embedded*” *gas customer*” since only licenced gas providers may provide gas. If there is any move to alter this, technical and safety considerations at the very least must be considered in public safety – deviations at the may be at peril of policy-makers and regulators.

No gas is supplied to end-users of the composite product heated water. The OIC exemptions for small scale licencing apply exclusively to electricity where electricity is being directly supplied through flow of energy regardless of change of ownership or operation of the infrastructure. In the case of gas the distributor supplies a single gas master meter for which he is responsible.

Regardless of whether a distributor owns and operators or leases out hot water flow meters or other non-gas infrastructure; and regardless of whether host retailers purchase such hot water flow meters, such ownership cannot confer contractual rights to claim sale and supply of energy. To that extent the deemed provisions of the *GIA* have been grossly distorted.

The billing and metering services supplied are directly to the Landlord/OC, so that inappropriate and even unconscionable disconnection of heated water supplies cannot occur under the circumstances described..

In the case of bulk hot water (communally heated water in multi-tenanted dwellings, where only a single gas (or electricity) master meter exists) there is no measurement of the temperature of the hot water delivered to the consumer.

In the late 80's and early 90's public tenants on the corner units of four story used to have a 100 to 200 litre draw down before they actually got hot water and they paid for every drop that they ran through the tap. Given the numbers of consumers getting hot water it appears that the providers couldn't care less about the issues as long as they get paid.

In practice massive charges are applied that are not only unjust but are based on the entirely erroneous premise that any energy is being supplied at all – to the end user of the heated water. The gas that is supplied is to the Landlord/Owner, who is legally responsible for the payment of all charges for unmetered gas or electricity or water; and where water is metered can only charge at the cold water rate.

Monitoring Issues

At the very least I believe that the AER and the NSW DII should make further vigilant enquiries about what is actually occurring and its impacts.

I believe that each provider of gas or electricity should be required to explain exactly what their processes are when purporting to be supplying gas or electricity, but in fact merely involved in making arrangements for meter reading of water meters other as hot water flow meters or cold water meters' data management based on guesstimated gas usage; and providing billing services.

The question of unfair substantive terms arise in contracts that can be shown to be unfair and therefore voidable. The changes to generic laws forming part of the proposed Competition and Consumer Law (previously Trade Practices Act 1974) contains new provisions that do focus on unfair contract terms.

Though I have been assured that in NSW energy providers are not charging for either water hot or cold (which they do not own and may not sell); or for the energy used to heat that water. It is entirely unclear what practices are instead in place.

The *NSW Gas Supply Act 1996* defines consumer service as follows, and specifically relates to gas and a gas supply point, not to water reticulated in water services pipes, regardless of temperature.

“consumer service means any pipe or system of pipes used to convey or control gas, and any associated fittings and equipment, that are connected to a gas network upstream of the gas supply point, but does not include any part of a gas network.”

This is distinct from data management, meter reading (of water meters) and billing services provided through collusive arrangements between Developers and/or OC entities, and/or Landlords and energy suppliers, endeavouring to strip end users of enshrined rights.

What is clear is that Jemena (JGN), as part of its current Revised Gas Access Proposal in NSW is seeking to upgrade water meters at enormous expense, claiming that they are part of the gas distribution infrastructure – which is scientifically impossible. The basis for such a claim needs to be transparently explained.

Vigilance requires that the NSW Department of Industry and Investment directly checks with each supplier of energy and each distributor or data metering service exactly what practices are in place regarding imposition of contractual status for alleged sale and supply of energy (or heated water) and direct billing of end-user recipients of heated water reticulated in water pipes after being centrally heated.

In further material in preparation I analyze some of the definitions and provisions of the *NSW Gas Supply Act 1996* as they raise issues that are relevant to proper interpretation.

As to practices for energy suppliers under energy provisions discontinue heated water supplies that are integral part of tenancy agreements as mandated, these practices are unacceptable and outside the jurisdiction of energy policy makers endeavouring to apply energy laws.

There is nothing in any of the provisions that permits this form of disconnection where sale of gas and electricity are involved.

Please see my extensive case study and others submitted to the NECF2 Package and the Senate as previously referred to and the detriments caused.

TENANCY LAWS IN RELATION TO COST RECOVERY

On reviewing the website recently I stumbled on a number of regulatory cost allocation and other matters in several states that are also pertinent and would be affected by some of the considerations that I have raised.

These include impacts resulting from possible failure to consider comparative law and developments in multiple arenas, including the new national trade measurement provisions already in place, with full effect from 1 July 2010 (with some utility exemptions pending, and others being considered).

There are also impacts on several new provisions within the adopted Australian Consumer Law (1), with further additions expected after Senate consideration of the ACL Amendment Bill (2), which are expected to be incorporated into the ACL later this year, with the TPA being renamed Competition and Consumer Law (CC).

I discuss below on separate pages for each some of the considerations in States participating in the NECF

ACT

[ACT Tenancy Provisions under the ACT Residential Tenancies Act 1997¹²⁰](#)

Lessor's costs

42 The lessor is responsible for the cost of the following:

- (a) rates and taxes relating to the premises;*
- (b) services for which the lessor agrees to be responsible;*
- (c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;*
- (d) all services up to the time of measurement or reading at the beginning of the tenancy;*
- (e) all services after reading or measurement at the end of the tenancy providing the tenant has not made any use of the service after the reading.*

43 (1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

(2) The tenant is responsible for the connection of all services that will be supplied in the tenant's name.

44 The lessor must pay the annual supply charge associated with the supply of water or sewerage.

¹²⁰ *Residential Tenancies Act 1997 (ACT) A1997-84 Republication No. 324 effective 22 December 2009. Last amendment made by A2009-44*
<http://www.legislation.act.gov.au/a/1997-84/current/pdf/1997-84.pdf>

45 If the premises are a unit under the Unit Titles Act 2001, the lessor is responsible for all owners' corporation charges.

Comment MK

These provisions make it very plain that supply charges for water and sewage are Lessor responsibility, and also that the Lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

These issues are not clarified in other tenancy provisions, but it is a matter of common sense that no tenant should be liable for installation costs of this kind, or that competition for utilities be deemed to exist because a theoretical but inaccessible "choice" may exist to install such infrastructure in order to ensure direct consumption of energy used to heat water.

Hot water services are normally an integral part of the rental costs in multi-tenanted dwellings where a single gas meter and a single boiler tank exists for the supply of heated water.

Tenant's costs (ACT)

46 The tenant is responsible for all charges associated with the consumption of services supplied to the premises, including electricity, gas, water and telephone.

47 The tenant is not required by the lessor to connect or continue a telephone service.

Comment MK:

No direct flow of gas or electricity occurs within the bulk hot water arrangements in which a single meter for gas or electricity exists which fires up a single communal boiler tank from which heated water is reticulated in water service pipes.

These provisions appear to me to be clearest and fairest within jurisdictions and make matters patently clear in relation to liabilities, separate metering expectations and lessor liability

Reading of metered services (ACT)

48 (1) The lessor is responsible for undertaking or arranging all readings or measurement of services, other than those that are connected in the name of the tenant.

Comment MK

This clause makes it plain that the conditions precedent and subsequent in relation to meter readings is Lessor responsibility. This is contrary to the expectations placed in the proposed National Energy Retail Laws and Rules

(2) The lessor must provide the tenant with an opportunity to verify readings and measurements.

49 If the lessor does not arrange reading or measurement of a service connected in the name of the lessor by the day after the date of expiry of notice to vacate given in accordance with this tenancy agreement or the Residential Tenancies Act, the lessor is be responsible for payment of the unread or unmeasured service after the date of the last reading or measurement.

50 (1) If the tenant vacates the premises without giving notice before departure, the lessor must arrange a reading or measurement of services connected in the lessor's name within a reasonable time of the lessor becoming aware of the departure of the tenant.

(2) The tenant is responsible for payment of services to the date of that reading or measurement.

Repairs in unit title premises

58 If the premises are a unit under the Unit Titles Act 2001, and the tenant's use and enjoyment of the premises reasonably requires repairs to the common property, the lessor must take all steps necessary to require the owners corporation to make the repairs as quickly as possible.

Comment MK

These provisions make matters clear and are not as succinctly put within other tenancy provisions, though in Victoria the OC Act exists to cover common property infrastructure liability by the OC.

Hot water services where water is centrally heated and a single gas or electricity meter exists to provide the energy are under that category. The existence of hot water flow meters are irrelevant and unnecessary, and under new trade measurement provisions would not be appropriate instruments to use to make any form of calculation regarding alleged energy usage or consumption by an end-tenant receiving merely heated water in composite form reticulated in water pipes rather than at the outlet of a gas meter (or electricity meter) representing flow of energy.

The proposed National Energy Retail Rules and Laws also embrace the concept of direct flow of energy and disconnection under specified circumstances only of gas or electricity not water.

MK further comment:

The energy supplier distributor or third party data metering provider or meter reader does not own the water and may not on-sell it. Exceptions may apply to public authorities in the role of Landlord.

Energy suppliers or other parties may own the energy being used to heat a single boiler tank, but they do not transmit energy to end users of a composite water product – reticulated in water of varying temperature quality and consistency in water service pipes.

In some apartment blocks depending on location a 200 litre draw can be necessary before the water is even hot. Landlords have no incentive to lag pipes or maintain infrastructure. The debates about who is responsible for each part of the infrastructure are perennial.

Energy policy makers and energy providers should not be interfering in contractual relationships between Landlords and tenants or endeavour to strip residential tenants of their enshrined rights under tenancy, generic, contractual, common law or trade measurement instruments, current or proposed.

The Water Authority supplies the water to the Body Corporate who then apportions to each owner (not renting tenant) the cost of heating the water, unless a separate gas meter already exists (at the owners' expense) through which gas consumption can be directly measured.

In each of these circumstances the question of choice is but an artifact based on perpetuated misconceptions across the board by policy-makers and providers of energy alike.

It is absurd and unjust to expect a renting tenant to exercise any choice that involves the outlay of considerable funds for fixtures, fittings or meters that are essential for the proper measurement of utilities using the right instrument, for the right commodity, applying the right scale of measurement, and applying the generic contractual and common law rights in force.

I remind all policy-makers that the always are in the process of change. The existing arrangements if it implies choice that cannot in practice be exercise; or use of water meters to effectively pose as gas or electricity meters in attempts to guestimate the alleged sale and supply of gas where no flow of gas to each residential abode can be demonstrated.

A supply point does not mean a street address – it means the point at which gas leaves the gas infrastructure and enters the outlet of a gas meter.

Poor understanding of these technicalities has resulted in distortion of interpretations of existing and future provisions and progressive erosion of existing rights.

As to suggest that no matter may be appealed in the open courts – this again represents another illustration of poor understanding of the powers of higher courts.

NEW SOUTH WALES

In NSW Landlords can only reclaim the costs of actual consumption of **excess water**, or alternatively where water meters exist, and where by consent (but not obligatory under the law), additional standard term clauses are included in a tenancy lease, may reclaim additional **actual water consumption costs only** not supply charges and other costs. The same applies in Victoria.

Electricity and gas charges need to be metered to show consumption.

The NSW tenancy regulations appear to omit specific mention of heated water provisions where no direct supply occurs, as do the ACT provisions, but it is clear that in terms of water – only the excess cost of water (without specifying hot or cold) needs to be paid; or if by non-mandatory consent additional water costs are included in a lease.

VICTORIA

In **Victoria** even if water meters exist, Landlords can only charge for water costs if energy-saving devices are fitted (s69); the cost of consumption of water only may be charged not any supply or other charges bundled or unbundled); Landlords are responsible for all capital and infrastructure costs, including common property. The Landlord may not recovery other utility costs for gas or electricity for example in the absence of separate meters for each utility.

In some States, including Victoria, residential tenancy laws do not permit a Landlord to charge for the heating component of water unless a separate meter is fitted for each form of utility – and the cost such infrastructure is expected to be borne by the Landlord as an intrinsic part of the facilities provided. In addition, the Landlord may not charge for water even when accurately calibrated satellite hot water flow meters exist except at the cold water rate.

Specifically under s53 of the Victorian *Residential Tenancies Act 1997*¹²¹ the following provisions apply:

Residential Tenancies Act 1997 - SECT 52

Tenant's liability for various utility charges

52. Tenant's liability for various utility charges

A tenant is liable for-

(a) all charges in respect of the supply or use of electricity, gas or oil in respect of the tenant's occupation of rented premises that are separately metered except-

(i) the installation costs and charges in respect of the initial connection of the service to the rented premises; and

(ii) the supply or hire of gas bottles;

(b) the cost of all water supplied to the rented premises during the tenant's occupancy if the cost is based solely on the amount of water supplied and the premises are separately metered;

(c) that part of the charge that is based on the amount of water supplied to the premises during the tenant's occupation if the cost of water supplied is only partly based on the amount of water supplied to the premises and the premises are separately metered;

(d) all sewerage disposal charges in respect of separately metered rented premises imposed during the tenant's occupation of the rented premises by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(e) all charges in respect of the use of bottled gas at the rented premises in respect of the tenant's occupation of the rented premises.

¹²¹ *Residential Tenancies Act 1997* Victoria

Landlord's liability for various utility charges

53. Landlord's liability for various utility charges

(1) A Landlord is liable for-

(a) the installation costs and charges in respect of the initial connection to rented premises of any electricity, water, gas, bottled gas or oil supply service;

(b) all charges in respect of the supply or use of electricity, gas (except bottled gas) or oil by the tenant at rented premises that are not separately metered;

(c) all charges arising from a water supply service to separately metered rented premises that are not based on the amount of water supplied to the premises;

(d) all costs and charges related to a water supply service to and water supplied to rented premises that are not separately metered;

(e) all sewerage disposal charges in respect of rented premises that are not separately metered imposed by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(f) all charges related to the supply of sewerage services or the supply or use of drainage services to or at the rented premises;

(g) all charges related to the supply or hire of gas bottles to the rented premises.

(2) A Landlord may agree to take over liability for any cost or charge for which the tenant is liable under section 52.

(3) An agreement under subsection (2) must be in writing and be signed by the Landlord.

In addition

Residential Tenancies Act 1997 - SECT 54 (Vic)

Landlord's liability for charges for supply to non-complying appliances

54. Landlord's liability for charges for supply to non-complying appliances

(1) A Landlord is liable to pay for the cost of water supplied to or used at the rented premises for as long as the Landlord is in breach of section 69 or of any law requiring the use of water efficient appliances for the premises.

(2) Subsection (1) applies despite anything to the contrary in section 52 of this Act and Part 13 of the Water Act 1989.

I raised the following issues on page 26 of my original April 2010 submission:

“If any party should be contractually obligated for any metering and data services it should be the developer or Owners Corporation (Body Corporation) who originally requested the gas or electricity metering installation.

Any arrangements as to ownership of water assets, including metering and associated equipment is an arrangement between provider and the controller of premises, normally once developer stage is passed, the Body Corporate, not the end user of heated water.

I am concerned that the AER MCE AEMC and AEMO may by implication be sanctioning services that are unrelated to the sale and supply of energy. Changes to generic and trade measurement laws are very clear.

The National Measurement Institute is the sole authority on metrology matters and upholds the principles of legal traceability of commodities and services. For the purposes of current and proposed generic and other laws, electricity and gas are commodities and therefore are covered by the full suite of protections.

The Jemena Gas Networks (NSW) Ltd Revised Access revised proposal is pending the AER's final decision by 28 May is but the tip of the iceberg and my concerns extend much further to cost allocation principles generally both for electricity and gas in certain areas; to the ACCC's independent role in competition and consumer protection matters.

As to consideration those receiving heated water as a composite product under such conditions to be "embedded" this is absurd since no flow of energy ever enters the abodes of those deemed to be receiving gas.

Gas and electricity are commodities for the purposes of generic laws and the full suite of protections applies. There are implications also for statutory and implied warranty terms; unfair contract terms embedded in proposed energy rules and laws; and the pending Rule Change proposal by the AEMC, which was not made part of a transparent process at the time when the NECF2 Exposure Drafts were put forward for consideration by stakeholders.

EnergyAdvice has also raised the issue of meaningful stakeholder consultation, and queried why the Draft Decision of the AER was published without a further public forum?

Though this is not a requirement, in view of the degree to which stakeholder endorsement is compromised, and also given the massive regulatory changes on foot in generic, trade measurement, national energy laws and so on, a hasty decision without further direct consultation may be against public interest. This case is a test case and not about a particular provider. The principles will apply across the board to all energy providers and impact on all stakeholders.”

Residential Tenancies Act 1997 - SECT 69 (Victoria)

Landlord must ensure replacement water appliances have A rating

69. Landlord must ensure replacement water appliances have A rating

A Landlord must ensure that if an appliance, fitting or fixture provided by the Landlord that uses or supplies water at the rented premises needs to be replaced, the replacement has at least an A rating.

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55. Reimbursement

(1) If a Landlord pays for anything for which the tenant is liable under section 52, the tenant must reimburse the Landlord within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(2) If a tenant pays for anything for which the Landlord is liable under section 53 or 54, the Landlord must reimburse the tenant within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(3) Subsection (1) does not apply if there is an agreement to the contrary under section 53.

Comment MK

The problems with this cost-recovery arrangement are discussed more fully in the deidentified case study that I submitted to various arenas, including the MCE SCO NECF1 (2008) NECF2 Package (2010); the Gas Connections Framework Draft Policy Paper (2009); the Treasury's Unconscionable Conduct Issues Paper (2009) and the Senate's Economics Committee Consumer Inquiry (ACL-TPA Amendment Bill2) ((2010); and previously the Productivity Commission's Consumer Policy Inquiry (2007-2008) (subdr242 Parts 1-5 and 8).

These include:

1. Inaccessibility to fair and just complaints and non-litigious dispute resolution processes. For example most industry-specific complaints schemes are expressly limited under their charters to deal with complaints relating to BHW arrangements; embedded or exempt selling regimes. In the case of EWOV (Vic) they have openly expressed conflicts of interests
2. Difficulties under VCAT or other Fair Trading jurisdictions in other States in dealing with third parties not party to the Landlord-tenant agreement – which is why it is so attractive for Landlords to use those third parties in collusive arrangements with energy providers, with or without tacit or explicit sanction from energy authorities.
3. Cost of filing fees on a quarterly basis or at least as often as bills are issued, these costs often outweighing the value of reimbursement in monetary and stress terms
4. Waiting time for 28 days before VCAT reimbursement claim can be met
5. Dealing with recalcitrant Landlords who refuse to comply with Orders – repeatedly as documented for instance by the Tenants' Union Victoria

6. The imposition of conditions precedent and subsequent especially with regard to access to meters that are not in the care custody and control of end-users of utilities. Alleged denial of access to such meters results in unwarranted disconnection of heated water in the case of the BHW arrangements
7. Consequences of alleged “breach” of energy contracts that do not under contract and common law or tenancy provisions exist in the first place between energy providers and end-users of centrally heated water
8. Possible implications for credit rating
9. The inability of certain client groups to effectively participate and follow-through in litigious proceedings, especially because of the stresses and delays involved; language barriers; or generally compromised ability
10. Unjust imposition of unfair substantive terms under contracts that are not reflected in parity with generic provisions existing and proposed
11. Unjust use of inappropriate trade measurement practices that erode best practice stands and breach the spirit and soon the letter of trade measurement laws upholding the principles of legal traceability of measurement and measurement standards that include using instruments for the right purposes, in the manner intended, measuring the right commodity with the right instrument; using the prescribed units and scales of measurement.

As soon as remaining utility exemptions are lifted, many of the current practices may carry strict liability penalties under trade measurement provisions

12. The current arrangements for BHW contractual imposition trade measurement and charging will leave providers of energy vulnerable as well as potential those who tacitly or explicitly sanction practices that breach the spirit and letter of other provisions and violate best practice

SOUTH AUSTRALIA

In **South Australia** mandated tenancy terms require that the Landlord bears all statutory rates, taxes and charges imposed in respect of the premises (Div 11, s73 Rates taxes and charges)

In relation to the “*bulk hot water arrangements*” in **Queensland** tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Queensland Government at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

Please refer to the submission of Kevin McMahon to the NECF2 2nd Exposure Draft, now also included as submission 46 to the Senate’s TPA-ACL Bill2 enquiry, now completed and reported. Mr. McMahon was a direct victim of these policies albeit living in social housing, living in public housing in Queensland.

The SA provisions¹²² mention water within the Act itself as shown below

Division 11—Rates, taxes and charges

73—Rates, taxes and charges

(1) It is a term of a residential tenancy agreement that the Landlord must bear all statutory rates, taxes and charges imposed in respect of the premises.

(2) However, rates and charges for water supply are to be borne as agreed between the Landlord and the tenant.

(3) In the absence of an agreement—

(a) the Landlord will bear the rates and charges for water supply up to a limit fixed or determined under the regulations; and

(b) any amount in excess of the limit is to be borne by the tenant.

The SA tenancy regulations offer less clarification in relation to other utilities than do other provisions barring Qld, but it is more than reasonable to conclude that the provision of electricity nor gas must be by direct flow of energy and not on the basis of using a water meter to pose as a gas or electricity meter or where heated water reticulated in water pipes, having been heated in a communal water tank supplied by a single gas meter on common property represents electricity or gas provision.

¹²² *Residential Tenancies Act 1995 (SA) version 1 February 2010 Accessed 27 May 2010*
<http://www.legislation.sa.gov.au/LZ/C/A/RESIDENTIAL%20TENANCIES%20ACT%201995/CURRENT/1995.63.UN.PDF>

Extract **South Australian** tenancy regulations¹²³

8—Other amounts recoverable by the Landlord

Pursuant to section 53(2)(c) of the Act, a Landlord is also authorised to require or receive payments for the provision of electricity, gas or telephone services at the premises if the accounts for those items are in the name of the Landlord.

Note the SA tenancy provisions have not been updated for ten years since 2000

¹²³ *Residential Tenancies (General) Regulations 1995* (SA) last update 28 February 2000, Accessed 27 May 2010
[http://www.legislation.sa.gov.au/LZ/C/R/RESIDENTIAL%20TENANCIES%20\(GENERAL\)%20REGULATIONS%201995/CURRENT/1995.210.UN.RTF](http://www.legislation.sa.gov.au/LZ/C/R/RESIDENTIAL%20TENANCIES%20(GENERAL)%20REGULATIONS%201995/CURRENT/1995.210.UN.RTF)

QUEENSLAND

In **Queensland** compromised tenancy and fair trading provisions as discussed by Kevin. It is not the Body Corporate in public housing in Queensland to whom bills are issued, but rather to the residential tenants in public housing, most on very slim incomes.

The **Queensland** provisions have recently been consolidated as the *Residential Tenancies and Rooming Accommodation Act 2008* with regulations of a similar name but dated 2009

12 Services

12.1 Any services supplied to the premises, other than water, for which the tenant must pay.

Examples of services— electricity and gas

Mr. McMahon says in his submission to NEF2 also published on the Senate website¹²⁴

Since the FRC date in Queensland (1st July 2007) the price of natural gas has only increased by about 10%, but the price that Origin charge for BHW has increased to a level of 39% above the Victorian Conversion Factor, and the hot water meter reading fees have increased by 50%, over the last 3 financial years Origin has refused to converse with me, or give any reason why such price gouging is justified.

In Origin's case, even when the gas went down in price (the FRC date) - the price of BHW went up!

He has referred to 44% price gouge this by 44%. In relation to supply charges and hot water charges for BHW consumers in Queensland. (p4)

Mr. McMahon further states

LANDLORDS AND PROPERTY OWNERS

Bulk hot water meter reading fees on Origin invoices, show a fee to read and service that meter. On the 1st of July, prices increase and is applied to invoices as of that date. It is back-dated for 91 days (1 Qtr). It is not pro-rated for up to 91 days Other fees and charges on the bill (Gas, Hot Water, Supply Charges), are shown with both Pre and Post fees that center around the 1st of July.

Origin retrospectively apply this hot water meter reading fee.

¹²⁴ Submissions (2010) to Senate Economics Standing Committee Consumer Law Inquiry (completed Trade Practices Act (Australian Consumer Law) Amendment Bill(2)
http://www.apf.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm
Published item copy of submission from Kevin McMahon Qld resident in public housing as made to the National Energy Customer Framework 2nd Exposure Draft (March 2010)

BHW is not mentioned in government tenancy agreements in Queensland, for Landlords know that they cannot force a tenant to buy a service from someone else (Line Forcing TPA).

My Landlord (The Hon. Karen Struthers, MP) refuses to correspond with me also.

Housing Queensland does not allow a body corporate system for its tenants, for this usually relates to shared strata-titled property owners. Housing Queensland is exempt from most of the Residential Tenancies Act (Qld).

Over the last few years, the current state of affairs regarding Housing Queensland and QBuild, is to design properties for public housing and community housing where tenants have their own hot water systems, along with potable water, gas, electricity meters etc; with each individually metered. The Queensland Government is concerned about saving water in this time of climate change, and to help reduce carbon foot-prints. Energy and water saving restrictors are installed in tenants abodes.

Most of the BHW systems in Queensland are in older public housing flats and apartments, with the rest made up of nursing homes, caravan parks, converted old hotels and motels, boarding houses, and generally affect citizens on low incomes. Most tenants affected have a poor understanding of the energy sector at large.

Some tenancies may have gas BHW only, with an electric stove. Some may have BHW and a gas stove appliance also.

Tenants do not have the ability to turn down the hot water (say in hot weather) nor abate the cost of use, for they are charged by the litre, whether the water is tepid, luke warm or hot. These large shared boilers are running flat out, 24 hours a day, every day of the year and are a massive waste of energy. Stored hot water systems have poor insulation and have a lower energy rating, compared to “peizo spark - on demand” hot water units.

Stored hot water boilers have very basic insulation, and waste a lot of energy. Even the pilot light that is continually lit, is a waste of energy.

There are also health risks (known Legionnaire’s Contamination) regarding low heat settings for Hot Water Systems.”

Comment MK:

Note I have discussed Legionnaire’s diseases associated with boiler tanks at great length in my 2007 submission to the National Energy Efficiency 2 Package (NFEE), citing Australian and overseas data in support

The BHW arrangements post health risks; are inefficient in terms of energy conservation (a 200 litre draw of water is not uncommon in certain apartment blocks before water is hot); leave exploitation open, may occasion loss of water through unattended pipe leakages or failure to lag; and do not encourage Landlords or OCs to face their liabilities for maintenance.

TASMANIA

The **Tasmanian** provisions regarding water and sewage are under special campaign efforts by the Tasmanian Tenants Union, and are seen as unfair and burdensome especially to low income tenants.

There are numerous gaps in the Tasmanian provisions

The *Residential Tenancies Act 1997* (Tas) ¹²⁵ refers to a “*water consumption charge*” with increases expected. Consumption of water means that measured by a device capable of measuring water volume. Heated water is not mentioned and neither is electricity or gas.

“water consumption charge” means an amount levied on an owner by a regulated entity, within the meaning of the Water and Sewerage Industry Act 2008, for water consumed by an occupant of residential premises that is calculated as a fee for each unit of water consumed.

Other States including Queensland and South Australia followed Victoria’s lead with the bulk hot water arrangements. In Queensland the tenancy and fair trading protections are weaker and there are enhanced concerns about the operation of non-governmental monopolies in the provision of gas used to centrally heat a communal water tank. The segments of the community most impacted in Queensland are those living in public housing, most of them vulnerable and/or disadvantaged.

Even when they receive no gas at all they are required to pay FRC fees. ¹²⁶

Meanwhile, the QCA’s November 2009 report omitted to identify the following:

- Precisely how much gas was being transported via pipelines to heat communal water tanks (many in public housing; others in owner/occupier dwellings; others possibly in the private rental market without owner occupation?)
- How much gas in total was being used to heat communal “*bulk hot water tanks*” in multi-tenanted dwellings

¹²⁵ Tasmanian Tenancy Regulations
http://www.austlii.edu.au/au/legis/tas/consol_act/rta1997201/s17.html

¹²⁶ FRC means "Freedom of Retail Contestability" is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place. In Qld It is imposed on natural gas customers accounts, and is about \$25 per year for the first 5 years after the FRC date : 1st June 2007. It accumulates over this first 5 years as a "pass through cost" of about \$20million and will be phased out in a couple of years. Vencorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

- How calculations regarding gas consumption (using hot water flow meters that measure water volume not gas or heat) were made regarding the alleged sale of gas to end-users of heated water, and on what basis under the provisions of contractual law, revised generic laws under the *TPA* (which by the end of 2010 must also be reflected in all jurisdictional Fair Trading Laws); and the *Sale of Goods Act 1896 (Qld)*¹²⁷ or residential tenancy provisions; and what is likely to happen with the existing utility exemptions under National Trade Measurement provisions are lifted as is the intent., making the current practices directly invalid and illegal with regard to trade measurement.
- How such a contractual basis is deemed valid and will be consistent with the provisions of the Trade Practices (Australian Consumer Law) Act 2009, effective 1 January 2010, given that the substantive terms of the unilaterally imposed “*deemed contract*” with the energy supplier its servant/contractor and/or agent
- How the calculations used, which may be loosely based on the Victorian “BHW” policy provisions (based on what seem to be grossly flawed interpretations of s46 of the *GIA*)
- Whether and to what extent a profit base is used to “cross-subsidize” the price of Origin’s gas sales barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market¹²⁸ is captured by an incumbent retailer who apparently purchased in its entirety the “BHW customer base” in 2007, based not on the number of single gas master meters existed in multi-tenanted dwellings (which for Distributor-Retailer settlement purposes represent a single supply point, there being no subsidiary gas points in the individual abodes of those unjustly imposed with contractual status in terms of sale and supply of gas.
- On what basis massive supply, commodity, service and FRC charges are imposed on end users of gas so supplied for the heating of a communal water tank, when the services and associated costs property belong to the OC.

Refer to Qld Govt Fact Sheet “Sale of the Queensland Government’s Energy Retail Businesses, p2 “However, around 2,500 gas customers will now receive two bills if they are both serviced hot water (Origin) and natural gas (AGL) customers.

¹²⁷ Sale of Goods Act 1896 (Qld) (reprinted and as in force as at 29 August 2007)

¹²⁸ A misnomer since it is not water that is charged for but the heating component of a composite product where only a single gas (or electricity) meter exists which is used to heat a communal water tank from which water is reticulated in water pipes to the individual abodes of renting tenants either in private or public housing.

This is because ENERGEX's former natural gas business was sold separately as Sun Gas Retail. Some of these 2,500 customers with low rates of usage may experience an increase in their bills if both accounts attract minimum usage charges. However, the introduction of full retail competition in gas will allow such customers to manage this situation by charging their gas retailer." This last comment means transfer from AGL to Origin to compound the monopoly situation so that supply charges for the actual supply of gas for heating and cooking purposes is not duplicated on the basis of alleged supply of gas from Origin for the purposes of centrally heating a communal boiler tank, but not providing any direct flow of gas to the recipients of the heated water. See Kevin McMahon's submission to the NECF2 Package, also published on the Senate's website (TPA_ACL-Bill2).

Refer also to the Second Reading Speech by the then Treasurer The Hon Anna Bligh (now Qld Premier) and Member for South Brisbane) 'Energy Assets (Restructuring and Disposal) Bill' Hansard Wednesday 11 October 2006, especially penultimate paragraph page 1, and first paragraph p2 in which extraordinary guarantees seem to have been made regarding exemption from challenge. Perhaps Part 3 Statutory Orders of Review as contained in the Queensland Judicial Review Act 1991 need to be evoked – since one monopoly – the state Government sold energy assets (and implicitly packaged these with water assets) to another monopoly Origin in order that Origin could claim retail sale of energy to its guaranteed monopoly market where no sale or supply of energy through flow of energy is effected.

Refer also to comments made by the law firm instructed to act on behalf of Energex, though the vendor instructions were handled by the Government in what appeared to be complex arrangements

In my view the circumstances, warranties and guarantees so made deserve scrutiny, as also arrangements in other states during sale and disaggregation of energy assets. Such scrutiny may provide the key to understanding why these bizarre, scientifically and legally unsustainable provisions have been retained despite detriment and unworkability, as arrangements that appear to be fanning market dysfunction and consumer detriment.

There is a fair and just way of a fairer system of addressing the issues.

The Victorian *Residential Tenancies Act 1997* (RTA) prohibits charging for water, even when meters exist other than at the cold water rate, so the question of charging for heating is inappropriate.

Victorian *RTA* provisions disallow utility supply charges or charges for anything other than actual consumption charges where individual utility meters (gas electricity or water) do exist. This is a vast improvement on Old provisions.

Nonetheless loopholes allow third parties and energy suppliers not party to Landlord-tenant agreements to exploit the system with the apparently collusive involvement and active instruction of policy-makers and regulators.

Despite the existence of these arrangements and both implicit and explicit endorsement of discrepant contractual governance and billing and charging practices associated with the “*BHW arrangements*” none of the policy-makers or regulators seem to be willing to clarify within market structure assessments; competitive assessments or reports that such arrangements exist, must be taken into account, and must be covered by appropriate consumer protection arrangements.

Regardless of whether these matters are considered of a predominantly “economic-stream” interest, there are consumer protection issues that have been entirely neglected with jurisdictional and proposed national energy consumer protection frameworks in areas where it is mostly the most vulnerable of utility end-consumer, in a captured monopoly-type market with no chance of actively competing in the competitive market

DISCUSSION OF OWNERS' CORPORATION PERSPECTIVES

In relation to the latter group I refer to an article by Shane McNally of September 2007 entitled *"Making Every Drop Count"* in discussing the anomalies of strata **water billing** that exist throughout Australia, which need addressing. This refers to water billing for cold water supplied at a mains by the Water Authority, not hot water

He refers to Bruce Wheeler's views as General Manager of the Institute of Strata Title Management who believes that the current situation in NSW is unfair. McNally on p1 of his article refers to Bruce Wheeler call for an: *"across-the-board move towards individual water meters as a fair means of billing and also as a water saving measure."*

I uphold those views, and therefore am sympathetic to both the needs of residential tenants and individual strata title owners, who may continue to be exploited by arrangements, including bundled arrangements for service provision made with Developer and previous Owners before ever taking up residence.

Wheeler is quoted in McNally's article¹²⁹ as saying that

"The current one-meter situation (for strata owners) is unfair because at present there is one water bill per building and this is paid out of the strata levy which is calculated as a share of unit entitlement."

"Water bills aren't paid based on consumption by each unit, measuring owners could be paying for the excessive water consumption of their neighbour."

There are also GST anomalies that are considered unfair and are discussed within the article. The Institute of Strata Title Management is seeking federal and state governments to act on several issues; including closing the GST loophole so owners are no longer paying non-existent GST on water bills.

As also mentioned elsewhere in discussing the strata title owners' perspectives, there are unfair terms also inherent in billing practices undertaken when all the parties are owner-occupiers of strata title properties.

In these circumstances, the Australian Property Investor (Sept 2007) in discussing the situation in NSW, says that

paying for the excessive water consumption of their neighbour."

Wheeler says the GST anomaly is costing residents millions of dollars each year and argues that billing individuals rather than whole buildings for water would be fairer. This is not associated with hot water, but cost of water divided amongst owners.

¹²⁹ see www.apimagazine.com.au "Making every drop count: Article by Shane McNally."

The principles for billing owners simply by calculating the number of apartments or units and evenly dividing the cost has been also used for heated water in endeavouring to apportion to each supply and other charges – where for settlement purposes by a single gas supply or energization point exists, one GST charge and one proper contractual party – the Owners’ Corporation, who have to meet divided costs in the manner agreed under their terms.

Forcing strata owners into bundled arrangements or contractual arrangements that would not in contractual or common law to belong to them is inappropriate.

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

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

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

There are more class actions being initiated on the basis of contract, often by members of strata property in multi-tenanted dwelling

In one such litigious matter before the open courts the following issues are under challenge in the open courts:

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

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

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

To expect tenants to do so is absurd and normally not permitted by the OC or Landlord in any case.

2. The **legality of arrangements** for the sale of *“Hot Water and Internet Infrastructure;”*
3. The **signing of contracts** by the original Owners’ Corporation Manager;
4. The **alleged contract**, allegedly signed by the OC;
5. The **possible excessiveness of the charges**, using the flawed Victorian algorithm conversion factors and employing hot water flow meters to pose as electricity meters;
6. **Challenge to operational and service design parameters** initiated by the Developer in consultation with the energy providers using hot water flow meters to pose as gas meters, and selection of hot water infrastructure leading to water wastage and inflated charges
7. **Operational design** – relating to flow rate of the hot water being greater than the cold water.
8. The **quality of supply and service** of all the above alleged supplies and services over a period of six years.

(this last matter raises issues pertinent to proposed revisions to statutory and implied warranty considerations under the Australian Consumer Law (TPA))

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

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

Some possible solutions:

- Withdraw existing the BHW arrangements from energy provisions. Revisit departmental local authority Infrastructure and Planning arrangements that allow perpetuation of the BHW arrangements (see for example Qld Dept of Infrastructure and Planning sanctions Fact Sheet under Building Codes Queensland).
- Allocate responsibility to the appropriate contractual parties - OCs
- Make sure metering databases and service compliance is undertaken
- Apply appropriate trade measurement practices using the right instrument to measure the right commodity in the correct unit of measurement and scale.
- Ban communal hot water systems and install individual utility meters for gas electricity and water in all new buildings.
- Assist existing OCs and Landlords to upgrade and retrofit with individual meters and instantaneous hot water systems in each residential abode - meeting efficiency and health risk issues in one fell swoop and enabling proper application of metrology procedures that are transparent.

UNCONSCIONABLE CONDUCT

As mentioned earlier, I made a submission to the Commonwealth Treasury's Unconscionable Conduct Issues Paper in 2009 entitled Unconscionable Conduct – Can Statutory Provisions be further clarified? I reproduce here the attachments to that submission including a detailed case study that illustrates consumer detriment through unacceptable market conduct as well as unjustly imposed contractual status deeming sale and supply of an essential commodity – gas, that was never provided.

After protracted attempts to coerce an explicit market contract, the supplier of gas, metering and billing services to the OC, used its market power in a monopoly situation to disconnect heated water supplies on the false allegation that the recipient of that commodity was obligated to form a contractual contract for sale and supply of gas.

The victim of unacceptable practices resided in a multi-tenanted block of privately rented apartments wherein a single gas meter on common property (business premises of a Body Corporate) was used to fire a communal stationary boiler tank supplying heated water of varying temperature not normally “fit for purpose” in water pipes.

Though the supplier, a licenced energy retailer claimed ownership of the water infrastructure, meaning the water meters, no gas was supplied through flow of energy to the abode claimed to be receiving it. Mere ownership of the water infrastructure did not in common law create a contractual relationship for sale and supply of gas (or electricity). Persistent harassment even after being informed of the alleged consumer's vulnerabilities, coercive threat, misleading and deceptive conduct, are amongst the several allegations made.

Ultimately, with the full sanction of the industry-specific complaints scheme, the incorporated regulator and the energy policy maker, the tenant's heated water supplies were suspended through claiming of water meters, whilst the allegation was that energy was being supplied and whilst provisions for either decommissioning or disconnection applied only to energy if this was warranted. Yet no energy had ever been received. The methods used to calculate deemed usage of gas are those that are sanctioned by existing jurisdictional provisions.

Existing protections against unacceptable conduct, including unconscionable conduct will continue to occur unchecked if provisions within other jurisdictions are not brought into line with the spirit and intent of proposed generic laws.

Please refer to my submission to the Commonwealth Treasury Unconscionable Conduct Issues Paper (2009)

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

http://www.treasury.gov.au/documents/1614/PDF/Kingston_Madelaine.pdf

Other pertinent submission include

Essential Services Commission Review of Regulatory Instruments (2008) (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 (2008)

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/Madelienne%20Kingston.pdf

NECF2 (National Energy Law and Rules2) – proposed for sanction by SA Parliament Spring 2010

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/_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

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

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/Madeleine%20Kingston.pdf

also

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

www.pc.gov.au/projects/inquiry/consumer/.../subdr242part4

www.pc.gov.au/projects/inquiry/consumer/submissions/subdr242part5

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

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

Further comment is included in this submission to the AER updating some material, sourced from company websites and reports and from the AER's 2009 State of the Energy Market publication (with appropriate citation)

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

I raise the issue of unsolicited supplies in the context of this case study and implications for a particularly vulnerable end-consumer of utilities.

AEMC

<http://www.aemc.gov.au/Media/docs/Madeleine%20Kingston%202nd%20Sub%20Part%202-9253e33d-3fb9-4862-935d-08170f3b6504-0.pdf> (Part 2) (pp101-221)

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, published and originally solicited as late submissions to the original decision – but will be considered at the time of publication of the Final Decision. The Draft Decision was published on 6 April 2010.

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

To be augmented by a substantially similar submission as the current package of some 421 pages plus several appendices) addressed to the AER not only for this determination but other current and future determinations by both bodies and by the MCE.

AER Draft Decision Jemena (JGN) Revised Gas Access Proposal for 2010-2015

<http://www.aer.gov.au/content/item.phtml?itemId=736206&nodeId=345c45e72e13c0e49cbd5cff588a0135&fn=Madeleine%20Kingston.pdf>

Part 1 – published – Part 2 herewith belatedly for open publication if acceptable also (421 pages plus several appendices)

DEDICATED DISCUSSION OF IMPACT OF LEGAL METROLOGY ON CONTRACTUAL ISSUES –

focus on trade measurement considerations on deemed sale and supply of energy

I refer to **trade measurement matters**¹³⁰ – as extensively discussed within my submission and in submissions to other arenas referred to therein including the NECF1 and NECF2 packages and the Gas Connections Framework Draft Policy Paper.¹³¹

Incidentally the role of the NMI extends beyond merely ensuring accuracy of meters - the proper use of instruments for the correct purpose, measuring the right commodity; using the right scale of measurements are also relevant matters covered by the legislation subject to lifting of remaining utility exemptions as is the intent. See revised National Measurement regulations applicable from 1 July 2010 and intended lifting of utility exemptions.

See

PART V--GENERAL PROVISIONS ON USING MEASUREMENT IN TRADE

18H. Overview

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

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

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

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

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

18HF. Unreliable methods of measurement

18HG. Limiting use of certain measuring instruments

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

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

¹³⁰ Please refer to the National Measurement Institute's position as the sole legal authority in relation to trade measurement, not only with regard to verification and accuracy, but in terms of correct usage of instruments, using the right scale of measurement, measuring the correct commodity with the correct instrument. The revised National measurement Laws, implementable in all States from 1 July 2010, and pending lifting of remaining utility exemptions will highlight existing anomalies within state, territory and national energy related laws, and contractual matters under existing and proposed generic laws

¹³¹ Madeleine Kingston (2009) Submission to MCE SCO Gas Connections Framework Draft Policy Paper (as a component of the NECF2 Package)

See also implications of other aspects of comparative law including revised generic laws and substantive unfair contract terms inherent in tacitly or explicitly endorsed provisions under existing energy laws.

AMBIGUITIES RELATING TO UTILITY TRANSACTIONS

Problem: Legal traceability for consumption of utilities

Currently in Vic, SA and Qld, cold water master meters and/or satellite hot water flow meters are used to also measure electricity use and gas use through a questionable method of converting the volume of heated water to gas/electricity units.

No legally traceable means of calculating individual energy use or quality of heated water supplied (in temperature or flow rate) can be determined using the methods used to calculate consumption and deemed supply of gas or electricity. In Queensland occupants as end users of such heated water are being charged for both the water and the heat in addition to FRC charges and massive supply and/or commodity charges for the supply of energy even though the provision of heated water is a monopoly with end-users unable to make any choices as to provider of energy or of the heated water, which in Victoria is an integral part of a tenancy agreement

In Victoria no site reading was considered to be necessary at all so the question arises whether any actual readings can be relied upon. In Queensland under energy laws energy providers licenced to sell gas and electricity are charging for both the water volume and the alleged heat using units of measurement not prescribed.

In SA it is more common for site readings to occur, but these are of water meters with conversion factors being utilized to devise by water volume calculation approximate energy use by individuals. Even if such a calculation can be shown to be close to accurate, standard form contracts in tripartite governance models hold distributors responsible only for the heat supplied to a master gas meter but not for the quality or heating value of water actually received by individual renting tenants without separate energy meters. The bulk hot water arrangements are not only inconsistent between States but indicate problems in consumer protection that need to be addressed urgently.

In Victoria gas arrangements relating to the Principal Transmission System have the provision of gas mixing zones. Custody Transfer Meters measure the calorific value every half an hour to address the issue of gas quality.

Retailers buy natural gas by calorific value. One should therefore get what one pays for. Translated gas quality varies depending on the source.

"The conversion factors are based on the quality of gas supplied and then averaged over the regulatory period involved in setting the conversion factor. In the case of bulk hot water there is no measurement of the temperature of the hot water delivered to the consumer.

The water pipes reticulated heated water of varying temperature are seldom lagged

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The issues raised are clearly systemic across all jurisdictions where bulk hot water is supplied to residential consumers.

The central argument being provided to the NECF2 Package as the proposed Energy Retail Laws, Regulations and Rules (3 separate instruments) is that the provisions fail to uphold the single objective of energy provisions relating to

“Promot(ion) of efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of gas or electricity with respect to—

(a) price, quality, safety, reliability and security of supply of electricity; and

(b) the reliability, safety and security of the national electricity system.

There are implications for proper interpretation of contract, for unjust imposition of contractual status on the wrong parties and for implied and statutory warranty provisions under proposed generic laws. The gas used to heat communal boiler tanks are in fact provided to Owners’ Corporations not to individuals, but it is the end-users of a composite water product being charged for alleged energy consumption using calculation methods that defy the principles of legal traceability.

Issue: Legal traceability of consumption of utilities

It is unclear what legislation actually applies to utility meters.

NATIONAL MEASUREMENT AMENDMENT BILL 2008

OUTLINE

The National Measurement Amendment Bill 2008 amends the *National Measurement Act 1960* (Cth) to introduce a national system of trade measurement based on the current trade measurement systems of the states and territories. Following a review of the state and territory trade measurement systems, Council of Australian Governments (COAG) decided that a national (Commonwealth) system should be introduced. This Bill gives effect to that policy decision. The Bill also introduces some measures that have been approved by the Ministerial Council on Consumer Affairs (MCCA) for inclusion in the uniform state and territory trade measurement legislation but have not been introduced in all jurisdictions

The Bill repeals the current trade measurement provisions of Part VA that are specific to utility metering and inserts general trade measurement provisions, including:

- requirements for measuring instruments in use for trade (Part IV);
- general provisions for using measurement in trade (Part V);
- requirements for measurement of pre-packaged goods (Part VI). This includes the introduction of the average quantity system (AQS) that was previously approved for introduction into the National Measurement Act 1960;

- enforcement provisions, specifying evidential material and providing for the use of infringement notices and enforceable undertakings (Part VIII);
- requirements for the appointment of Commonwealth trade measurement inspectors, their powers (that replicate the current powers of state and territory trade measurement inspectors) and their obligations (Part IX);
- licensing provisions for the verifiers of measuring instruments (Part X) and the operation of public weighbridges (Part XI); and
- requirements for the appointment of verifiers of utility meters (Part XII)

Liability issues – trade measurement¹³²

In terms of liability under revised trade measurement provisions, with further refinement expected in winter 2010, and possible further changes to utility provisions as exemptions are progressively lifted I note as follows, from the Second Reading Speech

GENERAL NOTES

OFFENCE PROVISIONS IN THE BILL

The offence provisions in the Bill will apply to a wide range of entities, from small businesses to large multinational concerns, in a wide variety of circumstances. This makes it desirable to have a range of enforcement options appropriate to the different circumstances to which the Bill might apply. Consequently, the Bill provides for: different categories of offences in relation to particular conduct; for a range of responses, depending on the circumstances of a particular suspected offence; and for three tiers of penalties.

The Bill does this in the following ways:

- a number of provisions in the Bill create offences requiring a fault element and corresponding strict liability offences;
- as an alternative to prosecution, the Bill enables trade measurement inspectors to issue infringement notices to suspected offenders; and
- the Bill provides for three tiers of penalties, with the highest penalties being imposed for fault element offences, lower penalties for strict liability offences, and the lowest penalties are payable under infringement notices.

¹³² National Measurement Amendment Bill 2008 Explanatory Memorandum
http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_pdf/319962.pdf;fileType=application%2Fpdf
 Circulated by authority of the Minister for Small Business, Independent Contractors and the Service Economy, Minister Assisting the Finance Minister on Deregulation, the Honourable Dr Craig Emerson MP

Where appropriate, the offence provisions in the Bill also extend geographical jurisdiction for offences committed outside Australia. These issues are discussed in further detail immediately below, and in relation to specific provisions later in this Explanatory Memorandum.

Offences requiring a fault element

A number of provisions in proposed Parts IV, V, VI and VII create offences requiring a fault element. Section 3.1(1) of the Criminal Code (which is contained in a Schedule to the *Criminal Code Act 1995*) explains that an offence ordinarily consists of physical elements and fault elements. A person will be guilty of an offence requiring a fault element if it can be proved that the relevant physical elements for that offence exist, and one of the fault elements for each physical element is also proved. The physical elements for offences requiring a fault element contained in the Bill are set out in the proposed provisions creating those offences. The fault elements are set out in Division 5 of Part 2.2 of the Criminal Code. The offences requiring a fault element that are proposed to be created by the Bill have been designed to be consistent with the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Attorney-General's Department, and in particular Parts 4.3 and 4.4 of that Guide.

Strict liability offences

A number of provisions in proposed Parts IV (containing most utility provisions), V, VI, VII, IX, X and XI create strict liability offences.

Section 6.1 of the Criminal Code explains what is meant by 'strict liability'. A person will be guilty of a strict liability offence if it can be proved that the person committed a certain prohibited act. For example, a person will breach proposed subsection 18GA(2) if that person uses a measuring instrument for trade and that instrument is not verified. The person's state of mind is not relevant to their guilt. For example, it does not matter whether the person did not intend to breach subsection 18GA(2): the person will be guilty if it can be proved they committed the prohibited act.

The proposed strict liability offences created in the Bill are consistent with the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. In particular:

- none of the strict liability offences is punishable by imprisonment;
- the maximum penalty for committing one of the strict liability offences is a fine of up to 40 penalty units for an individual; and
- as explained below in relation to relevant provisions, strict liability has been imposed to enhance the effectiveness of particular provisions of the Act, by deterring people from committing offences, and to encourage people to be vigilant so as to ensure they do not breach the Act.

Reports 17/2000 and 6/2002 by the Senate Standing Committee for the Scrutiny of Bills were also considered in relation to the strict liability provisions of the Bill.

Extended geographical jurisdiction

Where appropriate, some offences have been extended in geographical reach, by applying extended geographical jurisdiction - category B (as provided for in section 15.2 of the *Criminal Code*). In these cases, a person will commit an offence if a requirement for standard geographical jurisdiction is satisfied, or the conduct constituting the offence occurs outside Australia and the person who commits it is an Australian citizen, resident or body corporate at the time of the alleged offence, subject to any applicable defences.

POWERS OF TRADE MEASUREMENT INSPECTORS

Problem: Legal traceability for consumption of utilities

Regarding national measurement reforms the National Measurement Institute website explains that

On 1 July 2010, National Measurement Institute (NMI), as a *division of the Australian Government's Department of Innovation, Industry, Science and Research* will [take responsibility for trade measurement nationwide](#). This will make NMI responsible for the full spectrum of measurement; from the peak primary standards of measurement to measurements made at the domestic trade level, and will provide the NMI with administrative and regulatory oversight in the area of trade measurement. Implementation is expected to take place at State and Territory level to uphold the fundamental principles of legal traceability in trade measurement, including for utilities.

The interests of economic infrastructure, including the goal of securing the confidence of all stakeholders depends on the concept of legal traceability being upheld in all trade measurement transactions so that Australia and New Zealand “*establish and maintain a national and international reputation for equitable trading*”

The lifting of utility exemptions is pending for certain utilities, and further provisions may be contemplated at the time that existing utility exemptions are lifted. Meanwhile I draw attention to the new provisions under Part 1, Part IV, V, XIII

Guide to the New National Measurement Regulations – verbatim message from the CEO p 4

“Trade measurement is an important element of economic infrastructure. It has the critical role of ensuring that all transactions whose value is determined by a measurement are correct. An estimated four hundred billion dollars a year in trade transactions rely on measurement.

Consumers and businesses alike rightly expect that goods that are sold on the basis of such measures as length, weight and volume, are accurately and faithfully represented. Suppliers of measuring instruments expect clear and comprehensive regulatory requirements. Governments and the economy as a whole require a trade measurement system that establishes and maintains a national and international reputation for equitable trading.

NMI is Australia's peak measurement organization, responsible for maintaining Australia's primary standards of measurement and for providing the legal and technical framework for the dissemination of measurement standards. We represent the only 'one-stop shop' for all disciplines of measurement in Australia – analytical, biological, chemical, physical and legal. We provide measurement expertise, calibration services, chemical and biological analyses and pattern approval testing.

NMI takes its new responsibility of trade measurement very seriously. We are keen to support industry and consumers alike by ensuring timely communication of legislative and regulatory obligations for businesses and rights for consumers.

This Guide provides a concise summary of the new national regulatory framework¹³³

The Commonwealth has constitutional responsibility for weights and measures (s 51(xv) of the Constitution). However, prior to 2008, the Commonwealth chose not to enact comprehensive trade measurement legislation. This responsibility therefore remained with the states and territories by default.”

The NMI Guide explains that an inconsistent pattern of regulation was introduced at different times by jurisdictions under the previous Uniform Trade Measurement provisions. The COAG policy decision on 13 April 2007, made it possible for substantial changes to the National Trade Measurement Act 1960 and the *Trade Measurement (Amendment) Act 1999*.

“Under the National Measurement Act 1960 (Cth), provisions that pertain to utility meters commenced on 1 July 2009. The National Trade Measurement Regulations 2009 (Cth) commenced on 11 September 2009. However, the enforcement provisions of the Act do not commence until 2010 and therefore some provisions, in both the Act and the Regulations, relating to other trade measuring instruments and packaging do not come into effect until the transition day, 1 July 2010.”

¹³³ National Measurement Institute Guide
<http://www.measurement.gov.au/trademeasurement/Documents/Guide%20to%20the%20New%20National%20Trade%20Measurement%20Regulations.pdf>

The NMI Guideline (p6) explains that as the new NMI regulations

“are part of a machinery of government transfer of trade measurement regulations from the states and territories to the Commonwealth the Office of Best Practice Regulation (OBPR) has provided an exemption from the need to carry out a regulatory impact analysis (see OBPR reference 10059).

Elsewhere on its website the NMI in describing its measurement system, the NMI refers to Australia's measurement system as *“based on Australian legal units of measurement and depends on the traceability of standards of measurement, reference standards and reference techniques.”*

In this context I am concerned about confusion that has arisen in relation to the statement by the Productivity Commission (2009) that the Ministerial Council on Energy (MCE) is *“.....the sole governance body for initiating and developing Australian energy market policy reforms for consideration by COAG. It also monitors and oversees implementation of energy policy reforms agreed by COAG.”*

Special-purpose bodies have been created by COAG and MCE to develop and implement specific reform packages for the energy sector.”

How can such a perception be sustainable when existing jurisdictional and national energy appear to have control over discrepant metrological lexicons, practices and procedures, discrepantly upheld at all levels that are continuing to create confusion within the marketplace at all levels whilst the principles adopted by the NMI require that:

“Consumers and businesses alike rightly expect that goods that are sold on the basis of such measures as length, weight and volume, are accurately and faithfully represented.”

(NMI Guideline 2010, p4, para 3).

I select specific examples of policy failure and discrepancy especially in relation to metrological issues, citing one topic already discussed at extraordinary length in other submissions to the MCE, ESC, PC NMI and Treasury, but also dealing with industry concerns about discrepancies in overlap and conflict within energy provisions in relation to licencing,¹³⁴ inconsistencies in regulation of gas meters.¹³⁵

¹³⁴ See for example Envestra's views summarized in the PC's Research Report Ch 5 Review of Regulatory Businesses (2009) including concerns in relation to framework issues and inconsistencies with gas meters

¹³⁵ Electrical Regulatory Authorities Council (2009) submission to the ETSR Consultation RIS c/f PC (2009) Review of Regulatory Burden Social and Infrastructure http://www.ret.gov.au/Documents/mce/_documents/Energy%20Market%20Reform/cris-oct-09/Electrical%20Regulatory%20Authorities%20Council.pdf
The PC (2009) (ibid) referred to the MCE Discussion Paper (MCE, ETSL 2009, p17) in relation to the uses gas meters as an example of regulatory inconsistency pointed specifically to calls for stakeholder comments on such inconsistencies

At a broader level would like to extrapolate from the submission of Standards Australia (2009) regarding alignment with regulatory arrangements managed by Commonwealth State and Territory Governments. Whilst the comments made were in relation to early indication in the development of standard development process as to whether an Australian Standard will become mandatory, the same principle applies to identification of all regulations that are pertinent, embracement of which is mandatory.

I refer in particular to the provisions of the NMI which are not given passing mention anywhere in the NECF2 document.

I further cite and extrapolate from the Electrical Regulatory Authorities Council (2009) submission to the ETSR Consultation RIS

“The proposed governance model is not supported because it allows an industry-led body to provide oversight of the regulation of itself via a Policy Committee containing only one electrical and one gas regulator amongst seven members.”

Problem: Legal traceability for consumption of utilities

The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions consumer protection is compromised.

The failure to distinguish within NECF drafting proposals between customers and end-consumers (of energy) or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

Though the concept of *“flow of energy”* is recognized within the NECF2 Package, it could be reasonably claimed that a perceived *“ostrich-like approach”* in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect of stripping end-users of their enshrined rights.

Distributors and retailers are effecting disconnection of heated water supplies by the clamping of these meters, designed only to measure water volume not heat, or even to withstand heat well. No energy passes through a water meter and none is supplied. The water is not owned by the retailer or distributor therefore no sale of water can be effected.

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009) Productivity Commission (2008 and 2009); and Federal Treasury (2009).

So far, it seems convenient strategies have been adopted to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

Currently in Vic, SA and Qld, cold water master meters and/or satellite hot water flow meters are used to also measure electricity use and gas use through a questionable method of converting the volume of heated water to gas/electricity units.

It is my understanding that despite regulations, similar practices may be adopted by energy suppliers in South Australia – with choice being considered to be the option to legitimize an otherwise enforced unjustly contractual arrangement in the belief that renting tenants have a real choice in terms of fitting gas meters and individual instantaneous boiler tanks for the purpose of obtaining heated water, instead of being supplied through an existing single boiler tank that centrally heats water and reticulates heated water in water service pipes.

No legally traceable means of calculating individual energy use or quality of heated water supplied (in temperature or flow rate) can be determined using the methods used to calculate consumption and deemed supply of gas or electricity.

In Queensland occupants as end users of such heated water are being charged for both the water and the heat in addition to FRC charges and massive supply and/or commodity charges for the supply of energy even though the provision of heated water is a monopoly with end-users unable to make any choices as to provider of energy or of the heated water, which in Victoria is an integral part of a tenancy agreement

In Victoria no site reading was considered to be necessary at all so the question arises whether any actual readings can be relied upon. In Queensland under energy laws energy providers licenced to sell gas and electricity are charging for both the water volume and the alleged heat using units of measurement not prescribed.

In SA it is more common for site readings to occur, but these are of water meters with conversion factors being utilized to devise by water volume calculation approximate energy use by individuals. Even if such a calculation can be shown to be close to accurate, standard form contracts in tripartite governance models hold distributors responsible only for the heat supplied to a master gas meter but not for the quality or heating value of water actually received by individual renting tenants without separate energy meters. The bulk hot water arrangements are not only inconsistent between States but indicate problems in consumer protection that need to be addressed urgently.

In Victoria gas arrangements relating to the Principal Transmission System have the provision of gas mixing zones. Custody Transfer Meters measure the calorific value every half an hour to address the issue of gas quality.

It is my understanding that retailers buy natural gas by calorific value. One should therefore get what one pays for. Translated gas quality varies depending on the source. Translated gas quality varies depending on the source, coal seam methane has a lower calorific value than natural gas from gas fields like the Santos Moomba fields or the Bass Strait and Otway Basin fields. The quality of gas from these fields also varies over time and depending on the treatment that the gas undergoes or from different fields.

The conversion factors are based on the quality of gas supplied and then averaged over the regulatory period involved in setting the conversion factor.¹³⁶

The conversion factors using water volume calculations to guesstimate actual gas usage charged in cents per litre with the conversion showing megajoules in Victoria and SA but not Qld, are based on the quality of gas supplied and then averaged over the regulatory period involved in setting the conversion factor. In the case of bulk hot water there is no measurement of the temperature of the hot water delivered to the consumer.

It is my understanding, in late 80's and early 90's public tenants on the corner units of 4 story height used to have a 100 to 200 litre draw down before they actually received hot water and they paid for every drop that they ran through the tap.

Sue Mills, Public Tenants Union of Victoria, The HEAT (Housing Energy Action Team) Report, September 1988 in regard to major conclusions on bulk hot water actions stated

- Hot water to laundries should be supplied separately.
- Bulk hot water systems must be replaced with individual tanks, so that individual households (end-user residential tenants) can judge their own hot water consumption and systems capacity and pay more fairly for hot water.

The practices in place, clearly sanctioned by jurisdictional authorities, and which the MCE has apparently refused to consider as a national energy law is proposed and adopted, is clearly discriminatory and disadvantageous to any consumer who is supplied under the arrangements it also contravenes a number of pieces of legislation

¹³⁶ Personal communication

The complexity of the issues involved has ensured that the industry-specific Ombudsman schemes have failed to understand the issues, which also appear to be incompletely understood by community organizations representing consumers, especially in relation to the trade measurement and common law contractual considerations. There is a mistaken belief that end-consumers of gas that is centrally heated are embedded, whereas in fact the term can only apply to electricity. Existing Victorian Orders in Council relating to exempt selling are also exclusive to electricity. There is no such thing as a gas network

Existing consumer protection provisions including codes and rules fail to address the inequity and the illegal provision of bulk hot water to consumers who have no other access to alternative sources of hot water.

There is no question of the monopoly situation whether the matter is considered to be a water provision issue or energy provision matter – which jurisdictions appear to be most unclear about, and which the MCE has chosen not to intervene in.

The issues raised are clearly systemic across all jurisdictions where bulk hot water is supplied to residential consumers.

The only fair solution is provision of individual utility meters for each recipient as an end-user so that fair and legally traceable means can be used to determine utility consumption. This should be mandated for all new buildings and government grants provided to assist OCs of existing multi-tenanted dwellings, especially in the private arena, to retrofit. This was recommended as far back as 1998.

I do understand that some cost recovery has to be made. My gripe is that contractual responsibility for supply charges are imposed on the wrong parties.

Mere ownership of water meters by distributors or energy supplies does not create a contractual obligation for sale and supply of energy where no flow of energy can be demonstrated. I continue to believe that the proper contractual party for all supply charges should be the Landlord or Body Corporate.

Energy distributors do not distribute water in any form, just gas or electricity. For settlement purposes there is only one supply charge imposed on the retailers by the distributors.

The current BHW arrangements were allegedly put in place allegedly to prevent price shock to end-consumers. They do not receive energy and therefore should be responsible for no supply or commodity charges associated with energy supply.

Queensland has no regulatory controls at all and what is considered to be a lucrative hot water supply market (for energy suppliers or distributors) and their servants contractors and/or agents.

There seem to be numerous confusions as to whether this is a water market or an energy market.

However, the proper contractual governance model needs to be in place, which is an issue that I have taken up with the MCE.

Rent hikes occur irrespective of the collusive arrangements in place and even if rents did go up, this would be a fairer and more transparent way in which things can be managed until or unless each recipient has a separate gas or electricity meter with which to measure their actual consumption of energy used to heat their water.

A pertinent public submission is that made to the Essential Services Commission's Review of Regulatory Instruments

Part 2A (ESC Regulatory Review (2008) – 2 parts

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

This analyses in extraordinary detail over 356 pages the BHW provisions, the history of adoption of the Guideline, its proposed repeal and implications; the transfer of provisions to the revised *Energy Retail Code v7 (Vic.)* (Feb 2010); the contractual, trade measurement and consumer detriment implications.

Since the adoption of this ESC Guideline 1 March 2006 (the contents of which are now contained in the Victorian Energy Retail Code v6), after various deliberative processes during 2004 and 2005, it has been possible with regulatory sanction for energy retailers to undertake the following:

- Creatively interpret the provisions of the *Gas Industry Act 2001* and the *Electricity Industry Act 2000* by imposing on the wrong parties contractual status, where the proper contractual responsibility for any consumption and supply charges or any other associated charges lie with the Landlord/OC or representative
- Use water meters to effectively pose as gas meters using practices that could be construed as misleading and in defiance of best practice trade measurement. I recognize that the utility exemptions for most utilities other than those specified under 87Regs (at present certain cold water meters)
- Use trade measurement practices that defy best practice as well as the spirit and intent of existing trade measurement laws and regulations, and which will become formally invalid and illegal as soon as remaining utility exemptions are lifted from national trade measurement provisions.
- Effectively make inaccessible the enshrined contractual rights under conflicting schemes and other provisions in the written and unwritten laws end-users of heated water that is centrally heated and supplied to Landlords or their representatives, including tenancy provisions and common law rights under contractual law; as well as the specific provisions of unfair contract provisions and the provisions of other generic laws

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These matters are also impacted by existing provisions and proposed changes to the [Energy Retail Code](#). Therefore selected matters from the proposals to amend the VERC are also discussed.

This submission includes detailed discussion of the application of deemed status on those receiving heated water supplies as a composite product (rather than energy) as an integral component of their rental lease arrangements with their private Landlords under mandated residential tenancy provisions.

This is most effectively discussed in the context of the proposed national provisions, regardless of what arrangements may be retained and perpetuated in the interim.

Of relevance also is the ESC Small Scale Licencing Framework Final Recommendations (2007) – see especially Overview p vii; page 24

Essential Services Commission (2007) Small Scale Licencing Framework Final Recommendations, Melbourne, p vi

The purpose of the paper was to examine the adequacy of current arrangements for provision of energy (electricity) within “*embedded networks*” with particular reference to the 2002 OIC in place in Victoria, originally intended to capture transitory supply and not be relied upon as an ongoing sole instrument governing such supply.

The OIC is exclusive to exemptions to certain small scale operators for electricity supply (not gas) within embedded networks was adequately meeting its purpose and how consumer protections and competition could be maintained. The small scale licencing exemption framework has now been elevated to the proposed Energy Laws – with implications for metrology procedures of pertinence to the NMI which I can discuss another time.

Those receiving communally heated water that is gas-fired by a single master meter on common property infrastructure belonging to either Developers or OCs are not embedded customers of gas. This term is used inaccurately because of poor understanding of the legalities and technicalities.

Under the new NECF2 Package the AER will consider applications for licence exemption - which itself raises a number of pertinent issues, some of which are discussed under the Exempt Selling section of this submission., as well as under complaints handling and redress.

Though only some utility exemptions under revised national measurement provisions have been effected to date with others to follow as soon as all procedural matters are attended to, there are implications for the manner in which current jurisdictional arrangements are being addressed, and also how certain provisions such as the small scale exemptions regime will operate.

I am most concerned that not even passing reference has been made within the NECF2 Package to the requirement for all distributors and retailers to adhere by NMI provisions, or to identify the glaring gaps in provisions contained within the NECF2 package as well as tacitly endorsed within the provisions left to jurisdictional control by energy policy makers and regulators. (I have previously cited the bulk hot water provisions for example as a gross example of policy failure apparently requiring utility providers to explicitly ignore the intent and spirit of national trade measurement requirements, albeit that not all utility exemptions have been effected).

The concerns extend well beyond patterning, licencing and verification procedures, since the use of the wrong instrument, theoretically used to measure or calculate the price for the wrong commodity (cold or hot water meters to approximate actual gas or electricity consumption by end-consumers receiving no flow of energy), applying the wrong units of measurement).

I refer to the legal architecture of the proposed NECF2 Package which will lead to the adoption of the National Energy Retail Laws and Regulations and Rules.

Of particular relevance to NMI provisions are the national retail market procedures, which for gas comes under the Gas Market Retail Procedures, and under the national Electricity Law the Market Settlement and Transfer Procedures, Metrology procedures

Though the NECF2 provisions do provide for “*flow of energy*” to the premises of those deemed to be receiving it, the MCE has decided to entirely overlook what is happening in the marketplace, fanned by misinterpretations of deemed provisions.

By failing to clarify within the energy-specific proposed Law and Rules what should apply as best practice policy, trade measurement and contractual arrangements under the proposed tripartite governance model adopted for the NECF, the MCE is choosing by default to allow unacceptable trade measurement and other practices to be perpetuated.

By September the new national energy regulations will be in place, attempting to co-exist with grossly flawed jurisdictional provisions and continuing to add to marketplace confusion and consumer detriment. Already more than one legal matter is on foot because all existing provisions in numerous jurisdictions are insufficiently clear about what sort of conduct and arrangement is acceptable.

The absence of clarification, consumer protection in specific regulations and flawed policy seen to be facilitating unacceptable market conduct will not strip end-users of utilities of their rights at least under common law provisions, but unfortunately these are not readily accessible to the vast majority of consumers. That is why I have worked so hard over a protracted period to call attention to consumer protection gaps and lowered standards of service delivery in the utilities arena, so far to no avail.

I refer to the proposed national energy objective under Part 1 Division 3 National energy retail objective and policy principles:

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Jemena (JGN) Revised Gas Access Proposal 2010-2015
Further open s comment and supporting data with several appendices
re JGN’s further submission(s) of 18 May 2010
and principles behind AEMC’s Rule Change Proposal ERC 0092 under the NER
(with possible extrapolation to NGR) – and other related determinations
Prepared also for multiple other arenas
Madeleine Kingston, Individual Stakeholder

I again mention my contention that the fundamental issue seems to be systemic failure to meet the Single Market Objectives of the NECF Package detailing the proposed Energy Law Regulations and Rules outlined in Part 1 Div 3 and of the National Gas Law and National Electricity Law.

As mentioned previously when discussing more generally clarity gaps, there appear to be numerous such gaps in the NECF2 Package, some of which are discussed below especially in relation to consumer protections for those who seem altogether to have been left out of the provisions – as a consequence of a deliberate decision by the MCE Retail Policy Working Group and its advisers to sanction by default practices that appear to contrive not only to strip end-users of utilities of their enshrined rights under multiple provisions, and to defy best practice trade measurement, but also adopt practices that are legally unsustainable and fail to recognize the trap of regulatory overlap and failure to consider comparative law.

In extrapolating from the ERAC’s submission, I also agree with the suggestion any MCE policy plan and RIS must be consistent with and “aligned as closely as possible to other key reforms including those under National Measurement Regulations and generic laws.”

Continuing the theme of extrapolation from other submissions I cite from the Queensland Government (2009) submission to the MCE’s Draft ETSR and Consultation RIS raising the principle of removal of energy (network) operations from other frameworks.

A similar objection may be raised in relation to policies adopted within energy provisions that have the effect of attempting to remove from or conflict with provisions within, for example metrology policies and regulations the proper province of the NMI.

Such a stance is guaranteed to contribute towards further confusion in the marketplace amongst energy providers, customers, end-consumers and to perpetuate the very conflict and overlap that nationalization of regulations across the board is endeavouring to eliminate.

Given the MCE’s implicit endorsement of certain jurisdictional provisions that at least in spirit and intent appear to breach NMI provisions by a) leaving these provisions intact in the hands of certain jurisdictions; b) failing to appropriately clarify matters within the NECF2 provisions such that no further discrepancy can result in endeavouring to interpret provisions within the various energy-specific provisions; outside those provisions, including those of the NMI.

Returning to the Queensland Government’s recommendations referred to above in another context, I again extrapolate and confirm my own opinion that the NECF2 Package of energy reforms should be cross-references to, and *“better mapped and discussed with other regulators to determine areas of commonality and how these can be easily extended.”* (Qld Govt Submission to MCE ETSR and Consultation RIS 2009, p9)

Again, in reflecting upon and extrapolating from the Qld Govt's comments in relation to harmonization of gas metering regulation (though mentioned by them in the context of safety), I am concerned that the NECF2 package has not only failed to even mention in passing the national agenda for metrology

"The scope suggests that the harmonization and nationalization of gas metering regulation would be included however it is understood that this may be occurring separately as part of national metering agendas" (p9)

I echo similar concerns to those of the Qld Govt expressed in the context of MCE technical and safety proposals, but instead relating to the NECF2 Package and all processes that led to its formulation.

Adapting the Qld Govt's words no aspect of the NECF2 package or policy positions that led to its development has provided *"detailed analysis of current jurisdictional arrangements, their variances"* and how policies seen fit to leave in the hands of jurisdictions are currently regulated – *"without such analysis problems can only be speculated."* (p10 Qld Govt 2009) *It provides no detailed analysis of current jurisdictional arrangements, their variances and how electrical and gas safety and technical matters are currently regulated. Without such an analysis problems can only be speculated*

I again refer to the findings of the Final Report dated October 2009 of the Commonwealth Consumer Advisory Committee observed that:¹³⁷ which referred to how certain issues may be addressed *"to protect and enhance the wellbeing of consumers now and into the future,"* in the following terms:

"Clarity and awareness of the law, combined with clear and effective methods for redress, are fundamental attributes in the law, and have been identified as being imperative in addressing the issues faced by consumers, retailers and manufacturers. Information about the type of warranties and remedies available to consumers when they experience product failure is crucial in promoting wellbeing and empowering consumers in today's environment.

This report considers how these issues can be addressed to protect and enhance the wellbeing of consumers now and into the future."

This report acknowledged that the current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law (Findings 5.1).

¹³⁷ Commonwealth Consumer Affairs Advisory Council (CCAC) (2009) Consumer rights: reforming statutory implied conditions and warranties. Commonwealth Treasury Final Report. October http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf

The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions consumer protection is compromised

The failure to distinguish within NECF drafting proposals between customers and end-consumers (of energy) or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

Though the concept of “*flow of energy*” is recognized within the NECF2 Package, it could be reasonably claimed that a perceived “ostrich-like approach” in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing the following:

- consumer detriment, market confusion;
- expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect of stripping end-users of their enshrined rights
- ultimately litigation in the open courts, a option that is already been taken up in this very matter. Class actions can result in enormous expense to all concerned and also implicate those sanctioning these practices

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009) Productivity Commission (2008 and 2009); and Federal Treasury (2009).

So far, it seems convenient strategies have been adopted to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

On the issue of trade measurement best practice I note with concern the correspondence from Dr. Laurie Besley CEO and Chief Metrologist to Mr. Drew Clarke as Chair of the AEMO Implementation Steering Committee concerning provisions within the Declared Wholesale Market Rules.

The response of the NMI dated 13 March 2008 to the consultation draft iterates concerns that the NMI's role to establish and maintain Australia's primary measurement standards and providing peak infrastructure that enables measurements in Australia to be accepted nationally and internationally do not become eroded.

Specific recommendations are made in that correspondence regarding definitions in relation to technical interpretation and metering. I have maintained an unwavering position regarding similar concerns about erosion of best practice trade measurement in relation to adopted metrology procedures, which appear to me to be a dog's dinner of inconsistency and poorest practice.

This is the context in which I have repeatedly raised issues of pertinence to NMI policies and practices as they impact on other regulatory schemes and their respective and discrepant interpretations.

Though the NECF2 Package does not address wholesale market operations, these are so fundamental to how the retail market operations and how settlements are achieved with flow on effects on the tripartite governance model adopted by the NECF2 that I feel compelled to mention them here.

Decisions and proposed legislation taken on one aspect of the market without consideration of other components of the market can produce both misleading and questionable outcomes.

Elsewhere I discuss the extent to which the AEMC's decision to find as competitive both the Victorian and the South Australian electricity and gas markets competitive was refuted by numbers of stakeholders, including The Hon Patrick Conlon, MP as Minister for Energy South Australia and a member of the MCE.¹³⁸

The AEMC's cursory consideration of the wholesale market and focus on one component of a market may have contributed to distorted results.

¹³⁸ I cite from the Productivity Commission's Research Report (2009) Regulatory Burden: Social and Infrastructure as follows in relation to retail competitiveness as assessed by the AEMC: The AEMC's review of retail energy competition in South Australia was concluded in December 2008 and a report presented to the South Australian Government and the MCE for consideration (AEMC 2008d). The review found that competition is effective for small electricity and gas customers, however, competition was more intense in electricity than in gas (AEMC 2008c). The review recommended that regulation of retail energy prices should end no later than December 2010 for electricity and June 2011 for gas. In April 2009, the South Australian Minister for Energy responded to the AEMC report. He pointed to 'differing views on the level of effective competition in the South Australian energy market' and stated that 'the South Australian Government does not accept the AEMC's recommendation for the removal of price control at this time' (Conlon 2009).

I have discussed this issue in considerable detail in my 2007 two-part submissions to the AEMC's during their Victorian review of retail markets (see bibliography), focusing on the extent to which the internal energy market has may have been under-assessed, and providing considerable support for this rationale by citing widely from stakeholder views and from academic sources, including Jamieson's literature review (World Bank)

That is why, in the context of the National Energy Retail Market Procedures for both gas and electricity consistency in metrology lexicons, interpretations is crucial if there is any hope of a try national approach to regulation.

I made the same observations about the AEMC's decision to consider retail competitiveness in Victoria and South Australia (with other states similar targeted in his timetable to determine effectiveness in other states), when the assessment of the retail market was substantially taken out of context of the wholesale market, with the latter receiving passing consideration only during the assessment and decision-making processes. There was much disagreement from many stakeholders as to whether the AEMC had accurately assessed competitiveness in both Victoria and South Australia.

Of particular relevance is the response by of the South Australian Government through Minister The Hon Patrick Conlon, MP in to SA, the Hon Patrick Conlon's submission to the ESC (2008) Victorian Review of the effectiveness of Retail Competition in the gas and electricity markets in SA; and the SA Government's submissions to the AEMC (2009) SA Review, and this Government's Response to the AEMC's seemingly pre-determined decision to also find the SA Australian market for gas and electricity to be competitive.

For a host of reasons I believe the time is over-ripe for direct Federal intervention in matters that have traditionally been left to jurisdictional control. I also believe that the NMI has a golden but possibly limited opportunity to assume more visible profile and control.

Other matters as raised by industry:

Inconsistencies in regulation of gas meters

Envestra has raised the specific issue of inconsistencies between jurisdictions in regulatory requirements for gas meters:

Envestra supplies gas meters to its customers in Victoria and in Albury, New South Wales. But while the same make and model of gas meter is purchased for both jurisdictions, Envestra must maintain separate stocks of gas meters to service its 23 000 Albury consumers and its 525 000 Victorian consumers. This is because New South Wales legislation requires gas meters installed in that state to be stamped with a NSW seal of approval. The additional administrative and operational burden of complying with the NSW legislation is ultimately borne by Albury consumers. (sub. 13, p. 2).

Governments have been working for nearly two decades to achieve greater consistency in trade measurement regulation between jurisdictions. By 2006 all states and territories had adopted Uniform Trade Measurement Legislation.

However, continuing inconsistencies and different interpretations prompted COAG to identify trade measurement as a high priority regulatory ‘hot spot’. Work has been progressing on the implementation of a national system of trade measurement to be administered by the Commonwealth through the National Measurement Institute (NMI). The new system is to commence on 1 July 2010.

These reforms will not, however, address the issue of inconsistencies in gas meter regulations. The *National Measurement Act 1960* was amended in 1999 to include Part VA, which provided for the Commonwealth to carry out type (pattern) approval of utility meters and initial verification.¹³⁹

Initially all classes of meters were exempt with the intention being that the exemption would be lifted for particular classes of meter once the necessary infrastructure was developed.

The exemption has been lifted for certain water meters and progress has been made towards lifting the exemption for domestic electricity meters. NMI plans to address gas meters once work on water and electricity meters is further developed. NMI has already taken part in certain international meetings on gas meter standards.

The Commission also notes that the ETSLG discussion paper (MCE ETSLG 2009, p. 17) uses gas meters as an example of regulatory inconsistency and specifically calls for stakeholder comments on such inconsistencies.

Any gas meter that can legally be used in one Australian jurisdiction should be able to be used in any other jurisdiction without modification. Reform needs to be expedited and should be pursued by the Ministerial Council on Energy through its current work on harmonizing energy technical and safety regulation in consultation with the Ministerial Council of Consumer Affairs, which has been overseeing national trade measurement reforms.

¹³⁹ ⁸ These changes were made following the Kean review of Australia’s Standards and Conformance Infrastructure (Keane 1995). Monitoring of meters in use remains the responsibility of state and territory authorities.

DISTRIBUTOR-RETAILER-CUSTOMER RELATIONSHIPS

Limited discussion of contractual governance matters –

Relationships between retailers and customers, between distributors and customers, deemed customer arrangements

Numerous sections of the package are impacted by these considerations

On specifics on interpretation Instead of detailed discussion of each component of the Interpretation Section under 102, I group components of this section with several others to discuss the application of deemed contracts in the tripartite governance model adopted, more especially since term “customer connection service has been broaden to cover a range of procedures as follows:

To save repetition in different places, the discussion below thematically discusses several sections from different parts of the NECF2 Package focused primarily on deemed contracts in the tripartite governance model

Starting with Div 1 Prelim 105 Meaning of Customers and Associated Terms:

“The term ‘customer’ covers both small customers and large customers.”

Comment MK

This term does not distinguish between customers (for Body Corporate entities) and end-consumers of utilities. This is crucial when determining who the proper contractual party should be.

See for example continuing debate and confusion surrounding contractual arrangements and legal traceability of energy within the jurisdictional *“bulk hot water arrangements”* currently the subject of more than one legal dispute in the open courts, including one in particular involving both *“provider of hot water services and internet services.”*

That matter was initiated in fact by the current members of an OC¹⁴⁰ and raises many issues that are pertinent to contractual matters, even though renting tenants are not part of the equation.

¹⁴⁰ Dispute between a Victorian Owners’ Corporation, and a Developer (Inkerman Developments) who entered into a contract for the sale of “hot water services” through an energy retailer relying on the flawed jurisdictional ‘bulk hot water arrangements’ initiated by Victoria and adopted in two other States, albeit applied discrepantly in each. These legal proceedings on foot were initiated by an Owners’ Corporation regarding retrospective estimated liability over 6 years questioning.

- The legality of arrangements for the sale of “Hot Water and Internet Infrastructure;
- the signing of contracts by the original Owners’ Corporation Manager;
- the alleged contract, allegedly signed by the Owners’ Corporation;
- the possible excessiveness of the charges, using the flawed Victorian algorithm conversion factors and employing hot water flow meters to pose as electricity meters;

In determining a contractual relationship for the sale and supply of energy, flow of energy must be established to the premises of the party deemed to be receiving it.

The definition of connection within the NECF2 Package means a *“physical link between a distribution system and a customer’s premises to allow the flow of energy.”*

The Victorian Gas Distribution System Code describes The VGDSC describes **DISTRIBUTION SYSTEM** as a network of pipes meters and controls which the Distributor uses to supply gas. A water meter does not form part of that distribution system. It is not associated with the supply of gas as:

“a point on a distribution system at which gas is withdrawn from the distribution system for delivery to a customer which is normally located”

Under the proposed NECF **SERVICE PIPE** means a pipe ending at a metering installation or, for an unmetered site a gas installation, which connects a main or a transmission pipeline to a customer’s premises, as determined by a distributor.

A hot water flow meter, the instrument theoretically used in effect as a substitute gas meter under policy-maker and regulator sanction in three different States is not connected to a pipe which connects a main or transmission pipeline to a customer’s premises if that customer is deemed to be an end-user of centrally heated water, a composite product, serviced by a single energization supply point. Such an instrument measures water volume only not volume or heat. These instruments are poorly designed to withstand heat in any case.

Creative and unacceptable interpretations as to what kinds of meters represent those that are *“separately metered”* under both energy and non-energy provisions.

Comment MK

Please see further discussion in Apdx 2 analyzing selected provisions from the further Revised Energy Retail Code v7 published February 2010 and effective from April 2010, containing anomalies and conflict within and outside energy laws current and proposed and with numerous other provisions including generic laws current and proposed, residential tenancy laws, OCs laws; common law contract and the like.

-
- e) challenge to operational and service design parameters initiated by the Developer in consultation with the energy providers using hot water flow meters to pose as gas meters, and selection of hot water infrastructure leading to water wastage and inflated charges
 - f) operational design – relating to flow rate of the hot water being greater than the cold water.
 - g) the quality of supply and service of all the above alleged supplies and services over a period of six years.

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In the case of OCs managing multi-tenanted dwellings, either private or public, in the case of communally heated water supplies receiving heat from a single energy connection or energization point, these are the proper contractual parties under contractual law and in view of multiple provision regarding the sale and supply of goods, including trade measurement provisions, subject to the lifting of remaining utility exemptions.

The NER and the ESC Energy Retail Code describe business premises as follows:

“business premises means premises of a business customer, other than premises used solely or principally for personal, household or domestic use”;

By contrast, the national measurement provisions go further in distinguishing premises from residual abodes. Premises can refer to a chook house or boiler room (which may house cold water flow meters ancillary to the mains water meter and/or satellite hot water flow meters that measure water volume but not heat or gas volume or electricity.

Omitting the term *“residential”* from premises meaning abode can confuse the picture as to who is receiving the energy to heat the water. There are contractual considerations as to the proper contractual party since in these cases the sale and supply of electricity and gas are always provided to the OC not the end-user of heated water supplies. This is further discussed in Apdx 1, 2, 6, 7, 8

and Part 1 Div 1 Prelim 105 Meaning of Customer and Associates Terms;

Part 3 Relationship between distributors and customers, a

Division 1 Preliminary 105

Part 3 Division 2 Obligation to provide customer connection services

302 Obligation to provide customer connection service

This does not clarify the position when a Developer or an OC as a new *“business customer”* (rather than end-consumer) seeks a new connection (long before any renting tenant is in sight) and the expected nature of a continuing contractual relationship for sale and supply of energy that is supplied to a single connection or energization point. It is crucial for the national Framework to allow for and address these issues instead of sweeping the matter under the carpet for decades.

Whilst the MCE has made it patently clear that it will not address the BHW policy matter within this package, continued refusal to accept responsibility for leaving glaring gaps in consumer protection and implicitly facilitating continued adoption of poor regulatory practice without also considering the implications of regulatory overlap and the obligation of energy providers to abide by all laws, could be interpreted as irresponsible.

Division 4 Deemed standard connection contracts

304 Model terms and conditions

305 (1) (2) (3) Adoption of form of standard connection contract

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Standard and deemed contracts need to be consistent with generic provisions current and proposed.

See Part 6 NERR Deemed (3) This section does not affect deemed customer retail arrangements under Division 9.

Division 2 Customer retail contracts generally

202 Kinds of customer retail contracts

(1) There are 2 kinds of customer retail contracts, as follows:

- (a) standard retail contracts;
- (b) market retail contracts.

(2) A retailer cannot provide customer retail services to small customers under any other kind of contract or arrangement.

(3) This section does not affect deemed customer retail arrangements under Division 9.

(4) This section does not affect RoLR deemed small customer retail arrangements under Part 6.

Division 3 Standing offers and standard retail contracts for small customers

203 Model terms and conditions

The Rules must set out model terms and conditions for standard retail contracts (referred to in this Division as the *model terms and conditions*).

customer connection contract means a contract between a distributor and a customer of the kind referred to in section 303;

customer connection service for premises means any or all of the following:

- (a) a service relating to a new connection for the premises;
- (b) a service relating to a connection alteration for the premises;
- (c) a service relating to the ongoing energization of the premises, including the initial energization, supply, de-energization or re-energization of the premises;
- (d) a service prescribed by the Rules as a customer connection service for the purposes of this definition;

customer retail contract means a contract between a small customer and a retailer of a kind referred to in section 202 for the provision of customer retail services for particular premises;

customer retail service means the sale of energy by a retailer to a customer at premises;

de-energization or ***disconnection*** of premises means—

- (a) in the case of electricity—the opening of a connection; or
 - (b) in the case of gas—the closing of a connection;
- in order to prevent the flow of energy to the premises;

deemed customer retail arrangement means an arrangement that applies between a retailer and a move-in customer or a carry-over customer under section 235;

deemed standard connection contract means a customer connection contract that is taken to be entered into under section 306;

Comment MK

All of these definitions and associated provisions are impacted by arguments presented in relation to deemed energy supply for those receiving communally heated water reticulated in water pipes.

Energy suppliers and distributors are disconnecting heated water supplies with the tacit sanction of all authorities involved.

Such a contract may exist between energy suppliers, distributors and developers or OCs at the time of initial connection of gas or electricity infrastructure (or even water infrastructure) and they are the parties to such arrangements, not a successive renting tenants who may occupy the building(s) where such connections have been made.

Therefore right from the outset the proper contractual apportionment needs to be determined.

At the February Workshop Fora some industry participants mentioned that they did in fact distinguish between customers and en-consumers, not that an end-consumer of a heated water product reticulated in water pipes can possibly be legitimately deemed to be consuming energy legally or illegally, or that the effect of any claims of sale and supply of energy is likely to be legally sustainable under revised generic laws or existing sale of goods provisions.

I cite from the MCE RPWG Composite Paper July 2007

Grounds for disconnection

“obligations under the deemed distribution contract that are expressed to give rise to an express right of disconnection (e.g., failure to provide safe access or meet equipment specifications, or taking unauthorized supply).”

It is impossible to see how either failure or inability to provide access to hot water flow meters can have anything to do with the provisions sited above regarding disconnection. The MCE has chosen to turn a blind eye to the types of disconnection that are occurring, using the existence of hot water flow meters and any leasing or ownership that may apply in relation to either distributors or retailers can justify disconnection of heated water supplies in multi-tenanted dwellings.

It is my view that such actions would be considered unjust and unfair under generic laws proposed, especially as they are taken or threaten in the context of endeavouring to secured an explicit market contract for energy that is not sold or supplied to the end-users of that heated water through flow of energy

(3) De-energization of gas supply

Despite any other provision of this Division, the retailer may exercise the right to arrange for de-energization of the customer's gas supply in accordance with timing determined under the dual fuel contract.

As mentioned, on the basis of collusive arrangements with OCs or private Landlords, Energy retailers and distributors are together disconnecting heated water supplies. The mere existence of hot water flow meters or cold water flow meters, and regardless of ownership of such measuring instruments (which are unsuitable instruments with which to measure gas or electricity as they measure water volume only not heat)

Retailers have been misled in their interpretation of deemed supply in relation to energy for those receiving heated water supplies.

The existence of hot water flow meters are being primarily used to coerce disconnection or suspension of heated water supplies delivered in water pipes to those residential tenants residing in multi-tenanted dwellings.

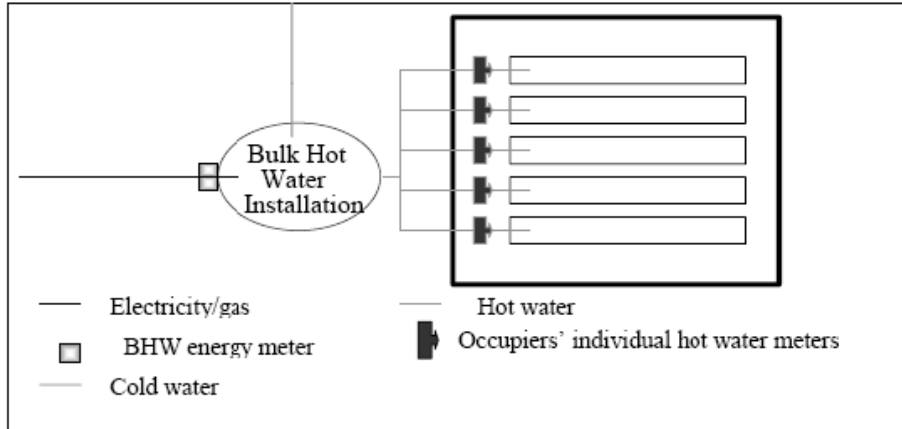
The Deidentified case study already published with my response to the Gas Connections Framework Draft Policy Paper (2009) (as a component of the NECF) and to the Treasury's Unconscionable Conduct Issues Paper (2009) – appended here once again to draw attention to the injustices.

(4) De-energization of electricity supply

The retailer may exercise the right to arrange for de-energization of the customer's electricity supply in accordance with timing determined under the dual fuel contract but no earlier than 15 business days after the date of the de-energization of the customer's gas supply under subrule (3).

See comments above re disconnection of heated water supplies reticulated in water pipes

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

(taken from ESC Deliberative Document prior to adoption of the BHW pricing and charging provisions relying on readings of hot water flow meters, and converting volume of water used into a “deemed gas rate” as a fixed conversion factor requiring ho site readings at all)

The term hot water meter refers to a **hot water flow meter** not gas or electricity meters.

Only one gas meter exists with a Meter Identifying Number (MIRN_ shown. See diagram square marked BHW energy meter. This is either a single gas meter or a single electricity meter. It powers the boiler system marked as “bulk hot water installation” so that communally heated water can be transmitted in water service pipes to individual apartments.

No separate boiler tanks exist in each residential premises, and no flow of energy to those premises is achieved. These installations are normally made at the time of building erection. Owners have little incentive to maintain the boiler system and associated equipment. In older buildings the water service pipes are rarely lagged.

In the late 80’s and early 90’s public tenants on the corner units of four story used to have a 100 to 200 litre draw down before they actually got hot water and they paid for every drop that they ran through the tap. Given the numbers of consumers getting hot water it appears that the providers couldn’t care less about the issues as long as they get paid. For older buildings these inefficiencies and impacts of energy efficiency are perpetuated some 30 years later.

In practice massive charges are applied that are not only unjust but are based on the entirely erroneous premise that any energy is being supplied at all – to the end user of the heated water.

The gas that is supplied is to the Landlord/Owner, who is legally responsible for the payment of all charges for unmetered gas or electricity or water; and where water is metered can only charge at the cold water rate.

By utilizing loopholes in energy regulation in the form of Codes, and misinterpretation of the deemed provisions of gas under the Gas Industry Act 2001, (and equivalents in other jurisdictions), Landlords are escaping their mandated responsibilities by engaging host retailers as billing and metering agents – with those services frequently contracted to other third parties.

No-one is clear about responsibilities for maintaining the meters or infrastructure, the quality of the water supplied is frequently sub-standard and inconsistently hot; the health risks of using non-instantaneous boiler tanks remain unaddressed; energy efficiency concerns (water pipe lagging etc) never attended to; and implied and statutory warranty provisions entirely ignored.

As to continuing to uphold provisions that are legally unsustainable; cannot demonstrate a legal contract with end-users deemed to be receiving energy; persisting with conflict and overlap with other schemes, defying best practice trade measurement; ignoring unfair contract provisions; and upholding disconnection processes and procedures that are inconsistent with every aspect of current and proposed energy laws; this is an intolerable situation that reflects the poorest possible example of flawed policy and regulatory practice.

I again refute any perception that the current consumer protection system is working reasonably well, or any suggestion that cursory tweaking may bring desirable outcomes.

Particularly in the arena of energy at any rate within Victoria, complaints handling, compliance enforcement commitment has been so diluted as to bring into question whether a public enquiry may be justified on several grounds. None of the responsible regulatory or complaints handling agencies have taken a responsible and accountable action in matters specifically brought to their attention.

Flawed policies that have occasioned unacceptable consumer detriments remain in place unaddressed.

One of these may be deferring final decisions about how specified consumer protections should operate, especially in the arena of essential services, with energy being one of these.

There are grey areas around service quality for hot water meter maintenance, accuracy and safety issues associated with boiler tanks

The term Bulk Hot Water Installation means boiler tank which is surrounded by hot water flow meters allocated to individuals.

Energy suppliers either lease or own these meters, but not the water supplied by the water authority. A supplier who does not own a product cannot sell it under generic laws current and proposed.

In Queensland apparently the relevant host energy supplier apparently leases these hot water flow meters from the distributor who arranges for a water meter reading. Massive water meter reading fees are charged to each resident. Only one gas meter exists, providing heat to the boiler tank. The existence of the water meters aids in justifying under “cost-recovery” pretexts but the meters if read at all simply exist to theoretically allow for a conversion factor formula to be applied so that deemed gas usage can be determined. See overleaf for formulae adopted by the Victorian ESC.

In SA it is more common for meter readings to occur – also using the Victorian model for conversion factors relying on water volume usage to calculate deemed gas usage.

Whilst intending the package to apply to all Australians the split of regulatory responsibility has created significant anomalies that result in application of the Package some but not all Australians, since the MCE has made a conscious decision not to deal with who are regarded as contractually obligated to both distributors and retailers, though they receive not an iota of energy in the form of gas or electricity demonstrated through flow of energy.

Some possible solutions:

- Withdraw existing the BHW arrangements from energy provisions. Revisit departmental local authority Infrastructure and Planning arrangements that allow perpetuation of the BHW arrangements (see for example Qld Dept of Infrastructure and Planning sanctions Fact Sheet under Building Codes Queensland).
- Allocate responsibility to the appropriate contractual parties - OCs
- Make sure metering databases and service compliance is undertaken
- Apply appropriate trade measurement practices using the right instrument to measure the right commodity in the correct unit of measurement and scale.
- Ban communal hot water systems and install individual utility meters for gas electricity and water in all new buildings.
- Assist existing OCs and Landlords to upgrade and retrofit with individual meters and instantaneous hot water systems in each residential abode - meeting efficiency and health risk issues in one fell swoop and enabling proper application of metrology procedures that are transparent.

Further Comment MK:

I update my comments on p 71 of my submission to the PC's Review of Australia's Consumer Policy Review (2008) subdr242part4, EWOV's publicly stated views about wrongful disconnection and ESC's role in determining when this should be undertaken by retailers¹⁰¹

Since that was written the Wrongful Disconnection Operating Procedures were repealed in the big sweep to reduce regulatory burden.

In any case the thrust of that document was related almost exclusively to hardship issues. No a single mention was made to wrongful disconnection in the context of suspending heated water supplies through clamping of hot water flow meters that measure not gas, electricity of heat, but water consumption. Such disconnection takes place at the instigation of host retailers responsible for supplying through a single master gas or electricity meter energy used to heat a communal water tank supplying in water pipes heated water that is centrally heated in multi-tenanted dwellings (e. g flats and apartments) The threat of such inappropriate disconnection of heated water supplies is normally used in coercive attempts by energy retailers to forge a contractual relationship with tenants taking up occupancy in flats and apartments, where the proper contractual party is the Landlord or Owner.

For distributor-retailer settlement purposes a single supply point exists – a technical term that does not been the abode of an end-user of heated water, but rather the double custody changeover point where gas or electricity) leaves the infrastructure and enters the outlet of the meter, in such a case a single master gas or electricity meter that forms part of common property and therefore Landlord/Owner responsibility.

In Victoria tenancy laws are quite clear that where water meters of any description exist, only charges for water consumption can be made at the cold water rate, and that heat and that the Landlord/OC is responsible for all consumption charges of any utility that cannot is not separately metered, including the heat used to centrally heat water supplies reticulated to apartments. VCAT has repeatedly ruled on this matter.

Yet current regulations in three jurisdictions permit improper imposition of contractual status on end-users of communally heated water, as well as massive apparently uncontrolled supply, commodity and/or unspecified bundled charges on individual tenants, thus recovering many times over what represents a single supply charge for the master gas or electricity meter – that should be apportioned to Landlords/owners. In Queensland an additional FRC charge is applied also to end-users of centrally heated water.

The term applies to "*freedom of retail contensability*" which does not apply to those who are trapped in a non-contestable situation with heated water supplied by a Landlord who chooses a retailer for the supply of gas used in the central heating of water supplied to tenants in multi-tenanted dwellings.

The FRC charge is imposed on natural gas customer accounts at around \$25 a year for the first 5 years after the FRC date (in Qld 1 June 2007).

FRC is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place.

It accumulates over this first 5 years as a *"pass through cost"* of about \$20million and will be phased out in a couple of years.

VenCorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

There are no MIRNs for end-users of heated water in multi-tenanted dwellings and no means of calculated in a legally traceable manner the amount of gas used in the heating of individually consumed gas (or electricity) used to heat a communal boiler tank supplying water to multiple tenants.

The current system of apportioning deemed gas usage for individuals supplied with communally heated water will become invalid and illegal when utility restrictions are lifted.

The question of the proper contractual party has not been resolved, and neither the regulator or policy makers who imposed these unjust terms are willing to take any action even when the insistence of an energy retailer in seeking disconnection of heated water supplies can be regarded as unconscionable.

For further discussion see my published extensive Deidentified Case Study showing what can only be regarded as irresponsible and inappropriate conduct on the part of policy-maker, regulator and industry-specific complaints scheme in condoning disconnection of heated water supplies to a particularly vulnerable end-consumer of heated water supplies who denied through his representatives that any contract for the supply of energy existed or ought to exist. Ultimately after 21 months of abortive dialogue with the authorities and complaints scheme, that party had his heated water supplies indefinitely suspended through the clamping of a hot water flow meter that measures water consumption but not gas or heat. It was never reinstated. Despite medical evidence and reports that he would suffer detriment if he lost the continuity of his water supplies, such evidence had no impact on the discretion held by the energy regulator (Victoria) to forbid disconnection.

In this case the repeated coercive threats of disconnection of heated water were unconnected with overdue bills – none were ever issued.

The threats of disconnection were used as a strategy to force a contractual relationship between tenant and supplier as part of what can only be described as a collusive arrangement between Landlord, energy supplier, policy-maker and regulator.

Neither the complaints scheme nor the regulator publishes reports or details of complaints about disconnection that takes place under such circumstances – which is commonplace if contractual status is not accepted by the tenant for the reasons explained, or if bills issued by the energy supplier for the alleged consumption of gas are not paid.

The arrangements are inconsistent with all other provisions with existing and proposed energy laws, with best practice trade measurement, with existing rights under tenancy and generic laws and represent substantive unfair terms as well as breach of implied or statutory warranty on the basis that the commodity supplied – heated water – is not fit for the purpose in many cases since the quality of the heated water in terms of temperature is normally variable

In theory, the existing nonsensical algebraic conversion factors applied (See Victorian Energy Retail Code v6 Clause 3) previously incorporated under the now repealed Bulk Hot Water Charging Guideline 20(1) is theoretically based on the quality of gas supplied then averaged over the regulatory period involved in setting the conversion factor.

There is no such thing as an “*embedded*” *gas customer*” since only licenced gas providers may provide gas. If there is any move to alter this, technical and safety considerations at the very least must be considered in public safety – deviations at the may be at peril of policy-makers and regulators.

No gas is supplied to end-users of the composite product heated water. The OIC exemptions for small scale licencing apply exclusively to electricity where electricity is being directly supplied through flow of energy regardless of change of ownership or operation of the infrastructure. In the case of gas the distributor supplies a single gas master meter for which he is responsible.

Regardless of whether a distributor owns and operators or leases out hot water flow meters or other non-gas infrastructure; and regardless of whether host retailers purchase such hot water flow meters, such ownership cannot confer contractual rights to claim sale and supply of energy. To that extent the deemed provisions of the *GIA* have been grossly distorted.

The billing and metering services supplied are directly to the Landlord/OC, so that inappropriate and even unconscionable disconnection of heated water supplies cannot occur under the circumstances described..

In the case of bulk hot water (communally heated water in multi-tenanted dwellings, where only a single gas (or electricity) master meter exists) there is no measurement of the temperature of the hot water delivered to the consumer.

Though my focus as an example of policy gaps is often on energy, this does not mean that the same concerns cannot be extrapolated for other arenas.

(5) Restrictions on de-energization not affected

Nothing in this rule affects the operation of rule 610.

612 Request for de-energization

(1) If a customer requests the retailer to arrange for de-energization of the customer's premises (whether or not the customer requests a final bill), the retailer must use its best endeavours to arrange for—

- (a) de-energization in accordance with the customer's request; and
- (b) a meter reading; and
- (c) the preparation and issue of a final bill for the premises.

Division 5 Application of this Law, the Rules and Procedures to forms of energy

116 Application of Law, Rules and Procedures to energy

(1) This Law, the Rules and the National Energy Retail Market Procedures apply to—

- (a) the sale and supply of electricity or gas or both to customers; and
- (b) a retailer to the extent the retailer sells electricity or gas or both; and (c) a distributor to the extent the distributor supplies electricity or gas or both.

(2) References in this Law, the Rules and the National Energy Retail Market Procedures to energy are to be construed accordingly.

(3) Nothing in this section affects the application of provisions of this Law, the Rules or the National Energy Retail Market Procedures to persons who are neither retailers nor distributors.

The law refers to sale and supply of energy.

No sale and supply of energy occurs in relation to those receiving heated water supplies where a single master gas or electricity meter is used to communally heat a non-instantaneous boiler tank supplying heated water to multiple parties in their individual residential premises.

Yet the MCE is aware of inconsistent and bizarre arrangements whereby a contractual relationship is being imposed for alleged sale and supply of energy where no flow of energy occurs and no energy can possibly be said to be sold and supplied. The contractual relationship is being deemed to exist between end-consumers of heated water so supplied inappropriately and on account of distortion of the meaning of sale and supply of energy, consumption and illegal consumption

The neglect of the MCE to take this matter appropriately on board and re-direct current jurisdiction provisions to hold the proper parties contractually obligated for the sale and supply of energy used to heat communal boiler tanks, as supplied to Developers and OC can be interpreted not only as misguided but irresponsible.

Ignoring the fact that innocent end-users of heated water being held contractually obligated; potentially in arrears of alleged energy bills when none is supplied or consumed; potentially incurring debt records; being improperly accused of illegal consumption of energy' and being obligated for a host of conditions precedent and subsequent can hardly be considered responsible action by the MCE .

309 Deemed standard connection contract to be consistent with model terms and conditions

(1) The terms and conditions (whether original or varied) of a deemed standard connection contract have no effect to the extent of any inconsistency with the model terms and conditions as currently in force or any required alterations.

(2) If there is such an inconsistency, the model terms and conditions or required alterations (as the case requires) apply instead to the extent of the inconsistency.

310 Duration of deemed standard connection contract

A deemed standard connection contract between a distributor and a customer remains in force until—

(a) an AER approved standard connection contract or a negotiated connection contract in respect of the premises comes into force; or

(b) the deemed standard connection contract is terminated in accordance with the terms and conditions of the contract.

Comment MK

I strenuously object to the unilaterally imposition of contractual status by energy providers for contractual obligation for sale and supply of energy when it is water products that are supplied in water pipes, wherein the heat supplied to a communal water tank is supplied by a single gas or electricity meter, which for settlement purposes is a single supply distribution point or energization point.

On the basis of implying a deemed contractual relationship that would be unsustainable in law for alleged sale and supply of energy, end-users of heated water products are being held contractually obligated to retailers and distributors, with ripple effects for perceived over-dues of alleged bills; move-in and carry-over customer considerations; alleged denial of access to hot water flow meters that are irrelevant to the calculation of energy since they are technically had scientifically incapable of measuring anything more than water volume. Retailers do not own water volume, there it may be that philosophically bodies such as the ESC may believe that it is legitimate to endeavour to recover through either bundled or unbundled costs a proportion of water costs also.

It is preposterous to suggest that a move-in renting tenant may be illegally consuming energy when in good faith such a party relies implicitly on residential tenancy laws and inclusion within the rent and mandated terms of a lease that any utility that is not the subject of a separate meter and where no direct flow of energy can be demonstrated is solely the responsibility of the Landlord or OC.

If no flow of energy exists, no sale or supply of energy can be deemed to have occurred.

The failure of the MCE to acknowledge what is happening, and to go as far as saying that nothing will be done at all about these anomalies in the full knowledge of how certain jurisdictional instruments are operating can be taken to be an irresponsible and inappropriate act of omission impacting adversely on end-consumers of utilities.

Examination of the licence provisions for the three host retailers issued by the Essential Services Commission will confirm that the intent of the interpretation of customer was originally mean to be the OC with whom a direct contract is formed deemed or explicit for the sale and supply of energy, as well as a gas or electricity metering installation at the outset when connection is requested either by the original Developer, or implicitly by the subsequent OC.

Division 9 Deemed customer retail arrangements

238 Obligations of retailers

(1) As soon as practicable after becoming aware that a small customer is consuming energy under a deemed customer retail arrangement, the financially responsible retailer for the premises concerned must give the customer information about the following:

- (a) the retailer's contact information;
- (b) details of the prices, terms and conditions applicable to the sale of energy to the premises concerned under the deemed customer retail arrangement;
- (c) the customer's options for establishing a customer retail contract (including the availability of a standing offer);
- (d) the consequences for the customer if the customer does not enter into a customer retail contract (whether with that or another retailer), including the entitlement of the retailer to arrange for the de-energization of the premises and details of the process for de-energization.

(2) If the small customer is a carry-over customer of the retailer, the retailer does not have to give the customer the information required under subrule (1) if the retailer has already given the customer a notice under rule 237 relating to a market retail contract and containing that information.

Comment MK

See comments above and the consistent theme in this submission highlight the anomalies that the MCE has chosen deliberately to overlook in relation to the false claim by retailers and distributors, facilitated by jurisdictional sanctions to consider a move-in end-consumer of heated water supplies to be “consuming energy under a deemed customer retail arrangements.

This reflects failure to adequately interpret sale of goods provisions, implied and statutory warranty provisions; technical and scientific considerations; “flow of energy” concepts; unfair substantive clauses as contained in proposed generic laws and already included in Victorian unfair contract provisions; trade measurement best practice and the fundamentals of contractual law.

Energy that is supplied from a single master meter to fire a single communal boiler tank used to supply heated water is not consumed by end-users of that water and it is preposterous that energy retailers see fit to threaten disconnection of that heated water when becoming aware of a move-in tenant occupying a single dwelling in a multi-tenanted building. As illustrated in the Deidentified Case study already presented and reproduced with this submission, unjust and unwarranted disconnection of heated water supplies to a particularly disadvantaged and vulnerable tenant occurred as a consequence of practices sanctioned at jurisdictional level more explicitly; and tacitly endorsed by the MCE through failure to properly clarify the matter.

standard meter , in relation to a particular small customer, means a metering installation of the type that would ordinarily be installed at the premises of the customer.

Comment MK

This must surely need to be clarified as a gas or electricity meter – this is an energy law. Water meters are being relied upon to make guestimates of the heat used to heat a communal water tank. No flow of energy is effected to the premises of those deemed to be receiving as or electricity.

Problem: Denial of deemed contractual obligation for sale and supply of energy unless retailers can show the existence of contract through legal traceability of consumption of energy

It is these arrangements that are discussed in relation to the preposterous suggestion that an end-consumer of heated water in the absence of any flow of energy into the premises of the party deemed to be contractually obligated to both the retailer and distributor under the NECF2 Package tripartite governance model that has been extensively discussed in all previous submissions to MCE arenas, and in relation to this batch of proposed instruments mainly under Part 1 Division 1 – 3, to a large extent under Interpretation.

See also under objective.

An end-user of heated water in a multi-tenanted dwelling, notwithstanding policy arrangements and jurisdictional codes in place consumer heated water. In Victoria hot water services provided to renting tenants under residential tenancy laws are an integral part of mandated tenancy leases.

A renting tenant enters that agreement with a Landlord on the understanding that no utility bills will represent responsibility for the tenant unless a separate meter is supplied for each utility supplied. Further where water meters are available and have been sanctioned by the Water Authority and subject to suitable licencing and servicing arrangements, as well as complying with any applicable trade measurement provisions, heated water may only be charged to tenants at the cold water rate.

In the bizarre and inappropriate “*bulk hot water policy arrangements*” tacitly endorsed by the MCE through failure to address concerns about regulatory overlap within and outside energy provisions, retailers or their servants/contractors **or agents are issuing up** to several months after a legitimate tenancy is taken up under mandated lease provisions a “*vacant consumption letter*” that indicates “hot water consumption” is being monitored by or on behalf of the energy supplier, seeking now to charge for such consumption.

It is sometimes unclear from such correspondence whether it is water or energy that the energy supplier is endeavouring to allege contractual obligation.

The sale of goods acts and generic laws require ownership of any good (commodity) that Despite any ownership of satellite hot water meters associated with a communal boiler system, or access to cold water meters supplied water at the mains; and regardless of any deemed usage of gas to heat individual consumption of heated water that is communally heated, an energy retailer would in contract law and generic laws find it extremely difficult to prove that any contract exists at all.

It would be preposterous to suggest fraudulent or illegal supply of energy under circumstances where no energy of any description is received (associated with the “*bulk hot water arrangements*”), as facilitated by flow of energy into premises deemed to be receiving it.

A residential tenant enters into a direct contract with a Landlord or Owners/Corporation under mandated provisions, which in Victoria are unambiguous in relation to utilities.

It is the OC or Landlord who invites the supplier onto the property, requests a single gas master heater to be installed and makes arrangements for a communal water tank to be heated by that gas or electricity meter. That is where the contract lies for the connection installation, sale and supply of energy and any associated costs.

Host retailers are normally associated with specific distributors in certain geographical areas for the provision of energy in multi-tenanted dwellings where that energy is used to supply a communal water tank with heat reticulated in water pipes nor energy. Connection is described within the proposed NECF Package Second Exposure Draft as *“a physical link between a distribution system and a customer’s premises to allow the flow of energy”* No such facilitation of the flow of energy occurs at all when water delivers heated water of varying quality to individual abodes (residential premises) of tenants or owner-occupiers. In the case of the latter they make their own arrangements to apportion share of bills issued to a Body Corporate.

The ESC’s BHW Guideline 20(1) was repealed by the ESC last year on the pretext that it no longer had policy control of the pricing and charging - which allegedly reverted to the DPI. Its contents were transferred to the Energy Retail Code under Clause 3.

Subsequently, the DPI handed back policy responsibility to the ESC. Under statutory and warranty provisions, gas and electricity are goods. The supply of gas and electricity constitute a service. No gas or electricity are provided within the BHW arrangements.

It is therefore difficult to know what recourses are available. What is being provided is a heated water product. The gas is simply used in its development as a composite product. This has been my consistent argument. Retailers are not licenced by Water Authorities to on-sell water. Landlords are not allowed on on-sell water without a licence.

In Victoria where separate hot water flow meters are used in the calculation of consumption of heated water only the cold water rate may be applied and no additional supplier other cost-recovery charges.

This is anomalous with the Qld provisions, which inadequately protect consumers - you should stress this discrepancy.

Note the analysis by the ESC in the Draft Report re recovery of costs by retailers for purchase of hot water flow meters and water meter reading costs over and above the reading of the single master gas meter.

In Victoria under the RTA Landlords are responsible for all costs including supply charges that are not related to actual utility consumption by end-users even when a separate meter exists for each residential tenant.

If cold water meters exist charges may only be made at the cold water rate - since the heating component cannot be measured

Where no separate meters for each utility exists, no charges of any description have to be met by the residential tenant

This has been repeatedly upheld on a piecemeal basis by the Tenants Union - as I have pointed out on numerous occasions. The ESC knew this but persisted, believing that the RTA should be altered to reflect their philosophies not the other way round.

The AER will inherit regulatory responsibility for energy retail shortly, and there is a risk that current anomalies will be perpetuated in the absence of explicit clarification and reconsideration of existing provisions. It is not a good enough answer to regard these provisions and others as of economic import only and therefore irrelevant to non-economic consumer protection frameworks.

The arrangements directly impact on the tripartite governance model adopted by the NECF Package and on the consumer rights, especially those who are residential tenants in multi-tenanted dwellings.

The Tenants Union Victoria and other community organizations have been entirely unsuccessful in persuading policy makers, including the MCE of the issues that have also been repeatedly highlighted by me as an individual stakeholder in relation to the absence of protection for certain segments of the community, including tenants in multi-tenanted dwellings who can exercise no choice and who are entrapped in arrangements of either government or non-government monopolies wherein host retailers provide through a single gas or electricity meter energy used to heat a communal boiler tank, from which heated water is reticulated in water pipes to their respective abodes.

The lack of clarity with the proposed Energy Retail Law in terms of the differences between “premises” and “infrastructure” controlled and managed by Landlords and OCs and those occupied by end-users of heated water, coupled with terminology relating to “move-in customers” is likely to have the continuing effect of distortion of the intent and spirit of existing and proposed laws and will continue to represent conflict and overlap with other schemes, leaving energy providers at risk of breaching those provisions.

Yet the Essential Services Commission (Victoria) with the sanction of policy-maker Department of Primary Industries saw fit to incorporate into the revised Energy Retail Code provisions directly instructing retailers to adopt contractual models and billing practices that have had the effect of unjustly stripping end-users of utilities of their enshrined rights under multiple provisions.

Ignorance or unwillingness to consider the legalities and technicalities has resulted in inappropriate imposition of deemed contractual status on end users of heated water in multi-tenanted dwellings; with implications for perceptions of *“illegal taking of supply of gas or electricity;”* inappropriate disconnection of the wrong commodity (heated water by clamping of hot water flow meters), misinterpretation of the meaning of disconnection or decommissioning; harassment of end-users who should not be imposed at all with contractual responsibility, but rather the Landlord/OC.

Arguments to support the adoption of these provisions on the pretext of avoidance of price shock to end-users are invalid as the current arrangements have no impact on restricting rent hikes, and leave vulnerable end-consumers facing contractual responsibility through inappropriate risk shifting endorsed by Ministers, policy makers and regulators.

Other States including Queensland and South Australia followed suit. In Queensland the tenancy and fair trading protections are weaker and there are enhanced concerns about the operation of non-governmental monopolies in the provision of gas used to centrally heat a communal water tank. The segments of the community most impacted in Queensland are those living in public housing, most of them vulnerable and/or disadvantaged.

Even when they receive no gas at all they are required to pay FRC fees.¹⁴¹

Meanwhile, the QCA's November 2009 report omitted to identify the following:

- Precisely how much gas was being transported via pipelines to heat communal water tanks (many in public housing; others in owner/occupier dwellings; others possibly in the private rental market without owner occupation?)
- How much gas in total was being used to heat communal "*bulk hot water tanks*" in multi-tenanted dwellings
- How calculations regarding gas consumption (using hot water flow meters that measure water volume not gas or heat) were made regarding the alleged sale of gas to end-users of heated water, and on what basis under the provisions of contractual law, revised generic laws under the *TPA* (which by the end of 2010 must also be reflected in all jurisdictional Fair Trading Laws); and the *Sale of Goods Act 1896 (Qld)*¹⁴² or residential tenancy provisions; and what is likely to happen with the existing utility exemptions under National Trade Measurement provisions are lifted as is the intent., making the current practices directly invalid and illegal with regard to trade measurement
- How such a contractual basis is deemed valid and will be consistent with the provisions of the *Trade Practices (Australian Consumer Law) Act 2009*, effective 1 January 2010, given that the substantive terms of the unilaterally imposed "*deemed contract*" with the energy supplier its servant/contractor and/or agent

¹⁴¹ FRC means "*Freedom of Retail Contestability*" is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place. In Qld It is imposed on natural gas customers accounts, and is about \$25 per year for the first 5 years after the FRC date : 1st June 2007. It accumulates over this first 5 years as a "pass through cost" of about \$20million and will be phased out in a couple of years. Vencorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

¹⁴² *Sale of Goods Act 1896 (Qld)* (reprinted and as in force as at 29 August 2007)

- How the calculations used, which may be loosely based on the Victorian “BHW” policy provisions (based on what seem to be grossly flawed interpretations of s46 of the *GIA*)
- Whether and to what extent a profit base is used to “cross-subsidize” the price of Origin’s gas sales
- What barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market¹⁴³ is captured by an incumbent retailer who apparently purchased in its entirety the “BHW customer base” in 2007, based not on the number of single gas master meters existed in multi-tenanted dwellings (which for Distributor-Retailer settlement purposes represent a single supply point, there being no subsidiary gas points in the individual abodes of those unjustly imposed with contractual status in terms of sale and supply of gas.
- On what basis massive supply, commodity, service and FRC charges are imposed on end users of gas so supplied for the heating of a communal water tank, when the services and associated costs property belong to the OC

The Victorian *Residential Tenancies Act 1997* (RTA) prohibits charging for water, even when meters exist other than at the cold water rate, so the question of charging for heating is inappropriate.

Victorian *RTA* provisions disallow utility supply charges or charges for anything other than actual consumption charges where individual utility meters (gas electricity or water) do exist. This is a vast improvement on Old provisions.

Nonetheless loopholes allow third parties and energy suppliers not party to Landlord-tenant agreements to exploit the system with the apparently collusive involvement and active instruction of policy-makers and regulators.

Despite the existence of these arrangements and both implicit and explicit endorsement of discrepant contractual governance and billing and charging practices associated with the “*BHW arrangements*” none of the policy-makers or regulators seem to be willing to clarify within market structure assessments; competitive assessments or reports that such arrangements exist, must be taken into account, and must be covered by appropriate consumer protection arrangements.

¹⁴³ A misnomer since it is not water that is charged for but the heating component of a composite product where only a single gas (or electricity) meter exists which is used to heat a communal water tank from which water is reticulated in water pipes to the individual abodes of renting tenants either in private or public housing.

Regardless of whether these matters are considered of a predominantly “economic-stream” interest, there are consumer protection issues that have been entirely neglected with jurisdictional and proposed national energy consumer protection frameworks in areas where it is mostly the most vulnerable of utility end-consumer, in a captured monopoly-type market with no chance of actively competing in the competitive market

207 Adoption of form of standard retail contract

(1) Adoption and publication

A designated retailer must adopt a form of standard retail contract and publish it on the retailer’s website.

Note—This subsection is a civil penalty provision.

(2) Rules

The Rules may make provision for or with respect to the adoption, form and contents of forms of standard retail contracts, and in particular may provide for the manner of adoption and publication of forms of standard retail contracts by designated retailers.

(3) Adoption without alteration except as permitted or required

A designated retailer’s form of standard retail contract—

(a) must adopt the relevant model terms and conditions with no alterations, other than permitted alterations or required alterations; and

(b) if there are any required alterations—must include those required alterations.

(4) Permitted alterations

Permitted alterations are—

(a) alterations specifying details relating to identity and contact details of the designated retailer; and

(b) minor alterations that do not change the substantive effect of the model terms and conditions; and

(c) alterations of a kind specified or referred to in the Rules.

(5) Required alterations

Required alterations are—

(a) alterations that the Rules require to be made to the retailer’s form of standard retail contract in relation to matters relating to specific jurisdictions; and

(b) alterations of a kind specified or referred to in the Rules.

(6) Definition

In this section—

alterations includes omissions and additions.

208 Formation of standard retail contract

(1) A designated retailer's form of standard retail contract takes effect as a contract between the retailer and a small customer when the customer—

(a) requests the provision of customer retail services at premises under the retailer's standing offer; and

(b) complies with the requirements specified in the Rules as pre-conditions to the formation of standard retail contracts.

(2) A designated retailer cannot decline to enter into a standard retail contract if the customer makes the request and complies with the requirements referred to in subsection (1).

Division 9 Deemed customer retail arrangements

235 Deemed customer retail arrangement for new or continuing customer without customer retail contract

(1) An arrangement (a deemed customer retail arrangement) is taken to apply between the financially responsible retailer for energized premises and—

(a) a move-in customer; or

(b) a carry-over customer.

(2) The deemed customer retail arrangement comes into operation when—

(a) in the case of a move-in customer—the customer starts consuming energy at the premises; or

(b) in the case of a carry-over customer—the customer's previously current retail contract terminates.

(3) The deemed customer retail arrangement ceases to be in operation if a customer retail contract is formed in relation to the premises, but this subsection does not affect any rights or obligations that have already accrued under the deemed customer retail arrangement.

(4) Subsection (1) does not apply where the customer consumes energy at the premises by fraudulent or illegal means.

(5) If the customer consumes energy at the premises by fraudulent or illegal means—

(a) the customer is nevertheless liable to pay the standing offer prices of the financially responsible retailer for the premises in respect of the energy so consumed; and

(b) the financially responsible retailer may recover the charges payable in accordance with those standing offer prices as a debt in a court of competent jurisdiction; and

(c) payment or recovery of any such charges is not a defence for an offence relating to obtaining energy by fraudulent or illegal means.

(6) A move-in customer or carry-over customer is required to contact a retailer and take appropriate steps to enter into a customer retail contract as soon as practicable.

236 Terms and conditions of deemed customer retail arrangements

(1) The terms and conditions of a deemed customer retail arrangement are the terms and conditions of the retailer's standard retail contract.

(2) The prices applicable to a deemed customer retail arrangement are the retailer's standing offer prices.

(3) The Rules may make provision for or with respect to deemed customer retail arrangements, and in particular may supplement or modify the terms and conditions of deemed customer retail arrangements.

See definitions NECF2

Same comments as for 116 above

513 Form of energy authorized to be sold

(1) A retailer authorization may authorize the sale of electricity or gas or both.

(2) A retailer authorization cannot be varied to change or add to the form of energy that the applicant is authorized to sell to customers, as specified in the notice under section 507.

(3) This section does not prevent an application for or the grant of another retailer authorization.

Comment MK

Neither gas nor electricity as commodities or supplied as services where heated water is heated by a single gas master meter firing up a non-instantaneous boiler tank

The ESC has previously erroneously used the phrase "*energy is consumed when energy is supplied to produce another good or service heated water.*"

This is a misguided and technically and legally unsustainable perception and at risk of being taken up (by default) by the MCE refusing to act on energy provisions that are patently unjust; deem the wrong parties to be contractually obligated; and imposing a host of contractual obligations upon end-users of heated water – under energy laws and associated provisions under jurisdictional control

Part 2 Relationship between retailers and small customers

Division 1 Preliminary

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Jemena (JGN) Revised Gas Access Proposal 2010-2015

Further open s comment and supporting data with several appendices

re JGN's further submission(s) of 18 May 2010

and principles behind AEMC's Rule Change Proposal ERC 0092 under the NER

(with possible extrapolation to NGR) – and other related determinations

Prepared also for multiple other arenas

Madeleine Kingston, Individual Stakeholder

201 Application of this Part

- (1) This Part applies to the relationship between retailers and small customers.
- (2) This Part does not apply to or affect the relationship between retailers and large customers.

Division 2 Customer retail contracts generally

202 Kinds of customer retail contracts

- (1) There are 2 kinds of customer retail contracts, as follows:
 - (a) standard retail contracts;
 - (b) market retail contracts.
- (2) A retailer cannot provide customer retail services to small customers under any other kind of contract or arrangement.
- (3) This section does not affect deemed customer retail arrangements under Division 9.
- (4) This section does not affect RoLR deemed small customer retail arrangements under Part 6.

Comment MK

See comments elsewhere regarding the legally and technically unsustainable claim that a contract exists for sale and supply of energy where heated water that is communally heated by a single energy meter firing a boiler tank in a multi-tenanted dwelling.

Division 3 Standing offers and standard retail contracts for small customers

203 Model terms and conditions

The Rules must set out model terms and conditions for standard retail contracts (referred to in this Division as the *model terms and conditions*).

Comment MK

The standard retail model terms and conditions and those reflected under distributor-customer terms appear to have many gaps, especially in relation to revised generic laws. In the event of conflict the generic provisions will prevail, but it is pity to start a new set of laws with such discrepancies and place on the end-user of utilities the burden of disputing matters over which there should be no room for such dispute.

These new energy laws have an obligation to uphold the spirit intent and letter of generic and all other applicable laws and the provisions of the common law.

I remind the MCE of new provisions to include substantive unfair contract provisions within generic laws, enhancement of statutory and implied warranty provisions; changes to trade measurement provisions and pending lifting of remaining utility exemptions, as a starting point.

204 Standing offer to small customers

(1) A designated retailer must make an offer (a *standing offer*) to provide customer retail services to small customers—

Part 5 Relationship between distributors and retailers—retail support obligations

Division 1 Preliminary

501 Application of this Part

(1) This Part applies to a distributor and a retailer where they have a shared customer.

Comment MK

It is crucial to distinguish between customers and end-consumers of any utility. A customer may be a business customer such as an OC. An end-user of centrally heated water (using a communal water tank supplying multiple occupants in individual residential tenants), normally a renting tenant, is not an energy end-consumer, but is supplied with heated water reticulated in water pipes for which heat from a master gas meter is used to heat the communal tank.

The shared customer of the distributor and retailer is in such cases the OC or Developer who entered into a contract for the supply of energy infrastructure.

Mere ownership by either Distributor or Retailer or other energy provider of water infrastructure does not create a contractual relationship between the end-user of heated water and the energy distributor or retailer.

Neither the distributor or retailer owns the water, and therefore under the proposed generic laws would be hard-pushed to claim a right to sell the water. The right to sell the energy in the form of heated water that is centrally heated in a single boiler tank served by a single energy meter is a questionable method of establishing any contractual relation for either sale of energy (as a good or commodity) or the supply of energy, since there is no “*flow of energy*” demonstrable. See the NECF definitions for energization

(2) Where a distributor and a retailer have a shared customer, they are respectively referred to in this Part as “*the distributor*” and “*the retailer*”. Any third party arrangements made for “*metering and data services*” or other backroom tasks are part of their internal business or outsourcing arrangements whether or not in-house. If these tasks include maintenance of water meters that are entirely unnecessary for the sale and supply of energy or calculation of their consumption as goods with the full suite of protections.

502 Definitions

In this Part—

distribution charges means charges of a distributor for—

(a) use of the distributor’s distribution system; and

(b) if applicable, any charges payable by the distributor for use of a transmission system to which the distribution system is connected;

Comment MK

In the circumstances described above under 501, any distributor charges for use of the “*distributor system*” may legitimately be applied to the OC in multi-tenanted dwellings, but hardly the end user of heated water supplies. No “use of distribution system by the end-consumer of heated water occurs. The contract is properly between distribute-retailer and OC or Developer.

Notwithstanding the interpretation placed by retailers and distributors, either tacitly or explicitly endorsed by policy-makers regulators and/or Rule-Makers of deemed provisions, ignoring the precepts of contractual law and other provisions is at the peril of energy providers and those who sanction such questionable practices

Please note that no part of a water infrastructure or boiler system forms part of an energy distribution system. Regardless of who owns water pipes, water metering infrastructure and the like, mere ownership of such equipment cannot legally or technically create a contract for alleged sale and supply of energy. Supply charges for any such metering or billing duties undertaken, including inappropriate (and often theoretical) meter reading of hot water or cold water flow meters (see the bizarre BHW provisions) are not charges that should be imposed on end-users of heated water that is communally heated in multi-tenanted dwellings.

NEM Representative means a related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) of an electricity retailer that is registered with AEMO as a market customer under the NER and that, directly or indirectly, sells electricity to the retailer for on-sale to customers.

Comment MK

If this is an indirect way of endorsing questionable interpretation of contract law and endorsing the provisions of the “bulk hot water policy arrangements adopted in three jurisdictions and discrepantly applied, then it is an unacceptable distortion of existing and proposed provisions under multiple enactments current and proposed.

The on-selling of electricity must rely on the “*flow of energy*” concept that is embraced by the NECF definitions. No such “flow of energy can be demonstrated within the BHW policy arrangements. If intended to mean change of ownership of electricity transmission (embedded customers) this has a different application, but does raise questions about governance of service obligations, implied and statutory warranty under the generic provisions proposed; licencing and servicing obligations imposed by trade measurement authorities and the like, and has implications also for tenancy laws.

(a) at the standing offer prices; and

(b) under the retailer’s form of standard retail contract.

273 of 422

Note—This subsection is a civil penalty provision.

(2) The Rules may provide for the manner and form in which a standing offer is to be made.

(3) Without limiting the power to make Rules relating to the manner and form in which a standing offer is to be made, a designated retailer must publish the terms and conditions of the standing offer on the retailer's website.

Note—This subsection is a civil penalty provision.

(4) A designated retailer must comply with the terms and conditions of the retailer's standing offer.

Note—

Section 213 provides for the satisfaction of a designated retailer's obligation to make a standing offer by making an offer to certain small customers to sell energy under a market retail contract.

205 Standing offer prices

(1) Publication of standing offer prices

A designated retailer must publish its standing offer prices on the retailer's website, and the standing offer prices so published remain in force until varied in accordance with this section.

Note 1—

A standing offer price may be a regulated price under jurisdictional energy legislation.

Note 2—

This subsection is a civil penalty provision.

(2) Variation of standing offer prices

The designated retailer may vary the standing offer prices from time to time, but a variation has no effect unless—

(a) it is made in accordance with the requirements (if any) of jurisdictional energy legislation; and

(b) the variation (or the standing offer prices as varied) is published on the retailer's website.

(3) Publication and notification of variation

The designated retailer must:

(a) publish the variation (or the standing offer prices as varied) on the retailer's website; and

(b) publish a notice about the variation in a newspaper circulating in the participating jurisdictions in which the retailer has customers, notifying customers that—

(i) there has been a variation; and

(ii) the variation (or the standing offer prices as varied) are published on the retailer's website; and

239 Use of prepayment meter systems to comply with energy laws

(1) A retailer who provides customer retail services to a small customer using a prepayment meter system must comply with the provisions of the energy laws relating to the use of prepayment meter systems.

(2) Without limiting subsection (1), a retailer who provides customer retail services to a small customer using a prepayment meter system must ensure that the prepayment meter market retail contract complies with the requirements for a prepayment meter market retail contract set out in the Rules

102 Interpretation –

Comment MK

Discussed also elsewhere, dissecting selected terminology giving rise to confusion, lack of clarity; conflict and overlap with other schemes viz failure to consider implications of comparative law.

Other sections impacted:

105 Meaning of customer and associated terms

107 Classification and reclassification of customers

Division 2 Matters relating to participating jurisdictions

109 Participating jurisdiction s (cf NGL s21)

110 Ministers of participating jurisdictions (cf NGL s22)

111 Local area retailers (monopoly considerations)

112 Nominated distributors (monopoly considerations)

114 MCE statements of policy principles (cf NEL s8; NGL s25) 30

Division 4 Operation and effect of National Energy Retail Rules

115 Rules to have force of law (cf N EL s9; N GL s26) 31

Division 5 Application of this Law, the Rules and Procedures to forms of energy

116 Application of Law, Rules and Procedures to energy 31

Each of the above sections is impacted by failure of the MCE to properly clarify the bizarre arrangements that currently exist wherein contractual status for sale and supply of energy is unjustly imposed on end-users of heated water that is centrally heated in a boiler tank and reticulated in water pipes to individual end-user residential premises.

The sale and supply of energy and any other services such as metering and billing are provided to business customers as OCs not to end users of heated water.

Leaving this matter to jurisdictional control in the mistaken perception that this is simply an economic matter or that it is appropriate to ignore enshrined rights under the generic provisions proposed; common law; tenancy provisions; OCs provisions; trade measurement best practice (noting that utility exemptions are pending under revised regulations)

Part 2 Relationship between retailers and small customers

Comment MK

These and numerous other provisions are impacted by the arguments previously put forward

Especially in relation to impacts on certain classes of end-consumers of utilities (as opposed to customers of energy) all components of deemed customer retail arrangements under **Div 9, 202 (3) Deemed Customer retail arrangements** NERL and corresponding detail under NERR; and **Div 6 Deemed small customer retail arrangements**, especially:

Part 2 Division 9 Deemed customer retail arrangements

235 Deemed customer retail arrangement for new or continuing customer without customer retail contract

235 (1) (a) move-in customer; 1(b) carry-over customer) viz. distortion of interpretation in respect to certain classes of end-consumers of utilities;

235 2(a) distortion of interpretation of alleged "*commencement of consumption of energy*" (implying flow of energy to premises and end-consumer deemed to be receiving) the case of certain classes of end-consumers of utilities

– distorted through tacit acceptance within the Framework through failure to acknowledge or clarify conflict between Framework and with other regulatory schemes and the common law of jurisdictional arrangements known as "bulk hot water (policy) arrangements")

Part 2 Div 9 235 2(b) distortion of interpretation of alleged status as "carry-over customer" – similar distortion for same reasons as above

Part 2 Div 9 235 (3) – deemed provisions – failure to distinguish between business premises and residential premises with implications for interpretation of flow of energy to premises; and failure to appropriately distinguish between “customer (of energy) and “end-consumer – since flow of energy is central to determining sale and supply of energy as goods and ongoing supply respectively (refer to Sale of Goods Acts and revised generic laws proposed)

Part 2 Div 9 235 (4) and (5 (a) – (c)) – **distortion of the interpretation of fraudulent or illegal consumption of energy** as evidenced by direct flow of energy to the residential premises of end-consumers of utilities for certain classes of consumers – notably those referred to under the tacitly endorsed “bulk hot water policy arrangements” adopted by three jurisdictions which the MCE has steadfastly ignored in its deliberations in the full knowledge of the detrimental implications of these provisions; their conflict and overlap within existing and proposed energy provisions and with other regulatory schemes in intent spirit and/or letter; including proposed and generic laws and the common law

Part 2 Div 9 236 Terms and conditions of deemed customer retail arrangements

(1) An arrangement (a deemed customer retail arrangement) is taken to apply between the financially responsible retailer for energized premises and—

- (a) a move-in customer; or
- (b) a carry-over customer.

(2) The deemed customer retail arrangement comes into operation when—

- (a) in the case of a move-in customer—the customer starts consuming energy at the premises; or
- (b) in the case of a carry-over customer—the customer’s previously current retail contract terminates.

(3) The deemed customer retail arrangement ceases to be in operation if a customer retail contract is formed in relation to the premises, but this subsection does not affect any rights or obligations that have already accrued under the deemed customer retail arrangement.

(4) Subsection (1) does not apply where the customer consumes energy at the premises by fraudulent or illegal means.

(5) If the customer consumes energy at the premises by fraudulent or illegal means—

- (a) the customer is nevertheless liable to pay the standing offer prices of the financially responsible retailer for the premises in respect of the energy so consumed; and
- (b) the financially responsible retailer may recover the charges payable in accordance with those standing offer prices as a debt in a court of competent jurisdiction; and

(c) payment or recovery of any such charges is not a defence for an offence relating to obtaining energy by fraudulent or illegal means.

(6) A move-in customer or carry-over customer is required to contact a retailer and take appropriate steps to enter into a customer retail contract as soon as practicable.

The above conditions should only be applicable if flow of energy is demonstrable. It is preposterous to suggest that energy is being consumed, alternatively illegally consumed; or that conditions precedent and subsequent apply in the context of energy laws – which is what the MCE is tacitly saying by supporting the on-going application of certain jurisdictional policies permitting end-consumers of heated water to be penalized, wrongly imposed with contractual status, and disconnected from heated water supplies that in Victoria represent an integral part of their mandated tenancy leases.

See Deidentified case study previously presented to the Gas Connections Framework Draft Policy Paper

236 (1) – (3) Terms and conditions of deemed customer retail arrangements

(1) The terms and conditions of a deemed customer retail arrangement are the terms and conditions of the retailer’s standard retail contract.

(2) The prices applicable to a deemed customer retail arrangement are the retailer’s standing offer prices.

(3) The Rules may make provision for or with respect to deemed customer retail arrangements, and in particular may supplement or modify the terms and conditions of deemed customer retail arrangements.

See definitions NECF2

Comment MK

See all arguments presented elsewhere regarding inappropriate imposition of deemed contractual obligation for alleged sale and supply of energy where end-users are only receiving water products – regardless of temperature.

The application and use of terms such as "delivery of gas bulk hot water" and "electric bulk hot water" is nonsensical, meaningless and exploitive.

The MCE has chosen to taken no action on these issues, knowing that certain jurisdictional arrangements are unjust, unfair, legally and technically unsustainable, inconsistent with its own definitions and provisions and with multiple other regulatory and common law provisions existing and proposed.

Part 2 Div 3 Relationship between retailers and small customers

235 Deemed customer retail arrangement for new or continuing customer without customer retail contract p46

236 Terms and conditions of deemed customer retail arrangements 47

(see 229 Customer Hardship; (p44) – focus only on de-energization or disconnection associated with hardship rather than disputes over the legitimacy of the existence of any contract under generic and common law provisions for deemed sale and supply of energy – for example under the inappropriate “bulk hot water policy arrangements (as espoused under Victoria’s Energy Retail Code v6, and echoed but discrepantly applied in SA and Qld.)

238 Obligations of retailers

Part 2 Relationship between retailers and small customers

Division 1 Preliminary

201 Application of this Part

- (1) This Part applies to the relationship between retailers and small customers.
- (2) This Part does not apply to or affect the relationship between retailers and large customers.

Division 2 Customer retail contracts generally

202 Kinds of customer retail contracts

- (1) There are 2 kinds of customer retail contracts, as follows:
 - (a) standard retail contracts;
 - (b) market retail contracts.
- (2) A retailer cannot provide customer retail services to small customers under any other kind of contract or arrangement.
- (3) This section does not affect deemed customer retail arrangements under Division 9.
- (4) This section does not affect RoLR deemed small customer retail arrangements under Part 6.

Comment MK

The same considerations as above relate to those receiving heated water where no sale of energy can be shown to occur. Consumption and sale and supply of energy are contingent on flow of energy to the premises or party deemed to be receiving energy. This does not occur when heated water is reticulated in water pipes to individual abodes from a communal water tank in multi-tenanted dwellings.

SOME COMPARATIVE LAW CONSIDERATIONS

I In my original April 2010 submission to the AER in this matter I discussed 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.

It is my biew that notwithstanding jursdictional limitations there is a requirment for better inter-body collabortion such that conflict and overlap between schemes and policies do not arise

There are numerous comparative law inconsistencies between jurisdictional arrangements; inconsistencies within energy provisions and with other regulatory schemes; and a host of other matters.

See my extensive discussions in material published in MCE arenas, including the ECF2 package and my Submission (25 and attachments) to the Senate (ATPA_ACL) Bill2 Inquiry as referred to in my original published submission to the AER of April 2010.

jurisdictional energy legislation means legislation of a participating jurisdiction (other than national energy legislation), or any instrument made or issued under or for the purposes of that legislation, that regulates energy in that jurisdiction;

jurisdictional regulator means a body or person that is prescribed by the National Regulations as a jurisdictional regulator;

My various public submissions include that to the NECF2 package and to the Senate Economics Committee discuss in particular the tripartite governance model that relates to deemed contracts, particular for those in a captured market unable to participate in the competitive market, unilaterally imposed with contractual terms that may be considered contrary to substantive fairness under proposed generic laws; some limitations of the exempt selling regime, and apparent failure to consider comparative law considerations.

All components of the marketplace need to be seen to be well-functioning and all components need to have more certainty and confidence in policies and regulations adopted, hence my concerns. That certainty and confidence has been missing for a long time and needs to be restored in the public interest.

A conservative incremental approach and outdated provisions do not appear to be working to achieve optimal market functioning, especially within the energy. In their efforts to re-vamp generic laws, all credit to the Federal Treasury for recognizing that it is time to update consumer protection laws and heed the voice of the people.

It is most disappointing that the MCE has chosen to implicitly endorse by default grossly flawed jurisdictional provisions that represent conflict and overlap within and outside of energy provisions and represent poorest practice.

I have already commented on the drawbacks on continuing confusion created by discrepant provisions, terminology and metrological provisions co-operating with a supposed national framework.

One example includes the Bulk Hot Water (BHW) policy arrangements in three jurisdictions, with Victoria the first to adopt practices that deserve stringent scrutiny.

These policy provisions briefly reverted to DPI policy control before being reclaimed by the Victorian ESC after cosmetic repeal of the BHW Charging Guideline 20(1) and transfer of most components to the ERC, with the Victorian ESC intending under their current regulatory review to attempt somehow to validate the provisions by mere transfer from deliberative documents that remained under cover for three years.

See also all associated deliberative documents from 2004 and 2005, and the Guideline for which the ESC with DPI sanction effected cosmetic repeal, whilst still retaining the substance of the provisions by transfer from deliberative documents and the allegedly obsolete Guideline to the *Energy Retail Code v6* (see my response Madeleine Kingston Part 2A to Victorian ESC Regulatory Review (2008) as an available expanded document upon request and also selected comparative analysis of interpretations within various energy provisions, existing and proposed as well as comparisons with some National measurement provisions.

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

1. Seem to fail to reflect consistency and within existing and proposed energy laws; and consistency with other regulatory schemes in both spirit and intent
2. Seem to fail to adopt best practice provisions in terms of consumer protection and trade measurement practice
3. Appear to include legally and technically unsound and unsustainable provisions which appear to be based on flawed reasoning and poor understanding of technicalities and other considerations;
4. Appear to include substantive clauses that are unjust and unreasonable;
5. Appear to include provisions that appear to be facilitating conduct that could be interpreted as substantively or procedurally unconscionable
6. Appear to defy the fundamental and broader precepts of contractual law;
7. Appear to facilitate the provision of inaccurate and misleading online, oral and written information by policy-makers and economic regulators; by industry-specific complaints schemes

8. Appear to implement of practices that appear to defy the fundamental and broader precepts of contractual law, including under energy and other provisions in the written and unwritten law.
9. Appear to provide inaccurate information to consumers through policy makers, regulators and complaints schemes with implications for legal compliance
10. Appear to fail to target the right groups of consumers in terms of contractual liability. **(Targetting)**
11. Appear to have failed to address market failure in a timely or appropriate manner (Timeliness)
12. Appear to present risk management threats through risks through supplier liability under multiple generic laws (TPA, FPA, Unfair Trade Practices); and trade measurement provisions, conflict potential, expensive complaints handling **(Risk Management)**
13. Appear to fail the accountability test in ensuring absence of overlap and conflict with other regulatory schemes (unfair contracts; residential tenancy laws, trade measurement laws and intents **(Accountability)**)
14. Present risk management threats through risks through supplier liability under multiple generic laws (TPA, FPA, Unfair Trade Practices); and trade measurement provisions, conflict potential, expensive complaints handling **(Risk Management)**
15. Appear from the outset to have failed to demonstrate transparent consultation processes **(Consultation test)**
16. Appear to provide non-existent consumer protection and enforcement by authorizing, even directing retailers to adopt practices that conflict with existing consumer protections under tenancy and unfair contract laws and defy the spirit and intent of trade practice provisions **(Consumer protection and enforcement test)**.

In turn this leads to unacceptable market conduct and loss of supply of heated water to residential tenants, who are permitted under sacred tenancy laws to escape any liability for utilities that are not separately metered for each component of utility provided, and where legally traceable consumption cannot be shown; and where charges are applied other than for action consumption.

Enforcement of Industry Codes – Schedule 4 TPA (ACL1)

The TPA (ACL) Bill No. 2 refers under Schedule 4 to Enforcement of industry Codes (p344). I quote:

2 Subsection 51ACA(1)

Related contravention: a person engages in conduct that constitutes a related contravention of the applicable industry code; if the person:

- (a) aids, abets, counsels or procures a corporation to contravene the applicable industry code; or
- (b) induces, whether by threats or promises or otherwise, a corporation to contravene the applicable industry code; or
- (c) is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention by a corporation of the applicable industry code; or
- (d) conspires with others to effect a contravention by a corporation of the applicable industry code.

These provisions are admirable if the industry codes themselves are consistent with the provisions of generic laws, and other applicable laws, for example national measurement provisions.

Concerns arise as in the illustration above. The existing and proposed energy provisions, which require adherence to industry codes are seriously flawed for the reasons identified above.

In particular proper interpretation of the contractual party; looseness in wording; changes in meaning of fundamental terms, including lack of distinction between the term “customer” and “end-consumer” when deciding the question of to whom electricity or gas or other services such as billing and metering services (in many cases entirely unnecessary since water meters are inappropriately being maintained, upgraded and inappropriately used as instruments through which deemed gas or electricity can be calculated. Since this is scientifically and technically impossible, since gas and electricity do not pass through water meters; nor can either heat or gas volume (or electricity) be calculated using such an instrument.

The industry codes in relation to the “*bulk hot water provisions*” in multi-tenanted dwellings are entirely inconsistent with every other component of the energy laws regarding flow of energy and legal traceability and with the National Measurement’s role in ensuring legal traceability of trade measurements; proper use of instruments and so on.

How can any concept of fairness of proper interpretation of sale and supply of utilities be ensured under these circumstances?

Though not related to electricity or gas, why is water not also listed as a good (commodity). What is the difference. Provision of water for residential or business use appears to be a largely unregulated industry, though there are local laws where direct provision of water is provided.

In the case of multi-tenanted dwellings, it is always the Body Corporate (OC) who is responsible for purchase of the water supplied to the mains.

Under Victorian laws, even where separate water meters exist, only the cold water rate may be charge if calculation of actual consumption of water can be calculated by legally traceable means.

The matter is further discussed in other submissions and also within this one to illustrate the point since there are implications for both generic and energy-specific laws – and concerns about the operation of Schedule 4 under these circumstances.

In addition, if there are any provisions for substantive unfair provisions to be imposed on consumers in circumstances where no sale of goods or services to the end-user as consumer can be demonstrated – what is the point of the unfair terms.

The allegation here is that within the energy industry codes, and through explicit and implicit endorsement under proposed national energy laws, there are grossly unjust and unfair substantive provisions embedded in what is termed deemed or standard term contracts.

There mere existence of water meters or their ownership by energy providers or others cannot possible create a contractual obligation for sale and supply of a good that is not received by the party deemed to be contractually obligation.

The owner of water infrastructure cannot sell water without ownership of that water; and neither can sale and supply of gas or electricity be a legally or scientifically sustainable claim.

These further questions are pertinent:

- What recommendations can be made to rectify this matter within both generic and energy laws?
- How can any authority regulating the energy industry under energy laws have control in the first place of water provisions?
- Who will take charge of this matter and ensure that fairness is delivered?

For further questions see the 42 questions with some explanatory notes on page 32-44 Opex and Capex.

The current situation is untenable.

My submission to the Senate's TPA-ACL Bill2 Enquiry of April 2010 (25 and several appendices),¹⁴⁴ is one in a series of many to various arenas in which I have reinforced similar unaddressed concerns

¹⁴⁴ Madeleine Kingston (2010) Submission 25 to Senate Inquiry Consumer Law tpa-acl Bill2) (A pril) with 11 appendices
http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm

In my latest submission, that to the current Senate enquiry I have raised issues that have again and again been brought to the attention of public authorities and those deeming themselves to be unaccountable to the electorate or anyone else on the basis of their legal structure as incorporated bodies, despite fulfilling a public role.

I have “rammed” again the issues of failure to consider the fundamentals of comparative law within Australian provisions, and emphasis on the need to consider Australian provisions in the context of world’s best practice.

I am concerned about implicit and explicit guidelines and instructions to utility providers and others that have the effect not only of diluting existing and proposed enshrined rights of individuals, but of seemingly sanctioning and colluding with practices that

Fall short of best practice (see BHW arrangements as an example)

Are legally and scientifically unsustainable (see BHW arrangements as an example)

Endeavour to limit redress in any way by adopting clauses under one instrument claiming denial of access through the open courts on the pretext of alleged competition goals¹⁴⁵

For example in other public submissions and elsewhere within this submission, I have referred to the extraordinary Second Reading Speech of the then Treasurer of Queensland, now Premier, The Hon Anna Bligh, MP, referring to a clause inserted into the Energy Assets (Restructuring and Disposal Bill) (Clause 50) claiming that the Decision under that Act is

“...final and conclusive, cannot be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way, under the Judicial Review Act 1991 or otherwise (whether by Supreme Court of another Court the Judicial Review Act 1991, Court, another court, a tribunal or another entity) and is not subject to any writ or order of the Supreme Court, another court a tribunal or another entity on any ground.

However, this clause may effect contestable gas and electricity customers and persons (other than customers) in relation to any commercial agreements between them and energy assets. There are three circumstances in which third parties’ commercial rights may be affected by this Bill:

The disclosure of confidential information without third parties’ consent

The transfer of businesses, assets and liabilities between the energy entities without third parties’ consent; and

The issue, amendment, transfer, cancellation and surrender of retail and distribution authorities under the Gas Supply Act and Electricity Act in relation to any subsequent sale of Ergon Energy Pty Ltd by the purchaser to another person.

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Comment MK

In relation to attempts to thwart the course of justice and effectively exempt from the law accountability in decision-making by any party holding a public role or engaging in business – this is absurd and unacceptable

In particular attempts to restrict appeals before open courts and outside any restrictions contained within statutory provisions – to attempt to control the decisions of the judiciary goes to erosion of rights and thwarting of the course of justice and principles of accountability.

I am very concerned about the concerted timetable requiring that:

“all the legislative text should be agreed by end-June so the states can also then enact laws to apply both Commonwealth Acts nation-wide and bring the entire package into effect by 1 January 2011.”

In the rush to meet these deadlines, I fear that the golden opportunity to get things right will be missed. Once matters are entrenched in black letter law they will be far more difficult to reverse. Failure to cover the ground from the outset will undoubtedly result in repeated attempts to return to the legislation to insert or remove provisions that have the potential to be incompletely covered.

An incremental and conservative approach to resolving glaring omissions from the NECF Package (as seems to have characterized its project management) in relation to consumer protection for several groups of end-consumers of utilities raises issues of parity and equity and is inconsistent with the plan to comprehensively and appropriately cover consumer protection needs of all Australians.

With respect to those whose philosophical approaches may be governed by conservatism, may I say that the time for *“one-step-at-a-time”* philosophies has come and gone. We need a more pro-active strategic approach in the public interest, anticipating and keeping up with continuing marketplace changes and consumer expectations. Let us not reach for the lowest common denominator in such expectations. I owe my bold stance to David Tenant and his frank views about the role and nature of consumer advocates, and to many others who have inspired me by the mere existence of their published writings.

The submission of Pharmacy Guild of Australia (in discussing Health Practitioner regulation, but applicable to other provisions in principle) p7 refers to the findings of the Queensland Scrutiny of Legislation Committee that:

“In the Constitutional Systems of the Australian States and Territories, Prof Gerard Carney provides a summary of concerns regarding the legislative scrutiny of national scheme legislation.

“A risk of many Commonwealth and State cooperative schemes is ‘executive federalism; that is the executive tranches formulate and manage these schemes to the exclusion of the legislatures. While many schemes require legislative approval, the opportunity for adequate legislative scrutiny is often lacking, with considerable executive pressure to merely ratify the scheme without question.”

“Thereafter, in an extreme case, the power to amend the scheme may even rest entirely executive authority. Other instances of concern include, for example, where a government lacks the authority to respond to or the capacity to distance itself from the actions of a joint Commonwealth and State regulatory authority.

Public scrutiny is also hampered when the details of such schemes are not made publicly available. For these reasons, a recurring criticism, at least since the Report of the Coombs Royal Commission in 1977, is the tendency of cooperative arrangements to undermine the principle of responsible government. A further concern is the availability of judicial review in respect of the decisions and actions of these joint authorities.

Certainly, political responsibility must still be taken by each government for both joining and remaining in the cooperative scheme. Some blurring of accountability is an inevitable disadvantage of cooperation – a disadvantage usually outweighed by the advantages of entering this scheme. But greater scrutiny is possible by an enhanced and investigative role for all Commonwealth, State and territory legislation.”

“It would be disappointing if either CoAG or the relevant Ministerial Council approved a set of interpretative principles without stakeholder input and presented to Parliament as a fait accompli.”

The Pharmacy Guild has recommended that

“The Government should establish a clear mechanism that will allow interested stakeholders to make submissions on the nature of the proposed interpretive principles.

I support the Pharmacy Guild, Prof Frank Zumbo, Julie Clarke and all others who believe that small businesses have been entirely inadequately catered for both within the proposed generic laws and within energy provisions.

I would like especially support the Pharmacy Guild’s views on the issues of failure to adequately cater for small businesses, especially with regard to *“unfair conduct, as the suggested appropriate threshold permitting small businesses access to trade practices law relief.”*

On the issues of the complex mechanisms by which legislative drafting and Parliamentary sanction is achieved, I agree with the Pharmacy Guild that there is room for far more scrutiny and stakeholder involvement over the interpretative principles that are to be incorporated.

In the limited timeframe that the Senate has been allowed to consider the 30 submissions made, it is difficult to imagine how the task of weighing up discussion of perceived gaps can be effectively achieved.

I share the views of others that as much as it is time to bring an end of marketplace uncertainty, getting it right first up is a crucial issue if future detriment to industry and consumers is to be avoided in order to correct omissions and commissions that were not foreseen or considered because of the rushed timetable.

There are a number of other issues that I would like to raise, but for this response, I confine myself to expressing deep disappointment over adherence to historic approaches in dealing with legislative change.

In my submission to the Senate (25) I have called attention to the findings of David Greenberg¹⁴⁶ of the Commonwealth Association of Legislative Assembly

I am concerned about the extent to which Ministers in participating jurisdictions have within the cope of local regulations the opportunity to continue to make ad hoc changes to enshrined laws, especially where this has already been shown to erode the enshrined rights of end-consumers

In his introduction Greenberg discusses some ancient principles of UK law as follows:

"It is one of the most ancient principles of the law of England and Wales that in applying legislation the courts and any other reader should aim to construe it "according to the intent of them that made it." But while this trenchant aphorism is initially and superficially satisfying, like many an epigram the more one thinks about it the less it appears to mean.

Who are "those who made the legislation"? In the case of an Act of Parliament, it was notionally made by that shadowy concept "The Sovereign in Parliament", being neither the Sovereign, nor the Houses of Parliament, but a notional agglomeration.

To suggest that the Sovereign personally had any intention as to what was to be achieved by the legislation when giving Royal Assent to it would be patently absurd.

Equally, to suggest that both Houses, or even either House, actually had a single intention in relation to the construction of the Act would be to defy obvious reality.

And as soon as one arrives in the search at individuals who might be reasonably expected to have had actual and ascertainable intentions as to the construction of the legislation – such as the draftsman of the Bill, the departmental administrators or lawyers with responsibility for the content of the Bill, the Minister in charge of the Bill in either House, or individual Members of either House participating in consideration of the Bill – one has left the class of persons whose intentions can without constitutional impropriety be treated as the intentions of Parliament.

¹⁴⁶ Greenberg, D (2007 CALC in The Loophole p15).

In the case of subordinate legislation, the fact that there will often be a single individual making the legislation in a formal sense might suggest that it will at least be sufficiently clear whose intent is to be considered (even if there were difficulties in establishing what the intent was). But as soon as one examines the reality of the process by which subordinate legislation is made it becomes clear that the position is no better than in the case of primary legislation and may be worse.

In most cases, it is as absurd to attribute to the Minister making an instrument any actual intentions in relation to its meaning as it is to attribute intention to the Sovereign in granting Royal Assent to an Act.

There are three or four thousand statutory instruments made each year nowadays, and a departmental Minister might expect to sign several each week: as a general rule they will be either too lengthy and complicated to permit of the Minister acquiring much understanding of the detail or too trivial to make it feasible to brief the Minister on the content in detail.

Even if it were possible to establish whose actual intentions at the time of enacting legislation were relevant, it would still of course be difficult or impossible to ascertain what their intentions were. In the case of an Act of Parliament the only contemporary records likely to be of assistance are those set out in Parliamentary records.

*But although the courts now permit themselves in certain cases and subject to significant constraints to look at material of that kind in construing legislation, the fact remains that, as Lord Oliver of Aylmerton said in *Pepper (Inspector of Taxes) v. Hart* (the case in which the House of Lords decided that Parliamentary material could be considered for the purposes of resolving ambiguity)—experience shows that language – and, particularly, language adopted or concurred in under the pressure of a tight parliamentary timetable – is not always a reliable vehicle for the complete or accurate translation of legislative intention.*

The same is true of a Minister or group of Ministers making subordinate legislation.

Of course, one could ask the Ministers who proposed primary legislation to Parliament, or who themselves made subordinate legislation, what their intentions were (if their intentions were established as being determinative or even relevant): but the Ministers themselves would often have only a hazy idea of what their original intentions had been, while to allow them to substitute their present intentions in relation to the application of the legislation would be in effect to permit them an unrestricted, unaccountable and wholly informal power of continuous legislating.”

Greenberg's conclusion:

The concept of the legislative intent is neither as straightforward as it might appear at first glance nor as elusive as one might fear on closer examination. As traditionally understood by the courts it is a concept that is capable of being discovered by reference to objective criteria. Its nature, and the nature of those criteria, require to be borne in mind by the draftsman in order to ensure that his draft will be given the meaning that he intends. In particular, the nature of the objective search for legislative intent requires the draftsman to determine the nature of his primary target audience and the facilities likely to be available to them in applying and construing the legislation.”

See also Greenberg's further comments on p15:¹⁴⁷

“One could argue at length about whether an Act passed under the Parliament Act 1911 (c.13) is enacted by the Queen in Parliament, or as the special enactment formula might seem to indicate, by the Queen ‘in’ or together with, the House of Commons, but the argument would probably be inconclusive and futile

Food for thought for those interested in high level legislative principles - and particularly relevant in Australia in a climate of extensive legislative and regulatory reform. The concepts of innovation apply as much to regulatory practice as to industry benchmarks and market opportunities.

Eamonn Moran, formerly Parliamentary Counsel, Victoria and currently President of the Commonwealth Association of Legislative Counsel, especially:

“In my presentation I encouraged drafters to become familiar, not only with their own Interpretation of legislation, but with that of other Australian jurisdictions. That familiarity will enable a drafter to avoid the traps inherent in picking up and incorporating another jurisdiction's legislation.”

¹⁴⁷ Greenberg: Daniel Statute Law Review 27(1) 15-28, p15

OBSERVATIONS AND CITATIONS RE LEGISLATIVE DRAFTING

I draw attention to the views expressed by Eamonn Moran (2005) regarding inherent dangers in Interpretation. I cite directly from his August 2005 PowerPoint presentation¹⁴⁸

“The purpose of my presentation was to highlight the dangers inherent in picking up legislation from another Australian jurisdiction and incorporating it into your own statute book. Each jurisdiction drafts in the context of its own Interpretation legislation. Interpretation Acts vary greatly in Australia, both in their comprehensiveness and in their actual provisions.

Thus, for example, if an ACT Act were enacted in NSW without change, the following differences might result:

- *Section headings would not be part of the Act in NSW whereas they would be in the ACT*
- *The Crown would not be bound in NSW whereas it would be in the ACT*
- *Examples would not extend the provision of which they are examples in NSW whereas they could in the ACT*
- *Commencement would be limited to a single day in NSW whereas a staged commencement would be possible in the ACT*
- *Words like “liability” would operate without definition in NSW.*

In my presentation I encouraged drafters to become familiar, not only with their own Interpretation legislation, but with that of other Australian jurisdictions. That familiarity will enable a drafter to avoid the traps inherent in picking up and incorporating another jurisdiction’s legislation.

I also refer to the findings of David Greenberg regarding the nature and legislative intention and its implications for drafting as presented in a paper in 2007 to Commonwealth Association of Legislative Counsel (CALC)¹⁴⁹, subsequently by them body, in “The Loophole” originally published in the Statute Law Review.

See also views Bromley, Melanie (2009) Whose Law is it?—Accessibility through LENZ: Opportunities for the New Zealand public to shape the law as it is made in “The Loophole, Journal of the Commonwealth Association of Legislative Counsel 209 *ibid*), pp 14-24 (Melanie Bromley, Parliamentary Counsel New Zealand)

¹⁴⁸ Moran, E (2005) *“Interpreting legislation: providing a variety of outcomes Current developments – Statutory interpretation.”* PowerPoint presentation 4 August 2005

¹⁴⁹ Acronym not to be confused with that used for Consumer Action Law Centre a consumer policy advocacy body with limited casework scope funded by Consumer Affairs Victoria

See Laws, Stephen (2009) discussion of consistency vs innovation¹⁵⁰

I highlight findings from the above experts on legislative drafting, as food for thought for those interested in high level legislative principles - and particularly relevant in Australia in a climate of extensive legislative and regulatory reform. The concepts of innovation apply as much to regulatory practice as to industry benchmarks and market opportunities.

See Daniel Greenberg's¹⁵¹ (2007) analysis of the nature of legislation intention and implications for drafting¹⁵² prepared for CALC¹⁵³

In his introduction Greenberg discusses some ancient principles of UK law as follows:

"It is one of the most ancient principles of the law of England and Wales that in applying legislation the courts and any other reader should aim to construe it "according to the intent of them that made it."

"But while this trenchant aphorism is initially and superficially satisfying, like many an epigram the more one thinks about it the less it appears to mean."

Who are "those who made the legislation"? In the case of an Act of Parliament, it was notionally made by that shadowy concept "The Sovereign in Parliament", being neither the Sovereign, nor the Houses of Parliament, but a notional agglomeration.

¹⁵⁰ Consistency versus Innovation in The Loophole 2009 (the Journal of the Commonwealth Assembly The Loophole Journal of the Commonwealth Association of Legislative Counsel http://www.opc.gov.au/calc/docs/Loophole_October2009.pdf

¹⁵¹ Daniel Greenberg of Lincoln's Inn, Barrister, Parliamentary Counsel

¹⁵² Greenberg, Daniel (2007) *"The nature of legislative intention and its implications for legislative drafting."* Paper presented at Commonwealth Association of Legislative Counsel (CALC), subsequently by the Commonwealth Association of Legislative Counsel (CALC), in "The Loophole" originally published in the Statute Law Review, Volume 27, No. 1, 2006, pp. 15 – 28.

See summary of article http://slr.oxfordjournals.org/cgi/pdf_extract/27/1/15

¹⁵³ Not to be confused with the same acronym used to refer to Consumer Action Law Centre, a body funded by Consumer Affairs Victoria, providing minimal legal representation but heavily involved in the policy advocacy debate with the focus on those who are vulnerable and disadvantaged, but not others whose enshrined rights may be compromised

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See also Greenberg, Daniel (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12 in The Loophole *ibid*

This paper was presented to the CALC Conference, London, September 2005 and was originally published in the Statute Law Review, Volume 27, No. 1, 2006, pp. 15 – 28

See also Eamonn Moran, formerly Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Counsel, now Law Draftsman, Department of Justice, Hong Kong) especially:

See also Greenberg, Daniel (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12

See also Greenberg: Daniel Statute Law Review 27(1) 15-28, p15: cited above

To suggest that the Sovereign personally had any intention as to what was to be achieved by the legislation when giving Royal Assent to it would be patently absurd. Equally, to suggest that both Houses, or even either House, actually had a single intention in relation to the construction of the Act would be to defy obvious reality.

And as soon as one arrives in the search at individuals who might be reasonably expected to have had actual and ascertainable intentions as to the construction of the legislation – such as the draftsman of the Bill, the departmental administrators or lawyers with responsibility for the content of the Bill, the Minister in charge of the Bill in either House, or individual Members of either House participating in consideration of the Bill – one has left the class of persons whose intentions can without constitutional impropriety be treated as the intentions of Parliament.

In the case of subordinate legislation, the fact that there will often be a single individual making the legislation in a formal sense might suggest that it will at least be sufficiently clear whose intent is to be considered (even if there were difficulties in establishing what the intent was). But as soon as one examines the reality of the process by which subordinate legislation is made it becomes clear that the position is no better than in the case of primary legislation and may be worse.

In most cases, it is as absurd to attribute to the Minister making an instrument any actual intentions in relation to its meaning as it is to attribute intention to the Sovereign in granting Royal Assent to an Act. There are three or four thousand statutory instruments made each year nowadays, and a departmental Minister might expect to sign several each week: as a general rule they will be either too lengthy and complicated to permit of the Minister acquiring much understanding of the detail or too trivial to make it feasible to brief the Minister on the content in detail.

*Even if it were possible to establish whose actual intentions at the time of enacting legislation were relevant, it would still of course be difficult or impossible to ascertain what their intentions were. In the case of an Act of Parliament the only contemporary records likely to be of assistance are those set out in Parliamentary records. But although the courts now permit themselves in certain cases and subject to significant constraints to look at material of that kind in construing legislation, the fact remains that, as Lord Oliver of Aylmerton said in *Pepper (Inspector of Taxes) v. Hart* (the case in which the House of Lords decided that Parliamentary material could be considered for the purposes of resolving ambiguity)—experience shows that language – and, particularly, language adopted or concurred in under the pressure of a tight parliamentary timetable – is not always a reliable vehicle for the complete or accurate translation of legislative intention. The same is true of a Minister or group of Ministers making subordinate legislation.*

Of course, one could ask the Ministers who proposed primary legislation to Parliament, or who themselves made subordinate legislation, what their intentions were (if their intentions were established as being determinative or even relevant): but the Ministers themselves would often have only a hazy idea of what their original intentions had been, while to allow them to substitute their present intentions in relation to the application of the legislation would be in effect to permit them an unrestricted, unaccountable and wholly informal power of continuous legislating.”

Greenberg’s conclusion:

The concept of the legislative intent is neither as straightforward as it might appear at first glance nor as elusive as one might fear on closer examination. As traditionally understood by the courts it is a concept that is capable of being discovered by reference to objective criteria. Its nature, and the nature of those criteria, require to be borne in mind by the draftsman in order to ensure that his draft will be given the meaning that he intends. In particular, the nature of the objective search for legislative intent requires the draftsman to determine the nature of his primary target audience and the facilities likely to be available to them in applying and construing the legislation.”

Refer also to Daniel Greenberg’s discourse on legislation.¹⁵⁴

See also Eamonn Moran, formerly Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Counsel, especially:

See Greenberg: Daniel Greenberg on authorship and attribution to Acts of Parliament¹⁵⁵

“One could argue at length about whether an Act passed under the Parliament Act 1911 (c.13) is enacted by the Queen in Parliament, or as the special enactment formula might seem to indicate, by the Queen ‘in’ or together with, the House of Commons, but the argument would probably be inconclusive and futile.”

See also Eamonn Moran, formerly Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Counsel¹⁵⁶ especially:

“The purpose of my presentation was to highlight the dangers inherent in picking up legislation from another Australian jurisdiction and incorporating it into your own statute book. Each jurisdiction drafts in the context of its own Interpretation legislation. Interpretation Acts vary greatly in Australia, both in their comprehensiveness and in their actual provisions. Thus, for example, if an ACT Act were enacted in NSW without change, the following differences might result:

¹⁵⁴ Greenberg, Daniel, (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12

¹⁵⁵ Greenberg, Daniel Statute Law Review 27(1) 15-28, p15

¹⁵⁶ Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Council Moran, Eamonn, (2005) Current developments—Statutory interpretation
<http://www.pcc.gov.au/pccconf/papers/7-Eamonn-Moran.pdf>

- *Section headings would not be part of the Act in NSW whereas they would be in the ACT*
- *The Crown would not be bound in NSW whereas it would be in the ACT*
- *Examples would not extend the provision of which they are examples in NSW whereas they could in the ACT*
- *Commencement would be limited to a single day in NSW whereas a staged commencement would be possible in the ACT*
- *Words like “liability” would operate without definition in NSW.*

In my presentation I encouraged drafters to become familiar, not only with their own Interpretation legislation, but with that of other Australian jurisdictions. That familiarity will enable a drafter to avoid the traps inherent in picking up and incorporating another jurisdiction’s legislation.

Other useful citations from “*The Loophole*” the journal of the Commonwealth Legislative Assembly Counsel include these 2009 articles:

Bromley, Melanie (2009) Whose Law is it?—Accessibility through LENZ: Opportunities for the New Zealand public to shape the law as it is made in “*The Loophole*, Journal of the Commonwealth Association of Legislative Counsel 209 *ibid*), pp 14-24 (Melanie Bromley, Parliamentary Counsel New Zealand).

Greenberg, Daniel (2009) Access to Legislation – the Legislative Counsel’s Role. This article is based on a talk given at the 2009 Conference of the Commonwealth Association of Law Counsel in Hong Kong. It has benefited from the scrutiny of Saira Salimi and Jennifer Cartwright, both of the Office of the Parliamentary Counsel (United Kingdom). (Daniel Greenberg is Parliamentary Counsel UK)

Laws, Stephen (2009) Consistency versus Innovation in *The Loophole* 2009 (the Journal of the Commonwealth Assembly The Loophole Journal of the Commonwealth Association of Legislative Counsel Stephen Laws is First Parliamentary Counsel, UK

http://www.opc.gov.au/calc/docs/Loophole_October2009.pdf

Keys, John Mark, Professional Responsibilities of Legislative Counsel Paper presented at the conference of the Commonwealth Association of Legislative Counsel, Hong Kong, 1-3 April 2009

See Book Note—“*Principles of Legislative and Regulatory Drafting*” in *The Loophole* (2009) The Journal of the Commonwealth Assembly of Legislative Counsel Author: Ian McLeod a solicitor and Visiting Prof of Law at Teeside Uni.; Senior Assoc Legal Studies, London University, member of CALC and member of the Council of the Statute Law Society.

Comment MK

In discussing constitutional matters and legislation interpretation Rodger Hills in his book *The Consensus Artifact*¹⁵⁷ observes that “In modern democracies)..... “Where courts become clogged and the legal system fails is when the normal quota of judicial gets swamped with matters that have to do with constitutional interpretation or applicability of legislation

Food for thought for those interested in high level legislative principles - and particularly relevant in Australia in a climate of extensive legislative and regulatory reform. The concepts of innovation apply as much to regulatory practice as to industry benchmarks and market opportunities.

The National Measurement Institute’s scope may provide unique opportunities to lead the way for consideration of such half-forgotten principles. The Treasury within the context in this paper has yet another chance to examine how the system as failed to work so far – with half-baked self-regulation, inadequately phrased legislative provision and discrepant interpretations thereof, leading to distortion and compromise to consumer protections.

In conclusion I share the concerns of many that the limited time allowed for consideration of the many issues raised by stakeholders and many of the process concerns may hamper the adoption of best practice in endeavouring to adopt sustainable legislation.

As to the issues of conflict and overlap between schemes, lack of clarity; drafting issues and lack of time or opportunity to scrutinize other proposed legislation (notably energy) to ensure that the principles of consistency and adoption of a single national law with multiple jurisdictions is adopted. Professor Stephen Corones has discussed this very issue in his recently published material.

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.”

That goal seems to be receding further into the distance.

¹⁵⁷ Hills, Rodger (2007) *The Consensus Artifact*. AstroProject. Sydney NSW.

Finally, I note the ACCC's interpretation of current provisions regarding private actions.¹⁵⁸

Private actions

Individuals or corporations can bring private actions for contravention of restrictive trade practices provisions (Part IV), the unconscionable conduct provisions (Part IVA), the industry code provisions (Part IVB) or the consumer protection provisions (Parts V and VA) of the Trade Practices Act.

Remedies include:

- *damages (s. 82)*
- *injunction (except for mergers prohibited by s. 50) (s. 80)*
- *ancillary orders in favour of persons who suffer loss or damage, including return of property, return of money, specific performance, rescission or variation of contracts, and provision of repairs or spare parts (s. 87)*
- *divestiture of shares in relation to an unlawful merger (s. 81).*

The Jurisdiction of Courts (Cross-Vesting) Act 1987 in most cases permits the Federal Court or a state or territory Supreme Court to deal with all related proceedings.

However, Part IV matters must be brought in the Federal Court.

However, s. 46 (misuse of market power) matters may also be taken to the Federal Magistrates Court.

Overview of Australian Consumer Law Matters

The ACL is a generic law applying to all sectors of the economy.¹⁵⁹

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.

¹⁵⁸ ACCC website Legislation Overview of Trade Practices Act (when part 2 provisions are incorporated, the act is to be re-named Competition and Consumer Act

¹⁵⁹ Note there are further explanations about financial products and services as covered by Corporations Agreement 2002

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.

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/nor 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 organizations 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 or 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

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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.

DISCUSSION OF NATIONAL ENERGY OBJECTIVE

PERCEIVED FAILURE OF THE FRAMEWORK TO UPHOLD THE NATIONAL ENERGY RETAIL OBJECTIVE – SOME GENERAL COMMENTS

I do not intend to deal with the entire range of issues where the fundamental objective appears to fail, but rather will continue to address issues already extensively aired with the MCE orally and in writing to no avail, and notwithstanding the unambiguous message obtained from those involved in the formation or endorsement the NECF2 package that the issues of particular concern to me impacting detrimentally on several groups of consumers left entirely unprotected under this framework would not be addressed (if ever).

However, it was somewhat reluctantly conceded during the February NECF2 Workshops that the matters may have merit, whilst the position was maintained that they would not be addressed. Undeterred by that stance, and regardless of whether the MCE sees fit to reconsider its position, my views are once more provided in direct response to the NECF2 package at 2nd Exposure Draft stage and whilst the right of stakeholders to transparently participate in the public policy debate exists.

Part 1 Division 3 National energy retail objective and policy principles

113 National energy retail objective (cf NEL s7; NGL s23)

(1) The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.

(2) The national energy retail objective should not be taken to prevent or restrict the development and application of consumer protections for hardship customers and other small customers, including the development, approval and application of customer hardship policies.

Related objectives

Natural Gas (South Australia) Act 2008 Part 2, National Gas objective and principles; and Division 1, 23 national gas objective and of the

National Electricity South (Australia) Act 1996 Schedule 7—National electricity objective

Both relate to

Promot(ion) of efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of gas or electricity with respect to—

(a) price, quality, safety, reliability and security of supply of electricity; and

(b) the reliability, safety and security of the national electricity system.

Some sections impacted within both NERL, NERL include:

[101; 102; 105; 107; 110; 111, 112, 113; 115, 116;](#)

[Part 2;](#) Relationship between retailers and small customers and corresponding provisions within the NERR; Especially in relation to impacts on certain classes of end-consumers of utilities (as opposed to customers of energy) all components of deemed customer retail arrangements under **Div 9, 202 (3) Deemed Customer retail arrangements** NERL and corresponding detail under NERR; and **Part 6 NERR Deemed small customer retail arrangements**, especially: **Part 2 Division 9 Deemed customer retail arrangements**, especially 235 1a and 2(a) move-in customer; 1(b) carry-over customer

235 Deemed customer retail arrangement for new or continuing customer without customer retail contract

- distortion of interpretation of alleged *“commencement of consumption of energy”* (implying flow of energy to premises and end-consumer deemed to be receiving) the case of certain classes of end-consumers of utilities

– distorted through tacit acceptance within the Framework through failure to acknowledge or clarify conflict between Framework and with other regulatory schemes and the common law of jurisdictional arrangements known as “bulk hot water (policy) arrangements”)

Comment MK

I cannot see that the single national objective in the Framework, NGL and NEL has been met, especially in relation to selected groups entirely neglected within the proposed consumer protection framework for energy (NECF2).

The NECF Package in all its components does in fact appear to restrict the single objective and policy principles identified above, which are reflected those contained within the existing gas and electricity acts.

The devil is always in the detail. The NECF2 Package, appear to reflect pseudo-generic energy laws and rules fail to recognize this in practice, thus rendering the provisions less like energy-specific consumer protections than a cursory attempt to adhere to public policy expectations of industry-specific regulation. The focus is on process issues involving distributors, retailers and exempt sellers of utilities, with the new introduction of an exemption framework for gas also, previously rejected by the MCE as being a viable option because of safety issues.

It is not my view that the scanty consumer protection allowed within the NECF2 Package, poor consumer complaint and redress options, and omission altogether of several groups of consumers from the Framework’s parameters reflects either best practice regulation, inclusiveness of all Australians, clarity or due regard to comparative law. The Package appears to be more process-focused than reflecting real consumer protection.

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In addition I refer to inconsistency between all of these similar objectives and those of the national consumer policy objective are discussed with particular reference to the address by Dr. Steven Kennedy (2009)

“In considering consumer policy, this approach is reflected in the national consumer policy objective: ‘To improve consumer wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly.’”

As an end-user of utilities I do not see the NECF2 package as having achieved the degree of empowerment required to foster effective competition in the manner described above.

Competition is not end in itself and this is something frequently when economic efficiency models dictate how laws and subsidiary regulations are formed.

Elsewhere, and in numerous other public submissions I have referred to Gavin Dufty’s (2004) s of the Essential Services Commission’s philosophies as presented by John Tamblyn (2003) World Congress on Regulation, and concerns about the creation of residual markets when universal service obligations are shifted to consumers.

We are yet to see in place a well-functioning CSO model that will meet the needs of all consumers who have a right not only to participate in contribution towards competition, but also to guaranteed protection and redress options. These rights should not be excluded from availability to all Australians, no matter what the nature is of their minority statu8s in numbers or for other reasons.

Yet this package altogether excludes from both effective participation in fostering competition and from affordable and accessible redress options including through the jurisdictional complaints schemes known as Ombudsmen, in some cases with such limitations on their charters and jurisdictions, and with so many self-confesed conflicts of interest as to be of no value at all to certain groups of end-consumers of utilities. The exclusive focus on hardship (in the case of electricity representing 5% f the NEM) without focusing on other sectors of the community, including medium to large businesses means that the NECF2 Package fails on numerous counts in meting national consumer objectives and objectives under industry-specific laws.

In addition, the failure to properly consider the implications of comparative law, and provisions under other schemes and within the common law has created more not less confusion and potential for conflict, expensive complaints and redress and ultimately possible class actions in the open courts. Tow of these are already in progress in connection with the bizarre and inappropriate “bulk hot water policies” which three jurisdictions have been allowed to retain, apparently with so little understanding of or regard for the fundamentals of contractual laws, trade measurement best practice and a host of other provisions. Failure in this Package to ensure protection for all consumers of utilities, including those in temporary residence may be interpreted as irresponsible.

Likewise the small scale licencing or exempt regime is fraught with gaps that will create residual markets and exclusions from proper protection that the NECF2 Package has failed to address.

I deal with a selection of these issues in this submission though not in the depth deserved. As mentioned failure to comment on some aspects of these issues or to omit mention altogether of other matters does not represent endorsement, but merely time constraint.

I remind the RWPG that the Australian Consumer Law in the words of Dr. Stephen Kennedy (2009) that the new Australian Consumer Law

“...will introduce nationally consistent rules for business and trading practices, product safety obligations and the conduct of business-to-consumer transactions, including consumer contracts. These rules will apply to all businesses, and will apply throughout Australia.”

The ACL will include under a single national law for consumer protection and fair trading; national unfair contract terms law; a national product safety regulatory system and further reforms designed to enhance the operation of law which draw on best practice in existing state and territory.

There is also the question of the National Measurement Institute role which it will more comprehensively assume in July 2010 when revised regulations will take enforcement effect, though remaining utility exemptions are yet to be effected, and could be the subject of further provisions. I discuss some metrology matters in more depth elsewhere.

In the meantime I will say up front how disappointing it is that due care has not been taken to ensure that regulatory overlap and conflict with other schemes and with the common law, and even conflict, inconsistency, duplication within energy provisions, existing and proposed, to say nothing of retention of some of the policies and provisions that represent the worst examples of regulatory practice and regulation instead of the best. Mere harmonization on a model jurisdiction basis will not resolve these problems.

Energy infrastructure market failure and compromised consumer protection have been recurring themes for decades – the opportunity exists now to get things right in a climate of massive regulatory reform. What a pity to have to be governed by political and other pressures. Not that I am suggesting either that extensive consultation has not been undertaken, whilst reserving comment on the quality of that consultation, which many believe to have represented no more than tokenism.

RIS processes have failed to give reasons for not addressing certain concerns, and in other cases last minute inclusion of major changes (such as occurred between the NECF1 and NECF2 packages) has meant that neither industry nor consumers were consulted early enough of given a proper opportunity to study and respond to the hundreds of pages of proposed regulation, to say nothing of all the submissions, policy documents and commissioned reports that needed also to be taken into account.

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In this case I raise the issue of failed guarantee of the security of supply of essential services on the basis of both the provisions and the philosophical approach of such bodies as the Essential Services Commission,

INCONSISTENCY

On page 5 of the TPA (ACL) Bill(2) Explanatory Memorandum states that

Commonwealth State and Territory industry-specific legislation will continue to apply in some areas to the extent that it does not duplicate or is inconsistent with the ACL. Under the IGA the Australian Government and the governments of the States and Territories are to repeal or modify any laws which duplicate or are inconsistent with the ACL.

My focus in discussing this issue is limited to energy in relation to

- (a) unjustly imposed deemed standard contracts, as they are unjustly imposed on the wrong parties because of flawed state and federal regulations both implicitly and explicitly endorsing inappropriate provisions that have the effect of stripping consumers of their enshrined rights under proposed energy laws as well as numerous other provisions
- (b) Unjust and inappropriate trade measurement practices both explicitly and implicitly endorsed by state and federal provisions as they impact on consumers under both Codes and Guidelines, and within national wholesale gas and electricity laws, as well as within the proposed National Energy Retail Laws and Rules (National Energy Consumer Framework2) (NECF2), from which the consumer focus seems to have already disappeared before scheduled rubber-stamping in the Australian Parliament in Spring 2010

Though discussed in a different context (relating to structural health reform), Treasurer Wayne Swann in his interview ON 18 April 2010 with Laurie Oaks¹⁶⁰ said:

“What we can't do is simply put a fresh coat of paint across a flawed system with big cracks in it. That's why we need the Premiers to sign up for fundamental reform; fundamental reform which ends waste and duplication, and fundamental reform that ensures the system is financially sustainable.”

Of course, it is not my intent to discuss health reform debates and proposals or any stalemate positions that may arise in COAG dialogue with the Federal Government.

I merely wish to raise the issue as to whether either State or Federal Governments and their contracted advisers, have in designing energy provisions properly understood the implications of either implicitly or explicitly endorsing flawed policies that have the effect of undermining provisions under numerous protections including unfair contracts;

¹⁶⁰ Treasurer Wayne Swann Today Program Interview with Laurie Oaks 18 April 2010
<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=transcripts/2010/028.htm&pageID=004&min=wms&Year=&DocType>

Though it may seem that the issues I have raised are peculiar to energy, I remain concerned that original promises that there would be a single national law as referred to in Dr. Steven Kennedy's address of 27 November 2009 have become progressively eroded through failure of other jurisdictions to take account of the fundamentals of comparative law when designing new energy rules and laws and current proposed Rule Changes.

I do not believe that the Intergovernmental Agreement for the ACL signed on 2 July by COAG has been heeded or embraced during the formation and engrossment of the proposed Energy Laws and Rules.

In their online article A Brave New World - Senate endorses unfair terms regulation, commercial law firm Mallesons, Stephens and Jacques¹⁶¹ commented on the issue of uncertainty as to how regulators would approach the national unfair terms regime, noting that

“prima facie, the unfairness of a term is a matter between the consumer and the supplier, not the regulator and the supplier.”

Malleeson's notes that:

“Other regulators such as Consumer Affairs Victoria have in the past taken a targeted approach to unfairness with consultation in various industries With the view of persuading various industries.”

How regulators will approach the national unfair terms regime is a great unknown. Prima facie, the unfairness of a term is a matter between the consumer and the supplier, not the regulator and the supplier. However, other regulators (such as Consumer Affairs Victoria) have in the past taken a targeted approach to unfairness with consultation in various industries (such as telecommunications and fitness), with the view to persuading suppliers to change their contract terms. Whether the ACCC and ASIC will follow suit is unknown.”

This thus leaves consumers forced into the open courts if a regulator does not lead appropriate action over unfair terms.

The existing and proposed energy laws and rules, and the potential within them for ongoing dilution of the consumer protections which the single national generic laws are endeavouring to address through on demand Rules Changes, initiated by the AEMO, AEMC, or MCE, or responsible Energy Minister, State of Federal through for example Orders in Council is a matter that needs particular attention.

¹⁶¹ A Brave New World – Senate endorses unfair terms regulation Mallesons, Stephens and Jacques. (an international commercial law firm) 17 March 2010 accessed online <http://www.mallesons.com/publications/2010/Mar/10276861W.htm>

I start by examining the issue of inconsistency by comparing selected energy provisions with those within the existing and proposed generic laws, ACL Part 1 which received Royal Assent on 15 April and is now operational, and Part 2 which is the subject of the Second Bill. The two will then be combined to rename the TPA *Competition and Consumer Act 2010*.

These matters were discussed at considerable length in my last public submission, being that to the National Retail Energy Law and Rules Second Exposure Draft (NECF2 Package)¹⁶² and in many other such submissions, including the Senate Economics Committee's Consumer Policy Inquiry TPA-ACL Bill² and the Treasury's Unconscionable Conduct Issues Paper.

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 apparently failure of responsible bodies to apparent failure to undertake at least adequate inter-body collaboration in the design of new policies and regulations.

¹⁶² Madeleine Kingston (2010) Submission to National Energy Customer Framework² (NECF2) Package, (March) (to be called National Energy Law and Rules)
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
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

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*, which was referred initially to the Economics Committee, and has now been passed

This Bill was referred to the Senate Economics Committee which will

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

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Jemena (JGN) Revised Gas Access Proposal 2010-2015
Further open s comment and supporting data with several appendices
re JGN’s further submission(s) of 18 May 2010
and principles behind AEMC’s Rule Change Proposal ERC 0092 under the NER
(with possible extrapolation to NGR) – and other related determinations
Prepared also for multiple other arenas
Madeleine Kingston, Individual Stakeholder

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.¹⁶³

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.

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.

¹⁶³ Note there are further explannatons about financial products and services as covered by Corporations Agreement

Implementation of the new Trade Practices provisions will herald the 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.

The ACCC’s just-published Media Release says:¹⁶⁴

“The UCT law is designed to address the detriment that can arise in circumstances where consumers are offered contracts on a 'take it or leave it' basis and those contracts contain terms that are unfair,” ACCC deputy chair Peter Kell said.

"The ACCC will seek suppliers' cooperation to remove terms that may be unfair from consumer contracts," Mr Kell said.

"Where necessary, the ACCC will take further steps, including enforcement action, if faced with a contract term it believes to be unfair to consumers," he said.

On commencement, the ACCC will seek compliance with the UCT provisions and will review standard form consumer contracts where consumer harm is evident. The ACCC also considers the UCT provisions will form an important additional tool to its consumer protection toolkit.

"Ultimately the ACCC cannot endorse or 'OK' a term in a standard consumer contract, but this guide will help businesses to understand the operation of the new law," Mr Kell said:

The ACCC is also developing additional guidance for small business and consumers to further their understanding of this new law and these materials will be available from 1 July.

More information about the new UCT provisions is available via the For Consumers and For Businesses sections of the ACCC website www.accc.gov.au. A guide to the unfair contract terms law is available on the publications section of the website.

¹⁶⁴ <http://www.accc.gov.au/content/index.phtml/itemId/930765>

The UCT law is part of the Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010 which was passed by Parliament in March 2010 and applies to standard form consumer contracts.

From 1 July 2010, standard form consumer contracts that are entered into, or terms of existing contracts that are renewed or varied after that date, will be subject to the unfair contract terms law.

Under the law, a term in a standard form consumer contract is considered to be unfair if:

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

The court must also consider how transparent the term is within the contract and the contract as a whole when decided whether the term is unfair and therefore void.

While a term declared by the court to be unfair will be void, the contract will continue to bind the parties to the contract, to the extent that the contract is able to operate without the unfair term.”

Please refer to the Major Deidentified Case Study as an appendix in which I had direct involvement as the nominated third party consumer representative, This study was published in other submissions to the Productivity Commission, MCE, Treasury, and Senate, more recently being updated.

LACK OF CLARITY

(energy in relation to generic and trade measurement laws)

(selected areas only chosen as focus and examples)

Comment MK

I do not intend to deal with the entire range of issues where the fundamental objective appears to fail, but rather will continue to address issues already extensively aired with the MCE orally and in writing to no avail, and notwithstanding the unambiguous message obtained from those involved in the formation or endorsement the NECF2 package that the issues of particular concern to me impacting detrimentally on several groups of consumers left entirely unprotected under this framework would not be addressed (if ever).

However, it was somewhat reluctantly conceded during the recent workshops that the matters may have merit, whilst the position was maintained that they would not be addressed. Undeterred by that stance, and regardless of whether the MCE sees fit to reconsider its position, my views are once more provided in direct response to the NECF2 package at 2nd Exposure Draft stage and whilst the right of stakeholders to transparently participate in the public policy debate exists.

Part 1 Division 3 National energy retail objective and policy principles

113 National energy retail objective (cf NEL s7; NGL s23)

(1) The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.

(2) The national energy retail objective should not be taken to prevent or restrict the development and application of consumer protections for hardship customers and other small customers, including the development, approval and application of customer hardship policies.

There appear to be numerous clarity gaps in the NECF2 Package especially in relation to consumer protections for those who seem altogether to have been left out of the provisions – as a consequence of an apparently deliberate decision by the MCE RPWG and its advisers to sanction by default practices that appear to contrive not only to strip certain categories of end-users of utilities of their enshrined rights under multiple provisions, and to defy best practice trade measurement, but also adopt practices that are scientifically, technically and legally unsustainable and fail to recognize the trap of regulatory overlap and failure to consider comparative law.

In discussing how certain issues may be addressed “*to protect and enhance the wellbeing of consumers now and into the future,*” the Final Report dated October 2009 of the Commonwealth Consumer Advisory Committee observed that:¹⁶⁵

“Clarity and awareness of the law, combined with clear and effective methods for redress, are fundamental attributes in the law, and have been identified as being imperative in addressing the issues faced by consumers, retailers and manufacturers. Information about the type of warranties and remedies available to consumers when they experience product failure is crucial in promoting wellbeing and empowering consumers in today’s environment. This report considers how these issues can be addressed to protect and enhance the wellbeing of consumers now and into the future. “

This report acknowledged that the current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law (Findings 5.1).

The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions

The failure to distinguish within NECF drafting proposals between customers and individual residential customers as end-consumers (of energy) creates immediately problems. This causes particular problems in multi-tenanted dwellings whether privately managed by Owners’ C

Owners’ Corporations are frequently customers but never end-consumers. Either Developers of Owners’ Corporations are the entities that normally arrange for connection, any augmentation and seek ongoing sale and supply of energy to supply of either gas or electricity to heat communal boiler tanks that reticulate heated water, often of variable and inconsistent quality to end-users in multi-tenanted dwellings or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

¹⁶⁵ Commonwealth Consumer Affairs Advisory Council (CCAC) (2009) Consumer rights: reforming statutory implied conditions and warranties. Commonwealth Treasury Final Report. October http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf

Though the concept of “*flow of energy*” is recognized within the NECF2 Package, it could be reasonably claimed that a perceived “ostrich-like approach” in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect.

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009 Productivity Commission (2008 and 2009); and Federal Treasury (2009).

It would seem that convenient strategies are in place to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

In discussing how certain issues may be addressed “*to protect and enhance the wellbeing of consumers now and into the future,*” the Final Report dated October 2009 of the Commonwealth Consumer Advisory Committee observed that:¹⁶⁶

Clarity and awareness of the law, combined with clear and effective methods for redress, are fundamental attributes in the law, and have been identified as being imperative in addressing the issues faced by consumers, retailers and manufacturers. Information about the type of warranties and remedies available to consumers when they experience product failure is crucial in promoting wellbeing and empowering consumers in today’s environment.

This report considers how these issues can be addressed to protect and enhance the wellbeing of consumers now and into the future.

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The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions, Australian consumers of utilities face short-changing in expectations of proper consumer protection.

The failure to distinguish within NECF drafting proposals between customers and end-consumers (of energy) or to clarify de-energization, disconnection or decommissioning issues, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

As mentioned previously, at the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

Though the concept of “*flow of energy*” is recognized within the NECF2 Package, it could be reasonably claimed that a perceived “ostrich-like approach” in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect.

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009 Productivity Commission (2008 and 2009); and Federal Treasury (2009). So far convenient strategies to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

It is my contention that the fundamental issue seems to be systemic failure to meet the Single Market Objectives of the each following”

1. The NECF Package detailing the proposed Energy Law Regulations and Rules outlined in Part 1 Div 3
2. National Gas (South Australia) Act 2008, Part 2, National Gas objective and principles, and Division 1, 23
3. National Electricity (South Australia) Act 1996 - schedule 7—national electricity objective

There appear to be numerous clarity gaps in the NECF2 Package, some of which are discussed below especially in relation to consumer protections for those who seem altogether to have been left out of the provisions – as a consequence of a deliberate decision by the MCE RPWG and its advisers to sanction by default practices that appear to contrive not only to strip end-users of utilities of their enshrined rights under multiple provisions, and to defy best practice trade measurement, but also adopt practices that are legally unsustainable and fail to recognize the trap of regulatory overlap and failure to consider comparative law.

In discussing how certain issues may be addressed *“to protect and enhance the wellbeing of consumers now and into the future,”* the Final Report dated October 2009 of the Commonwealth Consumer Advisory Committee observed that:¹⁶⁷

“Clarity and awareness of the law, combined with clear and effective methods for redress, are fundamental attributes in the law, and have been identified as being imperative in addressing the issues faced by consumers, retailers and manufacturers. Information about the type of warranties and remedies available to consumers when they experience product failure is crucial in promoting wellbeing and empowering consumers in today’s environment. This report considers how these issues can be addressed to protect and enhance the wellbeing of consumers now and into the future.”

This report acknowledged that the current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law (Findings 5.1).

The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions

The failure to distinguish within NECF drafting proposals between customers and end-consumers (of energy) or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

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Though the concept of “*flow of energy*” is recognized within the NECF2 Package, it could be reasonably claimed that a perceived “ostrich-like approach” in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect.

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009 Productivity Commission (2008 and 2009); and Federal Treasury (2009). So far convenient strategies to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

TERMINOLOGY IN OBJECTIVE AND OTHER CLAUSES WITHIN THE NECF2 PACKAGE AND IMPLICITLY ENDORSED PROVISIONS

I note that the term *energy services* is employed within the Part 1 Div 3 objective.

For the purposes of Sale of Goods Acts and generic laws, gas and electricity these are goods (i. e. commodities) not services. For the purposes of sale and supply of energy, these are the only goods covered by the proposed Model Terms of Contract in the tripartite governance model to be adopted under the NECF2 Retail Laws Regulations and Rules. Therefore if supplies to provide services such as sale of appliances of end-consumers, these are covered by contractual laws governed by both generic and common law provisions. These services, however, are distinguishable from provision of goods (commodities), which applies to electricity and gas, and therefore afforded the full suite or protections.

There are specific laws and proposed further changes to generic laws that govern sale and supply of goods and services including implied and warranty provisions and unfair substantive terms. These issues will be discussed shortly since it is alleged that the proposed Model Terms and Conditions do not sufficiently take account of generic and common law provisions, and also that either my omission or commission are contrary to the existing and proposed rights and protections of end-consumers under other regulatory schemes.

When it comes to services such as billing and metering on behalf of Owners' Corporations these services are supplied to those parties, not to end-users of composite water products. Even in these circumstances where alleged contracts are formed with Owners' Corporations for alleged sale and supply of energy by energy providers or other third parties or of "hot water services" some bundled with "other services" legal disputes arise regarding contractual obligation. More than one of these is currently on foot with the OC taking direct action to air and clarify in the open courts issues that infringe on contractual rights, expectations of quality of alleged service provided and the like. This is discussed in further detail under Retail Connections (gas and electricity).

Whilst the NECF2 provisions carefully avoid reference to water products or disconnection of water services by energy suppliers by clamping of hot water flow meters, these practices are implicitly endorsed by the MCE in overlooking that these practices they know to be occurring in three different jurisdictions.

These practices as sanctioned at jurisdictional level have been facilitated by the mere existence of inappropriate provisions that represent systemic regulatory failures through the adoption of trade measurement and contractual models that are not simply inconsistent with proposed national energy laws, but with numerous other provisions.

For further detail please refer to my multiple submissions to various consultative arenas including the ESC (Vic)¹⁶⁸ MCE (2008)¹⁶⁹ and (2009)¹⁷⁰; the Productivity Commission (2008)¹⁷¹ and (2009)¹⁷² and the Federal Treasury. The matters have also been the subject of abortive discussions between the CAV, ESC, DPI and EWOV in endeavouring to resolve disputes over this very matter.

In adopting the BHW provisions for example, the Essential Services Commission, set up under a statutory enactment, was apparently unconcerned about its obligation under s15 of the Essential Services Act 2001 to avoid conflict and overlap with other schemes. This issue has also been thoroughly discussed and aired in other public submissions by me to Productivity Commission, ESC and MCE arenas, and has also been the subject of abortive discussion (see in particular subdr242part4 to the Productivity Commission)

Two other jurisdictions, SA and Qld have adopted the provisions, applying them discrepantly according to their own interpretations of deemed provisions, sale of goods provisions, implied and statutory warranty provisions; Owners' Corporation provisions, tenancy provisions.

When referring to sale and supply of gas (as opposed to heated water services) this is an important point. When applying deemed energy usage based on legally unsustainable claims of energy supply, sale or consumption (for example within the "bulk hot water policy arrangements" tacitly endorsed by the MCE through the NECF2 package provisions.

¹⁶⁸ Kingston, M (2008) Submission (2 parts) to ESC Review of Regulatory Instruments (17 and 30 November) Found at

<http://www.esc.vic.gov.au/NR/rdonlyres/4CBB1FA6-CCBA-4C4C-9B6C-A544AD8B6A80/0/MKingstonPt2RegulatoryReview2008300908.pdf> and
<http://www.esc.vic.gov.au/NR/rdonlyres/6AD5F77F-15F2-47E8-BA69-A0770E1F8C50/0/MKingstonPt2ARegulatoryReview2008300908.pdf>

¹⁶⁹ Kingston, M (2008) Submission (2-parts)¹⁶⁹ to MCE SCO National Energy Consumer Framework Consultation Regulatory Impact Statement found at

http://www.ret.gov.au/Documents/mce/_documents/Madeleine_Kingston_part120081208120718.pdf
(Part 1)¹⁶⁹
http://www.ret.gov.au/Documents/mce/_documents/Madeleine_Kingston_part320081208120718.pdf
(Part 3)

¹⁷⁰ Kingston, M (2009) Submission to the Gas Connections Framework (GCF) Draft Policy Paper, as a component of the MCE SCO NECF¹⁷⁰. Found at

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

The Addendum Component and its several attachments were also submitted to the Treasury's Unconscionable Conduct Issues Paper with the latter being particularly pertinent to considerations re-raised in this response to the NECF2 Package

¹⁷¹ Kingston, M (2008) Submission to Productivity Commission's Review of Australia's Consumer Policy Framework (subdr242) (parts 1-5, 8)

¹⁷² Kingston, M (2008) Submission to Productivity Commission's Regulation Performance Benchmarking Review2 Part 1 (Part 3 similar to that published on MCE SCO site

http://www.pc.gov.au/__data/assets/pdf_file/0006/83958/sub007.pdf

Jemena (JGN) Revised Gas Access Proposal 2010-2015

Further open s comment and supporting data with several appendices

re JGN's further submission(s) of 18 May 2010

and principles behind AEMC's Rule Change Proposal ERC 0092 under the NER

(with possible extrapolation to NGR) – and other related determinations

Prepared also for multiple other arenas

Madeleine Kingston, Individual Stakeholder

Elsewhere I discuss contractual issues relying on the tripartite governance model of the NECF2 Package which relies of “flow of energization” and concepts of disconnection or denergization of energy, not water products as appears to be widely adopted by host retailers and associated distributors discrepantly applying in three jurisdictions the bizarre and legally unsustainable “bulk hot water policy arrangements” originally formulated and adopted by the Victorian Essential Services Commission and Department of Primary Industries in 2006 and continuing to defy the fundamental concepts of appropriate trade measurement practices.

Other issues relate to fit for purpose considerations under proposed revisions to generic laws consistent with the spirit, intent and letter of the proposed generic laws and additional state and territory provisions.

For example the purpose of supplying heat to a master gas or electricity meter is to supply heat to a communal water tank from which heated water that is “*fit for purpose*” can be relied upon to consistently provide heated water of an acceptable temperature and quality

The heat is fact supplied on the business premises of an Owners’ Corporation to communal infrastructure under the care custody and control of the Controller of those premises (see National Measurement Act provisions and definitions; (not to residential tenants). Nonetheless limiting responsibility for quality of goods (i. e. energy) to the distribution supply point at the outlet of a single master energy meter installed under direct contractual arrangement between Owners’ Corporation and energy provider fails to consider the purpose of supply of energy – to facilitate provision fog heated water of acceptable temperature – not merely a composite water product from which the heat provided to each individual recipient of that product cannot be measured by legally traceable means.

Whilst the term disconnection has been reintroduced into the proposed legislation along with de-energization, by failing to either revoke current jurisdictional contractual and disconnection practices either explicitly or tacitly sanctioned under the bizarre ‘bulk hot water provisions” adopted in three jurisdictions, with two following Victoria’s lead

The unjust imposition of unfair substantive terms as evidenced for example in the legally unsustainable “*bulk hot water provisions*” tacitly endorsed through deliberate omission to appropriately clarify and bring into the national framework adequate protections against exploitation of consumer rights and enshrined protections under existing and proposed provisions within other schemes, including the enhanced unfair contract clauses and implied and statutory warranties under proposed generic laws.

With regard to price, in the case of those known as “*bulk hot water customers*” under ancillary energy provisions (in the case of Victoria the Energy Retail Code v 6).¹⁷³

¹⁷³ Essential Services Commission (2009) Energy Retail Code version 6, effective February 2010, effective from April 2010

Elsewhere under Part 4 of the NECF2 Package small customer complaints and resolution is discussed.

One of the issues of paramount concern is the extent to which energy policy makers and/or economic regulators seem to be prepared to encroach on the provisions of other regulatory schemes and jurisdictions providing consumer protection or certainty about contractual obligations.

The plight of residential tenants and their eroded rights and redress options is not a new topic. The advent of mushrooming metering and billing agent business under the umbrella of energy provision has given rise to anomalies, and practices, policies and regulations that are seen by many to be blatantly unjust and unfair.

The mere existence of generic laws does not always make them accessible or affordable.

There are gaps in access to redress on substantive grounds. Where the substantive unfair provisions are seen to be driven by statutory policies, it is these that need to be addressed.

In my Part 3 submission to the NECF Consultation RIS I provided detailed discussion of the extent to which current provisions for BHW pricing and charging and the attendant contractual and trade measurement considerations may be falling short not only of best practice, but the fundamental provisions that should drive imposition of contractual status on a “*take-it-or-leave*” basis where the proper contract should lie with Landlords and OC. The original goals of “*prevent consumer price shock*” are flawed and the current arrangements have certainly not prevented rent hikes.

The issues of overlap with other regulatory schemes is discussed in some detail including the obligation of regulators under any given jurisdiction to make sure that legislation and rules do not conflict or overlap with other schemes. The Essential Services Commission under their own enactment has an enhanced obligation to ensure this, though there is no evidence in the formulation of rules and other provisions that this is upheld.

The current moves at State jurisdictional level to strengthen the already weak position of end-users of bulk energy provided for the heating of hot water services in the absence of individualized energization points, during a time when no settled position has been arrived at in terms of the National Energy Consumer Framework especially with regard to such consumers and those in a similar position for technical reasons better classified as “*embedded consumers.*”^{174/}

¹⁷⁴ ⁷⁵ The classes of consumers are not synonymous. In the case of those properly categorized as “*embedded consumers*” they are receiving from a distribution network other than the original energy that is reticulated through an “*embedded network.*” In the case of most recipients of hot water supplies provided in multi-tenanted blocks of apartments and flats, the energy used in bulk to centrally heat boiler tanks from which heated water as a composite product is reticulated to end-users where the gas or electricity component normally comes from a single distribution point to a single energization point on common property infrastructure. This raises contractual and trade measurement issues that are swept aside unacknowledged under current and proposed provisions.

APPLICATION OF THE LAW NATIONAL REGULATIONS AND RULES AND SELECTED COMPARATIVE LAW CONSIDERATIONS

Division 1 Part 1 103

This Law, the National Regulations and the Rules apply in this jurisdiction except to the extent provided by or under the application Act of this jurisdiction or any other Act of this jurisdiction.

Note—

This Law, the National Regulations and the Rules constitute the "National Energy Customer Framework", which will apply in each participating jurisdiction by virtue of the application Act for that jurisdiction.

A jurisdiction's application Act may, for transitional or other reasons, modify the application of various provisions of the Framework for the jurisdiction.

Further, certain provisions of the Framework rely upon jurisdictional energy legislation for their full effect (see, for example, the operation of GSL schemes), and the Framework is intended to operate in parallel with jurisdictional energy legislation.

The Framework should therefore, in its application to a jurisdiction, be read in conjunction with the application Act and jurisdictional energy legislation of the jurisdiction”.

Comment MK:

It may be a good place for me to refer to the Treasury's Unconscionable Conduct Issues Paper¹⁷⁵ (to which I had made a submission highlighting many energy-specific concerns in the context of the NECF2 Package)

The Senate Standing Committee on Economics (2009) tabled the report of its inquiry into “*the need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*”.¹⁷⁶

The Senate Committee did not recommend the introduction of a statutory definition of unconscionable conduct, but made three recommendations directed at improving the clarity of the unconscionable conduct provisions of the *Trade Practices Act 1974* (TPA).

The Government will consider any further policy initiatives after the expert panel makes its recommendations to the Minister.

¹⁷⁵ Treasury (2009) The nature and application of unconscionable conduct: can statutory unconscionable conduct be further clarified in practice? Issues Paper November 2009

http://www.treasury.gov.au/documents/1676/RTF/Unconscionable_Conduct_Issues_Paper.rtf

¹⁷⁶ A copy of the report is available from the Parliamentary website, at www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08.

It is intended that any recommendations that require legislative amendments to the existing provisions of the TPA will be given effect in the second Bill to implement the Australian Consumer Law, which is scheduled to be introduced into the Australian Parliament in early 2010.

The issues highlighted by regulatory overlap between different schemes continue to significantly contribute to confusion in the marketplace; to ongoing consumer dissatisfaction; detriment and expensive though inadequate complaints handling under current structures and redress recourses.

Definitions and interpretations across all affected schemes need to be consistent and all provisions need to be cross-referenced to each other so that it is clear who the final arbitrator is when there is disagreement and also who has control. This is not the way things are working at present.

These factors have made significant contributions towards the inconsistencies. Merely aiming for harmony between all jurisdictions by adopting a single set of laws and rules to be implemented nationwide will not take care of the design gaps.

In the context of energy reforms (but containing principles that could readily be extrapolated to other arenas, I have amply illustrated this in my various submissions to consultative arenas including the Productivity Commission Review of Australia's Consumer Policy Framework (2008) (subdr242parts1-5, 8), submissions to MCE SCO arenas; to the NMI and to the Essential Services Commission's Review of Regulatory Instruments (2008)

Whilst I chose to focus on a single instrument by way of illustration and whilst matters arising from this remain unresolved with segments of the consuming population entirely unprotected as a consequence, the intent was to draw attention to the broader principle of regulatory overlap between schemes.

Since then I have called further attention to other areas of unaddressed concerns, in the light of ongoing reforms with national measurement provisions; energy provisions about to be rubber-stamped with perpetuation of many same design and policy flaws as previously.

NECF2 Workshops presented an outline of the legal architecture that relates to proposed energy laws. Of particular relevance to the National Measurement Institute and regulatory overlap and conflict issues are the national retail market procedures, which for gas come under the Gas Market Retail Procedures, and under the national Electricity Law the Market Settlement and Transfer Procedures, Metrology procedures.

On the issue of trade measurement best practice I note with concern the correspondence from Dr. Laurie Besley CEO and Chief Metrologist to Mr. Drew Clarke as Chair of the AEMO Implementation Steering Committee concerning provisions within the Declared Wholesale Market Rules.

The response of the NMI dated 13 March 2008 to the consultation draft iterates concerns that the NMI's role to establish and maintain Australia's primary measurement standards and providing peak infrastructure that enables measurements in Australia to be accepted nationally and internationally do not become eroded.

Specific recommendations are made in that correspondence regarding definitions in relation to technical interpretation and metering. I have maintained an unwavering position regarding similar concerns about erosion of best practice trade measurement in relation to adopted metrology procedures, which appear to me to be a dog's dinner of inconsistency and poorest practice.

This is the context in which I have repeatedly raised issues of pertinence to NMI policies and practices as they impact on other regulatory schemes and their respective and discrepant interpretations.

EXCLUSION WITHIN THE FRAMEWORK OF WHOLE SEGMENTS OF THE AUSTRALIAN POPULATION FROM PROTECTION, INCLUDING COMPLAINTS AND REDRESS

I believe that many provisions, including those left under jurisdictional control else or dismissed as being of an entirely economic focus rather than relating to components of both economic and non-economic considerations (for example, BHW arrangements; embedded consumers and small scale licencing (the latter two applying to electricity only). The issue of regulatory overlap with other schemes has been ignored; as have the proposed protections under generic laws, including substantive unfair terms within both standard and market contracts; and unconscionable conduct considerations which are the subject of ongoing evaluation by the Treasury following receipt of expert panel advice.

I was unable to effectively engage with the Panel in NECF2 Workshop consultations on 3 and 4 February in Melbourne or through extensive written submissions to MCE arenas, the contents of which appear to have been altogether ignored.

I was unable to the NECF2 Workshop Panel, or through protracted written dialogue with the RPWG as to how the current deficient Framework will operate, be monitored and evaluated, and how the needs of residential tenants in particular will be met where these needs are entirely neglected for those on deemed contracts especially for the bizarre BHW policy arrangements will be catered for despite the proposed implementation of a revised tripartite governance model that has entirely failed to account for certain groups of end consumers of utilities.

It concerned me that the Workshop process appeared to have been pre-empted particularly in respect to appropriate discussion with Panel members in abortive attempts to seek answers as to how the current deficient framework will operate, be monitored and evaluated with particular emphasis on whole groups of end—consumers of utilities altogether left out of coverage within the Framework.

Further I have evidence to hand that includes correspondence from Minister(s) that will confirm a pre-empted stance prior to completion of the consultative dialogue in relation to the NECF2 Package Second Exposure Draft to the effect that the Commonwealth Government is not considering national regulation of *“bulk hot water provisions”*

I have assumed that the CoAG agreement on this issue may be an influencing factor.¹⁷⁷ I believe that such an agreement should be re-visited and that Federal intervention is warranted for a number of reasons. There are no further constitutional impediments to such intervention.

My past efforts and those of others to engage in effective dialogue with this Federal Minister, and other members of the MCE on this issue have been abortive, as the BHW arrangements impact on a segment of the population in three jurisdictions who appear to have no proper protection under current energy provisions, and whose needs have from the outset been neglected even before proposals to adopt national energy laws.

In my view, the failure of the MCE to appropriately clarify this matter could be viewed as direct or tacit instruction to licenced and unlicenced energy providers to breach best practice, the intent and spirit of existing and proposed laws, and even direct breach of provisions, including those under the common law.

There is blatant evidence of market failure in certain areas including what is ridiculously referred to as “bulk hot water provision” within energy laws (mainly gas); embedded and exempt frameworks (electricity), with those ill-considered provisions, again based on Victoria’s perception of best practice about to be elevated from OIC provisions to the Law. Note the original OIC provisions were intended only to capture transitory provision of electricity to iterant parties, not to create a whole new opportunity for ongoing for innovative distortion of the most fundamental precepts of contract law; or to breach existing tenancy laws, Owners’ Corporations provisions (both discrepantly operating)’ trade measurement precepts and intended provisions.

There are certain current legal matters on foot in the open courts with regard to alleged exploitive conduct by “providers” of alleged energy services under distortions of the tacitly endorsed “bulk hot water provisions

Now the AER is to be held responsible for piecemeal consideration of an “*exempt selling framework*” which presumably includes those considered to be “embedded consumers.”

Please note that the term “*embedded consumer*” does not and should not ever apply to provision of gas, principally because of safety reasons, as recognized in MCE discussions prior to publication of the 2nd Exposure Draft.

¹⁷⁷ David Adams He also holds the view that COAG and ministerial councils are “*creatures of government for government*”. He believes that:
“*Broader forums and structured arrangements are needed to focus effort. Despite being a rather exclusive and tightly managed club COAG still represents the most obvious forum within which the states and territories and the Commonwealth could canvass a national approach. However a truly national forum where the policy community clans can meet with other partners (such as business and local government) would be a good way of testing the new settlement.*”
Cited from Adams, D (2001) *ibid*

In the full knowledge that the *“bulk hot water policy arrangements”* exist within three jurisdictions and continue to exploit enshrined and proposed consumer rights, the MCRE has also chosen to overlook the absence altogether of consumer complaints options and redress for the class of consumers impacted, more particular as choice in provider of utilities is unavailable to this captured group.

Both for the *“bulk hot water”* recipients unjustly deemed to be receiving energy and therefore unfairly subjected to all conditions precedent and subsequent; as well as to unjust implied claims of *“fraudulent and illegal consumption of energy”* (see for example most components of Part 2 Division 9 and mirrored more detailed provisions under the NERR); and for those under small scale licencing regimes or exempt selling regimes; industry-specific ombudsmen are prohibited from dealing with complaints.

Policy maker and regulators at jurisdictional level who implemented the BHW provisions have been shown to refuse to intervene in preventing disconnection not of energy but of heated water products (allegedly on the basis of a deemed energy contract), even when unconscionable conduct considerations, supported by irrefutable medical evidence.

I note that the Treasury has sought expert panel input on the issue of unconscionable conduct. Without pre-empting that advice, the Treasury has observed as follows

*“The Committee noted a growing trend in legislation to insert notes and examples to assist both the courts and the parties understand the effect of the provisions.”*¹⁷⁸ A statutory list of examples could function in a number of ways.

I have absolute empathy with groups of end-consumers of utilities and other goods or services facing hardship and have contributed my own small share of input into those client groups.

However, I am also empathic to the needs of the general population not facing hardship, small businesses and even larger businesses, since philosophically I believe that all consumers of goods and services deserve to be catered for equitably with regard to their specific and general rights, including those under the common law, and with particular regard to contractual rights.

For those reasons I am philosophically committed to provisions within the generic laws and other provisions that recognize not only the specific needs of those facing hardship either ongoing or temporary, but to the needs of the entire Australian population as consumers of goods or services of any description.

It is most disappointing that entire groups of end-consumers of utilities have been altogether left out of protection, complaints mechanisms and accessible redress.

¹⁷⁸ *ibid*, page 37.

Of all the issues raised in this submission this one of lack of parity and equity is to my way of thinking the most significant because it illustrates that even when major regulatory changes are undertaken, the needs of all Australians are not catered for appropriately.

This is an unacceptable state of affairs. No matter how much a group may seem to be a minority, there is never any excuse to favour one group above another when provisions such as these are effected.

The groups especially impacted through the “*sins of both omission and commission*” include those isolated to coverage under flawed jurisdictional policies including those known as the “*bulk hot water arrangements*” discrepantly adopted in three jurisdictions.

Whilst raised here in the context of failed objectives, this matter is more thoroughly discussed under Complaints handling and Exempt Selling Regime.

COMPROMISED WELL BEING OF COMMUNITY

Comment MK

Again, it is my contention that the fundamental issue seems to be systemic failure to meet the Single Market Objectives of the each following the proposed Energy Law Regulations and Rules outlined in Part 1 Div 3, and of National Gas (South Australia) Act 2008, Part 2, National Gas objective and principles, and Division 1, 23; and the National Electricity (South Australia) act 1996 - schedule 7—national electricity objective

There appear to be numerous clarity gaps in the NECF2 Package, some of which are discussed below especially in relation to consumer protections for those who seem altogether to have been left out of the provisions – as a consequence of a deliberate decision by the MCE RPWG and its advisers to sanction by default practices that appear to contrive not only to strip end-users of utilities of their enshrined rights under multiple provisions, and to defy best practice trade measurement, but also adopt practices that are legally unsustainable and fail to recognize the trap of regulatory overlap and failure to consider comparative law.

In discussing how certain issues may be addressed *“to protect and enhance the wellbeing of consumers now and into the future,”* the Final Report dated October 2009 of the Commonwealth Consumer Advisory Committee observed that.¹⁷⁹

“Clarity and awareness of the law, combined with clear and effective methods for redress, are fundamental attributes in the law, and have been identified as being imperative in addressing the issues faced by consumers, retailers and manufacturers. Information about the type of warranties and remedies available to consumers when they experience product failure is crucial in promoting wellbeing and empowering consumers in today’s environment. This report considers how these issues can be addressed to protect and enhance the wellbeing of consumers now and into the future.”

This report acknowledged that the current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law (Findings 5.1).

The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions.

¹⁷⁹ Commonwealth Consumer Affairs Advisory Council (CCAC) (2009) Consumer rights: reforming statutory implied conditions and warranties. Commonwealth Treasury Final Report. October http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf

The AEMC has not evaluated any of the rule changes that they have made as to what they have done for the electricity market and meeting the Single Market Objective. They have just started on the gas industry.

NSW consumers have faced at least \$2.4B on the basis of revenue determinations and Competition Tribunal matters one could say that the Advocacy Panel's failure to effectively resource consumers has placed the AER in the position of being a de facto consumer.

I make some general observations before turning to specifics.

In the case of the consultation process the failure of the Advocacy Panel to actually enhance/help consumer energy market consultation processes.

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

In Queensland, there are questions being asked about sale of energy assets and the types of arrangements and warranties that may have been made, especially in relation to the captured monopoly market for "bulk hot water" consumers, meaning those who are held contractually obligated for alleged sale and supply of energy where no flow of energy can be demonstrated and where recipients of heated water deemed unjustly to be receiving energy are forced to pay Free Retail Charges (FRC) even when they receive no gas at all to their residential premises, even for cooking (this group includes those who are disabled and cannot for safety reasons use gas because of safety hazards with naked flames.

There is a deficient complaints redress scheme, especially for those collectively known as "*embedded consumers of utilities*" though strictly speaking this really only applies to electricity. If plans are made to extend the term to gas there are safety, technical and other considerations that need to be considered.

It is of real concern that no matter what may be done in the future to address charter and constitution issues that restrict the handling of certain types of complaints about utilities by industry-specific complaints schemes known as Ombudsmen. In the case of EWOV, this body's perceived conflicts of interest in handling such classes of complaints and consumers – so that those termed "*embedded*" or receiving "*bulk hot water*" under jurisdictional policies remain without any form of complaints redress.

For the purposes of this submission, in order to reflect back the views of numerous consumer organizations that do use the term inclusively, I will allow a technical error in using the word to apply to other utilities,

There is a "*deficient metering protection*" framework with regard to access to quality, servicing and the like. There are confusions over which authority has proper control over these issues – with regard to all metrology issues the sole authority of the National Measurement Institute should be recognized and reflected also in cross-referencing when regulations are formulated.

There is not even mention of the NMA regulations that will apply to energy providers when remaining utility exemptions are made, or to the numerous changes that have been made to provisions to date. Therefore the smart metering provisions; the embedded consumer considerations the BHW provisions and other hot spot areas of inadequate protection need to be considered in this context also.

The failure to distinguish within NECF drafting proposals between customers and end-consumers (of energy) or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

Though the concept of “*flow of energy*” is recognized within the NECF2 Package, it could be reasonably claimed that a perceived “ostrich-like approach” in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009 Productivity Commission (2008 and 2009); and Federal Treasury (2009). So far convenient strategies to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

The BHW provision are confusing, illogical, scientifically, technically and legally unsustainable and conflict with all other schemes and with the common law and within energy provisions both state and federal.

There are safety and technical considerations, health risks associated with boiler tanks being used in such a way by using non-instantaneous, changes to temperature control, off peak adjustments, Legionnaire’s disease and other health risks. I have discussed these issues in my submission to the National Energy Efficiency Consultation (NFEE2) in 2007.

There are also safety and technical risks associated with embedded gas and electricity provision and licence exemptions.

Concerns have been raised by industry responding to the MCE Technical and Safety Draft Plan-Consultation RIS (2009)¹⁸⁰ and the PC's Regulatory Burden Research Report (2009) (Social and Infrastructure).¹⁸¹

Many of these concerns are unaddressed and have impacts on operational aspects of the NECF2 Package.

Consumers have constitutional rights that cannot be eroded in principle regardless of any alternations to provisions within regulatory schemes. The common law provisions must prevail and do not disappear but can be made inaccessible in practical terms because of cost, stress factors, adequate representation and the like.

The measures adopted have actually added financial burdens to end-consumers, especially those disadvantaged and living in sub-standard accommodation, so the absurd justification provided that they were adopted to "prevent end-consumer price shock" is challengeable - and so perhaps are the motives of all regulators who promoted these provisions, refused to re-consider them and conveniently ignored their existence in the formulation of new so-called national energy provisions (NECF2 package).

Discrepant interpretations of the application of existing provisions subject to lifting of the restrictions will lead to market confusion, expensive complaints handling; absence of proper complaints and accessible redress and snow-balling effects too numerous to contemplate.

Social and natural justice provisions within the common law stand behind the end-user's position, supporting the case that the proper contractual party is not the end-user but rather the Owners' Corporation. This is reflected also in the language used in the ESC's Determinations (in conflict with the actual provisions adopted) and in the licence agreements with the host retailers providing monopoly services to OC that have been misinterpreted as applying to end-users of heated water.

Best practice trade measurement stands behind the end-user's position (as an end-user of heated water) This includes all the obvious legal scientific and technical matters raised and highlighted in my various arguments - on behalf of the segment of the market representing a residual market, who are already stripped of their choices in a competitive market; who for the most part live in sub-standard rented accommodation poorly maintained especially with regard to infrastructure. Under some laws that infrastructure is undeniably the responsibility of an OC (e.g. Victoria)

¹⁸⁰ Refer to selected annotated bibliography in preparation available upon request; submissions from Envestra and others to the MCE Technical and Safety Draft Plan and Consultation RIS (PriceWaterHouse) 2009

¹⁸¹ Refer to Productivity Commission (2009) Review of Regulatory Burden Social and Infrastructure. Research Report

No aspect of the arrangements reflects anything but contempt for the concept of legal traceability in trade measurement relating to utilities.

The arrangements have been directly facilitated by the existence of policy arrangements that have been conveniently ignored by both state and federal authorities as ongoing examples of gross regulatory failure. Despite irrefutable evidence of market failure - as mostly highlighted by me as an individual stakeholder, nothing is likely to be done about these anomalies. That is why I believe the NMI has to battle for its position as an expert in trade measurement.

Within current jurisdictional provisions for BHW it is heated water that is disconnected through the clamping of hot water flow meters, penalizing en-users of heated water for failing to establish an explicit contractual relationship, causing considerable detriment to end-consumers who in good faith take on a residential tenancy fully expecting the residential tenancy laws and the trade measurement laws, as well as unfair contract and implied warranty legislation to protect them against inappropriate imposition of deemed energy contract status and unjustifiable disconnection of water supplies

The submission by the Griffith University Centre for Credit and Consumer Law and the collective response attached to their brief covering letter to the same arena, MCE Retail Policy Working Group can be views online.¹⁸²

The Tenants Union Submission to the Ministerial Council on Energy's Retail Policy Working Group (RPWG) Composite Paper through the MCE Market Reform Team in 2007¹⁸³ can be viewed also online¹⁸⁴ but since this is a very pertinent submission to some of the specific issues raised in relation to existing harmful regulation has been reproduced and cited in full.

¹⁸² Griffith University Law School, Centre for Credit and Consumer Law (2007) Submission to MCE Retail Policy Working Group Composite Paper National Framework for Distribution and Regulation. July 2007 found at

<http://www.mce.gov.au/assets/documents/mceinternet/Griffith%5FUniversity20070806145754%2Epdf>

¹⁸³ Tenants' Union Victoria (TUV) (2007) Submission in Response to the Composite Consultation Paper MCE Retail Policy Working Group National Framework for Distribution and Retail Regulation Authors: Dennis Nelthorpe, Project Worker; Rebecca Harrison, Research and Policy Officer Found at

<http://www.mce.gov.au/assets/documents/mceinternet/TenantsUnionVictoria20070718145702%2Epdf>

See also

http://www.mce.gov.au/assets/documents/mceinternet/National_Frameworks_For_Electricity_Distribution_Networks_August_200720070822104551.pdf

See RPWG Submissions Composite Paper, Submissions, June 2007

<http://www.mce.gov.au/index.cfm?event=object.showIndexPage&objectID=DC4D79A0-B5C6-8116-82CACC315FD86793>

¹⁸⁴ Tenants Union Victoria (TUV), (2007) Submission to MCE Retail Policy Working Group Composite Paper National Framework for Distribution and Regulation. July 2007 found at

<http://www.mce.gov.au/assets/documents/mceinternet/TenantsUnionVictoria20070718145702%2Epdf>

I refer to that submission made by the Tenants Union Victoria¹⁸⁵ to the as follows:

The Tenants Union supports the attached Composite Table Paper prepared on behalf of community sector organizations. In addition the Tenants Union wishes to highlight the following comments in relation to the Consultation Paper:

1. The Tenants Union submits that landlords, as property owners, should be primarily responsible for the obligations relating to access to the meter, access to the property and meeting equipment specifications imposed by distribution and retail regulation. The MCE should recognize that tenants, whilst occupiers of a property, may not have the legal right to interfere with the premises, in order to comply with regulatory obligations that are the responsibility of the property owner.

At minimum, the Tenants Union urges that the condition relating to failure to provide access to the premises should refer to “unreasonable failure to provide access to the meter”.

However, the Tenants Union submits that the approach to these issues adopted in the Consultation paper is flawed. It is submitted that the current approach of the Victorian regulator is legally preferable and fairer to energy customers.

The Tenants Union submits that the proposed increase in the period allowed for backbilling (at least in Victoria and Tasmania) is unacceptable, particularly for Centrelink recipients, and that the MCE should adopt best practice within state jurisdictions in regard to this issue. We believe that a retailer should only recover amounts undercharged during the previous 6 months. We note that best practice is 6 months (Tasmania) and it is the timeframe recommended by the Utility Regulators’ Forum.

The Tenants Union submits that the proposed increase in the period allowed for backbilling (at least in Victoria and Tasmania) is unacceptable, particularly for Centrelink recipients, and that the MCE should adopt best practice within state jurisdictions in regard to this issue. We believe that a retailer should only recover amounts undercharged during the previous 6 months. We note that best practice is 6 months (Tasmania) and it is the timeframe recommended by the Utility Regulators’ Forum.

The Victorian regulator reduced the period for backbilling to 9 months in response to the Jindarra and other similar submissions.

¹⁸⁵ The Tenants Union of Victoria was established in 1975 as an advocacy organization and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. The TUV represents the interests of tenants in law and policy making by lobbying government and businesses to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of rental housing and financial assistance provided to low-income households. (source preamble to TUV (2007) submission to Consultation Paper by MCE RPWG

The Tenants Union is concerned that an increase in large energy debts arising as a result of longer periods of backbilling will increase the housing stress on low income tenants.

Centrepay has not been included in the suite of options as a required payment method. We submit that Centrepay should be a payment option available to Centrelink recipients, but that they should not be required to utilise Centrepay.

The rental sector context

The Tenants Union is concerned that policy makers have a tendency to examine a market in isolation rather than recognize that each market is a part of a series of interconnected markets where decisions in that one market inevitably impact on related market sectors. In this submission the Tenants Union is concerned to ensure that there is a recognition by the Ministerial Council on Energy (MCE) that specific features of the private rental market are likely to reduce the capacity of tenants to access the benefits of the competitive energy market in Victoria and as a result tenants are likely to be dependent on the protections within the Victorian or national Retail Energy Code to ensure access to a continuous supply of energy.

In terms of the choice-constraint dichotomy, the reality is that the Australian private rental sector serves a dual function, providing choice for the more affluent and constraint for the poor.

The private rental market is highly segmented, offering choice and flexibility for some and limitations for others. The tenure's role within the broader housing market has taken on greater significance throughout the 1990s. According to the recent ABS data, one in four households is a renter household. In Victoria there are 328,176 households living in the private rental market. There are also 54,805 public tenants, making a total tenant population of 382,981. Once seen as a transitional tenure, renting has become the long-term option for many households who are unable to access home ownership.

Ironically, there is evidence that some households who are in a position to exercise market choices trade down in private rental, paying cheaper rents for less amenity, and effectively squeezing out low-income households who are reliant on the private rental market for long-term housing. Significantly, low cost (low rent) housing in the private rental market declined by 28% between 1986 and 1996, at the same time as there was an increase in low-income households renting privately.

The result in Victoria was a shortfall of 36,000 low cost properties across both metropolitan and rural areas in 1996. Little low cost private rental housing is purpose built and a mismatch between the private rental stock profile and changing household needs increases competition for limited stock.

The key structures of the private rental market have not kept pace with the demands on the tenure to provide long-term housing. Importantly, security of tenure remains limited, in most circumstances to an initial six- or twelve-month lease only. The underlying assumption of short-term leasing being that the landlord must retain flexibility in order to capitalize on the investment at any time.

This places low-income households in a precarious position, being essentially at risk of forced eviction at any time after the initial lease agreement expires. Unpublished data from the Residential Tenancies Bond Authority (RTBA) suggests that in Victoria the duration of tenancies in 96% of leases where the duration of tenancy was specified did not exceed twelve months and that the average duration of a tenancy is approximately eighteen months. It is common in cases that extend beyond the fixed-term lease to move onto a periodic lease (month to month)

Under a periodic lease the landlord can end the lease for no specified reason as long as they give the tenant 120 days notice. It is also worth noting that a landlord can give a tenant a 14-day notice to vacate if the tenant's rent is 14 days in arrears, regardless of the lease arrangements.

An ABS study on population mobility in 1999 reported that 66.5% of renters had moved in the previous three years. Of the renters who did not move only 7% were unemployed, suggesting that the likelihood of a person moving increases with unemployment. While all tenants are vulnerable to forced mobility, the risk for low-income households is much greater.

Currently, the rental vacancy rate in Victoria is a historically low 1.2%, indicating that demand for rental property is significantly outstripping supply. Because of increased demand, landlords have no inducement to make improvements to their properties in order to attract potential tenants.

These market conditions also work against any need for landlords to consider the need to ensure that properties are energy efficient and compound the effects of the split incentive that sees landlords responsible for capital costs but tenants responsible for payment of energy bills.

The energy market context

In 2004, and more recently in 2007, the Tenants Union made submissions to the ESC and the AEMC to the reviews of the effectiveness of full retail contestability in the Victorian energy market.

In 2004, the Tenants Union argued that the competitive energy market, in the first two years, had designed products that are contradictory rather than complementary to the fundamental characteristics of the tenancy market.

At issue was the term of the products in the respective markets. As a mature market, the tenancy market had fixed upon short- to medium-term leases of between one and twelve months to serve the needs of market participants.

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The energy market has quickly gravitated towards medium to long-term contracts of between one and three years to create a more efficient market.

In 2004 the ESC specifically commented that “some specific classes of customers are more vulnerable because of the structure of contracts offered by retailers” and noted the Tenants Union submission that “that there is a significant mismatch between the products available in the energy and tenancy markets.”

In the 2007 submission to the AEMC the Tenants Union acknowledged that there have been changes in the energy market since 2004. There are more retailers offering a greater range of products and contracts. There is also greater innovation with the development of dual fuel and green energy products.

However, the contract terms that most impact on tenants remain much the same as in 2004. Thus, despite the changes in the market since 2004, the Tenants Union maintains that tenants making rational decisions would not enter into one or three year contracts containing termination fees.

The Tenants Union is also concerned that increased competition has encouraged some retailers to engage in misleading behaviour, particularly associated with door-to-door marketing, which would not be tolerated in a more mature industry. Recent reports by the Financial and Consumer Rights Council Victoria and the Footscray and Essendon Legal Services highlight the willingness of retailers to mislead low income customers.

This perceived failure or laxity by regulators has meant that many low income tenants have been subjected to a constant barrage of apparently competitive offers by retailers under the guise of competition in circumstances where an examination of those market offers suggests that the benefits are illusory but loss of amenity in the homes and neighbourhoods of the tenants is substantial.

The Tenants Union believes that there is sufficient awareness of the existence of competition and market offers within the Victorian market. However new market entrants are too reliant on the crude and unsophisticated medium of door-to-door marketing for the delivery of information and offers to tenants.

A further concern for the Tenants Union is that many within both government and regulatory agencies regard as inevitable the removal of price caps and increases in energy prices flowing from that decision, the introduction of carbon taxes or trading schemes and the impact of drought. A common response to this scenario is for state governments to respond with plans to focus on energy efficiency measures as a means of reducing energy bills through reduced consumption.

In response to the recent Victorian Energy Efficiency Target Scheme Issues Paper, the Tenants Union submitted that private rental tenants will not receive any significant benefits from recently announced energy efficiency programs. The response identified a number of factors preventing widespread uptake of energy efficiency measures in the private rental market including:

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- *Tenants are prevented by law from making any alterations to rented premises*
- *The split incentive implicit in the landlord-tenant relationship*
- *Prevailing rental market conditions do not encourage landlords to invest in improving properties in order to attract tenants*

The Tenants Union has urged the Victorian Government and the AEMC to consider carefully whether all classes of consumers, and especially tenants, will benefit from energy efficiency measures before determining that an energy efficiency strategy will ameliorate the effect of price rises occurring after the removal of price caps.

The national framework for distribution and regulation

A. Landlord and tenants obligations

The Tenants Union is concerned that the Consultation Paper has failed to distinguish between the obligations of landlords and tenants, and property owners and occupiers, for the purpose of the proposed national energy laws.

The Tenants Union submits that landlords, as property owners, should be primarily responsible for the obligations relating to access to the meter, access to the property and meeting equipment specifications imposed by distribution and retail regulation. More importantly, the MCE should recognize that tenants, whilst occupiers of a property, may not have the legal right to interfere with the premises in order to comply with regulatory obligations that are the responsibility of the property owner.

It is more than a decade since the Office of the Regulator General in Victoria acknowledged that distributors and retailers should not be entitled to penalize a tenant, as occupier of a property, for the failure of the owner of the property to meet obligations set out in the Distribution and Retail Energy Codes.

The obligations of a tenant are set out in the Distribution Code Section. Those obligations are essentially to use best endeavours to notify the owner or their agent of any alleged non compliance. Section 1.5 states:

1.5 A tenant's obligations

1.5.1 Where a domestic customer has been advised of non-compliance with this Code in accordance with clause 11.2.2 and is unable to remedy the non-compliance as they are not the owner for the supply address, the customer must use best endeavours to have the owner or other person responsible for the supply address fulfill the obligation.

1.5.2 On request, the customer must provide the distributor with evidence that they have notified the owner, or other person responsible, of the non-compliance and of the requirement to comply with this Code.

The Victorian Retail Code provides for a right to be connected without reference to access to the meter but includes a requirement that a tenant provide details of the owner or estate agent. Section 13.3 of the Victorian Retail Code does allow for disconnection of a customer, including a tenant for failure to provide access to the meter.

However, the Code also provides a detailed process prior to disconnection that would allow a tenant time to notify the landlord, and if necessary, issue proceedings in the residential tenancies tribunal to require the landlord to provide access to the meter.

The Consultation Paper in Recommendation 1 has proposed that a retailer be allowed to refuse to connect a customer as a pre - condition of supply where there is a failure to provide access to the premises.

Similarly, the Consultation Paper in Recommendation 3 has provided that a distributor be entitled to disconnect a premises for non compliance including failure to provide safe access or meet equipment specifications

The Tenants Union submits that the approach adopted in the Consultation Paper is flawed. Further, the provisions adopted by the Victorian Regulator are legally sound and more appropriate for tenants in view of current tenancy laws in place throughout Australia.

The Tenants Union submits that there should not be a pre - condition that a tenant, as an energy customer, be required to provide access to the meter or the premises. It is unlikely that a tenant would enquire as to the location or accessibility of a meter during a property inspection and compliance with such a pre- condition may be impossible.

The appropriate process should be to require connection and where access has been subsequently denied adopt the remedy set out in the Victorian Retail Energy Code.

13.3 Denying access to the meter

A retailer may disconnect a customer if, due to acts or omissions on the part of the customer, the customer's meter is not accessible for the purpose of a reading for three consecutive bills in the customer's billing cycle but only if:

(a) The retailer or the relevant meter reader has:

- used its best endeavours, including by way of contacting the customer in person or by telephone, to give the customer an opportunity to offer reasonable access arrangements;*
- each time the customer's meter is not accessible, given or ensured the retailer's representative has given the customer a notice requesting access to the customer's meter; and*
- given the customer a disconnection warning including a statement that the retailer may disconnect the customer on a day no sooner than seven business days after the date of receipt of the notice; and*

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(b) Due to acts or omissions on the part of the customer, the customer's meter continues not to be accessible.

At a minimum the Tenants Union urges that these requirements should refer to the "unreasonable" failure to comply with the obligation to provide access to the meter. However it is submitted that the Victorian approach is legally preferable and fairer to energy customers.

The Tenants Union urges that the MCE to acknowledge that tenants as customers/occupiers, may be powerless to comply with requirements relating to access or equipment specifications. Further that such obligations fall more appropriately upon the landlord as owner of the property.

B. Other Matters

The Tenants has comments on two other matters raised in the Consultation Paper relating to terms of the Standing Offer.

(a) Undercharging

The proposed provision allows a retailer to backbill for twelve months regardless of the cause of the failure to bill or the hardship caused to the customer.

The Tenants Union is concerned that this provision is outdated and that AAR has not properly considered the impact of this provision on low income customers such as Centrelink recipients and tenants. The evidence in Victoria and the UK has been that billing system failures in the competitive market have given rise to the need for back-billing of this magnitude. That is, after takeovers, retailers have discovered that billing systems have not been compatible and some customers have not been billed for extensive periods of time.

A submission by Jindara Community Programs Incorporated in September 2003(copy attached) examined the impact of this problem on low income consumers in the Victorian market. It is noted that of the twelve case studies in the submission 75% were public or private tenants.

The key finding of the Jindara submission was that "the case studies illustrate that the failure to bill has created impossibly high bills that can only be paid with the assistance of an URG (government grant) or a partial waiver by the retailer. The reduction of the period for recovery of late billing to nine months would increase consumer protection and put pressure on retailers to accept responsibility for the hardship caused by these billing errors."

The Victorian regulator reduced the period for back-billing to 9 months in response to the Jindarra and other similar submissions. The Tenants Union is concerned that an increase in large energy debts arising as a result of longer periods of back-billing will increase the housing stress on low income tenants.

The Tenants Union submits that the proposed increase in the period allowed for back-billing (at least in Victoria and Tasmania) is unacceptable, particularly for Centrelink recipients, and that the MCE should adopt best practice within state jurisdictions in regard to this issue. We believe that a retailer should only recover amounts undercharged during the previous 6 months. We note that best practice is 6 months (Tasmania) and it is the timeframe recommended by the Utility Regulators' Forum.

(b) Payment methods

The Consultation paper has duplicated the options set out in many of the jurisdictional retail codes. A retailer must accept payment by a small customer by any of the required payment methods: in person, by telephone, by mail; or by direct debit.

The Tenants Union notes that Centrepay has not been included in the suite of options as a required payment method. We submit that Centrepay has become an essential payment option during the past decade, and an appropriate payment method for Centrelink recipients, particularly in regard to payment for essential services.

Moreover we believe that direct debit arrangements can impose significant detriment on some low income consumers. In particular, direct debit default fees at \$35 – 50 have a disproportionate impact on Centrelink recipients.

We believe that in relation to consumers in receipt of Centrelink payments, Centrepay should be available as a payment option. This should be at no cost to consumers.

*This suggestion should not prove difficult as most first tier retailers appear to provide access to Centrepay and IPART has recently determined that Centrepay should be considered as a payment plan option for a security deposit exemption. See Pg 125 of the following decision:
[http://www.ipart.nsw.gov.au/files/Electricity%20Retail%20Review%20-%](http://www.ipart.nsw.gov.au/files/Electricity%20Retail%20Review%20-%20Decision%20on%20Security%20Deposit%20Exemption%20-%2020100701.pdf)*

The reservations of the Total Environment Centre especially about embedded generation are of particular interest in the context of a very specific harmful existing regulation that needs reassessment. This is the technical matter explored in great detail. I reproduce TEC's Response to the RPWG¹⁸⁶ in full:

¹⁸⁶ Total Environment Centre (TEC) (2007) Response to MCE Retail Policy Working Group Composite Paper National Framework for Distribution and Regulation. 18 July 2007 (2 pages) Found at <http://www.mce.gov.au/assets/documents/mceinternet/TEC%281%2920070718150600%2Epdf>

Total Environment Centre (TEC) Response to RPWG Composite Paper July 2007

Re: Composite Consultation Paper – RPWG

Total Environment Centre (TEC) appreciates the opportunity to participate once again in the development of a National Framework for Distribution and Retail Regulation. The opportunities to discuss details with staff from the Retail Energy Team at the Department of Industry, Tourism and Resources were also very valuable.

TEC has participated in a joint response to completing the table of Recommendations and Comments developed by Allens Arthur Robinson, with other non-government organizations (NGOs) including the Consumer Utilities Advocacy Centre (CUAC), the Consumer Action Law Centre (CALC), the Alternative Technology Association (ATA) and the Australian Council of Social Services (ACOSS). We have attached a copy of the table.

There are two issues we wish to raise in this letter, that is, the treatment of embedded generation and of the National Electricity Market Objective.

Embedded generation

The main drawback from our perception is the lack of clarity about the relationship between the existing Rules, the draft “Code of Practice for Embedded Generation” and the recommendations in this Paper. There appear to be a number of Ministerial Council on Energy (MCE) processes which deal with arrangements for distributed/embedded generation and it has become increasingly difficult to ascertain how they all inter-relate.

The national processes and Issues Papers that relate to this subject – to our knowledge – and which TEC has participated in (as solo agent or with other NGOs) are:

- *The Renewable and Distributed Generation Working Group (RDGWG) commissioned PB Associates to produce a draft national “Code of Practice for Embedded Generation” (February 2006).*
- *The RDGWG also produced a paper on the “Impediments to the Uptake of Renewable and Distributed Energy” (February 2006).*
- *The MCE commissioned NERA Economic Consultancy to produce an issues paper on “Network Incentives for Demand Side Response and Distributed Generation” (April 2007).*
- *In the same process, NERA produced reports regarding draft Rules for distribution network service providers (April 2007).*
- *The House of Representatives Standing Committee on Industry and Resources is undertaking a “Case study into selected renewable energy sectors” (June 2007).*

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Jemena (JGN) Revised Gas Access Proposal 2010-2015
Further open s comment and supporting data with several appendices
re JGN’s further submission(s) of 18 May 2010
and principles behind AEMC’s Rule Change Proposal ERC 0092 under the NER
(with possible extrapolation to NGR) – and other related determinations
Prepared also for multiple other arenas
Madeleine Kingston, Individual Stakeholder

In a joint submission with other members of the Climate Action Network of Australia (including ATA), TEC recommended that many of the provisions of the draft COPEG should be elevated to the status of Rules.

There are many overlaps between these processes, as well as the recommendations from AAR in the composite paper. There is a great deal of uncertainty regarding investment in alternative forms of energy already, and the proliferation of processes – although a welcome sign of interest – is adding to this uncertainty. This is exacerbated by the apparent lack of knowledge within each process of the results (or status) of the other processes. We therefore seek clarification of how the MCE will deal with these duplications and any potential conflict between findings.

NEM Objective

The issue of the inadequacy of the NEM Objective in meeting environmental and social concerns has been addressed a number of times in this process, and is canvassed again in the Composite Paper. Recommendation 85 sums up Allens Arthur Robinson’s opinion that there is “no need to amend the statutory objectives”, which TEC does not support. We will not revisit the issue here, but we have attached a declaration about the need for environmental and social objectives, “Power for the People”. The declaration’s signatories include a range of non-government organizations, including ourselves, CUAC, ACOSS and St Vincent de Paul.

Comment MK

There appears to be a continuing a general and pervasive sense of unease about pending arrangements as reflected by the enormous energy (no pun intended) that has been invested into various submissions to various arenas - for years, apparently unheard.

The new proposals and guarantee of at least adequate consumer protection that does not simply reply substantially on generic laws and half-baked self-regulation and complaints processes are anxiously awaited.

EXEMPT SELLING REGIME

Discussion in this section extends to other States. Energy suppliers are operating across borders and there is soon to be a national retail energy law in place.

In relation to alleged choice in New South Wales I have discussed this elsewhere and have refuted perceptions that such a choice exists for renting tenants, who are subjected to owners' or Landlord consent for any structural alternations or installation of any form of infrastructure in individual apartments.

In any case, where such infrastructure does not exist individual with separate metering for each utility – the Landlord is responsible.

AER Exempt Selling Guidelines—see section 532;

AER exempt selling regulatory function or power means a function or power performed or exercised by the AER under Division 6 of Part 5 and the Rules relating to exemptions from the requirement to hold a retailer authorization, including (but not limited to) the following:

- (a) a decision whether to grant, vary or revoke an individual exemption;
- (b) a decision whether to impose, vary or revoke conditions on an individual exemption;
- (c) a decision whether to make, vary or revoke a determination specifying deemed exemptions or registrable exemptions, including any associated conditions;

Comment MK

Please see all comments also under Objective. Issues include reliability and security of supply, exclusion of certain segments of the community from protection; clarity; denial of choice and participation in contribution to competition for certain segments of the community; welfare of consumers; implications of gaps in the exempt selling regime and for those receiving no energy at all but rather heated water products, but are unjustly deemed to have energy contracts with distributors and retailers and being subject to threat or actual disconnection of heated water supplies through clamping of hot water flow meters on the basis of distorted and misguided interpretation of the deemed provisions; sale of goods provisions, generic laws and common sense interpretation of proper trade measurement practices.

I am most concerned about many aspects of the exempt selling regime, the extent to which these factors appear to have altogether been missed from consideration of the NECF2 exempt selling regime:

- (a) The fact that contestability is simply not an option for the vast majority of those living in multi-tenanted dwellings;
- (b) The differences between the gas and electricity markets and the fact that gas is not and should never be part of an exempt selling

- (c) In terms of contestability, in practical terms, a high proportion of those residing in multi-tenanted dwellings receiving gas or electricity are a captured monopoly market
- (d) Even those who for health and safety reasons cannot use gas at all because of the risks associated with a naked flame (for example those with particular disabilities), the mere existence of a gas-fired boiler tank in the care custody and control of an OC, or through collusive arrangements between OCs and energy providers, authorized or exempt, an unjust free retail competition charge is applied for gas that is not received at all through flow of gas to the premises deemed to be receiving (refer to the BHW arrangements in three jurisdictions, operating discrepantly)
- (e) comparative law considerations including jurisdictional and local laws (for example tenancy laws, OC laws; building code laws, technical and safety provisions; jurisdictional and federal metrology considerations; metrology. Failure to recognize the NMI as the sole authority and expert on trade measurement including metrology is a major policy and provisional flaw and will lead to ongoing confusion, debate, market unrest, expensive complaints handling and possible litigation.

Ministerial Orders in Council at jurisdictional level that facilitate exemption from licences that ought to be better controlled. The OIC's for exempt sellers was exclusive to electricity and intended to capture only those receiving transitory supply. Instead the provisions gave way to lucrative opportunities to exploit the enshrined rights of end-consumers of utilities, under the guise of "creative and innovative opportunities."

The AER will inherit regulation and some decision making over these issues from the ESC and DPI (Victoria) and presumably other states.

Many provisions, including those left under jurisdictional control (such as the BHW arrangements), or dismissed as being of an entirely economic focus rather than relating to components of both economic and non-economic considerations (for example, BHW arrangements; embedded consumers and small scale licencing (electricity only); the issue of regulatory overlap with other schemes has been ignored; and the proposed protections under generic laws, including substantive unfair terms within both standard and market contracts; and unconscionable conduct considerations which are the subject of ongoing evaluation by the Treasury following receipt of expert panel advice.

Impacted are those in private rental accommodation in multi-tenanted dwellings, those in similar situations in public house, caravan parks, rooming and boarding houses and the like, many not transitory

I refer to and support AER's view re Retail contestability and consumer protection for customers of exempt sellers (s.256) (see p of their response to the NECF2 Package, which appears on the AER site.

I support the AER's view that in relation to compliance by exempt sellers (s526) of the Retail Law, *"given the uncertainty of the power of energy ombudsmen to deal with matters concerning exempt sellers, enforceability is of particular importance."*

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I therefore support AER's recommendations as follows:

“the Retail Law attach a ¹⁸⁷ civil penalty to s526(2) and a conduct provision to capture the allowance for damages on s1306 for isolated instances, in relation to which civil penalties may not be a proportionate response, or where civil penalties may not be adequate in terms of compensating the effected consumer..

The Retail Law and Rules should also provide for a revocation process where an exempt seller has not complied with conditions of exemption and cannot show cause why the AER should not revoke the exemption

and

“... exempt customers should be afforded the right to a choice of retailer.”

This proposal is impractical if end-users are expected to fund the capital costs of replacement meters or other infrastructure in order to access that choice. This is discussed elsewhere under tenancy issues and restrictions under the law as well as the refusal in most cases of Lessor's to grant permission for such structural change, without which no renting tenant can exercise that right of choice in embedded situations (electricity) or where they are supplied with heated water in the absence of separate gas or electricity metering and without the flow of energy to their respective abodes. Similar problems arise with members of a strata titled property in multi-tenanted dwellings.

Some tenancy landlord/or body corporate laws are quite explicit about the Lessor's responsibility for all capital and maintenance costs of such infrastructure and common property. The same protections should lie within all laws, and there should no inequities because based on where end-consumers live geographically. There is a case for updating of all tenancy laws to reflect best practice and enhance protections, including extension to third parties endeavouring to strip end-users of their already enshrined rights.

I refer to and support the views of Consumer Action Law Centre as far back as 2007 in the submission referred to above (RPWG)referring to only scanty consideration b the Retail Policy Working Group's Issues Paper and urging more serious and detailed consideration of the gaps in providing protections to those in embedded networks, stressing that “consumers should not be disadvantaged in any way because of purchase of or receipt of energy through embedded networks.” See below

I note that the proposed parameters within the NECF2 Package in relation to exempt selling appear to be scanty with insufficient operational detail or indication of proper level of consumer protection.

¹⁸⁷ Consumer Law Action Centre (2007) Submission to the RP{G Working Papewr 2
http://www.ret.gov.au/Documents/mce/_documents/Consumer_Action_Law_Centre20070130111923.pdf

Since the 2006 Small Scale Licencing review was undertaken by the ESC it has not been transparent either by the DPI or the MCE how the system now known as the Exempt Selling Regime will actually operate, despite some broad generic-style provisions. Some of these have been queried by the AER as the responsible new regulator.

I place in context the undertaking of a Review of the Small Scale Licencing Framework at the request of Minister Theo Theophanous as far back as March 2006.

That Minister had referred to objectives to

1. Facilitate efficiency in regulated industries
2. Facilitate effective competition and promote competitive market conduct; and
3. Ensure that users and consumers (including low-income or vulnerable consumers) benefit from the gains from competition and efficiency

I turn to some of these issues again shortly, having already discussed them in the context of the NECF2 Package Objectives and perceived shortfalls in meeting those objectives.

Minister Theophanous had referred to

“...licence exemption Orders (which are made on Ministerial recommendations) are primarily designed to address incidental, unintended or technical breaches of the standard licencing provisions. Although the exemption process has been recently used to facilitate small scale distribution and selling activities, this is the not intended use of such instruments.”

One consideration was *“the extent to which small scale retailing and distribution is emerging as a valued service for consumers in embedded network situations”*

In relation to data about the market, it is most disappointing that though EWOV as the energy-specific complaints scheme¹⁸⁸ saw fit to undertake a feasibility study of the small scale licencing market¹⁸⁹ but declined to share the information obtained to better inform policy-makers, regulators and the wider community. EWOV in twice responding during 2006 and 2007 respectively to the ESC Small Scale Licencing Review publicly admitted to conflicts of interests. These are discussed elsewhere.

Though EWOV’s funding predominantly comes from membership fees paid by its members under mandated provisions for distributors and retailers belong to such a scheme, it also receives funds from Consumer Affairs Victoria (CAV).

¹⁸⁸ Dispute resolution scheme is an incorrect term as discussed in my submission to the PC’s Review of Australia’s Consumer policy Framework, components of which are repeated below under Complaints Handling

¹⁸⁹ Energy and Water Ombudsman Victoria Ltd (2006 and 2007) Submissions to ESC Small Scale Licencing Issues Paper and Draft Decision respectively
<http://www.esc.vic.gov.au/NR/rdonlyres/695EF0E8-FBEB-4B42-879F-B233058DFAF0/0/PublicforumSmallScaleLicencing20060914.pdf>

This body was set up under a statutory enactment, is considered to be the most suitable body to field energy complaints in Victoria, and has indirect obligations through the ESC and the DPI under statutory provisions. In fact it is correctly labeled a “*prescribed entity*”

Though there are certainly circumstances such as nursing homes, educational institutions and the like where such provision is reasonable, subject to meeting appropriate technical and safety standards (which does not include gas – the OIC was exclusive to electricity) many consumer organizations and individuals did not feel that the framework was operating to enhance consumer protection or effective participation in the competitive market.

I apologize for repetition from an earlier section under Objective, but I feel this matter needs to be considered in its own right as a significant gap in the Exempt Selling Regime.

Many community organizations and individuals including me have referred to exploitive practices in the provision of utilities becoming even more prevalent in numerous settings, with prices being charged for unregulated “*embedded*” water networks and for “heated water pricing” than those not considered to be “*embedded.*”

Retail choice:

As observed by Tenants Union Victoria¹⁹⁰, though there are some circumstances where some *limits on consumer’s free retail choice* may be considered reasonable (*such as to facilitate community development of embedded generation initiatives or to allow a consumer to sign a long-term contract*), there is consensus that *it is essential that consumers are able to exit the network should participation in the network prove materially disadvantageous*”

The AER in its published response to the NECF2 Package comments as follows in terms of choice:

“However, the ability of customers to choose their own retailer in the competitive market depends on network configuration and metering, which are usually determined at the time a building is constructed. Planning and building laws do not mandate the provision of individual meters for each dwelling in multi-tenanted dwelling complexes, and technical and safety regulations do not take a uniform approach to meter placement.”

¹⁹⁰ Tenants Union Victoria (2006) Further Comments on the Small Scale Licencing Framework Issues Paper (ESC) (29 September), p2

We recognize that this issue is not one that can or should, be addressed in the National Energy Retail Law or Rules. However to facilitate customer choice of retailer in new developments, jurisdictions should consider changing planning and building laws to mandate the provision of accessible metering for each dwelling in multi-tenanted complexes, to ensure that electricity metering arrangements are conducive to full retail contestability. Individual gas metering may also be required if significant gas usage will occur.

Host retailers are normally associated with specific distributors in certain geographical supply remits for the provision of energy in multi-tenanted dwellings where that energy is used to supply a communal water tank with heat reticulated in water pipes nor energy. Connection is described within the proposed NECF Package Second Exposure Draft as *“a physical link between a distribution system and a customer’s premises to allow the flow of energy”* No such facilitation of the flow of energy occurs at all when water delivers heated water of varying quality to individual abodes (residential premises) of tenants or owner-occupiers. In the case of the latter they make their own arrangements to apportion share of bills issued to a Body Corporate.

There is no question that participation in choice and competition is denied those who are collective regarded as embedded end-consumers of utilities, whether of gas, electricity or other utilities (for the sake of convenience I will include those covered under the jurisdictional “bulk hot water policies” who receive not energy but heated water, the heating component of which cannot be measured by legally traceable means.

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

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

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

Queensland are those living in public housing, most disadvantaged. Even when they receive no gas at all they are required to pay FRC fees.¹⁹¹

¹⁹¹ FRC means *“Freedom of Retail Contestability”* is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place. In Qld It is imposed on natural gas customers accounts, and is about \$25 per year for the first 5 years after the FRC date : 1st June 2007.It accumulates over this first 5 years as a *“pass through cost”* of about \$20million and will be phased out in a couple of years.

Meanwhile, the QCA's November 2009 report omitted to identify the following:

- Precisely how much gas was being transported via pipelines to heat communal water tanks (many in public housing; others in owner/occupier dwellings; others possibly in the private rental market without owner occupation?)
- How much gas in total was being used to heat communal “*bulk hot water tanks*” in multi-tenanted dwellings
- How calculations regarding gas consumption (using hot water flow meters that measure water volume not gas or heat) were made regarding the alleged sale of gas to end-users of heated water, and on what basis under the provisions of contractual law, revised generic laws under the *TPA* (which by the end of 2010 must also be reflected in all jurisdictional Fair Trading Laws); and the *Sale of Goods Act 1896 (Qld)*¹⁹² or residential tenancy provisions; and what is likely to happen with the existing utility exemptions under National Trade Measurement provisions are lifted, as is the intent, making the current practices directly invalid and illegal with regard to trade measurement
- How such a contractual basis is deemed valid and will be consistent with the provisions of the Trade Practices (Australian Consumer Law) Act 2009, effective 1 January 2010, given that the substantive terms of the unilaterally imposed “*deemed contract*” with the energy supplier its servant/contractor and/or agent
- How the calculations used, which may be loosely based on the Victorian “BHW” policy provisions (based on what seem to be grossly flawed interpretations of s46 of the *GIA*)
- Whether and to what extent a profit base is used to “cross-subsidize” the price of Origin's gas sales

VenCorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

¹⁹² *Sale of Goods Act 1896* (Qld) (reprinted and as in force as at 29 August 2007)

Note state laws will have till the end of 2010 to bring their generic laws in line with the revised generic laws (currently still called *Trade Practices Act 1974*, but will be re-named Competition and Consumer Law 2010.

- What barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market¹⁹³ is captured by an incumbent retailer who apparently purchased in its entirety the “BHW customer base” in 2007, based not on the number of single gas master meters existed in multi-tenanted dwellings (which for Distributor-Retailer settlement purposes represent a single supply point, there being no subsidiary gas points in the individual abodes of those unjustly imposed with contractual status in terms of sale and supply of gas.
- On what basis massive supply, commodity, service and FRC charges are imposed on end users of gas so supplied for the heating of a communal water tank, when the services and associated costs properly belong to the OC.
- The Victorian *Residential Tenancies Act 1997* (RTA) prohibits charging for water, even when meters exist other than at the cold water rate, so the question of charging for heating is inappropriate.
- Victorian *RTA* provisions disallow utility supply charges or charges for anything other than actual consumption charges where individual utility meters (gas electricity or water) do exist. This is a vast improvement on Qld provisions. Nonetheless loopholes allow third parties and energy suppliers not party to Landlord-tenant agreements to exploit the system with the apparently collusive involvement and active instruction of policy-makers and regulators.
- Despite the existence of these arrangements and both implicit and explicit endorsement of discrepant contractual governance and billing and charging practices associated with the “*BHW arrangements*” none of the policy-makers or regulators seem to be willing to clarify within market structure assessments; competitive assessments or reports that such arrangements exist, must be taken into account, and must be covered by appropriate consumer protection arrangements.
- Regardless of whether these matters are considered of a predominantly “economic-stream” interest, there are consumer protection issues that have been entirely neglected with jurisdictional and proposed national energy consumer protection frameworks in areas where it is mostly the most vulnerable of utility end-consumer, in a captured monopoly-type market with no chance of actively competing in the competitive market.

I also note the AER’s comments on access to complaints schemes by those considered to be “*exempt customers*” under exempt selling schemes.

The same applies to those receiving communally heated water that is either gas-fired by a single master gas meter or an electricity meter supplying a non-instantaneous boiler tank.

¹⁹³ A misnomer since it is not water that is charged for but the heating component of a composite product where only a single gas (or electricity) meter exists which is used to heat a communal water tank from which water is reticulated in water pipes to the individual abodes of renting tenants either in private or public housing.

These are not exempt customers. There is no such thing as a gas network. Gas is either directly supplied and directly received through flow of energy – or it is not.

For electricity an embedded network may exist if ownership and/or operation of the network changes hands from the original transmission source.

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

In Queensland, there are questions being asked about sale of energy assets and the types of arrangements and warranties that may have been made, especially in relation to the captured monopoly market for “bulk hot water” consumers, meaning those who are held contractually obligated for alleged sale and supply of energy where no flow of energy can be demonstrated and where recipients of heated water deemed unjustly to be receiving energy are forced to pay Free Retail Charges (FRC) even when they receive no gas at all to their residential premises, even for cooking (this group includes those who are disabled and cannot for safety reasons use gas because of safety hazards with naked flames).

Whilst speaking of competition and perceptions of its effectiveness in two jurisdictions, with the third – ACT targeted on schedule, whilst the following observations may not seem relevant to the legal architecture of the proposed drafts, I resurrect some of the issues that I had raised in my two-part submissions to the AEMC’s Review of the Effectiveness of Competition in Victoria and subsequent reference in submissions to the MCE and other arenas concerning the submissions and responses received from The Hon Patrick Conlon, MP and member of the MCE, who will be the responsible Minister for the instrument now in hand – the National Energy and Retail Laws and Rules.

The reason for making passing mention of this is that the philosophical climate of deregulation and light-handedness has developed in tandem with what has been seen as flawed assessment of the energy markets as to competitiveness. This is more so in relation to gas. There is general market unrest. Complaints figures are rising and these are the tip of the iceberg given the relatively small proportion of the population as a whole who actually complain.

A framework, for example of licence exemption, poor monitoring generally, and especially of the 100+ Rule Changes that have been undertaken by the AEMC which have not been subjected to retrospective regulatory impact analysis; the long-standing failure to consider regulation in the context of the internal energy market and rapid changes and a climate of general regulatory uncertainty in the face of so many changes; are all issues that impact on consumer well-being and ability to participate in the competitive.

For the sectors discussed throughout this submission – their choices are non-existent. Though numbers may be relatively small, these considerations illustrate beyond any doubt the impacts of policy and regulation in developing residual markets; marginalized groups and those left without protection altogether perhaps because it is seen as all too burdensome to address the issues that have remained in the too-hard-basket for so long.

Consumer and regulatory policy generally that is formulated in vacuum conditions with a focus on process rather than in the context of the internal energy market, blatant evidenced of market failure in many areas and poor understanding of the differences between the electricity and gas markets may be destined for repeated re-evaluation as to the effectiveness of those policies.

So for the sake of an historical glance back to the time that the AEMC prepared itself for what appeared to be pre-determined decisions to find for competitiveness, and remembering the distortions that appear to have been made of data on the basis of poor understanding of behaviour economics; and on reliance on the poorest possible data availability, as freely admitted in CRA’s Price and Profit Margin Report (discussed at some length in my 2007 AEMC submissions – I repeat the following, remembering that two more RoLR events have occurred, and the market has become very tough for second-tier retailers. Assessment of the retail market, and regulatory focus on retail outside the context of volatile wholesale conditions appears to be a short-sighted approach.

As far back as April 2002, PIAC¹⁹⁴ had made same salient points about consumer protection and energy costs in their public submission to the Independent Pricing and Regulatory Tribunal (IPRT), NSW as quoted under elsewhere Objectives

Provision of certain utilities whether or not technically meeting the definition of embedded” (which applies to electricity – there are no gas networks, a misconception frequently held by the MCE) and included, also for the of addressing similarities between the “heated water” appear to be operating in an unregulated environment.

Therefore, I resurrect here the previously expressed views of Consumer Action Law Centre in response to the RPWG Working Paper 2 regarding embedded networks.¹⁹⁵

Embedded networks

We are concerned that the Paper only scantily considered the issue of embedded networks and small-scale distribution and retailing. In Victoria, there are many such networks which fall outside the scope of regulation, including retirement villages, apartment buildings and caravan parks. The Victorian Essential Services Commission is currently undertaking an inquiry into the regulation of such networks.

¹⁹⁴ PIAC (2004) Submission to Independent Pricing and Regulatory Tribunal (IPRT), NSW, Mid Term Review of Regulated Retail Tariffs

<http://www.ipart.nsw.gov.au/files/Public%20Interest%20Advocacy%20Centre%20-%20S4970.pdf>

¹⁹⁵ Consumer Action Law Centre (2007a) Response to MCE Retail Policy Working Group 2

http://www.ret.gov.au/Documents/mce/_documents/Consumer_Action_Law_Centre20070130111923.pdf

We recommend that the RPWG consider the recommendations of that inquiry, and ensure that there is clarity about the regulatory requirements relating to embedded networks. As a minimum, it is our view that consumers should not be in any way disadvantaged or have reduced protections because they purchase or receive energy through an embedded network.

“Small-scale licensing

The ESC is conducting a review of the exemption framework for the distribution and retailing of energy on a small scale. This concerns the supply and sale of energy to consumers who share a defined geographic boundary such as residential apartments, shopping centres, retirement villages and caravan parks.

Under the Electricity Industry Act 2000 and the Gas Industry Act 2001, distributors and retailers of electricity or gas must hold a licence unless they are exempt from this requirement. For electricity distribution and retailing, general exemptions are specified in an Order-in-Council which came into effect on 1 May 2002. An entity may also obtain a specific exemption from the Governor-in-Council.

On 20 July 2006, the ESC released an Issues Paper that seeks comment from stakeholders on the current licensing exemptions framework and what regulatory framework should apply to small scale energy distribution and retailing. Submissions to the Issues Paper can be accessed here. CLCV provided a submission which argued that residential consumers in embedded networks (such as retirement village and caravan park residents), should be accorded the same consumer and price protections that are provided to consumers of licensed retailers. This should include access to dispute resolution through the Energy and Water Ombudsman Victoria (EWOV).

Submissions were also provided by the Tenants’ Union of Victoria (TUV) and the Alternative Technology Association (ATA) and are available on the ESC’s website.

I reflect the views and concerns of Consumer Action Law Centre (CALV) (2007a) to the RPWG¹⁹⁶

Consumer protection in relation to metering

We note that pursuant to the VEDC, a distributor and a customer must comply with the Electricity Customer Metering Code (Metering Code).⁸ The Metering Code regulates metering to the extent not regulated by the National Electricity Rules and the Metrology Procedure. The Metering Code provides some important protections for consumers, including a consumer right to request metering accuracy tests and metering data. Such rights do not appear to have been considered by the Paper, but they should be included in the contractual relationship between the consumer and distributor.

¹⁹⁶ ibid Consumer Action Law Centre (2007) Submission to Retail Policy Working Group Working Paper2

Distributor interface with embedded generators

The Paper notes that additional work in relation to the distributor-embedded generator interface has been undertaken by a parallel MCE work stream, and has included consultation on a draft Code of Practice for Embedded Generation. The Paper recommends that the outcome of this work be incorporated into the regulatory framework proposed by the RPWG.

We support this proposal, and recommend that once adopted, jurisdictions should remove or modify conflicting legislation. We also support the proposal that the Code be reformulated as Rules and be incorporated as part of the 2007 legislative package, rather than proceeding with an AEMC rule-change process. We also support the recommendations made by the Climate Action Network Australia in their submission to the consultation on the draft Code.⁹

Embedded networks

We are concerned that the Paper only scantily considered the issue of embedded networks and small-scale distribution and retailing. In Victoria, there are many such networks which fall outside the scope of regulation, including retirement villages, apartment buildings and caravan parks. The Victorian Essential Services Commission is currently undertaking an inquiry into the regulation of such networks.¹⁰

We recommend that the RPWG consider the recommendations of that inquiry, and ensure that there is clarity about the regulatory requirements relating to embedded networks.

As a minimum, it is our view that consumers should not be in any way disadvantaged or have reduced protections because they purchase or receive energy through an embedded network.”

Access to complaints redress for embedded end-consumers of energy and for those receiving communally heated water in multi-tenanted dwellings.

Both those who are considered embedded customers of electricity (the term embedded cannot apply to gas – there are no embedded gas networks, and the term network is frequently used by the MCE out of place without recognizing the differences between the gas and electricity markets); and those who receive heated water that is communally heated and should not in the first place be contractually obligated for the alleged sale and supply of energy have no complaints recourses or affordable redress.

In any case, even if the charters and constitutions of existing energy-specific Ombudsman schemes were to be extended to include exempt sellers, EWOV is one such scheme that belies it will face conflicts of interest in dealing with complaints.¹⁹⁷

¹⁹⁷ See EWOV (2006) Response to ESC Small Scale Licencing Issues Paper and Final Decision EWOV’s Submission to Essential Services Commission Licencing Framework Issues Paper August 2006, p 3

Retailer Choice

The AER in its published response to the NECF2 Package comments as follows in terms of choice:

“However, the ability of customers to choose their own retailer in the competitive market depends on network configuration and metering, which are usually determined at the time a building is constructed. Planning and building laws do not mandate the provision of individual meters for each dwelling in multi-tenanted dwelling complexes, and technical and safety regulations do not take a uniform approach to meter placement. We recognize that this issue is not one that can or should, be addressed in the National Energy Retail Law or Rules. However to facilitate customer choice of retailer in new developments, jurisdictions should consider changing planning and building laws to mandate the provision of accessible metering for each dwelling in multi-tenanted complexes, to ensure that electricity metering arrangements are conducive to full retail contestability. Individual gas metering may also be required if significant gas usage will occur.”

I also note the AER’s comments on access to complaints schemes by those considered to be “exempt customers” under exempt selling schemes.

The same applies to those receiving communally heated water that is either gas-fired by a single master gas meter or an electricity meter supplying a non-instantaneous boiler tank. These are not exempt customers. There is no such thing as a gas network. Gas is either supplied directly or not.

If not supplied directly then the end-consumer of heated water communally heated is not the customer of any exempt seller in terms of energy and does not consume energy. Nevertheless this class of consumers has no complaints recourse and must rely on litigation that is unaffordable for most.

Though I refute and deny that end-users of communally heated water are embedded consumers of energy, I discuss this matter here lest the MCE follows the ESC and DPI lead to consider them to be so classed.

I note that the Tenants Union also believes this class to be “*embedded*” and that on-sellers of water are an unregulated market in respect of alleged energy supply.

<http://www.ewov.com.au/site/DefaultSite/filesystem/documents/PDF/Responses/2006/060825-L-EWOP%20comments%20on%20ESC%20Small%20Scale%20Licensing%20Framework%20Issues%20Paper.pdf>

see also EWOV’s response to the same issue in their 2007 Response to the ESC Small Scale Licencing Draft Decision (2007)

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I disagree with the ESC perception that the RTA is the correct legislative arena for redress. The matter is far more complex since there are many issues inherent in the mere fact that a contract is deemed to exist – with the wrong party and has implications for conditions precedent and subsequent, substantive unfair terms under generic laws; perceptions of illegal consumption of energy by move-in residential tenants relying on RTA protections; carry-over-customers; perceptions of overdue bills; and finally the ongoing threat of disconnection or suspension of heated water supplies where an energy provider claims to be selling energy.

These matters are discussed at great length in other submissions to the MCE, but to make sure I attach as appendices my 2008 submission to the ESC Regulatory Review and the Deidentified Case Study that was submitted to the GSC Draft Policy Paper, in addition to the Parodied letters of coercive threat send to the same arena.

“The AER also supports the proposed policy principle in s 528(1)(c) that exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under the NECF. Currently exempt supply customers in most jurisdictions do not have the same access to an Ombudsman or alternative dispute resolution scheme that is afforded to customers of a retailer. As the AER cannot effect the operation of industry-based statutory Ombudsman schemes (for example, through a condition requiring that an exempt seller participate in such a scheme), jurisdictions and ombudsmen schemes should consider whether it is necessary to extend the jurisdiction of the schemes to customers of exempt sellers to give full effect to this principle.”

In principle, a system where multiple bodies are responsible for licence and servicing provisions has the potential to become confusing and complicated by regulatory overlap and conflict, a matter that appears to have been given no thought at all in the formation of the NECF2 Package.

Market participants are required to abide by all laws and provisions not just those within energy, recognizing also the many jurisdictional discrepancies in interpretation and application of various provisions which will lead to continuing confusion and defeat the purpose of a nationalized energy framework.

I have many concerns about gaps and issues that arise from an exempt selling regime, more particular where service and licencing provisions may conflict and overlap with trade measurement provisions or water industry provisions.

This is more so in view of the fact that energy retailers (and now distributors) facilitated through flawed interpretations of deemed provisions either implicitly or explicitly sanctioned at jurisdictional level under what are commonly known as the *“Bulk hot water arrangements”* are using questionable methods of calculating and apportioning liability for both consumption charges for energy where such consumption cannot be shown by legally traceable means consistent with National Measurement philosophies; and where massive unregulated and unmonitored supply charges, FRC charges and other unbundled charges are also being apportioned by host retailers and others involved in the lucrative *‘bulk hot water’* market under energy regulations.

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Those in multi-tenanted dwellings who are renting tenants cannot participate at all in the contestable market; are obliged to accept monopoly provision by both distributor and retailer (though not receiving direct energy, but heated water supplies communally heated)

In these cases a single master energy meter (gas or electricity) exist and a single supply charge is made by distributor to retailer for settlement purposes. Those charges properly belong to the OC as controller of premises and proper contractual party.

In circumstances where direct supply of energy occurs through flow of energy, regardless of change of ownership or operation of the facilities, there are also issues of proper trade measurement using prescribed units of measurement.

I summarize the three billing options considered for the bizarre technically and legally unsustainable BHW arrangements adopted in three jurisdictions

1. Option 1: adjustable conversion factor: rejected
2. Option 2 Fixed conversion factor (adopted) based on a conversion factor at a cents per litre hot water rate as gazetted
3. Option 3 – Site specific Option – REJECTED a portion gas measured at the site-specific master meter to each individual customer based on their hot water use –

I firstly note that those receiving heated water that is centrally heated living in multi-tenanted dwellings are not embedded consumers of gas or electricity.

Hot water is not an energy commodity, though energy may be used to heat it – in such cases from a single master gas meter (and in some cases electricity meter)

Gas consumers of any description are never embedded consumers of energy. Energy is either directly supplied in gas service pipes or it is not. There is no such thing as a gas network. The term network and the term embedded applies exclusively to electricity. The Order in Council (OIC) under consideration by the ESC in discussing the small scale licencing regime referred to is exclusive to energy.

Consideration of those receiving communally heated water was outside the scope of that review, and has no place in the exempt selling regime.

The ESC mistakenly applies terminology in referring to the perception of consumption of energy in providing another good or service – hot water.

The ESC's choice of phrase below regarding alleged consumption of energy is technically and legally unsound. No energy is consumed at all. It is used to heat a communal boiler tank, not consumed by any end-user, in the same way as metal is used in the manufacture of a car.

The MCE has taken no action to correct the perceptions that have developed within jurisdictions and amongst energy providers as to the proper interpretation of deemed energy contracts and of all other applicable laws and provisions including under the common law. Proposed revisions to energy laws and those already included in other laws need also to be taken into account.

The following statement is flawed, inaccurate and unsustainable in terms of deeming sale and supply of energy.

“Energy is consumed in providing another good or service — hot water.”

Gas and electricity are goods not services. In the absence of direct flow of energy to the residential premises of an alleged end-user of energy deemed to be consuming energy simply because it is used to heat a communal tank is sufficient in itself to negate any perception of either sale or supply of energy as a good or any perception of its on-going supply to the end-user of heated water as a composite product.

The service of ongoing supply of gas is made to the OC or Developer of a multi-tenanted property, not to the end user of water – see detailed analysis of these contractual matters in my submission to the ESC Review of Regulatory Instruments (2008) Part 2A, which is appended as part of my submission to the NECF2 Second Exposure Draft

Additional services of metering and billing are also provided to the OC.

On a piece meal basis this has repeatedly been upheld by VCAT in matters brought before it by the *Residential Tenants Union (RTA)* Victoria.

Having said that it is entirely inappropriate to expect any residential tenant to file proceedings before VCAT on an ongoing basis 28 days after seeking payment from the Landlord for bills that should not in the first place be issued by energy suppliers to end-users of heated water.

The cost of repeated filing fees often out-weighs the cost of recovery. The process is long-winded, costly and stressful and repetitive as it needs to be repeated for each bill. Even when orders are made, it is not always possible to recover costs from a Landlord, who does not in the first place issue a bill.

Many residential tenants living in sub-standard poorly maintained accommodation with communal boiler tanks, are not equipped to face legal proceedings for a number of reasons, even at tribunal level.

The ESC has some idea that the residential tenancy laws should be changed to suit its purposes and flawed interpretations of contract law and rejection of the technical and scientific principles underlying the concept of legal traceability of measurable commodities (see discussion under trade measurement section). Remaining utility exemptions will be lifted. Some have already occurred.

The ESC was fully aware that the current arrangements would become invalid once the National Measurement Provisions lifted those provisions. In the meantime the arrangements breach other laws current and proposed, including under the NECF2 package which clearly discusses the concept of “*flow of energy*” in determining connection and ongoing supply of energy.

The issues of unjust imposition of contract by way of substantive unfair terms contained in deemed contracts for alleged energy sale and supply on end-users of heated water are not addressed merely by seeking retrospective claims against Landlords or OCs.

Notwithstanding any clauses that may be inserted in Model Terms and Conditions for deemed contracts sanctioned by the NECF2 Package, the generic laws will prevail in the event of conflict and these terms are likely to be found to be substantially unfair under revised provisions. Nevertheless it makes very poor regulatory sense

Further, the matters have implications for conditions precedent and subsequent, including the unjust requirement to provide access to meters that are in the care custody and control of Landlords more so when it is the OC or Developer who is the proper contractual party (see details of gas licences issued to the host retailers.

They also have implication for the unjust and unreasonable perception that when a residential tenant moves into rented premises unjust or illegal consumption of energy occurs by dint of accepting heated water supplies that are communally heated and reticulated in water services papers, after being heated by a single gas master meter as a connection service and ongoing sale and supply of energy to an OC or Developer.

This is especially so when residential tenancy provisions, at least in Victoria consider hot water services as described without separate metering for each metering utility to be integral part of mandated lease arrangements. This brings us back to conflict and overlap between schemes and failure by energy policy-makers and regulators to consider other laws and the enshrined rights of consumers or businesses under the common law.

There are other implications for unwarranted perceptions of unpaid energy bills under the circumstances described.

There are implications for move in and carry over customers.

And yet the NECF package believes it is adopting a national law and for transition (or other reasons) by continuing to tacitly sanction current arrangements under the BHW provisions, continue to allow unjust and inappropriate provisions

I cite from components of the Essential Services Commission (2007) Final Decision on Small Scale Licencing Framework¹⁹⁸ (now referred to as the Exempt Selling Regime in the NECF Package.

¹⁹⁸ Essential Services Commission (2007) ESC 2007 Small Scale Licensing Framework: Final Recommendations, Melbourne. (March)

These are the words used in the VESC's Final Decision

In the Commission's view, there appear to be two issues in regard to bulk hot water:

- *The ability to introduce user pays for the energy used in heating water.*
- *The charges that a body corporate/Landlord can impose on residents/tenants*

Charging for the supply of bulk hot water

ESC 2007 Small Scale Licensing Framework: Final Recommendations, Melbourne.

This review has assessed the adequacy of the current regulatory arrangements applying to the small scale distribution and/or resale of energy to customers within embedded networks. It has provided an opportunity for stakeholders to assess whether these arrangements are sufficient for regulating the activities of small scale operators and reflect upon the appropriateness of the obligations that they must comply with.

In deciding upon its recommendations, the Commission has given consideration to its objectives under the Essential Services Commission Act 2001, the Minister's views as set out in his letter to the Commission and the current national arrangements as administered by the Australian Energy Regulator.

Another important consideration has been the benefits that small scale distribution and/or reselling activities can provide to their customers and to customers in the broader market. Any revised regulatory arrangements should aim to minimise the cost impact on small scale operators themselves so that they can continue to offer these benefits to their customers.

The Commission has concluded that the current regulatory framework applying to small scale distributors and/or resellers needs improvement. However, it believes that these improvements can be achieved through only minimal changes to the existing framework, minimizing the impact on small scale operators while also improving the customer protection framework.

Once the Commission's role in administering the revised arrangements is clarified, the Commission will undertake a comprehensive consultation process consistent with its Charter of Consultation and Regulatory Practice.

At this stage, the Commission does not have any specific timelines for implementation as these will depend upon the Minister's deliberations on the recommendations and how soon the revisions to the legislation occur. However, the Commission will be aiming to begin implementation as soon as practicable after a response is received.

<http://www.esc.vic.gov.au/NR/rdonlyres/864FF246-D12C-494F-A4CD-A22BDFD98C9C/0/Smallscalelicensingframework.pdf>

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Some stakeholders have raised the issue of the way that Landlords charge their tenants for bulk hot water.

In this situation, gas or electricity is used to heat the water prior to its circulation to residents. In other words, energy is consumed in providing another good or service — hot water. Each residency is only separately metered for the water consumed and the gas/electricity used to heat the water is not separately metered.¹⁹⁹

Despite this, the Commission has been informed that, in some instances, Landlords have separately billed residents for the energy consumed in heating the resident's hot water.

Sections 52 and 53 of the Residential Tenancies Act (RTA) apportion liability for utility charges between Landlords and tenants/residents. If the rental property is separately metered, the tenant pays for connection and supply and Landlords are liable for installation costs. If not separately metered, the Landlord is responsible for the installation costs and the costs of connection and supply. Despite the provisions of the RTA, information provided by stakeholders suggests that some Landlords may be breaching the requirements of the RTA by:

- *separately billing for the gas consumed in heating the water despite apartments not being individually metered for gas consumption — bills are generally based upon quantity of hot water consumed*
 1. *charging differential rates for cold and hot water.*
 2. *Disputes in relation to this matter have been heard by the Victorian Civil and Administrative Tribunal (VCAT). The Commission's understanding is that VCAT has heard these disputes under the RTA as this is where its jurisdiction rests.*

In these cases, the Commission understands that VCAT has decided that, under the RTA, only volume based water charges may be recovered by Landlords. VCAT has ruled that:

- *The RTA (rather than the energy or water industry Acts) provided the legislative provisions that assist in the resolution of these issues.*

¹⁹⁹ The question of separate metering is an issue of contention. The VESC chooses apparently because of its philosophical views about “*user pays*” to regard hot water flow meters which measure water volume only not gas volume or heat (energy) to be suitable substitute instruments through which to measure or calculate individual gas consumption in the absence of any flow of gas to a given tenants’ premises. Here they openly admit to there being no separate metering for the gas or electricity used to heat water. There is no mention of the requirement to have a meter licence, how metering maintenance and replacement should be maintained and monitored and on what basis it is acceptable to strip end-users of their rights under multiple provisions because of attractive “*look through tax entity*” benefits to Landlords/Owners, who do not normally pass these benefits through to the end-uses; who sometimes use exploitive techniques; and who make collusive arrangements with retailers apparently with full sanction from energy policy-makers and “independent” regulators who sometimes do not see themselves externally accountable in any way, purely on the basis of their corporate legal identities.

- *The Landlord (or body corporate) can bill owners for water used, hot or cold, but only at the cold water rate — administrative charges as well as the gas required to heat water can not be charged to tenants under the RTA unless the utility is individually metered.'*
- *The Landlord (or body corporate) is not allowed to read the hot water meter and apply the heating conversion factor.*

In a confidential submission, one stakeholder indicated that one issue with the current charging arrangements is that, under VCAT's rulings, the body corporate is left to pass on costs for energy used in heating water through lot liability. As a result, the body corporate cannot provide for the accurate reflection of individual apartment usage.

The Tenants Union of Victoria has indicated that its concern is that:

... as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities. Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act and other relevant utilities legislation. ... because the price at which hot water can be sold in embedded networks is not regulated, on-sellers are able to set their own process and residents may be charged at higher rates than consumers of the same products who do not reside in embedded networks.

In the Commission's view, there appear to be two issues in regard to bulk hot water:

- *The ability to introduce user pays for the energy used in heating water.*
- *The charges that a body corporate/Landlord can impose on residents/tenants for the supply of water.*

From the information available to the Commission, it appears that the issue with bulk hot water charging arises from current apportionment of responsibilities between Landlords and tenants under the RTA. Currently, the energy used to heat the hot water used by one resident is not separately metered. As a result, under section 53 of the RTA, the Landlord is liable for all charges arising from the installation, supply and use of the energy used in heating water.

The Commission does not believe that this issue can be or should be addressed through the Small Scale Licensing Review. However, it suggests that a review of the RTA be undertaken to determine whether there is a need to vary its provisions and address the issue of bulk hot water. In this regard, one option may be to prescribe the introduction of a meter which measures the value of energy delivered, taking account of both the hot water volume and temperature.

These remarks indicate poor understanding of the technicalities and legalities involved, of the laws of contract or understand of and respect for the jurisdiction of other schemes.

So it was very clear where the ESC stood almost 3 years ago on this issue. That position has not altered. Of equal concern is where the NECF stands in the brink of rubber-stamping through proposed legislation, potentially carrying forward the same compromised consumer protections through either omission of commission in the spirit and letter of legislative provision.

Meanwhile the very exploitive practices of which the ESC made mention at the outset of this component of its Draft Decision on Small Scale Licencing continue – with energy retailers and other suppliers of energy capitalizing on loopholes and poorly designed and conceptualized decisions to imposed deemed contractual status on end users of heated water supplies reticulated in water pipes.

The concerns expressed by community agencies such as the Tenants Union Victoria, Department of Human Services, Consumer Law Action Centre and Consumer Utilities Advocacy Centre have gone unheeded. The TUV’s detailed submission has been selectively quoted, and despite direct advice about the limitations of VCAT’s powers, especially in the face of the current Ministerial Orders in Council governing small scale licencing matters, have remained unattended. This would seem to be a philosophical approach based on what the ESC believes is appropriate and notwithstanding other considerations such as the provisions of contractual law

My own concerns in dedicated submissions on the topic to the ESC (Part 2A Regulatory Review of Instruments 2008), and to MCE arenas. I am reproducing the Deidentified Case study and supporting data that was submitted to the Gas Connections Framework last year to gain some currency and refresh the memories of those who appear to have discarded the matter as a “too hard basket” issue.

I repeat the ESC’s obligation and counterparts in other states responsibility for ensuring security and reliability of supply of essential goods and services, and of the MCE to intervene in matters that represent detriment, threaten security of supply of essential services; cause consumer detriment and marketplace uncertainty with exploitive practices continue secure in the knowledge that for the most part the end-customer groups most impacted by inadequate protection in these areas are the least likely to be comfortable with legal proceedings or be in a position to pursue this through VCAT or other recourses. As mentioned previously the processes are protected and come with cost in terms of filing fees and protracted stress. It is entirely unacceptable that such groups of end-users of utilities should be left unprotected.

The TUV pointed out that some permanent residents live in rooming houses, and caravan parks. For as long as any residents were permanent proper protections should apply.

Page 6 of TUV's August 2006 submission to the ESC Small Scale Licencing Review (reproduced in its entirety as an appendix) discusses the absence of monitoring and regulatory oversight in relation to OIC; provisions as follows.

“Furthermore, as noted in the Issues Paper at p 34, there is no regulatory oversight ensuring that the provision of the OIC requiring distributors and on sellers to inform customers of the VCAT dispute resolution mechanism is being complied with. Without appropriate supervision of distributor and on-seller behaviour, this provision will not provide customers with adequate protection equivalent to that enjoyed by customers who do not reside in embedded networks. This is manifestly unfair, and should be addressed as a matter of urgency.”

In its follow up submission in September 2006 (also reproduced as an appendix in its entirety) TUV raises further issues relating to the gaps, monitoring of non-compliance, the status of consumers in deregistered networks and any associated RoLR considerations, non-compliance with distribution or disconnection.

No monitoring scheme exists regarding those who are properly considered to be embedded under existing PIC provisions – which are exclusive to metered electricity.

Many misconceptions exist over the proper definition of exempt frameworks, their application and monitoring.

TUV has raised the issue of whether over housing types and tenures should be captured within the regulatory model, and has also mentioned the NHW arrangements and the unregulated on-selling of water, leaving aside what energy providers are endeavouring to do in terms of wrongly claiming “consumption of energy” and implying *“illegal consumption of energy”* in connection with the bulk hot water provisions.

These matters will continue to confuse the market and cause continuing detriment if not addressed.

Yet the MCE in adopting a so-called national framework has chosen not to address the issues or appropriately clarify matters.

The absence of collaborative discussion between those regulating various schemes has not aided in bringing clarity, fairness and proper monitoring of any of these issues – so they go unchecked, utility provisions that should be considered to be part of either government monopolies or non-government monopolies are escaping oversight under competition provisions.

It is unacceptable for the new energy laws and rules to become operational without proper attention to these matters – that is where the clear responsibility lies in adopting a national energy law that should cover all Australians, and not contribute towards an already unconfident and poorly catered consumer protection.

None of these issues can at present be dealt with by EWOV under its charter, and it has already been made patently clear how EWOV handled a case that remained open on their books for 18 months and a further the abortive months whilst a merits review request was explored and abandoned as an unsuitable option, even after the prove continued with procedural breeches and continued to badger a vulnerable end-consumer of heated water denying contractual obligation. Ultimately disconnection of water through clamping of the hot water flow meter was effected and never restored.

If the BHW provisions as they stand are expected to continue, and notwithstanding all the arguments put forward regarding the inappropriateness of deeming end-users of communally heated water as contractually obligated, proper monitoring and complaints mechanism need to be put in place.

As to TUV's suggestion that EWOV take on complaints relating to embedded customers (whilst disputing that this is the right term to use where energy is deemed to be received by those receiving water products), EWOV has made it very plain that they are not only reluctant but also see conflicts of interest inherent in changes to constitution and charter that enable the handling of these complaints.

Again, the philosophical reasoning has been adopted by the regulator(s) without the smallest regard for best practice trade measurement practice, for overlap and conflict with other schemes, and with the enshrined existing rights of individuals.

As a consequence the wrong parties are being held contractually liable for a product they do not receive and which cannot be measured by legally traceable means.

It is not just a matter of costs, but the implications of being regarded a deemed customer without justification, and being expected to accept other contractual obligations that cannot be delivered by residential tenants who have no access to the substitute meters (hot water flow meters) relied upon to guestimate gas or electricity usage by rule-of-thumb imprecise methods.

These matters need to be unambiguously clarified within the new Energy Laws and Rules such that consumer rights do not become further eroded.

I quote directly from the ESC's final decisions in relation to the small scale licencing review 2006 – which has left continuing confusion and unaddressed issues.

ESC 2007 Small Scale Licensing Framework: Final Recommendations, Melbourne.

Charging for the supply of bulk hot water

“This review has assessed the adequacy of the current regulatory arrangements applying to the small scale distribution and/or resale of energy to customers within embedded networks. It has provided an opportunity for stakeholders to assess whether these arrangements are sufficient for regulating the activities of small scale operators and reflect upon the appropriateness of the obligations that they must comply with.”

In deciding upon its recommendations, the Commission has given consideration to its objectives under the Essential Services Commission Act 2001, the Minister's views as set out in his letter to the Commission and the current national arrangements as administered by the Australian Energy Regulator.

Another important consideration has been the benefits that small scale distribution and/or reselling activities can provide to their customers and to customers in the broader market. Any revised regulatory arrangements should aim to minimise the cost impact on small scale operators themselves so that they can continue to offer these benefits to their customers.

The Commission has concluded that the current regulatory framework applying to small scale distributors and/or resellers needs improvement. However, it believes that these improvements can be achieved through only minimal changes to the existing framework, minimizing the impact on small scale operators while also improving the customer protection framework.

Once the Commission's role in administering the revised arrangements is clarified, the Commission will undertake a comprehensive consultation process consistent with its Charter of Consultation and Regulatory Practice."

At this stage, the Commission does not have any specific timelines for implementation as these will depend upon the Minister's deliberations on the recommendations and how soon the revisions to the legislation occur. However, the Commission will be aiming to begin implementation as soon as practicable after a response is received.

"Some stakeholders have raised the issue of the way that Landlords charge their tenants for bulk hot water.

In this situation, gas or electricity is used to heat the water prior to its circulation to residents. In other words, energy is consumed in providing another good or service — hot water. Each residency is only separately metered for the water consumed and the gas/electricity used to heat the water is not separately metered.²⁰⁰

²⁰⁰ The question of separate metering is an issue of contention. The VESC chooses apparently because of its philosophical views about "*user pays*" to regard hot water flow meters which measure water volume only not gas volume or heat (energy) to be suitable substitute instruments through which to measure or calculate individual gas consumption in the absence of any flow of gas to a given tenants' premises. Here they openly admit to there being no separate metering for the gas or electricity used to heat water. There is no mention of the requirement to have a meter licence, how metering maintenance and replacement should be maintained and monitored and on what basis it is acceptable to strip end-users of their rights under multiple provisions because of attractive "*look through tax entity*" benefits to Landlords/Owners, who do not normally pass these benefits through to the end-uses; who sometimes use exploitive techniques; and who make collusive arrangements with retailers apparently with full sanction from energy policy-makers and "independent" regulators who sometimes do not see themselves externally accountable in any way, purely on the basis of their corporate legal identities.

Despite this, the Commission has been informed that, in some instances, Landlords have separately billed residents for the energy consumed in heating the resident's hot water.

Sections 52 and 53 of the Residential Tenancies Act (RTA) apportion liability for utility charges between Landlords and tenants/residents. If the rental property is separately metered, the tenant pays for connection and supply and Landlords are liable for installation costs. If not separately metered, the Landlord is responsible for the installation costs and the costs of connection and supply. Despite the provisions of the RTA, information provided by stakeholders suggests that some Landlords may be breaching the requirements of the RTA by:

- *separately billing for the gas consumed in heating the water despite apartments not being individually metered for gas consumption — bills are generally based upon quantity of hot water consumed*
- *charging differential rates for cold and hot water.*

Disputes in relation to this matter have been heard by the Victorian Civil and Administrative Tribunal (VCAT). The Commission's understanding is that VCAT has heard these disputes under the RTA as this is where its jurisdiction rests.

In these cases, the Commission understands that VCAT has decided that, under the RTA, only volume based water charges may be recovered by Landlords. VCAT has ruled that:

- *The RTA (rather than the energy or water industry Acts) provided the legislative provisions that assist in the resolution of these issues.*
- *The Landlord (or body corporate) can bill owners for water used, hot or cold, but only at the cold water rate — administrative charges as well as the gas required to heat water can not be charged to tenants under the RTA unless the utility is individually metered.'*
- *The Landlord (or body corporate) is not allowed to read the hot water meter and apply the heating conversion factor.*

In a confidential submission, one stakeholder indicated that one issue with the current charging arrangements is that, under VCAT's rulings, the body corporate is left to pass on costs for energy used in heating water through lot liability. As a result, the body corporate cannot provide for the accurate reflection of individual apartment usage.

The Tenants Union of Victoria has indicated that its concern is that:

... as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities. Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act and other relevant utilities legislation. ... because the price at which hot water can be sold in embedded networks is not regulated, on-sellers are able to set their own process and residents may be charged at higher rates than consumers of the same products who do not reside in embedded networks. ^[105]

In the Commission's view, there appear to be two issues in regard to bulk hot water:

- *The ability to introduce user pays for the energy used in heating water.*
- *The charges that a body corporate/Landlord can impose on residents/tenants for the supply of water.*

From the information available to the Commission, it appears that the issue with bulk hot water charging arises from current apportionment of responsibilities between Landlords and tenants under the RTA. Currently, the energy used to heat the hot water used by one resident is not separately metered. As a result, under section 53 of the RTA, the Landlord is liable for all charges arising from the installation, supply and use of the energy used in heating water.

The Commission does not believe that this issue can be or should be addressed through the Small Scale Licensing Review. However, it suggests that a review of the RTA be undertaken to determine whether there is a need to vary its provisions and address the issue of bulk hot water. In this regard, one option may be to prescribe the introduction of a meter which measures the value of energy delivered, taking account of both the hot water volume and temperature.”

Comment MK

Hot water flow meters measure water volume not heat. They are poorly designed to even withstand heat. Even if technology were developed, either energy is being sold or water. It cannot be both.

Energy retailers have no right to sell water and do not own the water in the first place. Mere ownership of hot water flow meters and infrastructure does not create a right of contract or right to on-sell the water or the heat that is used.

The gas supplied to a single master meter is supplied to an OC or Developer and is not consumed at all by end-users of heated water.

The National Measurement provisions expect to see legal traceability of goods or services that can be measured by a trade instrument. Utility exemptions will be lifted when all procedures are in place. The NMI is the sole authority on legal metrology.

The ESC is misguided in its suggestions, and has not taken into account numerous comparative law considerations including contract law under common law provisions or substantive unfair terms under generic provisions – these will be incorporated into the new generic laws.

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

These arrangements were complicated, did not prevent price shock to end-consumers, but instead created higher costs, confusion, expensive complaints handling and even litigation.

It is simpler and fairer to require retailers to bill OCs directly, to mandate for new buildings to install individual instantaneous water tanks and for the principle of flow of energy to be upheld. Grants should be provided for retrofitting of existing buildings. Boiler tanks of the type described are notorious for harbouring water-borne diseases. One woman died in Queensland on this account using water supplied from a communal water tank that was poorly maintained.

The system should not be facilitated but banned. Landlords are not motivated to maintain systems of this nature if there are reward to continue to neglect maintenance responsibilities, which fall into a grey area and remain unmonitored as to outcomes and impacts on end-consumers.

The system did not prevent rent hikes, but continued to feather the nests of Landlords unwilling to take direct responsibility or to appropriately fit multi-tenanted dwellings.

This not merely an economic issue with regard to charging, it is entrenched in the principles of contractual law, legal traceability and fairness.

I quote verbatim from the Tenants Union Victoria submission²⁰¹ to the ESC's small scale licencing review cited above:

“TUV is concerned that the existence of embedded networks creates confusion about the responsibility for payment for utilities for tenants and residents of rented accommodation within these networks.

In many instances, this confusion results in payment of utilities costs in excess of what would normally be required.

The Residential Tenancies Act 1997 (RTA) is the primary legislation governing residential tenancies, including caravan parks and rooming houses, in Victoria.

Sections 52 and 53 of the RTA apportion liability for utilities connection, service and consumption between Landlords and tenants and residents of caravan parks and rooming houses:

²⁰¹ Tenants Union Victoria (2006) Submission to ESC Small Scale Licencing Review (Aug)
http://www.tuv.org.au/pdf/submissions/Small_Scale_Licensing_Review_ESC_082006.pdf

If a rental property is separately metered, the tenant pays for the connection of supply to the property and for consumption;

Owners are liable for the installation and infrastructure costs of the initial connection of service to the property, and for the utilities consumed if the property is not separately metered.

However, there have been a number of instances whereby residents of dwellings in embedded networks were charged for energy consumption where there is no separate metering. Upon challenge to Victorian Civil and Administrative Tribunal (VCAT), all bills remitted to tenants and residents were found to contravene the Act and the amount paid under these unlawful bills were refunded.

However, despite the clarity of the Act on point of liability for utilities charges, and these VCAT orders, we believe that these practices are still occurring.

The following case studies illustrate the dissonance between the provisions of the Residential Tenancies Act 1997 and billing practices adopted by some bodies corporate or owners/managers of dwellings in embedded networks. In particular, the potential for profiteering from tenants and residents in the provision of utilities need to be urgently addressed. “

Please see the Appendices for further details and case studies.

“Hot water pricing and the regulation of metering in embedded networks

The previous case studies also demonstrate that there is insufficient regulation protecting consumers in embedded networks from profiteering in regard to the sale of hot water. In the Docklands and Courtyard Apartments cases, the consumer protection provisions of the Gas Industry Act did not apply because hot water, not gas, was being sold. However, because the price at which hot water can be sold in embedded networks is not regulated, on-sellers are able to set their own process and residents may be charged at higher rates than consumers of the same products who do not reside in embedded networks. This is manifestly unfair, and effectively creates two classes of consumer, one of whom is afforded appropriate legislative protections from exploitative pricing by providers, and one who is not.

Furthermore, these case studies also raise the question of the meters used to measure residents’ consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained. Again, consumers in embedded networks are not being afforded the same level of protection from unfair practices and exploitation as other utilities consumers, and this must be addressed to ensure parity among Victorian consumers. “

The remainder of the TUV submission deals with specific issues raised by the Paper. Please refer to the appendices for further details of this and related matters.

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The Appendices also include the Deidentified Case Study and other material submitted to the Gas Connections Framework Draft Policy Paper and to the Treasury's Unconscionable Conduct Issues Paper since I am determined to bring forward for attention such matters as have been consistently overlooked by the MCE in considering the general and specific rights and needs of residential tenants in particular and upholding a commitment to ensure that the national energy laws and rules reflect a fair and comprehensive coverage in the proper protection of all Australians.

There remain many concerns about how the Exempt Selling Regime and other similar categories of housing types and residential tenants can be appropriately covered – and how the existing provisions will be monitored and evaluated.

As mentioned elsewhere the AEMC has undertaken over 100 Rule Changes but there appears to have been no mechanisms adopted to monitor and evaluate outcomes and sweep for evidence of market failure.

The above section was included in my detailed submission to the NECF2 Package in February this year.

I have since discovered further pertinent matters that are complex and inter-related which I have raised with numerous parties including the AEMC, who is seeking a Rule Change at the instigation of the AEMO; the AER in the process of assuming further national responsibility for energy and water regulation; the ACCC in view of the consumer protection and competition issues involved, as well as the monopoly considerations.

I give below the substance of my emailed correspondence to the AEMC of 16 April copied to several other relevant parties and re-sent on 18 April to the generic electronic address. This was copied to several stakeholder bodies including the AER and AEMO

“Proposed Rule Change Provision of Metering Data Services and Clarification of Existing Metrology Requirements Rule Change - Section 107 Notice

I note the second notice of extension given by the AEMC on 15 April 2010 under section 107 of the National Electricity Law to extend the publication date for the Draft Rule Determination to 6 May 2010, on the basis of the complexity of the matters posed under the proposed Rule change at the instigation of the MCE.

I missed out on responding to the original proposal but note that there is an opportunity to respond to the Draft Rule Determination after its publication, for which a period of some two months is likely to be offered – refer to our recent telephone discussion on this matter.

I note this matter was not transparently discussed in the context of the extensive consultations undertaken in connection with the NECF Package and that there were many matters left without clarification or indeed any attention at all. All 41 submitters to the NECF2 package raised objections and concerns about gaps and the consultation processes, albeit that different groups of stakeholders had discrepant perspectives.

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I have informed the AEMC is aware that a related inquiry is in hand by the AER regarding the Revised Access Arrangement Proposal from Jemena Gas Networks (NSW) Ltd.

Please refer to:

Consultation by the AER on the Revised Proposal by Jemena Gas Networks (NSW) Ltd

See AER/ACCC Gas Access Arrangements Appendix 12.2 Standalone and avoidable costs.

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.

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.

I note on the smartgridaustralia website²⁰² 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

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.

²⁰² www.smartgridaustralia.com

Jemena 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 specialize 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.

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.²⁰³”

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.

²⁰³ 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.

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.”

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 Intergovernmental Agreement 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 OCs 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, 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 OC (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 MCE and AEMC are endeavouring to sanction by implication 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.

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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.

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*."

On 18 April I again wrote to the AEMC to their electronic generic address to further discuss the Rule Change Determination delayed till 6 May 2010, and to ensure that the correspondence from 16 April reached the generic address as a formal communication.

Extension of time for the making of draft Rule Determination for the Electricity, Rule Change

Provision of Metering Data Services and Clarification of Existing Metrology Requirements Rule Change - Section 107 Notice.

On 15 April 2010, the Commission gave notice under section 107 of the National Electricity Law to extend the publication date for the draft Rule Determination to 6 May 2010. The Commission considered that this extension of time is necessary because the Rule Change raised issues of sufficient complexity.

The Draft Decision was duly published on 6 May along with a draft consolidated

I note that industry stakeholders have expressed numerous concerns about this matter, to which I have added my own.

As observed by Jemena Electricity Networks (Vic) Ltd (**JEN**) in their submission of October 2009

"The Rule Change proposal, submitted by AEMO, principally seeks to transfer the current deed-based framework that governs Metering Data Providers (MDPs) to a framework contained in Chapter 7 of the National Electricity Rules (NER). It does this by creating a new category of MDP in the NER and transferring responsibility for collecting metering data from Type 1,2,3 and 4 meters from AEMO to the Responsible Person (RP)."

Jemena: (16 October 2009)

“Likely Costs to Stakeholders

As outlined above, this consultation is one of several that are currently running that will result in changes to the NER. This clearly raises timing and implementation issues. It also contributes to an increased regulatory burden at a time when the specific need for change at this precise time is unclear.

Need for Rule Change and Timing of Consultation

The proposed Rule Change is extensive and signals a substantial move from the current NER. The current consultation program is ambitious with several related and overlapping consultations being carried out that are currently at various stages. These include the AEMO consultation on Metering Provider (MP)/MDP accreditation and the MCE Smart Meter National Electricity Law (NEL) amendments.

Jemena understands that the National Stakeholder Steering Committee is developing considered changes for smart metering and suggest that once the final determination is set for this Rule Change it could be used as a firm basis for those changes.

Jemena submission on AEMC rule change on MDPs.doc

“Service Level Procedures

Jemena does not support the Service Level Procedures (SLRs) contained at the proposed 7.2.9 of the NER. The majority of these SLRs are already contained in the Metrology Procedures at 7.14 of the NER. Jemena would welcome clear and efficient documentation without unnecessary duplications.”

“Changes to Settlement Ready Data

The change to the definition of Settlement Ready Data in Chapter 10 of the NER potentially requires the replication of metering data from AEMO systems to the LNSP on the possibility that AEMO has done additional processing on the meter data. Jemena does not support changes to settlement ready data that would require significant system changes for the replication of metering data from AEMO systems to the LNSP to bring the data across for billing purposes.”

SP AusNet's reservations about complexity are noted in their submission of 21 October 2009. This provider is part-owned by the Singapore Power Consortium who has majority share

UED is associated with the Jemena Group, owned by Singapore Power International, a holding company for two other Jemena companies which, also manage numerous other Jemena-related companies, including outsourcing and data providers that appear to be related parties. In relation to both gas and electricity the corporate and ownership structures of Jemena, UED, AGL, Alinta and Multinet (all owned by the Singapore Power Group) there are related matters that are pertinent in the broader context of outsourcing - as raised also with the AER and ACCC - see my correspondence

United Energy Distribution (UED) has raised significant issues regarding smart meters and their pertinence to the issues being considered, as well as other concerns.

Grid Australia in its submission of 16 October 2009 on behalf of National Electricity Market (NEM) electricity transmission network owners ElectraNet (South Australia), Powerlink Queensland (Queensland), SP AusNet (Victoria), Transend (Tasmania) and TransGrid (New South Wales) has raised a number of reservations about the Rule Change proposal by the AEMO regarding contractual and liability obligations

Integral Energy's reservations in their submission of 20 October 2009 included comment on the fact that the AEMO had not received the endorsement of any Reference Group or any individual registered participant

Integral Energy had also observed that no quantification of the costs or benefits of the proposed amendments has been provided.

Integral also raised significant issues about smart metering including the incomplete deliberations by the MCE as to appropriate smart metering arrangements.

All of those arrangements will also impact on smart grids in the longer term, a responsibility held by the Department of Climate Change, Energy Efficiency and Water.

Already the Victorian smart meter derogation will mean that the meters the subject of the current premature mandated roll-out will be incompatible with the grid and the Victorian Auditor's damning report of November 2009 has made it clear that the economic, technical and consumer protection case had not been made out.

EnergyAustralia has also raised significant concerns about the implications for smart metering.

As to water grids considered to be part of the electricity or gas network - this is a significant matter the implications of which appear not to have been taken into account. It is absurd to suggest that water meters and grids could be part of the gas distribution or electricity distribution networks. There is no such thing as an embedded gas network in any case.

In the case of the grossly unfair substantive contract terms contained within what are commonly known as the Bulk Hot Water Guidelines (now incorporated under 3.2 of the [Energy Retail Code](#), v 7 Feb2010, Vic) (inappropriately imposed contractual status on the wrong parties as recipients of water reticulated in water pipes and receiving no energy at all, I hope this matter can be corrected as a matter of policy at the earliest opportunity since the provisions are unfair, create unnecessary costs with bizarre metering arrangements for water meters; and have serious implications for rising costs as a result of inappropriate adoption of metering procedures and practices that are inconsistent within existing energy provisions and with numerous other legislative provisions in other schemes

In my view the issues of smart meters and smart grids are inter-related issues.

The role of the National Measurement Institute as sole legal authority on trade measurement issues, including servicing and licencing issues appears not to have been contemplated or referred to.

It is of concern that decisions of this nature appear to be made without appropriate levels of inter-body collaboration.

Please see policy implications of Network service provider extensions on AER website

Network service provider exemptions:

[AER home page](#) -> [Monitoring, reporting and enforcement](#) -> Network service provider exemptions

The implications of revised generic laws under Trade Practices provisions appear not to have been taken into account. As mentioned Part 1 of the changes to the TPA (Australian Consumer Law) became operational from 14 April 2010, the day of Royal Assent. Further changes as part of the Trade Practices (Australian Consumer Law) Bill (no.2) 2010 are under deliberation by the Senate Standing Economics Committee.

Technical, safety, operational and comparative law considerations appear to have been incompletely considered.

I note that there are no consumer perspectives other than my own as an individual stakeholder belatedly raised.

Notwithstanding lateness, given that the AEMC is still deliberating it would be inappropriate to ignore the thrust of the issues raised simply on the matter of procedure and timelines.

These matters may also be relevant to other inquiries including:

Australian Energy Market Commission

Updates:15 April 2010

Extension of time for the making of Rule Determination for the SA Jurisdictional Derogation (Connections Charging) - Section 107 Notice

Electricity, Rule Change

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Jemena (JGN) Revised Gas Access Proposal 2010-2015
Further open s comment and supporting data with several appendices
re JGN's further submission(s) of 18 May 2010
and principles behind AEMC's Rule Change Proposal ERC 0092 under the NER
(with possible extrapolation to NGR) – and other related determinations
Prepared also for multiple other arenas
Madeleine Kingston, Individual Stakeholder

On 15 April 2010, the Commission gave notice under section 107 of the NEL to extend the publication date of the Rule determination to 6 May 2010. The Commission considered an extension of time is necessary due to a material change of circumstances.

See my brief inputs as correspondence dated 16 and 27 April respectively. It is my intent to submit substantially the same package as this current one also, in response to the Draft Report published on 6 May 2010.

The AEMC has advised that the particular matters I have raised will be deferred for consideration at the time of considering responses to the Draft Report and Draft NEL Ch7

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.

Please refer to:

Consultation by the AER on the Revised Proposal by Jemena Gas Networks (NSW) Ltd – for which a decision is expected on or around 11 June 2010

See AER/ACCC JGN Gas Access Arrangements **Appendix 12.2 Standalone and avoidable costs.**

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.

See my submissions to various public consultation arenas:

Essential Services Commission Review of Regulatory Instruments (2008) (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 (2008)

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/Madeleine%20Kingston.pdf

NECF2 (2010)

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/_documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/Madeleine%20Kingston.pdf

see also submission by Kevin McMahan, 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

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

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/Madeleine%20Kingston.pdf

AER Jemena (JGN) Revised Gas Access Proposal – Gas Dispute

<http://www.aer.gov.au/content/item.phtml?itemId=736206&nodeId=345c45e72e13c0e49cbd5cff588a0135&fn=Madeleine%20Kingston.pdf>

also

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

www.pc.gov.au/projects/inquiry/consumer/.../subdr242part4

www.pc.gov.au/projects/inquiry/consumer/submissions/subdr242part5

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

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 structure of the marketplace at the time in some detail, including economic considerations, price and profit margin considerations in the light of commissioned reports; some best practice regulatory issues.

<http://www.aemc.gov.au/Media/docs/Madeleine%20Kingston%202nd%20Sub%20Part%201-d448ce8f-6626-466d-9f97-3d2c417da8b4-0.pdf> (Part 1 (first 100 pages))

<http://www.aemc.gov.au/Media/docs/Madeleine%20Kingston%202nd%20Sub%20Part%202-9253e33d-3fb9-4862-935d-08170f3b6504-0.pdf> (Part 2, pp 101-221)

<http://www.aemc.gov.au/Media/docs/Madeleine%20Kingston%202nd%20Sub%20Part%202-9253e33d-3fb9-4862-935d-08170f3b6504-0.pdf> (Part 2 pp 101-221)

Finally, I reminded the AEMC of the changes to generic laws and recent ACCC Media Release See

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

<http://www.accc.gov.au/content/index.phtml/itemId/930765>

The purposes of providing this information here is to illustrate just how much confusion remains in an unstable regulatory marketplace, the consequences for consumers, and the apparently lack of effective protective mechanisms or redress.

The embedded network arrangements have been the source of angst and anxiety for all components of the market. They have never been sufficiently transparent and they are constantly changed. There is never any opportunity for stakeholders including consumers to catch up with what is happening or what the implications for them will be.

Already the Victorian Auditor-General has condemned the hastily and ill-considered mandated Victorian roll out of smart meters. His damning November 2009 report²⁰⁴

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.”

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 consumers⁷) 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.

²⁰⁴ 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

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"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 cap 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.

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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 21st 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 nit 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.”

In relation to gas John Dick had commented that there appears to be *“no national vision/energy policy .The nation is still running on the 1977 Frazer Govt policy of “dig it up sell it off and use the proceeds to import.”*

In Queensland there are many concerns about sale of assets. I have discussed some of these in my submission to the NECF2 package, and the implications also for exempt selling regimes, the bulk hot water arrangements, and any warranties and guarantees that may have been provided to the only host retailer who inherited the “bulk hot water clientele.”

A direct victim of these policies whose grievances apparently remain unaddressed made an independent submission to the NECF2 package as the only private individual input. He discusses the Queensland situation, monopoly and exploitation of those least able to fight back and the implications for him and his fellow tenants living in a public authority block of apartments that his poorly maintained.

His efforts to call attention to unfair practices openly endorsed by all concerned were not rewarded with outcomes of any kind.

In a climate where the authorities writing new laws allegedly mindful of appropriate consumer protections, despite the adoption and imminent enhancement of generic laws, one has to ask how confident consumers can afford to be that their interests will be safeguarded by policy-makers and regulators many of whom appear to be operating in vacuum conditions without the collaborative efforts that are required to ensure that guarantees that there will be no duplication, inconsistency or erosion of consumer rights.

The “*bulk hot water arrangements*” are but the tip of the iceberg.

There are numerous health and safety considerations inherent in the use of stationery inefficient boiler tanks that are not maintained properly, where there is no lagging of pipes and where wastage of water up to 20-0 litres can occur before water is of an acceptable temperature.

There is a risk of Leigionnaires disease also. One Australian woman has already died as a direct result of exposure to contaminated water supplied from such a tank.

Far from allowing expensive upgrades with the idea of using remote readings – allegedly of gas but using RF heads on water meters these boiler tanks should be banned and each individual abode retrofitted with a separate instantaneous water heater where direct flow of energy can be measured and charged for burying legally traceable means.

When efforts are made to establish who is responsible the accountability shifting game begins. Aside from the bizarre calculation and trade measurement methods used, expensive contractual debates, erosion of fundamental rights under generic laws result, and consumers remain dissatisfied and unprotected.

It is entirely unacceptable that as new generic laws are put into place a significant lack of governance and coordination appears to be accompanying the roll out of all sorts of so-called innovative ideas, but consumer protections are not in place, remain inadequate and no one body seems to have sufficient responsibility to ensure better outcomes, more guarantees and restoration of consumer confidence.

Therefore I have as a last resort raised these issues as the Senate decides how best to enhance the generic provisions and/or refer the matter for further scrutiny perhaps by the Senate Committee for Fuel and Energy.

Distributors are now proposing to spend huge sums of money fully recoverable from consumers to upgrade the water meters that are not necessary, do not measure gas or electricity, simply because they have been permitted to consider these as suitable instruments through which gas and electricity may be measured. They are not.

My reservations about the governance and accountability of the DPI, the state energy regulator and the self-regulated complaints scheme EWOV are a matter of record in public consultation arenas.

I have also expressed many concerns about the perceived consumer protection gaps in the National Energy Consumer Framework (NECF2) on the brink of being rubber-stamped under legislation particularly in relation to residential tenants, especially in relation to the bizarre bulk hot water arrangements in which in the absence of an energy meter or any delivery of energy facilitated by its flow to the abodes of such tenants, hot water flow meters are being relied upon to measure guestimated gas usage for the alleged heating component of that water and in the absence of any legally traceable means of measuring gas or electricity consumption.

The issues pertinent to proper interpretation of contractual rights and responsibilities in these matters are far from clarified in either the generic provisions or proposed energy provisions. Such clarification as does exist goes to consumer detriment.

The opportunity to thoroughly air these matters existed but squashed. Though I gave up the time to attend a two-day workshop it was made abundantly clear from the outset that the matters would not be addressed or discussed, regardless of merit. but no reasons were provided. The responsible Minister took the same stance with approached individual. I had also gone to the lengths of writing to every single Minister on the MCE.

I am prepared to say quite frankly now that I am extremely unhappy about the levels of accountability or attention to industry-specific protections or willingness to heed consumer views and perspectives on these issues.

One might go as far as to suggest that there may be a high level of regulatory capture and that the hope of a settled effective marketplace in which both consumers and traders and confident and happy is receding rather than becoming a realistic goal.

For those reasons despite the advanced place that proposed legislation is at, I make a final plea to consider how little expected protections will do to lift consumer confidence.

Confident consumers mean confident markets. There is an urgency for all of these matters to be properly addressed.

It is not a good enough answer to provide some protection for some of the population – we expect **ALL CONSUMERS IN ALL MARKETS** to receive equal protection.

SOME LIABILITY ISSUES

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.*"²⁰⁵

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."

²⁰⁵ http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf

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 2010.²⁰⁶

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 OC 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).

²⁰⁶ 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

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 Corones

“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.³⁰” (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*⁴⁰ 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’.

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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.⁵⁵ His Honour held that the language of s 18(4) 'evokes the common law, with its commonsense approach to causation and remoteness'.⁵⁶

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.⁵⁷ 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."⁵⁸

Comment MK

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.

LEGISLATIVE DRAFTING – SOME OBSERVATIONS AND CITATIONS

I draw attention to the views expressed by Eamonn Moran (2005) regarding inherent dangers in Interpretation. I cite directly from his August 2005 PowerPoint presentation²⁰⁷

“The purpose of my presentation was to highlight the dangers inherent in picking up legislation from another Australian jurisdiction and incorporating it into your own statute book. Each jurisdiction drafts in the context of its own Interpretation legislation. Interpretation Acts vary greatly in Australia, both in their comprehensiveness and in their actual provisions.

Thus, for example, if an ACT Act were enacted in NSW without change, the following differences might result:

- *Section headings would not be part of the Act in NSW whereas they would be in the ACT*
- *The Crown would not be bound in NSW whereas it would be in the ACT*
- *Examples would not extend the provision of which they are examples in NSW whereas they could in the ACT*
- *Commencement would be limited to a single day in NSW whereas a staged commencement would be possible in the ACT*
- *Words like “liability” would operate without definition in NSW.*

In my presentation I encouraged drafters to become familiar, not only with their own Interpretation legislation, but with that of other Australian jurisdictions. That familiarity will enable a drafter to avoid the traps inherent in picking up and incorporating another jurisdiction’s legislation.

I also refer to the findings of David Greenberg regarding the nature and legislative intention and its implications for drafting as presented in a paper in 2007 to Commonwealth Association of Legislative Counsel (CALC)²⁰⁸, subsequently by them body, in “The Loophole” originally published in the Statute Law Review.

See also views Bromley, Melanie (2009) Whose Law is it?—Accessibility through LENZ: Opportunities for the New Zealand public to shape the law as it is made in “The Loophole, Journal of the Commonwealth Association of Legislative Counsel 209 *ibid*), pp 14-24 (Melanie Bromley, Parliamentary Counsel New Zealand)

²⁰⁷ Moran, E (2005) *“Interpreting legislation: providing a variety of outcomes Current developments – Statutory interpretation.”* PowerPoint presentation 4 August 2005

²⁰⁸ Acronym not to be confused with that used for Consumer Action Law Centre a consumer policy advocacy body with limited casework scope funded by Consumer Affairs Victoria

See Laws, Stephen (2009) discussion of consistency vs innovation²⁰⁹

I highlight findings from the above experts on legislative drafting, as food for thought for those interested in high level legislative principles - and particularly relevant in Australia in a climate of extensive legislative and regulatory reform. The concepts of innovation apply as much to regulatory practice as to industry benchmarks and market opportunities.

See Daniel Greenberg's²¹⁰ (2007) analysis of the nature of legislation intention and implications for drafting²¹¹ prepared for CALC²¹²

In his introduction Greenberg discusses some ancient principles of UK law as follows:

"It is one of the most ancient principles of the law of England and Wales that in applying legislation the courts and any other reader should aim to construe it "according to the intent of them that made it."

"But while this trenchant aphorism is initially and superficially satisfying, like many an epigram the more one thinks about it the less it appears to mean."

²⁰⁹ Consistency versus Innovation in The Loophole 2009 (the Journal of the Commonwealth Assembly The Loophole Journal of the Commonwealth Association of Legislative Counsel
http://www.opc.gov.au/calc/docs/Loophole_October2009.pdf

²¹⁰ Daniel Greenberg of Lincoln's Inn, Barrister, Parliamentary Counsel

²¹¹ Greenberg, Daniel (2007) *"The nature of legislative intention and its implications for legislative drafting."* Paper presented at Commonwealth Association of Legislative Counsel (CALC), subsequently by the Commonwealth Association of Legislative Counsel (CALC), in "The Loophole" originally published in the Statute Law Review, Volume 27, No. 1, 2006, pp. 15 – 28.
See summary of article http://slr.oxfordjournals.org/cgi/pdf_extract/27/1/15

²¹² Not to be confused with the same acronym used to refer to Consumer Action Law Centre, a body funded by Consumer Affairs Victoria, providing minimal legal representation but heavily involved in the policy advocacy debate with the focus on those who are vulnerable and disadvantaged, but not others whose enshrined rights may be compromised

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Eamonn Moran, QC is President of CALC. Law Draftsman, Department of Justice, Hong Kong), former Chief Parliamentary Counsel for the State of Victoria with 32 years of legislative drafting
See also Greenberg, Daniel (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12 in The Loophole ibid

This paper was presented to the CALC Conference, London, September 2005 and was originally published in the Statute Law Review, Volume 27, No. 1, 2006, pp. 15 – 28

See also Eamonn Moran, formerly Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Counsel, now Law Draftsman, Department of Justice, Hong Kong) especially:

See also Greenberg, Daniel (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12

See also Greenberg: Daniel Statute Law Review 27(1) 15-28, p15:

"One could argue at length about whether an Act passed under the Parliament Act 1911 (c.13) is enacted by the Queen in Parliament, or as the special enactment formula might seem to indicate, by the Queen 'in' or together with, the House of Commons, but the argument would probably be inconclusive and futile

Who are “those who made the legislation”? In the case of an Act of Parliament, it was notionally made by that shadowy concept “The Sovereign in Parliament”, being neither the Sovereign, nor the Houses of Parliament, but a notional agglomeration.

To suggest that the Sovereign personally had any intention as to what was to be achieved by the legislation when giving Royal Assent to it would be patently absurd. Equally, to suggest that both Houses, or even either House, actually had a single intention in relation to the construction of the Act would be to defy obvious reality.

And as soon as one arrives in the search at individuals who might be reasonably expected to have had actual and ascertainable intentions as to the construction of the legislation – such as the draftsman of the Bill, the departmental administrators or lawyers with responsibility for the content of the Bill, the Minister in charge of the Bill in either House, or individual Members of either House participating in consideration of the Bill – one has left the class of persons whose intentions can without constitutional impropriety be treated as the intentions of Parliament.

In the case of subordinate legislation, the fact that there will often be a single individual making the legislation in a formal sense might suggest that it will at least be sufficiently clear whose intent is to be considered (even if there were difficulties in establishing what the intent was). But as soon as one examines the reality of the process by which subordinate legislation is made it becomes clear that the position is no better than in the case of primary legislation and may be worse.

In most cases, it is as absurd to attribute to the Minister making an instrument any actual intentions in relation to its meaning as it is to attribute intention to the Sovereign in granting Royal Assent to an Act. There are three or four thousand statutory instruments made each year nowadays, and a departmental Minister might expect to sign several each week: as a general rule they will be either too lengthy and complicated to permit of the Minister acquiring much understanding of the detail or too trivial to make it feasible to brief the Minister on the content in detail.

*Even if it were possible to establish whose actual intentions at the time of enacting legislation were relevant, it would still of course be difficult or impossible to ascertain what their intentions were. In the case of an Act of Parliament the only contemporary records likely to be of assistance are those set out in Parliamentary records. But although the courts now permit themselves in certain cases and subject to significant constraints to look at material of that kind in construing legislation, the fact remains that, as Lord Oliver of Aylmerton said in *Pepper (Inspector of Taxes) v. Hart* (the case in which the House of Lords decided that Parliamentary material could be considered for the purposes of resolving ambiguity)—experience shows that language – and, particularly, language adopted or concurred in under the pressure of a tight parliamentary timetable – is not always a reliable vehicle for the complete or accurate translation of legislative intention. The same is true of a Minister or group of Ministers making subordinate legislation.*

Of course, one could ask the Ministers who proposed primary legislation to Parliament, or who themselves made subordinate legislation, what their intentions were (if their intentions were established as being determinative or even relevant): but the Ministers themselves would often have only a hazy idea of what their original intentions had been, while to allow them to substitute their present intentions in relation to the application of the legislation would be in effect to permit them an unrestricted, unaccountable and wholly informal power of continuous legislating.”

Greenberg’s conclusion:

The concept of the legislative intent is neither as straightforward as it might appear at first glance nor as elusive as one might fear on closer examination. As traditionally understood by the courts it is a concept that is capable of being discovered by reference to objective criteria. Its nature, and the nature of those criteria, require to be borne in mind by the draftsman in order to ensure that his draft will be given the meaning that he intends. In particular, the nature of the objective search for legislative intent requires the draftsman to determine the nature of his primary target audience and the facilities likely to be available to them in applying and construing the legislation.”

Comment MK

Food for thought for those interested in high level legislative principles - and particularly relevant in Australia in a climate of extensive legislative and regulatory reform. The concepts of innovation apply as much to regulatory practice as to industry benchmarks and market opportunities.

The National Measurement Institute’s scope may provide unique opportunities to lead the way for consideration of such half-forgotten principles. The Treasury within the context in this paper has yet another chance to examine how the system as failed to work so far – with half-baked self-regulation, inadequately phrased legislative provision and discrepant interpretations thereof, leading to distortion and compromise to consumer protections

Refer also to Daniel Greenberg’s discourse on legislation.²¹³

See also Eamonn Moran, formerly Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Counsel, especially:

See Greenberg: Daniel Greenberg on authorship and attribution to Acts of Parliament²¹⁴

“One could argue at length about whether an Act passed under the Parliament Act 1911 (c.13) is enacted by the Queen in Parliament, or as the special enactment formula might seem to indicate, by the Queen ‘in’ or together with, the House of Commons, but the argument would probably be inconclusive and futile.”

²¹³ Greenberg, Daniel, (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12

²¹⁴ Greenberg, Daniel Statute Law Review 27(1) 15-28, p15

See also Eamonn Moran, formerly Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Counsel²¹⁵ especially:

“The purpose of my presentation was to highlight the dangers inherent in picking up legislation from another Australian jurisdiction and incorporating it into your own statute book. Each jurisdiction drafts in the context of its own Interpretation legislation. Interpretation Acts vary greatly in Australia, both in their comprehensiveness and in their actual provisions. Thus, for example, if an ACT Act were enacted in NSW without change, the following differences might result:

- *Section headings would not be part of the Act in NSW whereas they would be in the ACT*
- *The Crown would not be bound in NSW whereas it would be in the ACT*
- *Examples would not extend the provision of which they are examples in NSW whereas they could in the ACT*
- *Commencement would be limited to a single day in NSW whereas a staged commencement would be possible in the ACT*
- *Words like “liability” would operate without definition in NSW.*

In my presentation I encouraged drafters to become familiar, not only with their own Interpretation legislation, but with that of other Australian jurisdictions. That familiarity will enable a drafter to avoid the traps inherent in picking up and incorporating another jurisdiction’s legislation.

Comment MK

The National Measurement Institute’s scope may provide unique opportunities to lead the way for consideration of such half-forgotten principles. The Treasury within the context in this paper has yet another chance to examine how the system as failed to work so far – with half-baked self-regulation, inadequately phrased legislative provision and discrepant interpretations thereof, leading to distortion and compromise to consumer protections

Some Specifics

First I turn to the confusing terminology used under Div 1 Part 1, 103 above. The wording is not plain enough for those wishing to grasp which laws to rely upon. This is more so since for whatever transitional or other reasons, these laws are in direct conflict with certain other subordinate energy provisions including under Codes.

²¹⁵ Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Council Moran, Eamonn, (2005) Current developments—Statutory interpretation
<http://www.pcc.gov.au/pccconf/papers/7-Eamonn-Moran.pdf>

Not only is there conflict and contradiction, making it entirely impossible to rely upon such fundamental concepts as the direct “*flow of energy*” to the premises of those deemed to be receiving energy and contractually obligation for the sale and supply of energy, but if certain jurisdictional provisions are to be relied upon they are also in direct conflict with other laws and provisions, including

Selected considerations include the following:

Direct conflict with enshrined protections under the common law, including contract law provisions and the provisions of natural and social justice

In Victoria s15 of the *Essential Services Act 2001* specifically prohibits conflict and overlap with other schemes and adoption of best practice. As discussed at great length within my published submissions to the consultative arenas, and referred to in my Deidentified Case Study including in most of these including that to the Treasury's Unconscionable Conduct Issues Paper (2009).

The provisions of s15 seem to have been treated with derision by the ESC (Vic) and Consumer Affairs Victoria were unable to persuade this body, believing itself to be unaccountable simply on account of his legal structure as an incorporated body with limited guarantee but without share portfolio, though set up under statutory enactments and administering statutory provisions.

Existing provisions and proposed changes to generic laws, including under substantive unfair terms provisions (whether or not sanctioned by policy makers and regulators), and including the model terms and conditions proposed for deemed and standard contracts as included in the NECF2 package; statutory and implied warranty provisions.

The emphasis here is on predications for the sale and supply of energy (see for example proposed revisions to statutory and implied warranty)

Note sale of gas and electricity are commodities both within generic and jurisdictional Sale of Goods; ongoing supply through direct flow of energy constitutes a service; certain other services such as metering, billing and the like are supplied to OCs not end-users unless a direct flow of energy can be established through legally traceable means, regardless of any change of ownership or operation. Note also that embedded consumers can only be of electricity, since there are no networks for gas.

In relation to generic laws addition, no passing acknowledgement has been made regarding contemplated further changes by the Federal Treasury with respect to unconscionable conduct provisions through inclusion of a non-exhaustive lists of unconscionable conduct behaviour or circumstances. The advice of an expert panel has been sought on this issue, who are also considering whether generic laws should cover the needs of small businesses.

Any changes that result from Treasury recommendations will impact on final inclusions in the proposed NECF2 Package, to be rubber-stamped through Parliament in September. I raised this issue at the Workshops in February, but am disappointed that the organizers chose not to volunteer the information that may be pertinent to both industry and consumers.

The Federal Treasury is considering further amendments to generic laws, especially with regard to unconscionable conduct provisions

Trade measurement provision upholding the legal traceability of goods, notwithstanding that the lifting of some utility exemptions has not yet been effected, bearing in mind recent changes to national measurement provisions

Sale of Goods Acts and changes to generic laws.

Note that by the end of 2010 all states will need to bring their generic laws into line with generic provisions. There have been specific changes in relation to sale of goods act, ownership of the goods deemed to be sold and a host of other issues to be taken into account.

Electricity and gas are goods (commodities). They therefore attract the full suite of protections available.

The services that are provided to Owners Corporations should in terms of any supply charges, metering data charges and the like are undertaken as a result of a direct non-transferable contract with the energy provider through whichever servant contractor or agent is employed. The proposed new category for the provision of such services in terms of electricity will be called Metering Data Provider. Nonetheless if these parties are engaged as outsourced contractors to either the developer or retailer or other third party, the contract for sale and supply of gas is with the energy provider not the MDS.

Therefore in the event of dispute, the en-user customer (if body corporate) or end-user only if directly supplied with energy through its direct flow into the premises deemed to be receiving energy (rather than heated water) will be able to take an action against either retailer or developer. The subsequent apportionment of liability between those parties is a matter between them.

It has been my direct experience and on the basis of anecdotal information provided to me that various parties endeavour to escape responsibility for directly resolving issues arising out of actions taken by servants contractors and or agents in relation to metering data services that are in fact contractual matters between Developers or Owners' Corporations, not end-users who are victimized by unnecessary and unjust imposition of contractual status for alleged sale and supply of energy that is not delivered at all through flow of energy.

For settlement purposes only a single gas or electricity meter exists and that is installed and maintained at the request of Developer or Owners' Corporation. These principles need to be properly understood, especially with the formation of a new category for metering data service provider (electricity) which may also be incorporated into further gas Rule Changes.

COST-SMEARING IMPLICATIONS FOR THOSE FACING HARDSHIP

The focus of the vast majority of recognized consumer advocacy input from various funded entities on hardship, as are jurisdictional consumer protection provisions (such as Victoria's Wrongful Disconnection provisions and EWOV's limited role under highly restricted charter and constitutional limitations.

I have absolute empathy with groups of end-consumers of utilities and other goods or services facing hardship and have contributed my own small share of input into those client groups.

However, I am also empathic to the needs of the general population not facing hardship, small businesses and even larger businesses, since philosophically I believe that all consumers of goods and services deserve to be catered for equitably with regard to their specific and general rights, including those under the common law, and with particular regard to contractual rights.

For those reasons I am absolutely philosophically committed to provisions within the generic laws and other provisions that recognize not only the specific needs of those facing hardship either ongoing or temporary, but to the needs of the entire Australian population as consumers of goods or services of any description.

In addition I am committed to the fundamental principles of corporate social responsibility and corporate ethical conduct, as well as to the forgotten original principles of national competition policy as upheld by Panel Members of the Senate Select Committee on Competition Policy (2000) (including Graham Samuel, AO, Chair ACCC and Dr. S. Dovers) as cited in some of my public submissions to consultative arenas including to the Productivity Commission's Review of Australia Consumer Policy Framework 2008 (subdr242parts1-5, 8).

My suggestion for exemption from any cost-smearing exercises undertaken were intended to extent to all those facing hardship, not just as a consequence of , not just as a consequence of RoLR events.

COST-RECOVERY PRINCIPLES GENERALLY

Finally I express grave concerns about the direction that cost recovery principles are taking as illustrated by Rule change after Rule Change. I site one below from the AEMO/AEMC standpoint.²¹⁶:

8.1 Rule Change proponent's view

²¹⁶ AEMC/AEMO Draft Rule Determination National Electricity Amendment (Cost Recovery for "Other" Services Directions Rule 2010
<http://www.aemc.gov.au/Media/docs/Draft%20Rule%20Determination-2c25d592-4817-4131-bae1-b1c77ea6bf1b-0.PDF>

The Rule Change Request addresses the recovery of costs from market participants by introducing regionalisation of cost recovery for “other” directions. In AEMO’s view, this establishes a more appropriate degree of consistency between the three categories of direction, and “promotes a more appropriate allocation of compensation costs between regions and ensures costs are passed through to Market Participants who benefit directly from consequences of the direction”.^{217/23}

In response to the NGF’s alternative approach to the issue, AEMO questioned the NGF’s statements regarding customers exclusively carrying the recovery of compensation costs for ancillary services, and that pricing and compensation in the event of a market intervention are based on the concept of leaving generators unaffected by the intervention.

8.2 Stakeholder views

In its 24 August submission, the NGF argued that that the outcome of the application of the existing framework for cost recovery – namely the vast majority of directions being considered as “other” services – “has not been in accordance with the intention of the Rules”.^{218/24} The NGF proposed the introduction into the Rules of a clarification of the circumstances in which AEMO may classify a direction as an “*other*” service. This guidance, which would result in the bulk of directions classified as directions for energy, would shift responsibility for funding compensation from generator and customers to solely customers. The NGF contends that this shift to recovery solely from customers is appropriate, on the basis that:

- The Rules provide for recovery of costs arising out of energy or MAS directions to be carried exclusively by customers, reflecting the fact that directions are generally for the benefit of customers only (ie by avoiding the need for load shedding).
- My concerns are extensive and embrace current regulatory determination access proposals that expect to make full cost recovery for the expensive replacement and maintenance of metering infrastructure that is not required in any context for the proper assessment of gas or electricity consumption (see extensive discussion re jurisdictional “*bulk hot water policies*” wherein water meters are being used with policy and regulator sanction to calculate deemed gas or electricity usage by end users of heated water of varying quality without any supply of energy through “*flow of energy*” to their residential premises. To my way of thinking this represents exploitation.

See submission of UnitingCare to AER

[Electricity distribution networks UnitingCare submission](#)

²¹⁷ ²³ Cost Recovery for "Other" Services Directions

²¹⁸ ²⁴ NGF submission, 24 August 2009, p. 2

I cite from J. E. Cameron's views on sustainability and triple bottom line parameters

Auditor General Victoria. (2004) Beyond the triple bottom line. Reporting on sustainability Occasional Paper (J. W. Cameron)

Meanwhile I refer to the words of a previous Victorian Auditor-General, J. W. Cameron Foreword in his Occasional Paper concerning triple bottom lines²¹⁹ and quote this directly to reinforce the principles that Australia should be embracing in every move to improve consumer protection and improved market functioning. He refers to the three pillars of sustainability as being environmental, social and economic.

In referring to wholistic approaches on p31 Cameron speaks of says that industrialized countries like Australia

"...are increasingly recognising that economic wealth alone is not an adequate measure of a society's development."²²⁰ In response to this shortcoming, several measuring and reporting projects augmented the concept of economic development with environmental and social considerations.

In his forward on page 3 Cameron discusses triple bottom line reporting as follows

FOREWORD (p3)

Sceptics might say that triple bottom line reporting is just the latest management fad. I see it rather as the tip of an iceberg. Beneath the calls for triple bottom line reporting is a groundswell of support for the larger idea of sustainability. What is this idea? What is driving it? What are its implications for the Victorian public sector? And how should we respond?

This paper sets out my Office's views on these questions and connects readers to the research we conducted to develop our views.

²¹⁹ Beyond the triple bottom line (2004). Reporting on sustainability Auditor General Victoria. Occasional Paper (J. W. Cameron)

http://archive.audit.vic.gov.au/op01_sustainability.pdf

"The terms 'sustainable development' and 'sustainability' are used in various ways, sometimes interchangeably. In this paper, sustainable development refers to economic development that is environmentally and socially sustainable (as defined in the 1987 Brundtland report2). Sustainability refers to the broader concept of balancing the environmental, social and economic concerns relating to any issue.

This wider scope means that the concept has a broader applicability in the public sector, particularly in the strategic planning area."

At the global level, efforts have been made for more than 30 years to integrate economic development with social and environmental concerns (Figure 1). Today's concept of sustainable development can be traced back to the 1987 World Commission on Environment and Development, and its influential Brundtland report.

²²⁰ Hart, M (1999) Guide to sustainable indicators 2nd edn Sustainable Measures Inc. Andover c/f Cameron, J. W. *ibid*, p35, citation 73 Notes

We all find it easiest to work with concepts that are clearly defined, stable and easy to measure. Sustainability has few such attributes. It has no universal definition, and has changed shape over time in tune with community demands.

It is multifaceted, and the relationships between its components are as important as the components themselves.

Clearly, sustainability is difficult territory, both for public sector managers and for auditors. However, it could also be a powerful stimulant for public sector performance. This paper exhorts public sector agencies to re-examine and improve their current performance measurement and reporting practices. It also provides an insight into how my Office will approach auditing sustainability initiatives in the Victorian public sector.

The paper pays particular attention to measuring and reporting, for two reasons. First, they feature heavily in the sustainability arena where they are used to drive performance improvements and pursue accountability. Second, it is my Office's role to audit the effectiveness of Victorian public sector programs and assure the accuracy of their public reports. We therefore have a special interest in measuring and reporting.

Multilateral organizations such as the World Bank,²²¹ the United Nations,²⁴ the Organization for Economic Cooperation and Development²⁵ and the International Labour Organisation²⁶ recognise institutional and governance pillars.

*The **institutional** pillar covers the 'formal and informal civic, political and legal arrangements that make up market activity and civic life.'²⁷ The **governance** pillar covers efforts to achieve an 'informed, pluralistic and involved society but with shared basic norms, standards and aspirations.'²⁸ Some agencies treat these two dimensions as processes for pursuing the three main pillars. (p14)*

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²²¹ www.worldbank.org. Cited from *ibid* Cameron JW (former Victorian Auditor General) 2004) citation 23

Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn's PowerPoint presentation at the World Forum on Energy Regulation, Rome Sept 2003 *The Right to Service – are Universal Service Obligations compatible with effective energy retail market competition?* Tamblyn World Form of Economic Regulators Rome 2003) (Dr. Tamblyn is now Chairperson of the AEMC. From 1 July 2010 he will be replaced as Chairperson by John Pierce, currently Secretary of the Dept of Energy and Resources).

Finally, I refer to the statements made by Mr. Knuth during the debate over the Second Reading Speech of the (then) Treasurer, now Premier of Queensland, The Hon Anna Bligh, MP, in relation to the Energy Assets (Restructure and Disposal Bill 2006²²² and his concerns over costs implications for the ordinary Australian.

“Mr KNUTH (Charters Towers—NPA) (12.35 pm): The Energy Assets (Restructuring and Disposal) Bill 2006, introduced by the Treasurer, deals with emerging issues within the Energy portfolio.

It gives me great pleasure to address this bill as I rise for the first time as shadow minister for the Energy portfolio.

The energy industry restructuring process has been a complex and staged process that has previously involved the separation of the electricity generation transmission and distribution components of the industry from the government owned monopolies that previously ran the whole system.

The point of this process is for the government to prepare the energy distribution components of the industry for privatisation and ultimate sale. The bill will allow for the preparation of the packaging process to occur within a time frame that is intended or supposed to achieve the maximum financial return for the state.

²²² Second Reading Speech The Hon Anna Bligh (then Treasurer now Premier of Queensland) “*Energy Assets (Restructuring and Disposal) Bil*”l, pages 1 and 2. Hansard Wednesday 11 October 2006. See also First Reading Speech August 2006. file name bli2006_10_11_38.fm
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_12_WEEKLY.pdf

Discussion was continued the next day 12 October

Refer the whole transcript the following Queensland Hansard pages are relevant: 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction) 231, 559. See views and concerns raised including from Dr. Flegg about the rushing of the debate of such importance; and of Mrs. Cunningham regarding the provisions regarding appeal and future sales without recourse to Parliament.

Refer to submission by public housing tenant Queensland Mr. Kevein McMahon and his submission to the NECF2 Package (March 2010) now also shown as sub 46 on the Senate Economics Committee website TPA-ACL Bill2), after I had analysed this submission and its implications for those living in public housing disadvantaged by the BWH arrangements. See my submission to the Senate ACK-TPA-Bill2 25 and appendices

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Jemena (JGN) Revised Gas Access Proposal 2010-2015
Further open s comment and supporting data with several appendices
re JGN's further submission(s) of 18 May 2010
and principles behind AEMC's Rule Change Proposal ERC 0092 under the NER
(with possible extrapolation to NGR) – and other related determinations
Prepared also for multiple other arenas
Madeleine Kingston, Individual Stakeholder

172 Energy Assets (Restructuring and Disposal) Bill 12 Oct 2006

In expressing concern on a number of issues associated with the privatisation of Queensland's electricity retail supply industry, I am very keen to seek the Treasurer's assurances on a number of matters, especially those involving ordinary electricity consumers in rural and regional electorates such as mine. For the most part, they will be among the 600,000 or so consumers not serviced by the new privatised energy entities that will operate in the full retail competition market after 1 July 2007. The government has recognised that some parts of the retail energy market are simply never going to be profitable enough to be attractive or viable for private sector operators.

From the briefing on the bill provided by Treasury, my understanding is that there will remain approximately 600,000 retail energy consumers who are mostly current Ergon customers whose retail energy needs will continue to be met by an energy entity that is a government owned corporation. By necessity, this GOC will need to be funded as part of the government's community service obligation. It will not be in the position to deliver a profit to the government for reinvestment in its infrastructure base.

I respectfully ask the Treasurer, in her summing-up on the debate of the bill, to outline for the House how she will ensure that those 600,000 electricity consumers who will need to depend on the government's own electricity entity will be adequately provided for. This is a major issue for constituents in my electorate of Charters Towers and, I am sure, for many others in remote parts of the state.

In raising this issue I convey to the Treasurer in the strongest and most sincere terms that I am not over-dramatising or exaggerating the importance of this matter to people in rural, regional and remote parts of the state.

There is a world of difference between the profitable electricity market of the southeast corner of the state which, through this bill, is being groomed for privatisation and the market provided by my constituents.

For the benefit of this House, I would like to inform members firsthand of some of the harsh and expensive realities involved in being connected to an electricity supply in rural and regional Queensland.

I shall share the experience of one of my constituents who resides on a property in Hidden Valley. This constituent received a letter from Ergon Energy dated 29 September 2006 thanking him for his request for Ergon Energy's network connection service to provide an electricity supply to his premises. The letter includes a quotation for this connection service, which requires a customer contribution of \$225,000.

That is not an amount one would expect to pay when moving house somewhere in south-east Queensland. However, the quotation does include an Ergon Energy contribution of a lousy \$11,000.

Certainly, those who have an acute interest in infrastructure and privatisation have been deprived of the opportunity to participate in this debate."

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CONCLUDING REMARKS

Increasingly at least within the arena of energy, there has been a trend to relentlessly adopt or propose cost recovery principles and mechanisms that are not transparent; that refer to identified “other services” that are not either specified in or cross-referenced to industry-specific provisions or in generic laws; and which imposed unilateral burdens of unacceptable and in some cases completely unnecessary and unwarranted cost-recovery for expensive replacement and maintenance of infrastructure that is extraneous to and entirely unnecessary in the calculation of actual consumption of energy.

The “*bulk hot water arrangements*” represent an excellent example. Proposals by distributor(s) to replace ageing water infrastructure in the context of energy provisions and cost-recovery phenomenal sums from end-consumers of utilities who do not even receive energy to their abodes. Mention has been made of metering infrastructure well over 25 years old; of safety and fire risks occasioned by infrastructure that has simply not been maintained, and of replacing water meters with RF heads to facilitate remote reading of water volume consumption when trying to calculate actual or deemed gas or electricity usage. It does not take a scientist or safety expert to work out the implications involved.

All telecommunications facilities including those associated with grids and smart meters of any description should be undertaken under stringent oversight. Smart grid and smart oversight should be undertaken by a single body with input from the National Measurement Institute.

The governance leadership and oversight required for the mandated Victorian smart meter roll out was not found to meet acceptable standards, and neither was the economic technical, consultation or consumer protection case made out, in the opinion of the Victorian Auditor General in his damning November 2009 Report.

The roll-out continues, other states will no doubt emulate and the MCE, seen by many to be Victorian-driven will continue to be influenced to accept proposals that may not meet minimal standards in formal auditing terms, nor the expectations of the community. Whilst these sound harsh reflections they need to be heeded.

Consequently, in the name of “*good regulatory practice*”²²³ in the alleged and unproven “*long term interests of consumers*” exclusively using “*economic efficiency*” yardsticks incorporated economic regulators and rule makers, and other policy makers within a largely corporatized public service, often with blurred demarcation; and frequently oblivious to accountabilities or the need for proper collaboration with other regulatory schemes, government bodies, the not-for-profit sector and other individual stakeholders (such as myself).

Extended consultation processes over months and sometimes years (see for example the NECF2 package contemplated over some 14 years and still deemed to be deficient in operational detail, clarity, consistency and consumer protection), does not equate to effective dialogue. In my personal opinion and those of many others consultation across the board seems to have been below standards of community expectation, especially in relation to policy and proposed legislation. This has had flow-on effects with regulatory practice and decision-making.

It is my hope that in highlighting these issues the AER, in consultation with the ACCC will see that the issues I have raised are indeed valid to the JGN proposal and to all other gas and electricity regulatory determinations in all states in relation to the bulk hot water arrangements in particular, but also in relation to what is fair and reasonable when determining the additional costs of outsourced services that are ultimately imposed on consumers..

The consequences for actual rather than perceived consumer protection are far-reaching.

This brings the arguments back to whether energy regulations in particular are consistent with the national generic objections that extend much further than economic efficiency principles adopted in the alleged “*long term interests of consumers*” and goes to the heart of consumer well-being and effective participation in competitive markets, in which the confidence of the entire marketplace is secured.

As to other components of a well-functioning economy – my firm view is that decision making processes and practices, governance, leadership and evaluation of workability of policy and regulation across the board are long overdue for re-examination.

I again point out that there are a number of matters on foot in the private courts challenging the contractual and trade measurement arrangements and associated billing arrangements and disconnection practice (of heated water supplied in water service pipes) in place in relation to bulk hot water arrangements.

²²³ Refer for instance to AEMC/AEMO Draft Rule Determination National Electricity Amendment (Cost Recovery for “Other” Services Directions Rule 2010
“*Conclulsion 6.4 The changes proposed in the Rule Change Request would address the issues identified by AEMO by putting in place regionalisation of cost recovery. It would also remove the now redundant reference to the fixed component of participant fees, promoting good regulatory practice*”

Regardless of any perpetuated limitations within jurisdictional or national energy and water policies – decisions by judges within the open courts cannot be pre-empted especially in relation to the fundamentals of contractual laws and common law provisions. It is misguided for any instrument to preclude private action in the open courts.

I have highlighted the numerous concerns - which I have already made public. I intend to raise my concerns widely in this and related matters not only in relation to the Queensland situation but what may be happening in other States.

I have many concerns about privatization, sale and disaggregation of assets in Queensland, especially in relation to energy.

Some of these have been raised publicly in the context of formal submissions, principally to energy arenas. I will spare everyone the finer details here but would like to pursue the matter further – in arenas where I may expect action.

a) the Ministerial Council on Energy (MCE), notably Response to National Energy Customer Framework (NECF2), to be rubber-stamped through the South Australian Parliament as the proposed national template legislation to be known as National Energy Rules and Laws.

b) Australian Energy Regulator (AER) (current deliberation on Jemena's Revised Gas Access Proposal for the 2010-2015 regulatory period a decision which will have major impacts in terms of a precedent-type decision). Similar concerns relate to asset management arrangements by other providers of energy in several states.

See also my submission to the Senate Economics Committee's current Inquiry into Consumer Law: Trade Practices Amendment (Australian Consumer Law) Bill2), currently under consideration.

I have in addition written to each Member of the MCE and believe that the SA Parliament, who will be asked to pass proposed national energy laws this Spring should scrutinize certain aspects of these provisions carefully.

Other states followed Victoria's suit adopting these legally unsustainable provisions and applying them discrepantly in different states.

Cursory research has produced some hard evidence to substantiate my concerns generally – which I believe should be made the subject of a public enquiry, both in relation to the adoption of the guidelines and what may lie behind them.

See also the public submission of a Queensland citizen impacted by flawed policies. This may be found as one of two individual stakeholder submissions to the NECF2 Package in March 2010, the other being mine. (March 2010).

Though recognizing that the matter upon which the AER is on the brink of publishing a final decision regarding NSW the matters cut across borders and particularly affect monopoly-like situations for distributions and host retailers as incumbents in relation to implementing policy arrangements either tacitly or explicitly endorsed within codes and guidelines – so simply by ignoring what is happening in the marketplace not only in relation to consumer detriment for particular classes of individuals; but for the entire population who inherit unnecessary costs in relation to alleged supply of energy when non is delivered; as well as inflated costs for metering data services associated with the maintenance of water infrastructure, whilst purporting to be operating within energy laws and those with responsibility for energy policy and regulation.

The matters I have raised have widespread and far-reaching implications not just for consumers but for the manner in which regulation is perceived to be functioning appropriately within Australia, for the economy at large and for a host of other issues too many to mention.

My interest in this area has not waned. I note that many stakeholders responding to the Senate Inquiry TPA-ACL have reflected some of my concerns about carving out of industry sectors from the full application of generic laws. I have pointed out the findings of Professor Stephen Corones and court decisions referred to by him.

My interest is not limited to consumer guarantees regarding security of energy supply issues and existing case law, but to many other matters in which policy makers, rule makers, regulators and others appear to have effected a re-write of laws sanctioned or intended for sanction by Parliament.

I am most concerned that so many decisions are made without Parliamentary section, and have questioned the impacts of constitutional powers vested in Ministers which can give rise to creeping erosion of consumer rights and of the rights and responsibilities of other stakeholders.

As to confusion that appears to have arisen regarding the perceived powers under energy laws to sanction energy price increases when none is supplied (for example the grossly unfair bulk hot water arrangements wherein hot water flow meters and cold water meters are effectively posing as gas and electricity meters; wherein energy providers also owning and maintaining water meters are encouraged under existing Codes and implicit endorsement under national energy laws to believe that access arrangements and cost determinations regarding energy supply can include massive and costly upgrades to water meters, where these instruments cannot possibly in a legally traceable way measure energy consumption - it is heated water as a composite product that is supplied to end-users in multi-tenanted dwellings.

The metering and data services provided, if they can be seen as valid at all, are provided to developers and Owners Corporations not to end-users of centrally heated water that is reticulated in water pipes. Jemena (JGN) in its gas access proposal has attempted to justify upgrade to water meters allegedly as "*part of the gas network*" - a scientific impossibility, and to prepare for remote readings through "*smart-metering type technology*" which may ultimately have implications for grid technology. Though grid technology metering - a communications field is now under the control of the Department of Climate Change and Water, I note that responsibility for smart metering has been retained by the MCE. In my opinion the two cannot be properly separated.

Compatibility of communications; inter-operability between metering equipment and grids, (including for water grids) and many other considerations arise.

As to continuing to implicitly endorse the use of water meters as substitute gas and electricity meters this concept is ludicrous and rests with flawed policies initiated originally by the Victorian Regulator Essential Services Commission and copied in other states in varying degrees, producing further confusion, inconsistency and regulatory overlap across the board. I have also raised concerns about any warranties and guarantees that were made at the time of disaggregation of assets that may have impacted adversely on consumers and adoption of best practice. I have directly sent to the Senate shard data in support of these concerns and would be happy to foreword also to the Treasury under separate cover.

There are implications not only in terms of cost which under current cost recovery models lies with the end-consumer of utilities in the end, whether private party or business

Providers are seeking to extend their product mix in a monopoly market under energy laws where no protections whatever exist and where contractual arrangements defy the most fundamental precepts of contractual, common law and trade measurement provisions in intent, spirit and letter.

Unless these matters are appropriately addressed within generic energy and water provisions and trade measurement provisions, to say nothing of building codes; tenancy provisions and a host of others, how can fairness prevail, including with regard to substantive unfair terms encapsulated in codes and guidelines or other provisions be effected?

It is in that context that I again bring these matters to the attention of several agencies, parliamentarians, community organizations and individual stakeholders.

I have begun to make my concerns very widely known beyond public consultation arenas.

For such reasons I refer again to the *Queensland Energy Assets (Restructuring and Disposal) Bill 2006* passed by the Queensland Parliament Legislative Assembly and reported in Hansard, Qld Parliamentary Library Second Reading Speech by The Hon Anna Bligh (then Treasurer now Premier of Queensland) “*Energy Assets (Restructuring and Disposal) Bill*,²²⁴” pages 1 and 2. Hansard Wednesday 11 October 2006. See also First Reading Speech August 2006. file name bli2006_10_11_38.fm

²²⁴ Legislative Assembly Parliament of Queensland, Hansard 11 and 12 October 2006 First and Second Reading Speech, especially pages 1 and 2 regarding warranties and guarantees offered to the purchaser of certain contestable and non-contestable assets the latter including to “bulk hot water provision and the captured monopoly clientele who receive not energy but heated water in water infrastructure

See whole transcript the following Queensland Hansard pages are relevant: 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction) 231, 559. See views and concerns raised including from Dr. Flegg (Lib Moggill) about the rushing of the debate of such importance; and of Mrs. Cunningham, Independent regarding the provisions regarding appeal and future sales without recourse to Parliament

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_12_WEEKLY.pdf

I cite “Mrs. Cunningham: However, there are a few issues of concern that I want to raise. There is clause in this legislation that removes the ability of decisions made under this legislation to be reviewed, including judicial review. In our original briefing I was advised that that in part was to have regard to the caretaker convention should an election occur before this bill was fully enacted. Given that the election has been completed, I question why that condition has to be reinserted to the same extent as it was previously or whether there are other purposes for that non-reviewable clause to be included

“Dr FLEGG (Moggill—Lib) (11.58 am): I rise to speak to this bill, which relates to the privatization sale of extensive energy assets held by the state of Queensland. At the outset, I want to say that the government, by applying the guillotine to the debate of this vital bill, is insulting the people of Queensland”

Refer also to Body Corporate and Community Management and Other Legislation Amendment Bill (Qld) 11 October 2009, pp 68-70 and implications.

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf

Page 70 states that The *Body Corporate and Community Management Act 1997* (BCCM) regulates some 33,000 community titles schemes containing over 303,000 lots of units. It was estimated at the time that well over 500,000 Queenslanders live in apartments or units. In addition a significant proportion of Queensland’s estimated eighteen and a half million annual visitors and tourists choose to stay in community title apartments and units during their stay rather than hotels and motels.

Kevin McMahon’s publically available story indicates that he has battled long and hard against the odds to achieve fairness in provision for access to centrally heated apartment managed by BCCM. The arrangements made as a result of the Energy Assets Restructuring Bill, which was rushed through in a desperate hurry and considered by those passing the Bill to be “unusual” because of this, have hampered any scope to obtain justice in the calculation of equitable charges. The matter raises issues of parity also and as discussed elsewhere the legal and scientific unsustainability of the provisions for “*delivery of bulk hot water.*”

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Jemena (JGN) Revised Gas Access Proposal 2010-2015

Further open s comment and supporting data with several appendices

re JGN’s further submission(s) of 18 May 2010

and principles behind AEMC’s Rule Change Proposal ERC 0092 under the NER

(with possible extrapolation to NGR) – and other related determinations

Prepared also for multiple other arenas

Madeleine Kingston, Individual Stakeholder

Since these matters impact on other States in as far as precedents have been set for the manner in which energy and water infrastructure are conveniently lumped together when OPEX and CAPEX costs and Metering Data Service Provision is considered with respect to policy and regulation, and considering the thousands of end-users impact, to say nothing of the remainder of the population bearing through cost-recovery exercise every cent of expenditure unnecessarily incurred in these arrangements, it is time for a close look at the implications and ways in which parity, equity, fairness and appropriate policy practice and procedure may operate.

In addition the question of the nature of the arrangements made should be further explored in the public interest.

By providing information in this way, whether or not too late to minutely examine, I may be contributing to the level of transparency that should dictate appropriate dialogue between Governments, Parliaments in both Houses, and their wide stakeholder base, of which I am a private citizen with long-standing concerns and publicly expressed views about energy policy during the terms of successive governments.

I am not motivated by political goals but a genuine concern to make sure that the economy of the country is not further compromised.

As mentioned the substance of these concerns has been expressed by me repeatedly in the public arena, I have made no defamatory remarks and concerns are transparently provided for consideration and scrutiny, hopefully in time to prevent further disasters with hasty rubber-stamping of provisions that are not already enshrined in black letter laws.

One of these is the proposed National Energy Retail Law and Rules which have instructed retailers and other unspecified metering data providers (replacing agents and assuming liabilities from the AEMO), by virtue of National Electricity Rules that will be endorsed by virtue of provisions regarding Rule Changes and Rules within the NECF2 Package.

In Queensland changes to other provisions including under the Planning Department's regulations permit water to be sold as a commodity, whilst energy charges are imposed, calculations made in cents/litre and redress options non-existent

The Bill referred to is weighted in favour of the BCCM. Public tenants have little say and certainly with regard to the BHW arrangements no accessible rights at all.

^[1] See Minister Ellison: Sale of Queensland Government's retail energy assets

[http://www.minterellison.com/public/connect/Internet/Home/Expertise/Track+Records/TR+-+Sale+of+Sun+Retail+\(1+of+2\)+28/09/2009+last+accessed+2+June+2010](http://www.minterellison.com/public/connect/Internet/Home/Expertise/Track+Records/TR+-+Sale+of+Sun+Retail+(1+of+2)+28/09/2009+last+accessed+2+June+2010)

See discussion under "*Competition Issues*"

Refer also to Kevin McMahon's submission to the NECF2 Package as a victim of the bulk hot water policies and residential tenant of public housing authorities in Queensland. As also included as sub 46 to the Senate Standing Committee's Consumer Policy Inquiry TPA-TPA-Bill2, to which I have referred in several submissions and communications

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The requirement for energy retailers to abide by existing bizarre policy guidelines enshrined for example within the Victorian Energy Retail Code v7 (Feb 2010) 3.2 (bulk hot water provisions) will represent those amongst the most appalling in terms of best practice, scientific or legal sustainability.

Several other states copied the Victorian provisions put into place at the time that John Tamberly was Chairperson of the Victorian Essential Services Commission.

Sweeping these concerns under the carpet will ensure that they will rebound like a boomerang. Some eggs just cannot be unscrambled.

Other concerns relate to flawed protections, if any, against unacceptable rising energy costs, not only for those facing hardship.

Credit support arrangements; hedging arrangements' spot market operations; proper protections, energy efficiency policies, are all matters that appear to have been incompletely considered in the mad rush to meet deadlines, regardless of long-range economic consequences.

I invite further direct enquiry and can be reached by email or telephone. At any rate despite lateness I respectfully request that this documentation be placed on the AER website as additional material that may also be useful as accessible data for future deliberations in policy and regulatory matters. Similar material will also be to the AER and many others.

Regards



Madeleine Kingston

Individual Stakeholder

LIST OF APPENDICES

Separate .pdf documents

<p>Major Deidentified Case Study²²⁵</p> <p>Illustrating conflict over interpretation of contractual status, flawed policies seen to be driving unacceptable conduct, including alleged unconscionable conduct, misleading and deceptive conduct, harassment and coercion and the like. Poor redress options. Inadequate complaints handling</p>	<p>Appendix 1</p>
<p>Analysis of the <i>Gas Industry Act 2001</i> (Victoria) in relation to flawed interpretation of existence of any contract, deemed or otherwise</p>	<p>Appendix 2</p>
<p>OTHER CASE STUDIES APPENDICES</p>	
<p>Case Study per CUAC <i>Winters v Buttigieg</i> VCAT 2004</p> <p>Bulk hot water charges; inadequate redress</p>	<p>Appendix 3</p>
<p>Case Studies courtesy Tenants Union Victoria – open submission to ESC Small Scale Licencing Review 2006</p>	<p>Appendix 4</p>
<p>Further comment Tenants Union Victoria open submission to ESC Small Scale Licencing Review 2006</p>	<p>Appendix 5</p>
<p>Reproduced comments Tenants Union Victoria open submission to ESC Small Scale Licencing Review Draft Decision 2007</p>	<p>Appendix 6</p>
<p>Reproduced extract NSW Govt Tenants matter parks landlord prosecution <i>Fair Trading Act</i></p>	<p>Appendix 7</p>

²²⁵ Updated from version submitted to Senate Economics Committee’s Consumer Enquiry (TPA-ACL-Bill 2) (2010). Report completed. Bill passed. *Trade Practices Act 1974* to be renamed Competition and Consumer Law; and earlier versions submitted to the NECF2 Package and published on the MCE website

EXTRACTS OR COPIES OF LEGAL INSTRUMENTS	
Copy of <i>Electricity Industry Act 2000</i> (Vic) Ministerial Order in Council 2002 ²²⁶ Exemption Order (DPI Victoria) (re small scale licencing exemption)	Appendix 8
EXTRACTS PERTINENT PROVISIONS	
Comparative analysis trade measurement and energy provisions in relation to contract, inconsistency, legal traceability, consequences Work in progress document	Appendix 9
Extracts Trade Measurement guidelines and explanatory material	
NMI General Information	Appendix 10
National Measurement Amendment Bill 2008 Explanatory Memorandum	Appendix 11
COPIES OF PERTINENT SUBMISSION(S)	
Copy of correspondence to the AEMC dated 16 April 2010 re Rule Change Proposal ERC0092 Metering Data Services and Metrology Procedures (to be taken into account with Draft Decision submissions, in addition to material substantially similar to this submission)	Appendix 12
Copy of correspondence to the AEMC dated 27 April 2010 re Rule Change Proposal ERC0092 Metering Data Services and Metrology Procedures (to be taken into account with Draft Decision submissions, in addition to material substantially similar to this submission)	Appendix 13
Some Evaluative Theory Principles	Appendix 14

²²⁶ This instrument was intended as for short term transitory provision of electricity only embedded situations where actual flow of energy was effected to the party deemed to be receiving it, but where network ownership and/or operation changed hands and distribution was not effected by the original distributor. This raises liability issues and reinterpretation of the tripartite governance model. The AER will make piecemeal exemptions as requested