

2 Aug 2010

Telephone 9017-3127

Mobile 0425-335-32

[email: mk2711@bigpond.net.au](mailto:mk2711@bigpond.net.au)

Mr. Tom Leuner
General Manager Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

By email: AerInquiry@ aer.gov.au

Dear Mr. Leuner

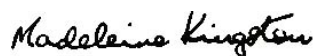
AER Approach to Exempt Selling – Issues Paper

I respond to the above issues paper in a limited way because of other commitments. Failure to comment on any one aspect of the Issues Paper does not imply endorsement.

Though this response raises many issues that have repeatedly been raised with the AER, ACCC, AEMC, MCE, AEMO, and other arenas, and though much of that material is re-submitted in the context of further material that has come to light, I make yet another attempt to call attention to my concerns, not only from the perspectives of residential tenants, but also that of many Owners' Corporation entities (Bodies Corporate) who either occupy as owner occupiers or lease out their property to tenants; as well as those of shop-owners and many others who are apparently frequently exploited by practices and policies adopted by market participants, either licensed or unlicensed, including "*metering data service providers*" (MDS), property developers and others who see room in the marketplace for practices that should not be condoned.

I ask that my entire submission and appendices be published transparently including such contact details as are provided.

Sincerely



Madeleine Kingston

Private Stakeholder

**AUSTRALIAN ENERGY REGULATOR
RESPONSE TO ISSUES PAPER
EXEMPT SELLING REGIME
MADELEINE KINGSTON
OPEN SUBMISSION¹**

August 2010

Available to be freely quoted with appropriate citation

Contact details to be retained on submission please.

Enquiries about this submission may be directed to:

**Madeleine Kingston (03) 9017-3127 or
email mkin2711@bigpond.net.au**

¹ Intended also for Australian Consumer and Competition Commission (ACCC), ASIC (in view of possible gaps in corporations law and illustration of continuing alleged market distortion); 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

CONTENTS

Covering letter

Please refer also to Submissions AER (JGN Gas Access Determination) 27 April (published), 27 May and 4 June 2010 (published as late submission) respectively to Jemena Gas Access AER Draft Decision including 15 unpublished appendices many substantially similar to those now attached with the current submission

Please also refer to submissions to AEMC ERC0092 Draft Decision Metering Data Service Provision and Clarification of Metrology Procedures dated 1 and 3 July, and previous correspondence 16 and 27 April 2010 respectively in the same matter all published on the AEMC website – direct links footnote refers²

Refer also to correspondence of 16 and 27 April already included with Initiation documentation, held back for consideration with responses to Draft Determination³

Contents	3-5
List of appendices	6-8
Disclaimers	6
Introduction	7-22
Some Jurisdictional Considerations	23-27
3 OVERVIEW OF EXEMPTIONS (AER Issues Paper 2010) (cover page)	28

3.1.3 EXEMPT SELLER AND CUSTOMER RELATED FACTORS

- ‘whether selling energy is or will be a core part of the exempt seller’s business or incidental to that business’
- ‘whether the exempt seller’s circumstances demonstrate specific characteristics that may warrant exemption’
- ‘whether the exempt seller is intending to profit from the arrangement’
- ‘whether the amount of energy likely to be sold by the exempt seller is significant in relation to national energy markets’
- ‘the extent to which the imposition of conditions on an exemption, or to which the requirements of other laws, would allow appropriate obligations to govern the applicant’s behaviour rather than requiring the applicant to obtain a retailer authorization’ **29-34**
- ‘the likely cost of obtaining a retailer authorization and of complying with this law and the rules as a retailer compared to the likely benefits to the exempt customers of the exempt seller’

² [Madeleine Kingston Main submission 1st July AEMC rule change ERC0092](#)
[Madeleine Kingston appendices 1-15 July AEMC - ERC0092](#)
[Madeleine Kingston addendum submission 3rd July AEMC-0092](#)

³ See emailed communications from AEMC dated 23 April and 5 May 2010 respectively, the first advising that the AEMC wished to regard correspondence of 16 April as belated response to initial consultation phase; the second advising that the AEMC would regard the correspondence of both 16 and 27 April along with responses to Draft Report

- ‘the likely cost of obtaining a retailer authorization and of complying with this law and the rules as a retailer compared to the likely benefits to the exempt customers of the exempt seller’
- whether the characteristics of the exempt customers or the circumstances in which energy is to be sold to them by the applicant are such as to warrant exemption’
- ‘the extent to which the imposition of conditions on an exemption, or to which the requirements of other laws, would allow the exempt customers access to appropriate rights and protections rather than requiring the applicant to obtain a retailer authorization’
- ‘any other customer related matter the aer considers relevant.’ each of these principles and factors is discussed further in section 4.

FURTHER COMMENT ON PARAMETERS OF THE PROPOSED AER EXEMPT SELLING REGIME 35-55

Sale of Energy 35-55

MCE/AER POLICY PRINCIPLES 56-131

Consistency in Framework

‘REGULATORY ARRANGEMENTS FOR EXEMPT SELLERS SHOULD NOT UNNECESSARILY DIVERGE FROM THOSE APPLYING TO RETAILERS’ 56

Choice 57-64

‘EXEMPT CUSTOMERS SHOULD, AS FAR AS PRACTICABLE, BE AFFORDED THE RIGHT TO A CHOICE OF RETAILER IN THE SAME WAY AS COMPARABLE RETAIL CUSTOMERS IN THE SAME JURISDICTION HAVE THAT RIGHT’

Redress 65-121

‘EXEMPT CUSTOMERS SHOULD, AS FAR AS PRACTICABLE, NOT BE DENIED CUSTOMER PROTECTIONS AFFORDED TO RETAIL CUSTOMERS UNDER THIS LAW AND THE RULES’.

SELECTED TENANCY ISSUES 104-118

Tenancy Laws in Relation to Cost Recovery

Some Owners’ Corporation Perspectives 119-122

Some Possible Solutions 123

Some Health Issues – Customer Focused 124-132

Selected Conduct Issues 133-150

including Conduct (see separate deidentified case study and other case studies as appendices). See also case studies, especially conduct relating to misleading conduct regarding measuring and consumption monitoring, content of bills

purporting to be supplying energy

SOME SPECIFIC COMPETITON ISSUES IMPACTING ON CONSUMER CHOICE AND PROTECTION	151-177
DISTRIBUTORS AND ASSET MANGEMENT OPERATORS	178-199
LIMITED DISCUSSION OF EMBEDDED GENERATION ISSUES AND RELATED CONSIDERATIONS FOR THOSE LIVING IN MULTI-TENANTED DWELLINGS RECEIVING NO ENERGY AT ALL ⁴	198-203
METERING DATA SERVICE AND METROLOGY PARAMETERS	204
<i>Context and Implications of the Proposed Rule Change</i>	205-211
<i>Metering Data Service and Metrology Procedures</i>	212-229
Discussion of some policy implications AEMC Rule Change Proposal ERC0092 ⁵ <i>As applicable to both electricity and gas in certain circumstances</i>	
SOME OPERATING AND CAPITAL EXPENDITURE CONSIDERATIONS	230-263
<i>Discussion of cost and selected competition implications</i>	
SELECTED DISCUSSION OF SOME METERING DATA PROVIDERS	264-272
SOME MONITORING ISSUES	273
SOME SPECIFIC COMPETITON ISSUES	274-313
SELECTED CONTRACTUAL ISSUES	314-344
FURTHER POLICY MATTERS IMPACTED	345
DEDICATED DISCUSSION OF IMPACT OF LEGAL METROLOGY ON CONTRACTUAL ISSUES –	345-362
CONTRACTUAL MATTERS IN NECF CONTEXT	363-389
DISTRIBUTOR-RETAILER-CUSTOMER RELATIONSHIPS	
SOME COMPARATIVE LAW CONSIDERATIONS	390-399

⁴ “Additional services”; “ancillary services”; “bulk hot water policy arrangements” “serviced hot water”
– as provided by energy providers licensed to distribute, transmit or retail energy not water products

⁵ As instigated by the AEMO

OBSERVATIONS AND CITATIONS RE LEGISLATIVE DRAFTING	400-410
DISCUSSION OF NATIONAL ENERGY RETAIL LAW AND RULES OBJECTIVE	411-
PERCEIVED FAILURE OF THE FRAMEWORK TO UPHOLD THE NATIONAL ENERGY RETAIL OBJECTIVE – SOME GENERAL COMMENTS	
Inconsistency	411-417
Lack of Clarity	421-425
Terminology in Objective and other clauses within the nef2 package and implicitly endorsed provisions	426-429
Application of the law national regulations and rules and selected comparative law considerations	430-431
Exclusion within the framework of whole segments of the Australian population from protection, including complaints and redress	432-434
Compromised well being of community	435-446
SOME LIABILITY ISSUES	447-450
STATUTORY WARRANTIES AND GUARANTEES	
LEGISLATIVE DRAFTING SOME OBSERVATIONS AND CITATIONS	451-457
COST-SMEARING IMPLICATIONS FOR THOSE FACING HARDSHIP	458-460
SOME COST RECOVERY PARAMETERS	461-465
SOME COMPETITION ISSUES, SPECIFIC AND GENERAL	469-550
CONCLUSION	547-556
LIST OF APPENDICES	557-558

LIST OF APPENDICES

Separate .pdf documents

Body Corporate Issues

Major Case Study 1 Body Corporate Entity Appendix 1

Tenant Issue

Major Deidentified Case Study 2⁶ Appendix 4

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 Appendix 2

Analysis of the *Gas Industry Act 2001* (Victoria) in relation to flawed interpretation of existence of any contract, deemed or otherwise Appendix 3

OTHER CASE STUDIES APPENDICES

Tenants Issues

Case Study per CUAC *Winters v Buttigieg* VCAT 2004 Appendix 3

“Bulk hot water charges”; inadequate redress Appendix 4

Case Studies courtesy Tenants Union Victoria – open submission to ESC Small Scale Licencing Review 2006 Appendix 5

Further comment Tenants Union Victoria open submission to ESC Small Scale Licencing Review 2006 Appendix 6

Reproduced comments Tenants Union Victoria open submission to ESC Small Scale Licencing Review Draft Decision 2007 Appendix 7

Reproduced extract NSW Govt Tenants matter parks landlord prosecution *Fair Trading Act* Appendix 8

⁶ Updated from version submitted to Senate Economics Committee’s Consumer Enquiry (TPA-ACL-Bill 2) (2010). Report completed. Bill passed. *Trade Practices Act 1974* to be renamed Competition and Consumer Law; and earlier version submitted to the NECF2 Package and published on the MCE website

EXTRACTS Of COPIES OF LEGAL INSTRUMENTS

Copy of *Electricity Industry Act 2000* (Vic) Ministerial Order in Council 2002⁷ Exemption Order (DPI Victoria) (re small scale licensing exemption) Appendix 9

EXTRACTS PERTINENT PROVISIONS

Energy Retail Code v7 (Vic) February 2010 extracts Appendix 10

Comparative analysis trade measurement and energy provisions in relation to contract, inconsistency, legal traceability, consequences Appendix 11

Work in progress document

NMI General Information Appendix 12

National Measurement Amendment Bill 2008 Explanatory Memorandum Appendix 13

COPIES OF PERTINENT SUBMISSION(S)

Copy of correspondence to the AEMC dated 3 July 2010 re Rule Change Proposal ERC0092 Metering Data Services and Metrology Procedures Appendix 14

Some Evaluative Theory Principles (upon request) Appendix 15

⁷ 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

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^{8/9} 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

⁸ 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

INTRODUCTION

Context of my involvement

I have been party to the public policy debate for several years especially in relation to consumer protection as they relate to energy provisions, trade measurement, generic and tenancy laws.

For some two years I was a nominated representative for a person with disability in vain endeavouring to uphold his enshrined whilst vigorously opposing policies and practices within the energy arena that show promise of become more entrenched and more inclined to deprive end-consumers of utilities of their rights and entitlements or from realistic opportunities to seek redress and justice. I refer those interested in the context to study the deidentified case study that is already in the public arena and now represents Appendix 1 with this submission.

I have had extensive contact with marginalized end-consumers in various settings and from different backgrounds as part of my voluntary community work; I receive many requests for assistance, even to the extent that I am sent energy bills and anecdotal stories of disadvantage or negative experiences from the perspective of end-consumers of utilities in the vain hope that I could somehow influence policy and rectify market power imbalances,; policies and practices that are unacceptable, exploitation of one kind or another, including the activities of parties purporting at the behest of Body Corporate entities to undertake metering data, billing and debt collecting practices that I believe would not be consistent with statutory or common law sanctions.

I have at first hand witnessed consumer detriments to both consumers and organizations, including not-for-profit businesses such as Body Corporate Associations, associated with energy policy and the particular policies that I wish to highlight that form part of the regulatory decisions being made in relation to access proposals, cost allocations, reference tariffs and retail market operations.

I have had direct and abortive dealings with poorly resourced complaints schemes with charters and jurisdictions too restrictive to address the range of concerns that I wish to raise; with one such scheme who has expressed conflicts of interest in dealing with the groups of end-consumers loosely referred to as “*embedded*” though those receiving heated water supplies that are centrally heated in multi-tenanted dwellings are not embedded consumers of energy at all – since they receive no direct flow of energy.

Whilst for electricity, in some circumstances, regardless of change of ownership or operation of facilities, a flow of energy does occur; in the case of this group that is not the case. In any case, there is no such thing as an embedded gas end-consumer. Either gas is directly delivered in gas pipes or it is not.

The apparent failure to understand the differences between gas and electricity markets has led to, in my belief, distortion of terminology and interpretation of laws, rules and provisions and to apparent disregard for the impacts of comparative law. Providers of goods and services are required to abide by all laws, not just those within energy.

I have grave concerns in terms of perceived lack of commitment to policies and regulation both within the energy and water industries to the highest standards of legal traceability in the trade measurement of utilities, and of possible short-sightedness when designing such regulations, given that many current explicitly or implicitly endorsed arrangements by energy policy makers, rule makers and/or regulators seem to be falling far short of best practice as well as being legally unsustainable.

There is a dearth of proper consumer representation. The Advocacy Panel has almost exclusively focused on electricity matters. It is extremely rare to see consumer organizations participating in seeking effective redress options or access to legal remedies. In fact even participation in the transparent consultative debate appears to have significantly dwindled in relation to energy – perhaps partly because of discouragement as to outcomes and partly because of poor resourcing.

There is a perception generally, mostly amongst those with a vested interest to emphasize the alleged benefits of on-selling of gas and/or electricity.

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

Shortly after the Victorian Ministerial General Order in Council for Exemption Licences was issued in May 2002 companies offering for example body corporate management, as well as property developers (one example being Inkerman Development and the service provider it appointed for the Oasis Inkerman Development in St Kilda and/or spruikers (one example being Henry Kaye) may have seen an opportunity to generate new income streams’ allegedly “*improve service levels*” and (potentially) *offer discounts to building owners and occupiers.*”⁹

The reality in many cases is far removed from these projections.

Unwarranted and unsolicited long-range service contracts for alleged sale and supply of gas, electricity, Internet and “*other services*” were imposed on unsuspecting purchasers were forced onto prospective purchasers, especially those buying off the plan strata titled properties.

I have direct evidence that offering free utility usage to large groups of owners or occupiers is infinitely cheaper in many cases than paying the “*metering data and other services*” fees, which many property developers and service providers often try to lock in with apparently unmonitored add-ons and CPI increases for up to two decades and more, whilst possibly profiting from retaining any savings made through wholesale purchase (at least of electricity) rather than passing on these savings.

My direct feedback from groups of property owners is that they see no advantage in these arrangements, and battle to attempt to extricate themselves from compulsory “*take-it-or-leave-it*” arrangements and/or unilaterally imposed alleged “*agreements*” along “*standard-term contract*” lines that would, if applicable to single individuals meet the criteria for unfair trade practices legislation.

⁹ See for instances the claims and interpretations made by Institute of Body Corporate Managers.
[http://www.ocv.org.au/pdfs/Guideline_ElectricityO"nSelling.pdf](http://www.ocv.org.au/pdfs/Guideline_ElectricityO)

This Issues Paper asks many pertinent questions with a policy slant towards opening up the market even further to three categories of provider:

- **Individual exemptions** providers whose applications for exemption will be considered (both for gas and electricity) on a piece-meal basis

Comment MK

Though there may be some circumstances where these are justified, these should be time-limited and carefully monitored

Besides anything else there are issues directly related to RoLR events and protections where many individual entities may not be prepared either for this or for the ravages of a volatile spot market

- **Deemed exemptions** for certain **classes of providers**, including, without necessarily obtaining the perspectives of those Owners' Corporations who have been stung and are entirely dissatisfied (I can name some) with current arrangements for alleged service provision and for unilaterally imposed alleged "service agreements" formed at the time that the Original Owner/Developer has charge of matters and appoints an "*Interim Body Corporate Guardian*" long before any prospective purchaser is in sight.

The same comments apply as for individual exemptions

In these cases, especially if a blanket policy position for deemed exemptions is to be taken for landlords and body corporate entities, care should be taken to ensure that misguided decisions to seek such exemptions are not based on the underlying goals of classes of services providers, including metering data service providers and asset management entities within and outside energy, to lock unsuspecting owners' corporations into unacceptable long-term alleged service arrangements that are unnecessary and expensive.

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

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

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

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

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

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

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

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

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

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

The same meter also provides gas for cooking purposes.

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

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

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

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

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

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

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

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

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

I note with concern that the views and interpretation of the original General Licence Exemption of Victoria issued by the Victorian Minister of Energy and sanctioned by the Governor-General in 2002 as expressed online by the Body Corporate Managers' Institute on the website of Owners' Corporation Victoria¹⁰

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

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

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

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

One such matter is the subject of legal dispute on a number of grounds including the alleged inescapable service arrangements made by service providers claiming to be providing energy services, using an interpretation of energy discrepant to that contained within the law, using instruments, units and scales of measurement not defined within the law; and forcing owners current and future on the same development into arrangements purporting to be beneficial to

¹⁰ See for instances the claims and interpretations made by Institute of Body Corporate Managers.
http://www.ocv.org.au/pdfs/Guideline_ElectricityOnSelling.pdf

them, but in fact over a period of some two decades (on the basis of challenged service agreements) actually costing the Owners' Corporation roughly double what they would otherwise be paying.

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

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

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

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

[Ministerial Order in Council May 2002 Electricity License Exemption Victoria](#)

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

[Ltr Minister for Energy Theophanous Victoria re Small Scale Licensing Exemptions March 2006](#)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I could say so much more. Suffice it to say in this initial submission that things are not what they appear to be. The Exempt Selling Regime, especially as previously operated and overseen by the Essential Services Commission Victorians from the outset been full of holes.

The parameters of the proposal and the initial policy stance of the AER, undoubtedly guided by the AEMC and/or MCE need to be further considered in the light of new case law and developments that ought to concern the entire community.

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

Scope of interest in this paper

It is disappointing to see that the AER is prepared to consider granting licence exemptions to several categories of provider and sanction to on-sell gas or electricity in a climate where the most vigilant care needs to be taken to ensure that exploitive practices and distortion of the intent of multiple provisions, including the proposed National Energy Retail Law and Rules encapsulated in the National Energy Customer Framework Package, the final version of which has not been transparently made available following the workshop for a held in Melbourne on 3 and 4 February 2010 at which I was present.

My concerns about embedded networks and exempt selling practices in certain contexts were consistently silenced to the extent that I managed during the second afternoon of the workshops to do more than touch on these.

I am also concerned that the exempt selling regime was not more robustly considered and aired in the context of the NECF2 package rather than as a response to an Issues Paper such as the one the subject of this limited response.

I have concerns about energy policy in several States including Victoria, Queensland, NSW, ACT and South Australia. These concerns are closely associated with policies for disaggregation and sale of assets, property development and asset management practices that are common practice but not necessarily consistent with a range of laws already in place and those proposed, including generic laws, tenancy laws, owners' corporations provisions; trade measurement provisions (proposed and pending lifting of remaining utility exemptions). In the case of Queensland certain warranties and assurances were made to purchasers of both contestable and uncontestable assets.

I have had occasion recently to write to the Prime Minister drawing attention in the first place to dissatisfaction with the governance and accountability of Queensland Premier, copying that correspondence to others including the Queensland Auditor General. Though the Queensland matters are in some ways unique there are similarities with regard to the adoption and application of certain policies that also apply to other States including Victoria, NSW, ACT, South Australia and perhaps Tasmania.

As to the inappropriate "*bulk hot water policies*" adopted in Queensland and in other states, apparently violating the fundamental principles of government and non-government owned monopolies – that is another story – see my widely published material within the public consultation arena. Otherwise contact me directly to ascertain what the concerns are about.

At a larger scale, these policies as adopted are contributing significantly towards detriments and alleged flaunting of existing legislative provisions including under s47 (exclusive dealings) of the *Trade Practices Act 1974*, which will be renamed *Consumer and Competition Policy 2010* when all amendments are complete.

I have uncovered alleged inappropriate market practices and conduct including certain billing practices undertaken by both licenced and unlicenced providers, incorporating those known as metering data service providers (MDS), especially within the energy arena, associated with policies perceived to be grossly flawed and am in the midst of exposing some of these practices with particular reference to Victoria's "*bulk hot water policies*" as impacting adversely on large sectors of the community. I have already extensively published on this issue in the course of my public consultation participation.

Metering Data Service Providers are a new category of provider as proposed by the AEMO, and the subject of a Rule Change Proposal by the AEMC, awaiting a final decision. The Draft Decision was published on 6 May. It adopted one of two options suggested by AEMO¹¹, being the one not recommended by this body. See their response, and the response of Integral Energy, who had sought independent legal advice from Blake Dawson, Solicitors, which they attached to their submission.¹²

Many issues that have repeatedly been raised with the AER, ACCC, AEMC, MCE, AEMO, and other arenas, and though much of that material is re-submitted in the context of further material that has come to light, I make yet another attempt to call attention to my concerns, not only from the perspectives of residential tenants, but also that of many Owners' Corporation entities (Bodies Corporate) who either occupy as owner occupiers or lease out their property to tenants; as well as those of shop-owners and many others who are apparently frequently exploited by practices and policies adopted by market participants, either licenced or unlicenced, including "*metering data service providers*" (MDS), property developers and others who see room in the marketplace for practices that should not be condoned.

The national energy laws and rules have failed to appropriately clarify matters that will continue to facilitate perceived distortions misinterpretations as well as unacceptable conduct. The AER is on the brink of further facilitating the granting of exemption licences in the on-selling associated with alleged sale and supply of gas and electricity.

Water meters are effectively posing as gas and electricity meters, whilst licensed and unlicensed providers normally known as "*Metering Data Providers*" are purporting to sell energy in calorific value, where for sale of goods, generic and energy laws the term energy means either gas or electricity.

Many States mimicked Victoria's inappropriate "*bulk hot water policies*" policies adopted in 2007, with Queensland adopting these discrepantly to most others, but in all cases the practices are unacceptable in terms of policy, consumer and business protection and compliance with various laws.

I remind the community of the track record of Victorian energy decisions and the scathing Victorian Auditor-General's November 2009¹³ in relation to the Victorian Smart Meter Roll-Out.

¹¹ [AEMO submission 1st July AEMC to ERC-0092](#)

¹² [Integral Energy submission 7th July to AEMC -ERC0092](#)

¹³ [Victorian Auditor-General Nov 2009 Report Advanced Metering Infrastructure Roll-Out Full Report 111109 AMI Full Report.pdf](#) (A damning report referring to poor governance, leadership and decision-making regarding the economic, technical case and compromised consumer protection issues

See also the Queensland Auditor-General's Report of 2007¹⁴ at the time of sale and disaggregation of energy assets, and to the record of warranties and assurances made to private parties purchasing both contestable and non-contestable assets

I refer to the summary by Gary Bugden of the Arrow Asset Management Case has implications for the whole of Australia.

See [Arrow Case Management Legal Precedent NSW Gary Bugden Summary.pdf](#)¹⁵

It concerns me greatly how easily the AER and others have been taken in by and pandered to monopoly-like energy providers and asset management providers linked to them. There is a big wide world out there of documented exploitation.

My limited kaleidoscopic view as a lone stakeholder who has persisted with the same issues for four years has taught me how much more there is to learn and how hopelessly inadequate the current policies, regulations and consumer protections appear to be.

Do I have any room to hope for improved vigilance, monitoring and consumer protection within statutory policies?

Or will it take multiple class actions before the open courts to achieve results. Is not the Arrow case sufficient in itself? What can the public rely upon in terms of a commitment by regulators to uphold the statutory instruments that they administer, or to more proactively investigate possible breaches when brought to their attention. And what of policy-makers, rule makers, industry-run, funded and management complaints' schemes purporting to adopt best practice in the case of the Energy and Water Ombudsman Victoria'; The following links may provide some insight into recent concerns, but new developments compel me to further iterate the unmonitored impacts of multiple energy and urban water policies. My plea to the ESC and equivalents in other states and territories; AER, MCE, AEMC AEMO ACCC and ASIC is to more carefully monitor what is happening in the marketplace.

¹⁴ [Queensland Auditor-General's 2007 Report Executive Summary](#)

¹⁵ Gary Bugden's name has been associated with strata titles since 1973. In the past 30 years he has actively participated in all sectors of the industry - as a strata manager, specialist lawyer, academic, development consultant, government consultant, author, commentator and law reformer. The breadth and depth of this experience has resulted in him being described as Australia's leading authority on strata titles. He practiced extensively in structured land titles and common interest subdivisions throughout Australia and the Asia-Pacific region. He undertook projects for the World Bank in Vietnam and Cambodia and was external consultant to the Vietnamese Government on its 1994 land law reforms. Following extensive overseas travel and research in the early 1980's, he pioneered air space development in Australia and was the driving force behind the introduction of community titles to this country. He was the external consultant to the Queensland Government on the 1997 community titles legislation.

That legislation was innovative in its departure from a generic regulatory approach to a more project specific approach. Gary has authored 3 loose-leaf services, a loose-leaf book and 3 other books on strata and community title management. He was a part time lecturer in strata titles at a Sydney Law School for some 9 years, served as National Editor of the Australian Property Law Bulletin for many years and has presented well over 200 papers at conferences and seminars both in Australia and overseas.

He retired from legal practice 5 years ago but has maintained his involvement in the industry through his writings, speaking engagements and strata related company directorships.

I refer in particular to a recent ASIC decision to suspend a certain property spruiker Henry Kaye from managing corporations for five years; to the joint venture by Inkerman Developments and the Victorian City of Port Phillip, and similar property developments in other states seeking to lock in for well in excess of two decades (though sometimes less) to service agreements forced onto unsuspecting purchasers of strata titled property for alleged provision of gas, electricity, water and heating services and other bundled services. The practices could be interpreted as breaches of s47 (exclusive dealing) of the *Trade Practices Act 1974* and of numerous other provisions

Energy policy makers, rule makers and regulators are oblivious to or disinterested in outcomes and impacts on the general community including residential tenants, shop-owners, owners' corporation entities and others.

I will be elaborating further but meanwhile the following links may be helpful to those wishing to explore the matter further.

[*Draft decision AEMC rule change MDS and metrology*](#)

[*Madeleine Kingston Main submission 1st July AEMC rule change ERC0092*](#)

[*Madeleine Kingston appendices 1-15 July AEMC - ERC0092*](#)

[*Madeleine Kingston addendum submission 3rd July AEMC-0092*](#)

[*Kevin McMahon main submission 3rd July AEMC-ERC0092*](#)

[*Kevin McMahon Supplementary submission 11 July to AEMC MDS Rule Change ERC-0092*](#)

[*AEMO submission 1st July AEMC to ERC-0092*](#)

[*Integral Energy submission 7th July to AEMC -ERC0092*](#)

[*Kevin McMahon Submission 8 March 2010 to MCE National Energy Customer Framework \(NECF2\)*](#)

[*AER Submission to National Customer Framework NECF2 see p3 Exempt Sellers*](#)

[*Madeleine Kingston Submission 2008 to ESC Review of Regulatory Instruments*](#)

I am aware of more than one legal matter on foot in the open courts challenging the precepts that have been adopted in the lucrative serviced hot water data metering provider monopoly and exploitive market.

The Exempt Selling Regime contemplated by the AER, presumably under the direction of the MCE and AEMC, and perhaps with input from the AEMO, as well as likely reliance on flawed Victorian provisions, especially given the Victorian dominance of policy issues needs to be extremely carefully considered and formulated. The AER has an opportunity here to gain some credibility – or not if these policies are at least adequate, nay they must surely be better than merely adequate?

The enshrined rights of those covered under contract and the common law cannot be stripped from them by mere statutory provisions. The worm will turn ultimately and will bring in its wake expensive and unnecessary litigation.

Consumers won't forever tolerate abuse of market power and misguided policies.

I can only begin to suggest that a Pandora's box of issues that appear to have been so incompletely considered in the formulation of state and territory national laws, either implicit or explicit, with such minimal consideration of the impact of comparative law.

For example, no single State or Commonwealth statutory provision will affect other rights or remedies.

Specifically, at the end of the day, even in the name of "*competition policy*;" or the alleged "*the best long term interests of consumers*" or any other such guise, under any circumstances; howsoever engrossed, structured, intimated or otherwise conveyed within such provisions, or for that matter terms of commercial agreement between one party or another, including between government authorities and other entities for example such a provision **WILL NOT**:¹⁶

- a) **affect or limit a civil right or remedy** apart from such an Act, whether at common law or otherwise'
- b) **exonerate from liability including under the common law** such recourses, including through, compliance with any given legislative Act or ancillary provision including, Code or Guideline or reference thereto within statutory provisions; generic, state or territory; industry-specific or otherwise; and irrespective of discrepancies; misinterpretations (for example deemed sale and supply of gas or electricity as commodities attractive the full suite of protections under multiple provisions) or any other energy form; or any other commodity or service to a customer (incorporated or otherwise)
- c) **hamper, restrict or remove civil or other rights or obligations under other statutory other provisions**, notwithstanding any misguided transparent or hidden warranties or guarantees (for example any warranties or guarantees entered into during the disaggregation of infrastructure or other assets)
- d) **over-ride recourse to seeking justice under enshrined rights** within the written or unwritten laws, including under the common law
- e) imply or create **limitations as to culpability and/or liability** by the mere existence of perceived exoneration under one enactment or ancillary provision (or for that matter terms of any commercial agreement, whether or hot between government authorities); including but not limited to for example to commercial agreements formed between government organizations during the disaggregation and sale of infrastructure assets;¹⁷ specific legal provisions under state, local government or federal laws; or generic laws;
- f) in any way **limit a court's powers** under the Penalties and Sentences Act (2) without limiting subsection (1), compliance with this Act does not necessarily show that a civil obligation that exists apart from this Act has been satisfied or has not been breached.

¹⁶ ¹ One example is the Energy Assets (Restructuring and Disposal) Act 2006 (Qld)
See Queensland Legislative Assembly, Hansard pp 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction, (then) Qld Treasure and Minister for Infrastructure) pp231, 559. 11, 12, 31 October 2006

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEEKLY.pdf
<http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2006/06AC042.pdf>

¹⁷ ² See for example the extraordinary and perhaps misguided arrangements, guarantees, warranties and assurances provided to purchases within the energy industry of energy (and impliedly other assets and/or client bases

I now refer to provisions currently operational in State and/or Territory jurisdictions. These issues are further discussed and analyzed in the appendices already submitted with my main submission to the AER in his Jemena Gas Networks (NSW) Pty Ltd Gas Access Determination¹⁸ and similar appendices (x15) to the AEMC's Draft Determination ERC0092 Metering Data Services Providers and Clarification of Metrology Procedures of 1 July 2010¹⁹ and under various headings including Contractual arrangements, and tenancy provisions.

I hope that this initial submission to the AER Issues Paper will help to highlight a range of issues that need far more scrutiny before a credible Exempt Selling Framework should be contemplated.

If lessons from the past are no use to us, why bother? The complete lack vigilance in collecting and analysing data about marketplace performance gaps to date has not assisted in structuring appropriate public energy policy,

Yet the Victorian industry-run and managed complaints scheme calling itself somewhat misleading "Ombudsman" (Energy and Water Ombudsman –EWOV) mounted a feasibility study on small scale licensing provision without choosing to share information, despite its public role.

In its response to the ESC's Small Scale Licensing Issues Paper 2006-2006, EWOV went out of its way to identify self-confessed conflicts of interest and apparent confusion over its role and loyalties, seemingly perceiving itself more as an industry association than an objective complaints scheme. But complaints scheme biased or otherwise is all that body could ever be.

It is a commonly held view that this body, believing itself to be "*independent*" and unaccountable except to its own Board merely on account of its separate legal identity appears not to have the skills-set, continuity of staff; jurisdiction charter, or importantly, motivation, to deal with the complexities of an evolving market-place and demands for minimal standards of consumer protection beyond the most basic

I have grave ongoing concerns about the objectivity of industry run and funded-schemes. Some function better than others, but at the end of the day the existing complaints-handling environment for energy and water is inconsistently applied, has many failings, cannot deliver community expectation; seems to be fraught with conflicts of interest and limited jurisdiction;

At the end of day some such bodies appear to pander to industry needs and pressures rather than taking a balanced and objective view. In fact some like EWOV express conflicts of interest especially in relation to those groups of providers not covered by "*membership categories*" under mandated requirements for belonging to a dispute resolution scheme.

This remains a grey area for which no policy position by the AER has been established in relation to the authorization or exempt selling regime.

It is not a good enough MCE policy position that only "*where practicable*" should consumer protection be proffered. All consumers and businesses should have access to affordable complaints redress. The current redress options under the charters, constitution and policy parameters of many if not all industry-specific complaints schemes appears to hamper and restrict smooth and proper access to fair and equitable complaints options.

¹⁸ [Madeleine Kingston Addendum Submission 4 June2010 \(with 14 appendices\) Jemena Gas Access Determination](#)

¹⁹ [Madeleine Kingston Submission 1 July 2010 to AEMC ERC0092 Provision of Metering Data Service Provision and Clarification of Metrology Procedures, Draft Decision \(6 May 2010\)](#)

As to reliance on generic laws, there would be some comfort in this were it not for policy stances often taken by bodies with the regulatory scope to vigorously enforce the laws they administer, but instead appear to have a written policy focussed on commitment by the parties in dispute under published conciliation policies. One such example seems to be Consumer Affairs Victoria (CAV). To my way of thinking such a policy has the effect of hampering access to justice by forcing conciliation.

Equally the brief of many industry complaints bodies like EWOV, somewhat misleadingly called Ombudsmen, have very limited jurisdiction at all to deal with many matters of valid complaint and can only make binding decisions where the parties agree, and then only in very limited circumstances.

I am by no means the first to comment on these issues.

I have direct experience and/or knowledge of such limitations and biases, including one case where the Chairperson of a Body Corporate Scheme housing some 160 owners/occupiers was unable a period of three years to obtain a timely and simple answer to a question about who the responsible energy retailer was. The excuse proffered was alleged “privacy issues.” Yet the proposed

Ultimately after some persistence and time-delay, and perhaps public exposure of deficiencies EWOV reluctantly provided the information sought as much for insurance as for other reasons.

My own direct experiences as a nominated advocate for particular disadvantaged end-consumer of utilities and water through the existing complaints system and statutory provisions over a period of some two years has been well-documented through published case study in the consultative arena.

In general limited charter and jurisdictions of industry-specific complaints schemes have hampered the delivery of at least adequate consumer protection in many cases. There is a general perception that the self-managed, self-regulating approach is of very limited value save in a limited number of circumstances.

Yet the proposed national energy laws and rules see it as desirable, but apparently not mandatory that access to adequate complaints recourses and affordable redress.

To my knowledge, beyond lip-service nothing at all has been done to address consumer protections gaps or the biases and conflicts of interests involved. The advent of a new category of metering data provider as proposed by the AEMO and on the likely brink of endorsement by the AEMC will further compromise consumer protection.

At the same time, with no documented record of how the market is function; with a history of excessive granting of exemption certifications to those purporting to be providing energy; apparently minimal monitoring and a monopoly-like market gaining increasing power, consumer protection within the energy arena particularly is almost non-existent, or at best of the poorest quality.

Yet an enhanced Exempt Selling Regime is contemplated. We all have good reason to anticipate further changes with anticipation.

I refer again to Peter Kell's views of half-baked self-regulation²⁰ at the time when he was CEO of CHOICE. He is now Deputy Chair at the ACCC and the public rarely hears from him. He had some interesting views to express about holding corporations to account and the value of self-regulation policies, as expressed in three consecutive years at National Consumer Congress events I still have those transcripts with souvenir value at least.

Where to from here? Consumer protection and market conduct become increasingly compromised whilst we hurtle into an abyss of uncertainty and poor confidence.

Sincerely

Madeline Kingston

Madeline Kingston
Private Stakeholder

²⁰ Kell, Peter (2006) Consumers Risk and Regulation. Speech at National Competition Council, Melbourne

SOME RELEVANT JURISDICITONAL CONSIDERATIONS

3.1 The AER's role under the proposed Energy Retail Law and Retail Rules

The Issues Paper defines the AER's role as an "*independent*" (referring to its incorporated legal structure under Corporations Law), statutory authority, whilst transparently admitting that it is an integral part of the Australian Competition Commission ACCC) under Part IIIAA of the *Trade Practices Act 1974* (Cth). (TPA)

This is a good start, since many organizations similarly structured in terms of legal entity, despite being formed under statutory enactments, believe themselves to be unaccountable, barring to their own Boards of Management, and presumably the statutory body administering corporations law under the *Corporations Act 2001*.

Most people are aware that there have already been extensive changes to the Trade Practices already reflects operational effect of those changes made under the *TPA (Australian Consumer Law) Bill 2010*. Some changes are yet to be effected. When complete, the TPA is to be re-named *Consumer and Competition Law 2010* effective from 1 January 2011.

Sometimes a perception arises amongst stakeholders that the dichotomy between the ACCC and AER may benefit from being more clear-cut

For example, in discussing the submission by TransGrid to the MCE during the consultation on the AER-AEMC-ACCC Memorandum of Understanding (MOU) Framework in April 2004, these crucial issues were raised and are just as relevant today, and in the context of this particular Issues Paper as they were over six years ago.

I quote directly from TransGrid's submission

In particular, is the apparent inconsistency between the proposals contained in the 'MoU' paper and the 'Streamlining the Code Change Process' paper, insofar as the ACCC's role is concerned with the Code change process. Whilst the effectiveness of the formal and informal linkages are integral to these proposals, TransGrid notes that, in the Code Change paper 'informal' feedback is expected from the ACCC (Step 2), yet it does not establish any obligation by the ACCC to provide more considered input (to the AEMC) with respect to TPA concerns.

In contrast, the MoU paper establishes an obligation on the ACCC to "promptly advise the AEMC.. [on competition or access issues] taking into account any submission received by the AEMC". To enable the ACCC to consider submissions received, this obligation must follow the first round of consultation with market participants, whereas the Code change process appears to anticipate that the AEMC will call for submissions based on ACCC advice.

Specific Concerns

- 1. It could conceivably be inferred from page 4 of the document that the AER will "share" staff with the ACCC. Such a proposal, whilst intuitively appealing, blurs the boundaries between the bodies and appears to be inconsistent with the notion of an 'independent' AER. Although the AER may provide input to ACCC inquiries, the 'sharing' of staff implies that the accountabilities of specific staff are split between the organisations. This is not a good governance model. It should be possible for the ACCC to have access to AER staff (on a formal arms-length basis) and still preserve a clear line of accountability of AER staff to the AER commissioners.*

2. *It should be emphasised that although the ACCC will hire AER staff, they may come from other regulators (as per Appendix 2, Ministerial Statement 11 December 2003)*^{1[1]21}
3. *TransGrid would suggest to the SCOs that to avoid confusion a clearer statement on the relationship between the AER and their role with respect to the TPA would be beneficial.*

A more accurate description on this issue could be:

“The responsibility for enforcing the TPA remains with the ACCC, and the AER may be called upon to provide analytical support to assist the ACCC in undertaking this role. [Note - The ACCC may also call on advice from other sources as well as/or instead of AER advice]”.

4. **Scope for review of MoU:** *The recitals should note that the MoU, in conjunction with the proposed Code change process, are designed to (inter alia) streamline the regulatory processes. If this is not successful, the recitals should note that the MoU and Code change process may be revisited and amended as necessary.*

Other Concerns

Both the MoU paper and the Code change paper fails to explicitly clarify which institution will have the likely responsibilities (presumably the AER) for key regulatory arrangements, such as the development of the “Regulatory Test” for electricity transmission. TransGrid notes that the MCE agreed to the following transmission policy principle in December 2003:

“A new regulatory test for transmission, to include full economic benefits of increased competition, to be implemented in July 2004”.

In light of the December 2003 MCE concerns about the current ‘regulatory test’ regime, which has been plagued with operational problems under the ACCC, it remains unclear as to which Institution will have carriage of this important issue under any new regulatory arrangement.”

I acknowledge the care taken by TransGrid through Kym Tohill as General Manager/Corporate Development to iterate concerns that reflect similar concerns by others, I endorse those concerns.

I am particular concerned that many decisions made by the AER, or by the AEMC and/or MCE, including in the context of Rule Changes and Code Change proposals, often initiated by the AEMO are taken with regard to the provisions of generic and other laws, including under trade practice provisions administered by the ACCC.

²¹ ^{1[1]} *“The proposed staffing arrangements will allow the AER and AEMC to be provided with the best available expertise from the ACCC, other regulatory bodies and elsewhere.”*

Increasingly erosion of the original intent of the revised generic laws to apply to all sectors in all jurisdictions has become eroded such that the energy industry appears to be not only out of sync with other provisions, but also seem to defiantly undermine enshrined protections for consumers and businesses in the name of alleged consumer protection and promotion competition. I discuss this further later, and also reproduce many sections already on the AER, AEM and MCE websites that are pertinent especially in relation to comparative law.

Energy Action Group's submission of 8 April 2004 to the same consultative process included the following remarks and concerns – which I also share and which remain pertinent in the current climate.

Most of the consumers who have been directly involved in issues around the National Electricity Market have been frustrated by systemic problems around the relationships between NECA, NEMMCo and the ACCC. The decision to use of light hand incentive regulation has in turn strongly favoured the transmission and distribution network service providers. The use of Vesting Contracts then generous retail Standing Offers and inherent transmission network constraints has acted to protect both generators and retailers. (The major problem relating to Victorian and South Australian generators and several pipeline owners was in the main caused by the new owners over paying for the assets they bought or by factors external to the Australian electricity and gas markets.)

It is important for the MCE and the SCO to recognise that the entire process has been underwritten by electricity and gas consumers and they have been excluded from almost all processes and decision making. The MOU between the various regulatory bodies needs to provide for greater consumer involvement particularly at the oversight and decision making levels of the AEMC, AER .and ACCC.

Whilst there are clearly multiple expensive consultations undertaken by each of the bodies named, frequently with competing deadlines and short frames, it has not been my experience during the four years and more that I have participated in the policy debate through consultative arenas that consumer perspectives or the perspectives of either large or small businesses are taken into proper account or reflected in the policy decisions made.

Merely conducting consultative dialogue to satisfy the requirement to do so, does not equate to meaningful dialogue, especially in the light of a tendency to pre-determine outcomes

I now move on issues specific to the AER's expanding role and functions and the extent to which some functions have or will be transferred to the AER or alternatively will, at least in the short term, remain with the ESC

Transfer of functions from Essential Services Commission of Victoria (ESCV) to AER

I note from the AER website as follows:

From 1 January 2009, the AER is the economic regulator of Victorian electricity distribution network service providers (DNSPs). The DNSPs in Victoria are CitiPower, Powercor, Jemena, SP AusNet and United Energy.

These functions were formally the responsibility of the Essential Services Commission of Victoria

[The AER's role in Victoria for electricity distribution](#)

[Rollout of Advanced Metering Infrastructure \(smart meters\)](#)

[Victorian AMI cost recovery](#)

[General background of transfer of functions from ESCV to AER](#)

[Complaints - Victorian electricity customers](#)

[Information about the Energy & Water Ombudsman Victoria \(EWOV\)](#)

[Power disruption—Victorian electricity customers](#)

[Public lighting regulation in Victoria](#)

[Interval meter reassignment requirements](#)

[Service target performance incentive scheme for Victorian electricity distribution businesses \(2006-10\)](#)

Decisions regarding DNSPs applications for exclusion from the service target performance incentive scheme.

[Performance reports of Victorian electricity distribution businesses](#)

[Benchmark upstream augmentation charge rates for Citipower's network](#)

[CitiPower's and Powercor's proposed security fee scheme](#)

I note as follows also from the AER website

Background on the AER's new functions

The proposed new Law and Rules being implemented as part of the National Energy Customer Framework will transfer non-price distribution and retail regulatory functions from state and territory jurisdictions to the AER (except in Western Australia and the Northern Territory in respect of electricity). Effective transfer of these functions is likely to occur on an incremental basis from the middle of 2011.

The AER's responsibilities under the new Law and Rules will include:

- *Providing for retailer authorizations and exemptions*
- *Approving retailer customer hardship policies*
- *Compliance and performance monitoring and reporting*
- *Administering a retailer of last resort scheme*

Responsibility for electricity and gas retailer prices is to remain with state and territory jurisdictions. Some jurisdictions may exclude gas from the new customer framework.

For further information about the new legislation and rules refer to the [Ministerial Council on Energy's website](#)

3 OVERVIEW OF EXEMPTIONS (AER Issues Paper 2010)

3.1.3 EXEMPT SELLER AND CUSTOMER RELATED FACTORS

I deal with this section before proceeding to policy parameters s contained in the proposed National Energy Law AND Rules, as these issues are dealt with in more depth and are followed by extended related discussion. It therefore makes more sense to deal with a limited range of issues which the AER **may take into account rather than those which is must, to comply with proposed laws.**

Having said that I cannot sufficiently emphasize the importance of those issues considered optional, whilst recognizing that time limits allows me only to deal with a handful. However, given that there will be other opportunities to more formally address issues after the National Energy Rules and Laws are formalized, I will aim to address some issues left without comment. Failure to comment on all aspects of the Issues Paper does not imply endorsement.

*There are a number of exempt seller related factors⁷ and customer related factors⁸ that the AER **may** take into account when carrying out its exempt selling functions and powers. The exempt seller related factors in the proposed Retail Law are:*

‘WHETHER SELLING ENERGY IS OR WILL BE A CORE PART OF THE EXEMPT SELLER’S BUSINESS OR INCIDENTAL TO THAT BUSINESS’

Cursory comment MK

It has become a core part of the role of *“metering service providers and other types of licensed and unlicensed services providers* to market themselves as allegedly providing fuel and water goods and services (electricity gas and water), bundled and unbundled forming part of the infrastructure of body corporate

There is evidence of what may be interpreted as collusive arrangements with developers who see opportunities to impose, despite the provisions of exclusive dealings prohibitions, long-range service agreements spanning up to two decades or more for unsolicited services that lock in purchasers as owner-occupiers or their residential or other tenants living in strata titled properties unacceptably limiting choice, whilst charging inflationary prices for various infrastructure services bundled or unbundled, but including alleged energy, water, Internet, security and other services.

The AER should inform itself of what is happening in the marketplace and read up on the **Arrow Asset Management Case NSW 2007** referred to herein as well as ASIC’s involvement in focusing on the impacts of collusive arrangements between property spruikers, property developers and service providers before making any decisions.

See:

[Arrow Asset Management Laqndmark Case NSW 2007 Summary Gary Bugden](#)

In addition the AER should be aware of changes to other laws especially trade measurement laws before opening up the market to further distortion and consumer detriment.

‘WHETHER THE EXEMPT SELLER’S CIRCUMSTANCES DEMONSTRATE SPECIFIC CHARACTERISTICS THAT MAY WARRANT EXEMPTION’

There may be selected circumstances where carefully monitored time-limited exemptions may be warranted, and subject to structured and timetabled review and monitoring

However, in the main, where allegations by property developers, for example may be seeking to justify why separate metering or other more appropriate arrangements should be made whilst planning and installing infrastructure in new buildings or upgrading older buildings, these are not always substantiated.

In many of the new developments that I have sighted experiencing problems associated with for example long-range service arrangements for alleged provision of “*energy services*” “*hot water energy services*” (a nonsensical term that bears no relationship to terms and definitions or provisions within energy laws current and proposed)

‘WHETHER THE EXEMPT SELLER IS INTENDING TO PROFIT FROM THE ARRANGEMENT’

MK Comment

My direct knowledge and experience is that exempt selling, especially those who are self-assessing, whether large or small, are profiting from these arrangements – often to the tune of millions of dollars over up to two decades.

The recent Arrow Asset Management case NSW 2007 is but the tip of the iceberg.

Many so-called service providers working in collusion with property developers are claiming “*ownership*” of infrastructure normally an integral part of body corporate strata titled property, and demanding millions of dollars if a Body Corporate wishes to exist from arrangements, whether or not entered into voluntarily and/or with full informed consent.

Both owners and tenants are adversely affected, and breaches of multiple provisions, including under exclusive dealing and third party line forcing is common. One such case appears to be the Owners Corporation situation at 33 Inkerman Street, St Kilda (Oasis Developments).

I can show actual figures of the extent to which licensed and unlicensed providers, some simply alleging supply of “*energy*” based on measures of temperature gauge gadgets used to measure water temperature in water heat panels used for room heating, using terminology that is to be found nowhere with energy or trade measurement laws.

‘WHETHER THE AMOUNT OF ENERGY LIKELY TO BE SOLD BY THE EXEMPT SELLER IS SIGNIFICANT IN RELATION TO NATIONAL ENERGY MARKETS’

MK Comment

This is a loaded question that needs far more careful consideration. Time constraints prevent a considered response at this stage.

The on-selling industry is growing. It is closely associated with the property development market and asset management. There are perceptions in the market place that despite all provisions, it is possible to retain and claim ownership and management of embedded assets electrical conduits, boiler systems, Internet infrastructure, pipes and associated equipment water or related to provision of gas and electricity.

Market distortions are apparent but little information is readily available for analysis apart from anecdotal material – which I have spent some time and effort identifying both from the perspective of residential and other tenants, and from those of landlords and Owners’ Corporations managing properties housing or accommodating owner-occupiers as well as tenants, either business or residential.

ASIC has identified a number of problems associated with arrangements made through property spruikers and developers, seemingly in collusive arrangements with service providers of one description or another purporting to be providing utilities and/or fuel of one description or another.

I have made mention of the impacts of some of these arrangements.

At the time that full retail completion was deemed to exist in Victoria, when the ESC first introduced its “*bulk hot water policies*” subsequently adopted in one form or another by other states there was a relatively small number of properties compared to national figures impacted.

The story is different now, spruikers who are more obvious and others perhaps less obtrusive, whilst possibly nevertheless promoting certain agendas are impacting on the marketplace. Whilst not necessarily directly involved in purchase from the wholesale market at “*favourable prices*” there is some evidence to suggest possible collusion between energy providers and “*metering data service providers*” or others associated with property management and development that has impacts as distortions within the on-selling market.

My feedback is that those locked into arrangements as owners of property are not as thrilled about the arrangements that are being promoted as evidence of “*market demand*” and “*benefit*” so that claims of benefits outweighing detriments can be substantiated.

‘THE EXTENT TO WHICH THE IMPOSITION OF CONDITIONS ON AN EXEMPTION, OR TO WHICH THE REQUIREMENTS OF OTHER LAWS, WOULD ALLOW APPROPRIATE OBLIGATIONS TO GOVERN THE APPLICANT’S BEHAVIOUR RATHER THAN REQUIRING THE APPLICANT TO OBTAIN A RETAILER AUTHORIZATION’

MK Comment

This opens up a minefield of considerations which time constraints prevent me from addressing

The political will to investigation and if necessary prosecute may exist for certain matters, but for upholding of generic provisions within the energy arena, the will appears to be weak

At the very least every provider or on-seller should be required to have a **registrable** exemption with timetabled monitoring of outcome.

‘THE LIKELY COST OF OBTAINING A RETAILER AUTHORIZATION AND OF COMPLYING WITH THIS LAW AND THE RULES AS A RETAILER COMPARED TO THE LIKELY BENEFITS TO THE EXEMPT CUSTOMERS OF THE EXEMPT SELLER’

MK Comment

If only I could tell a tale. I have begun to suggest the minefield and Pandora’s box of issues not considered. My direct experience is that “*captive*” customers unilaterally imposed with service obligations at the time of purchasing off-the-plan properties and being expected to pass on obligations ad infinitum under what appear to be illegal BOOT schemes (buy own operate and transfer) are geared up to benefit exempt sellers and property developers and spruikers more than any “*deemed customer.*”

‘ANY OTHER SELLER RELATED MATTER THE AER CONSIDERS RELEVANT’.

The customer related factors are:

‘WHETHER THE CHARACTERISTICS OF THE EXEMPT CUSTOMERS OR THE CIRCUMSTANCES IN WHICH ENERGY IS TO BE SOLD TO THEM BY THE APPLICANT ARE SUCH AS TO WARRANT EXEMPTION’

MK Comment

This question needs very careful consideration.

For the most part, service agreements relating to sale and supply of electricity (including arrangements specific to the host retailers for the bizarre “*bulk hot water arrangements*”), are those determined between property spruikers and/or developers as in many cases relating to Henry’ Kaye’s involvement with the Oasis Development in 2003, with ongoing and unfinished work on the development with a vast majority of prospective owners already in the throes of purchasing off the plan.

The situation greatly resembles the circumstances in the landmark legal decision before the NSW Supreme Court known as the Arrow Asset Management Case.

For the most part, where multi-storied buildings are involved housing, for example residential owner-occupiers and/or tenants, it is a core part of business of the middlemen involved to be on-selling energy or water related or telecommunications goods and/or services.

Profit margins made are astronomical.

Protections and complaints redress are non-existent

Care should be taken when determining the extent to which core functions are met during the assessment criteria.

‘THE EXTENT TO WHICH THE IMPOSITION OF CONDITIONS ON AN EXEMPTION, OR TO WHICH THE REQUIREMENTS OF OTHER LAWS, WOULD ALLOW THE EXEMPT CUSTOMERS ACCESS TO APPROPRIATE RIGHTS AND PROTECTIONS RATHER THAN REQUIRING THE APPLICANT TO OBTAIN A RETAILER AUTHORIZATION’

MK Comment

Access to any form of justice is expensive and comes with unacceptable prices. There seems to be almost no political will to sustain enforcement in certain areas, but the worm is turning and I have no doubt that class actions in the open courts will become the norm in time in the absence of appropriate statutory backing when misconduct and breaches occur and are reported.

Regardless of how good policies and statutory provisions are – without enforcement these provisions are impotent.

Industry-specific complaints schemes see conflicts of interest in dealing with certain classes of service provider.

For as long as middlemen of any description are purporting to provide “*energy service*” or “*measure energy*” or “*charge for energy*” (albeit for gas measured in Kwh and charged in cents per litre – making a mockery of trade measurement requirements for legal traceability subject to lifting of remaining utility exemptions, as is the intent.

‘ANY OTHER CUSTOMER RELATED MATTER THE AER CONSIDERS RELEVANT.’ EACH OF THESE PRINCIPLES AND FACTORS IS DISCUSSED FURTHER IN SECTION 4.

MK Comment

I hope the AER will begin to gather the knowledge and experience required to make these complicated assessments in a marketplace where there is almost no readily accessible data to assist with decision-making. However, anecdotal experience and case law is mounting.

A lax attitude to granting exemption certifications to date has opened up the floodgates. I was appalled for example to find that there were in excess of 150 license exemption certificates issued by the ESC, some issued apparently without any due care to ascertain eligibility consent of owners, or proof of ownership of the property claimed to be “owned and operated.”

Usual practice does not make current practices legal or desirable except in limited circumstances.

In my opinion, in relation to the “*bulk hot water*” provisions in place in which middlemen are purporting to be determining energy consumption for energy supplied to a single gas or electricity meter, much of the distortion seems to have been facilitated, by opportunities created by flawed jurisdictional policy – which was originally initiated by the Essential Services Commission (ESC) Victoria and the Department of Primary Industries (DPI) who played a game of football with responsibility. The provisions of the Bulk Hot Water Guideline 20(1) were ultimately transferred to s 3 and 4 and an appendix of the revised *Energy Retail Code v7* (effective date 1 April 2010).

Apparent disregard for the fundamental; principles of comparative law is regrettable. I have discussed this in several published documents in the consultative arena, and include a similar chapter within this submission, in addition to reproducing an analysis of the extent to which the National Energy Law and Rules seem to have fallen short of its own objective and objectives reflected within generic and other provisions.

As to choice, I have already addressed this – repeatedly and have dedicated significant components of material that already published in response to the AER’s Jemena Gas

Networks (NSW) Ltd Gas Access Determination (Draft Decision (27 April, 4 June 2010,²² plus 15 unpublished appendices and case studies); and to the AEMC's ERC0092 Provision of Metering Data Services and Clarification of Metrology Procedures (1 July 2010²³ with 15 appendices and 3 July as an supplementary submission).²⁴

<http://www.aer.gov.au/content/item.phtml?itemId=737338&nodeId=b07bfe5f3fe9e34661d8620b52e808a1&fn=Madeleine%20Kingston%20further%20submission.pdf>

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.

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:

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.

²² [Madeleine Kingston Further Submission 4 June Jemena Gas Access Determination Draft Decision AER](#)
²³ [Madeleine Kingston 1 July2010 Main Submission AEMC Draft Decision ERC0092 Metering Data Service Providers and Clarification of Metrology Procedures](#)
²⁴ [Madeleine Kingston 3July2010 Supplementary Submission to AEMC ERC0092 Metering Data Service Provision and Clarification of Metrology Procedures](#)

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.

For the purposes of this particular submission time constraints do not permit me to further examine remaining sections of the specifics of the AER Issues Paper.

However, I understand that future opportunities will arise, perhaps towards the end of 2010 or early 2010 when more formal consultations are undertaken.

Meanwhile I continue with providing many sections that had been included in my published submission dated 4 June 2010 to the Jemena Gas Networks (NSW) Ltd Gas Access Draft Determination (and accompanying 14 appendices available upon request; our rely on new batch of REVISED appendices with this submission)

I was alarmed to find a few days ago that the ESC, despite the specific provisions contained in the General Order in Council of May 2002 re Exempt Licensing, well over 150 such licences were randomly issued unjustifiably without due care to ascertain ownership, eligibility etc or any attempt to monitor the marketplace and outcomes of public policy. The AER now proposes to expand the exempt licence market including three categories of exemption – deemed for certain classes (such as landlords and body corporate entities); registrable exemptions; and piecemeal exemptions. Light-handed regulation has got out of hand.

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

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

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

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

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

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

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

FURTHER COMMENT ON SELECTED PARAMETERS OF THE PROPOSED AER EXEMPT SELLING ISSUES PAPER²⁵

The introduction to the Issues Paper explains that this is the first step in developing guidelines about the Exemption Framework, *which is intended to address a number of matters, including the procedure for applying for an individual exemption and the categories of sellers whole qualify for class exemptions.*

I note that more formal consultation will ensure once the proposed National Retail Laws and Rules are in place, which is expected to be during September 2010.

I reserve the right to either re-submit the same submission in response to further initiatives, or to re-submit with expansion and any additional data that may become available in due course. This is merely a start with highlighting issues that have for decades seem to have been poorly understood by all policy makers, rule makers and regulators within energy and other arenas.

It is not a good enough response or perception that this is a *“too-hard-basket”* issue.

It is not a good enough excuse that skilling, training, historically discrepant opinion or interpretation; usual practice or some other factor may have hampered responsible and/or proper interpretation of all laws and provisions, not just those under energy provisions including codes and guidelines

Meanwhile I attach preliminary material relating to a pertinent case study, this time from the perspective of Owners' Corporations who are locked into inappropriate long-term service agreements with either licensed or unlicensed providers, including the class of providers generally referred to as Metering Data Service Providers²⁶

²⁵ Please note that time constraints at this stage preclude more thorough examination of the specific questions posed in the Issues Paper. However, I note there will be opportunities to respond to more formal consultation once the proposed National Energy Laws and Rules are passed. Please consider me to be a serious stakeholder wishing to obtain maximal notice of such consultations – at draft stage if feasible.

²⁶ Please refer to material already available on the AER website in response to Jemena Gas Networks (NSW) Ltd Gas Access Determination 2010-2015 dated 27 April 2010; 4 June 2010 (455 pages plus 15 unpublished appendices available from the AER or myself upon request); other material dated 27 May 2010 (not published); ongoing correspondence to key personnel at the ACCC and AER and many other parties; and to the AEMC's ERC2001 Rule Change Proposal; Draft Determination of 6 May 2010 to which I made two published submissions on 1 and 3 July 2010 respectively, in addition to two items of correspondence dated 16 and 27 April 2010 included under the initiation documents as late submissions, all of which were also brought to the attention of the AER formally

[Draft decision AEMC rule change MDS and metrology](#)

[Madeleine Kingston Main submission 1st July AEMC rule change ERC0092](#)

[Madeleine Kingston appendices 1-15 July AEMC - ERC0092](#) [Madeleine Kingston addendum submission 3rd July AEMC-0092](#)

See also

[Kevin McMahon main submission 3rd July AEMC-ERC0092](#)

[Kevin McMahon Supplementary submission 11 July to AEMC MDS Rule Change ERC-0092](#)

[AEMO submission 1st July AEMC to ERC-0092](#)

[Integral Energy submission 7th July to AEMC -ERC0092](#) (includes legal advice from Messrs Blake Dawson, Solicitors)

[Kevin McMahon Submission 8 March 2010 to MCE National Energy Customer Framework \(NECF2\)](#)

I note that the proposal is based on the 2nd Exposure Draft of the National Energy Customer Framework released in November 2009 to which some 41 responses were made,²⁷ including three from individuals – Kevin McMahon from Queensland (8th March); Dr. Leonie Solomon.

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

[Kevin McMahon Submission 8 March 2010 to MCE National Energy Customer Framework \(NECF2\)](#)²⁸

and of Dr. Leonie Solomons shareholder of failed second-tier Jackgreen Ltd, and Director - Solomons Superannuation Fund (shareholder of Jackgreen Ltd)

[Dr. Leonie Solomons Submission 26 February 2010 to MCE National Energy Customer Framework 2 \(NECF2\)](#)²⁹

[Dr. Leonie Solomon Submission 26 February 2010 to National Energy Customer Framework2 \(NECF2\)](#)

As explained by the AER on p3 of the Issues Paper, *under Part 5 of the proposed Retail Law, a person wishing to sell energy must either hold a retailer authorization or have an exemption from that requirement. The AER will be responsible for issuing exemptions.*

This issues paper and the attached draft classes of deemed and **registrable exemptions** constitute the first step in the AER's consultation process. This work is based on the second exposure draft of the National Energy Customer Framework (released November 2009) and will be updated following passage of the final framework.

It concerns me how many "**registrable exemptions**" have been randomly issued by the ESC, between 2002 and 2010, bearing in mind the limitations of the Victorian Ministerial General Order in Council of May 2002 and the concerns expressed by Minister Nick Theophanous, the then Minister for Energy.

See:

[Ministerial Order in Council May 2002 Electricity License Exemption Victoria](#)

²⁷ [National Energy Customer Framework2 \(NECF2\) Submissions](#)

[Madeleine Kingston Submission to MCE National Energy Customer Framework March 2010](#)

Major submission with case studies and analysis - examining amongst other things objectives comparative law and application. More case study material in preparation from owners' corporation perspectives

²⁸ This submission was written by a victim of certain policies that are also the subject of my own submissions. These policies cannot simply be written off as irrelevant, since energy providers of one form or another, including licensed and unlicensed providers, many currently operating without any registrable exemption are continuing to rely on loopholes in jurisdictional and other provisions, and on discrepant and misguided reliance on interpretation of existing and future energy and other laws, especially deemed provisions for sale and supply of gas.

²⁹ Dr. Leonie Solomons is Executive Director Consulting Systems; Dr Leonie Solomons (shareholder of Jackgreen Ltd) Director - Solomons Superannuation Fund (shareholder of Jackgreen Ltd) - this submission raises a number of concerns, including issues regarding RoLR events which are pertinent to aspects of the issues paper

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

[Ltr Minister for Energy Theophanous re Small Scale Licensing Exemptions March 2006](#)

I am extremely concerned about the prospect of perpetuation of the ESC's reasoning and at national level, and especially given the preliminary indications of the current thinking of the AER. The failure to consider comparative law considerations current and proposed, the pending lifting of utility exemptions, the conflict within and outside energy regulations remain issues of ongoing concerns.

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

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

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

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

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

I will discuss transitional arrangements and the list of exemptions elsewhere. I remain concerned that the ESC appears to have indiscriminately granted exemptions to numerous parties including Body Corporate Entities well beyond the parameters of the Ministerial Exemption Order of May 2002, and despite the specific concerns made by the then Minister for Energy Victoria, Minister Nick Theophanous, MP.

SALE OF ENERGY

3.1.1 Sale of energy

Section 501 of the proposed Retail Law prohibits any 'unauthorized selling of energy'. The AER considers that a sale of energy occurs when a person passes on a charge for energy as a separate charge, as opposed to a situation where the cost of energy is absorbed into another charge such as rent.

The AER assumes that, where a charge for energy is absorbed into another charge, the energy portion of the charge would be covered under the applicable jurisdictional tenancy law and any other relevant legislation. This covers a number of situations, such as hotels, motels and caravan parks for holiday makers. For the avoidance of doubt, however, the AER is proposing to provide an exemption for such charges. This is discussed below in section 5.2.1.

Service fees for unmetered supply of energy to public and community housing tenants will not be considered to involve a sale of energy and will therefore not be addressed under the AER's guidelines and determinations. As the proposed National Retail Law and Rules (see NECF2 Package) only address the sale of energy, the AER's guidelines and determinations will also not address the selling of bulk hot water.

Q1: Do stakeholders agree with the AER's interpretation of what constitutes the sale of energy?

Comment MK:

The AER may not be aware of what is actually happening in the marketplace or the limitations of the Victorian assessment of matters to date or their perceptions of what constitutes adequate policy or consumer protection.

The Victorian Small Scale Licensing Review 2006-2007 had many limitations. Many participants including solicitors not declaring conflicts of interests, complaints schemes transparently confessing to conflicts of interest (notably EWOV Victoria); and industry participants of small scale providers with a vested interest participated.

So did some community organizations, including Tenants Union Victoria several of whose case studies I had cited in previously published appendices, reproduced with this submission, as well as one of 2004 published by CUAC, all representing tenants perspectives.

In addition I have published several times over within the consultative arena a particular case study that spanned almost two years wherein a particular disadvantaged end-consumer of heated water deemed to be "consumer energy" impliedly illegally as a tenant relying on enshrined tenancy, generic and common law rights, in which I acted as a nominated representative. Ultimately though under the guise of an aggrieved host retailer allegedly supplying deemed gas to this person, discontinued instead his heated water supplies for 12 months, after protracted and fruitless debate with the biased Industry-run Victorian complaints scheme; with the ESC and the DPI, who upheld the perspectives of a host retailer in the face of medical evidence and reports that it would be detrimental to the end-consumer to discontinue essential heated water supplies.

There are no energy provisions explicitly sanctioning such conduct, but it is common knowledge that where a single gas meter supplies a communal water tank with heat, the only disconnection that can take place is that of water instead of energy.

The existing Australian practices are a disgrace and place this country in the limelight in terms of the worst trade measurement and other practices in the name of energy provisions.

It is my personal view that energy policy-makers, rule makers and regulators have been consistently over-stepping the boundaries of their own jurisdictions, and have continued to disregard the fundamentals of comparative law.

More recently I have had occasion to empathize with the perspectives of owner-occupiers residing in strata titled property who are frequently exploited by property developers apparently in collusion with energy providers, meter data providers and other such “*service providers*” claiming to be operating within energy laws, but with such a degree of distortion of the intent spirit and letter of multiple provisions as to make a complete mockery of consumer and business protection.

I begin by citing in more detail from Section 501-505 of the proposed National Energy Retail Law (see p

[Second Exposure Draft National Energy Customer Framework 2nd Exposure Draft - Proposed National Retail Law](#)

Electricity and gas are the only commodities termed “*energy*” under existing and proposed energy, generic, trade measurement and tenancy laws. These are goods not services and attract the full suite of protections.

Under the proposed NERL **energy means electricity or gas or both;**

Under the proposed National *Energy Retail Laws* s513, scheduled to be passed before the South Australian Parliament in September 2010 the form of energy authorized for sale is restricted to gas or electricity or both – and does not include heated water supplies, milk honey, glue or any other commodity, although it is indicated that a licence for gas does not extend to a licence for electricity and vice versa.

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.*

Part 5 Authorisation of retailers and exempt seller regime

Division 1 Prohibition on unauthorised selling of energy

501 Requirement for authorisation or exemption

- (1) A person must not, in this jurisdiction, engage in the activity of selling energy unless—*
 - (a) the person is the holder of a current retailer authorisation and subsection (2) or (3) applies to the person; or*
 - (b) the person is an exempt seller.*
- (2) This subsection applies to a person in relation to the sale of electricity if the person is a Registered participant in relation to the purchase of electricity directly through a wholesale exchange, as required by section 11 (4) of the NEL.*

(3) This subsection applies to a person in relation to the sale of gas if the person—

(a) is a user or non-scheme pipeline user (within the meaning of the NGL) registered (or exempted from registration) to participate in a regulated retail gas market in this jurisdiction, as required by section 91LB of the NGL, in a registrable capacity specified in the NGR relating to this jurisdiction for a user or non-scheme pipeline user; and

(b) is a Registered participant in relation to a declared wholesale gas market, as required by section 91BJ of the NGL, in the registrable capacity specified in the NGR for a person who sells natural gas to customers that has been transported through the declared transmission system.

Note—

This section is a civil penalty provision.

Under Part 5 of the proposed Retail Law, the AER will be responsible for issuing and revoking retailer authorizations. Unless exempt from the requirement, a person must hold a retailer authorization prior to engaging in the retail sale of energy.

Energy laws prohibit “*unauthorized selling or energy*”

How would the AER view a situation where a service provider, either licensed or unlicensed, breaches provisions for re-sale and charging for energy by re-defining energy altogether, and using devices in calculating alleged deemed usage of gas by measuring through a temperature gauge attached to a water panel used to heat a room, and the claim provision of energy expressed in KwH, but charging in cents per litre.

How can such an alleged “energy service” be related to the provision of gas for the heating of a single boiler tank supplying water for taps in individual apartments (kitchen, bathroom, laundry), as well as for

The prescribed unit of measure for gas is joules, megajoules, gigajoules or multiples thereof. Gas cannot be measured or expressed in KwH. It is also inappropriate to measure gas whilst charging in cents per litre (despite the misguided provisions contained within the Victorian *Energy Retail Code v7* (February 2010, applicable from April 2010) Clause 3 and 4 and an appendix)

Electricity exemptions pursuant to the *National Trade Measurement Act 1960*.

Certainly, the usage of novel devices such as may be able to measure the temperature of water transmitted in water pipes to a heat panel. In the cases I have in mind the tepid water leaves the heat bank is recycled and a further supply of water is transmitted, after being heated by a single gas meter on a property housing say 160+ or 300+ owner-occupiers or residential tenants.

This is exactly what is happening on some properties, in arrangements claiming to have locked in unsuspecting owners’ corporations to up to two decades or more to unsolicited and unwanted service arrangements at sometimes twice the price obtainable elsewhere because of decisions made by developers and their associates or chosen “*service providers*” to “*operate and manage*” and even allegedly *own* various forms of infrastructure, for the most part of a nature that is normally an integral part of body corporate property.

The BOOT system of operation (buy own operate and transfer) may be common practice – but can it be considered legal and meeting all laws, including generic, trade measurement, owners’ cooperation, tort, and common law provisions, including the rights of natural justice.

Providers of one description, whether or not licensed or exempted, whether or not monitored or required to be accountable, where or not covered by existing complaints mechanisms; are seeking to bundle charges, not as part of rent, such as a service charge that may be issued by a public housing authority to cover composite services, but rather a range of alleged goods and services for which they expect, upon the direction of a property developer, for example, seeking to gain from securing without consent of Body Corporate entities as collective owners

gas company means *a gas distribution company, a gas retailer or a gas transmission company;*

gas distribution company means *a person who holds a licence to provide services by means of a distribution pipeline; gas distribution system means-*

(a) the primary distribution system; and

(b) any distribution pipeline or system of distribution pipelines that, under section 13(1), is an approved distribution connection; and

(c) any distribution pipeline or system of distribution pipelines that, under section 13(2), is an approved distribution adjunct;

gas fitting includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas;

gas producer means *a person who carries on a business of producing natural gas;*

gas retailer means a person who holds a licence to sell gas; gas transmission company means any person, other than AEMO, who owns, operates or provides a service by means of a transmission pipeline;

gas transmission system means-

(a) the primary transmission system; and

(b) any transmission pipeline or system of transmission pipelines that, under section 14(1) is an approved transmission connection; and

(c) any transmission pipeline or system of transmission pipelines that, under section 14(2), is an approved transmission adjunct;

transmission pipeline means-

(a) a pipeline for the conveyance of gas-

(i) in respect of which a person is, or is deemed to be, the licensee under the Pipelines Act 2005; and

(ii) that has a maximum design pressure exceeding 1050kPa- other than a gathering line within the meaning of the Petroleum Act 1998; or

(b) a pipeline that is declared under section 10 to be a transmission pipeline- but does not include a pipeline declared under section 10 not to be a transmission pipeline;

transmit means *convey gas through a transmission pipeline;*

MK Comment: (see further discussion under appendix Comparative Analysis of Energy and Trade Measurement Laws

This AER's Issues Paper as the first consultative step seeks feedback from stakeholders on a range of potential issues have been identified in developing a framework for exempt selling under the proposed Retail Law and Retail Rules.

However, the AER has welcomed any comments on issues in relation to exempt selling not specifically raised in this paper. In this submission to the AER I will not only be relying on this invitation, and repeating much of what has already been proffered to the public arena, including to other AER consultations; to the AEMC, MCE, AEMO; and other consultations, but will also refute the appropriateness of the statement made within the Issues Paper that the AER will not deal with certain matters notably the alleged distortions of energy laws by various classes of energy and alleged "*ancillary services;*" "*reference services*" "*additional services*" providers.

Suffice it to say here that I intend herein and in future submissions as the Exempt Selling Regime is developed to examine the approach apparently taken by the AER on the one hand:

1. Endorse the including of Capital Expenditure (CAPEX) and Operating Expenditure (OPEX) costs for expensive upgrades to water meters and hot water flow meters involving for example the addition of radio-frequency heads to existing hot water flow meters, as for example proposed and granted to Jemena Gas Networks (NSW) Pty Ltd in their Gas Access Proposal for 2010-2015.³⁰
2. Refuse to consider appropriate protections and the implications of the growing "*bulk hot water*" market, wherein providers who neither own the water, nor are entitled to charge for alleged gas consumption based on measurement of "*calorific values*" if these can be measured at all
3. Apparently fails to consider existing distortions and malfunctioning within the marketplace with special reference to perverse outcomes intended by the introduction of a new category of service provider – that of Metering Data Service Provider (MDS). In practice many of these registered unregistered providers appear to be exploiting the market and locking in unsuspecting owners and/or residential or corporate tenants into a **BOOT** system of operation (buy, own, operate and transfer) contrary to the exclusionary provisions of s47 of the *Trade Practices Act 1974* (to be re-named *Competition and Consumer Law 2010*; Owners' Corporations provisions and other provisions.

³⁰ Note that Jemena Asset Management (JAM) a subsidiary of Jemena Ltd, in turn under the umbrella of holding company uses a similar approach in various States for both gas and electricity, in making recommendations for asset management, including such tasks as are undertaken by either licensed or unlicensed metering data providers such as IT and backroom tasks, including billing practices. Ongoing concerns beginning to merge in a growing market for the lucrative "*on-selling*" market continue to merge – details of which I intend to expose in discussions with various parties and bodies to illustrate the unmonitored detriments and outcomes for end-consumers, including individuals, incorporated bodies, either commercial or not-for-profit; (for example body corporate entities responsible for residential and business premises as "*controllers of premises.*" Refer to generic and trade measurement laws, and to Owners' Corporation provisions (for example Victoria's *Owners Corporation Act 2006*; *Queensland Body Corporate and Community Management Act 1997* updated to 1 July 2010; and other similar provisions in other States; and to tenancy laws

4. In my view AER and its associated bodies as policy and rule makers, such as the MCE, AER and AEMO should not on the one hand wash its hands of determining any guidelines regarding the distorted interpretation of provision of energy (described within the Issues Paper, the Victorian *Energy Retail Code*; within generic and trade measurement laws as referring to gas or electricity only, not **heated water** or milk honey, petrol, calorific value (as an attribute and expressed in terms that are not endorsed by trade measurement practices requiring specified units and scale of measurement, subject to imminent lifting of utility exemptions) or any other commodity.

So-called providers of energy have found creative ways in which to define energy (for example in calorific values, as measured by a device fitted with temperature sensors affixed to a water heat panel for room heating. This has nothing whatever to do with measuring gas consumption, for example through a single gas meter used to heat a communal water tank, a process mistakenly and meaninglessly referred to as bulk hot water or *“consumed energy hot water energy consumed”*

The ESC in its analysis of the responses to its Small Scale Licensing Review mistakenly believed that energy is *“consumed”* by an individual end-user of heated water at a single gas meter used to heat a single boiler tank. IU have analyzed in some detail in various appendices including of the Victorian *Gas Industry Act 2001* and other provisions (see Appendix 3) why it seems that the deemed provisions under that enactment seem to have become distorted, and my concerns about the risks of such distortion being carried into the National Laws.

Failure to explicitly forbid such arrangements within energy laws by ignoring market failures and distortions of this kind is tantamount to tacit endorsement, as well as failure to properly monitor the marketplace.

No redress under existing complaints schemes exists for those who are exploited by unlicensed and unregistered providers wishing to seize on existing weaknesses within energy codes, notably the Victorian Energy Retail Code Clause 3 and 4 and an appendix, as discrepantly adopted in several other states.

Those who are vulnerable are not restricted to those living in caravan parks, rooming or boarding houses and the like. Vulnerable parties include unsuspecting purchasers of strata titled property purchasing off-the-plan; body corporate members as owner-occupiers, residential tenants, corporate tenants in shopping centres and a host of others, both in relation to gas and electricity.

Whereas it is possible for an electricity network to change ownership and operation – and for the term *“embedded consumer”* to be correctly applied because there is direct *“flow of energy”* facilitated regardless of change of ownership or operation, the same does not and should not apply to gas, as much as the AER and others are motivated to standardize provisions.

There are significant differences between gas and electricity. There are many safety had technical considerations is allowing on-sellers, owners and operators of facilities to assume direct responsibility for gas provision or to allow continuing market distortions to occur when only a single gas meter supplies gas to an entire multi-tenanted property, often with multiple buildings scattered over a considerable portion of land, or else contained within high rise or medium rise apartments.

The a philosophical mind-set to expand the Exempt selling regime through the auspices of the AER, and consideration being given to including Landlords and Body Corporate entities without considering the implications and glaring evidence of market distortion and consumer detriment, including detriment to body corporate entities and tenants, residential and business.

Landlords and body corporate entities do not sell energy or “*energy services*” when they supply heated water to individual residential tenants in water pipes, after the water has been centrally heated by a single gas or electricity meter that heats a single boiler tank.

Neither does measurement of temperature through a device attached to a water heat panel (for room heating) constitute legitimate measurement of gas or electricity used to heat water that is centrally heated through a single gas or electricity meter

I refer to process of arranging for energy suppliers and/or others to supply energy, say specifically gas or electricity for, say an block or flats or apartments, where:

- multiple individuals or groups occupy a separate residential abode (premises),
- questionable trade measurement practices are employed in the use of water meter infrastructure (cold water mains, subsidiary cold water meter; hot water flow meters, temperature calculation devices affixed to water heat panels used for room heating upon which calculations are made for alleged individual ascertainment of the heated component of water is assessed for both hot water tap supply and for water panel heating), to calculate by imprecise methods deemed apportionment of energy use;
- contribute to inflated costs allegedly associated with the distribution and transmission of electricity or gas; by employing third parties providing billing and metering data services
- by using infrastructure not designed for the purpose;
- using the wrong instrument for the wrong commodity;
- using the wrong units and scale of measurement in trade measurement calculations
- third party operators frequently aim to assist landlords and Body Corporate entities to escape their mandated obligations under tenancy laws to undertake “*other services*” (to retailers and landlords not alleged end-consumers of alleged energy supplies of heated of that involve use of water meter infrastructure to calculate alleged consumption of, sale and supply of gas and electricity.
- In other cases, such third-party operators seeking to include a range of unrelated “*bundled services*” (including alleged supply of energy; alleged servicing of boiler systems; internet, security, TV cabling and other such services)³¹ as dictated by a property developer.

³¹ See for example the services offered by Service Link, who in the case study cited worked with the original Owner/Developer Inkerman Developments (associated with property spruiker Henry Kaye)/

For example selling off the plan, the victims are unsuspecting property purchasers in strata titled property, who deny authorization of the arrangements in place, and are forced into commercial litigation to illustrate the absence of a legally sustainable alleged contract for sale and supply of those services, often, contrary to the exclusive dealing provisions of generic laws and competition laws to lock in purchasers and their successors as well as tenants into long-range

- I have discovered that energy providers, associated “metering data providers,” licensed and unlicensed, for the most part altogether are escaping the laws in place or the scrutiny of regulators charged with monitoring the market and ensuring that practices are fair and do not cause consumer detriment, including to small consumers and businesses alike.
- Some such providers measuring alleged energy consumption for “*gas-fired hot water heating*” and apartment heating using “WATER PANELS” **using a single gas meter for multi-tenanted dwellings, expressing that consumption in kilowatt hour and charging in cents per litre by employing temperature sensors attached to water panels that are unconnected with heated water flowing through taps in kitchens, laundries and bathrooms.**
- The AER has recently sanctioned massive CAPEX and OPEX outlays by Jemena Gas Networks (NSW) Ltd as requested through their Asset Management company Jemena Asset Management (JAM), a subsidiary of Jemena Ltd.
- This is for outlays on radiofrequency heads for **water meters and hot water flow meters** to facilitate **remote reads and disconnections of water** in a processes using hot water flow meters (*which measure only water volume not gas, electricity or heat*) and cold water meters effectively as substitutes for gas and electricity meters.
- The AER, following policies recommended by the AEMO, AER and MCE either fail to understand or have no interest in examining the impacts of regulatory decisions (gas and electricity access determinations) or have no power to over-ride other decisions. Though officially part of the ACCC, the AER is largely controlled by energy policy and rule makers without expertise in metrology or the will to maintain minimal standards or monitoring.
- Detailed plant and services contracts of questionable validity between developers and unlicensed alleged “*energy and water providers*” which refer to “*domestic hot water heat exchangers immersed coil type Edwards LEX manufacture or approved equivalent. The heat exchangers are complete with “temperature sensor, expansion, vessel, pressure relief, overflow, piping connections, insulation and other safeties.”*”
- None of these devices can possibly measure gas or electricity consumption, yet relying on discrepant interpretation of existing written and unwritten codes and guidelines in place at jurisdictional level, a new vehicle for exploitation has been created by either tacit or explicit endorsement at all levels. It is as if entirely ignoring the evidence of market distortion makes the matter disappear.
- However, the central issue is usage of the wrong instrument for the wrong purpose, measuring the wrong commodity, as well as apportioning contractual liability on the wrong parties. Lifting of utility exemptions is pending, but by the end of this year electricity exemptions will be lifted under National Measurement provisions.

- The National Measurement is the sole legal authority on trade measurement issues, contrary to impressions of others that all metrology procedures belong within the energy arena.
- Though it is encouraging that the AER, consistent with the proposed National *Retail Energy Law*, is required to uphold the concept of sale of energy being restricted to gas and electricity, there are many loopholes that have not been addressed, and will have direct impacts on proper practice and protection under the proposed Exempt Selling Regime.

More recently I have been involved in addressing the perspectives of Owners Corporation entities that are also being exploited by current policies and practices. It has become blatantly obvious wish energy providers, property developers, unlicensed “*service providers*” and others wish to purchase or lease back water infrastructure including boiler equipment in strata titled property. The outcomes are imposition of long range “service obligations” and exploitation in other ways or owners of properties who believe that in purchasing property they are also purchasing common property infrastructure such as boiler systems, lifts and the like and will not be saddled with long-range service agreements hampering competition.

The hot water and cold water meters are being used as tools of exploitation against both property owners and tenants. The levels of exploitive market conduct are serious and unaddressed by all policy makers involved.

transmission of gas does not mean transmission of heated water in water coils or water services pipes

Under the Victorian Energy Retail Code *energy* means electricity or gas or both

Yet the Victorian *Energy Retail Code* v7 (February 2010, effective April 2010) sanctions provisions previously contained within a now obsolete Guideline, the “Bulk Hot Water Charging Guideline and Bills Based on Interval Meters”

The *Gas Industry Act 2001* refers to licences

licence means a licence issued under Part 3;

licensee means the holder of a licence issued under Part 3;

licensee standing offer means-

(a) the tariffs determined by a licensee under section 42(1) and published

in the Government Gazette in accordance with that subsection, as varied from time to time by the licensee as provided for under section 42(3); and

(b) the terms and conditions determined by a licensee and approved by the Commission under section 42(1) and published in the Government Gazette in accordance with that subsection, as varied from time to time by the licensee and approved by the Commission as provided for under section 42(4);

Regulation of tariffs for prescribed customers

21. Regulation of tariffs for prescribed customers

(1) The Governor in Council may, by Order published in the Government Gazette, regulate, in such manner and in relation to such period as the Governor in Council thinks fit, tariffs for the sale of gas to prescribed customers or a class of prescribed customers.

(1A) The Governor in Council may only make an Order under subsection (1) if under an MCE directed retail competition review the AEMC-

(a) concludes that competition in a market for gas is not effective; and

(b) recommends, in accordance with the MCE's written direction for that review, that price controls on prices for retail gas services be (as the case requires) retained or reintroduced.

(2) Without limiting the generality of subsection (1), the manner may include-

(a) fixing the tariff or the rate of increase or decrease in the tariff;

(b) fixing a maximum tariff or maximum rate of increase or minimum rate of decrease in the maximum tariff;

(c) fixing an average tariff or an average rate of increase or decrease in the average tariff;

(d) specifying policies and principles for fixing tariffs;

(e) specifying a tariff determined by reference to a general price index, the cost of production, a rate of return on assets employed or any other specified factor;

(f) specifying a tariff determined by reference to any one or more of the following-

(i) a prescribed customer or class of prescribed customers;

(ii) a person or a class of persons authorised to sell gas;

(iii) the purpose for which the gas is used;

(iv) the quantity of gas used;

(v) the period of use;

(vi) the place of supply;

(vii) any other specified factor relevant to the sale of gas.

(2A) Without limiting the generality of subsection (1), in determining the manner tariffs for the sale of gas to prescribed customers or a class of

prescribed customers are to be regulated, the Governor in Council may have regard to the tariffs payable by the prescribed customers or a class of prescribed customers during the review period.

(3) An Order under subsection (1) may direct the Commission to make a decision in respect of such factors and matters or in accordance with such procedures, matters or bases as are specified in the Order, or both.

(4) An Order under subsection (1) has effect as from the date specified in the Order.

(4A) Sections 53 and 54 of the Essential Services Commission Act 2001 apply to an Order under subsection (1) as if the Order were a determination made by the Commission under that Act.

(5) The Governor in Council may, by Order published in the Government Gazette, declare that a person or class of persons specified in the Order is, for the purposes of this section, a prescribed customer or class of prescribed customers.

(6) In this section-

MCE directed retail competition review means an MCE directed review (within the meaning of the National Gas (Victoria) Law) under section 79(1)(e) of that Law;

***prescribed customer** means a person, or a member of a class of persons, to whom an Order under subsection (5) applies;*

***review period** means the period-*

(a) commencing on the day that the direction of the MCE requiring an MCE directed retail competition review is published in the South Australian Government Gazette under section 79(3) of the National Gas (Victoria) Law; and

(b) ending on the day before the day the Order under subsection (1) is made.

** * * * **

2) A person must not engage in the sale of gas by retail, either as principal or agent, unless the person-

(a) is the holder of a licence authorising the sale of gas by retail; or

(b) is exempt from the requirement to obtain a licence in respect of the sale of gas by retail because of an Order under section 24.

Penalty: 1200 penalty units and 120 penalty units for each day after the day on which a notice of contravention of this subsection is served on the person by the Commission.

** * * * **

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

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

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

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

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

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

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

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

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

To expect tenants to do so is absurd and normally not permitted by the OC or Landlord in any case.

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

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

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 Commissions Inquiry Into Australia's Consumer Policy Framework (subdr242parts 1-5 and Part 8, 2008) and other public consultation arenas.

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

See extract below taken from an agreement allegedly applicable to owners of a Body Corporate the subject of a case study outlined in Appendix 1. The essence of these arrangements is encapsulated in a document that until recently was transparently available online on the website of the relevant Service Provider. Seeking to promote the boot concept and force through what appear to be "*third party line forcing*" strategies calculated to ensure that service arrangements and obligations deemed to exist through unilateral imposition of obligation in perpetuum not only expected to be incumbent on immediate prospective owners or occupiers, but all successive owners and/or assignees.

42. Heating and Hot Water Energy Services Agreement

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

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

Contract of Sale

- 41.6 a reference to a statute or regulation, or to a provision of a statute or regulation, includes a reference to that statute, regulation or provision as amended, consolidated, replaced or re-enacted from time to time.
- 41.7 the obligations imposed and the benefits conferred under this Contract on each of the parties are binding upon and enure for the benefit of the respective parties and each of their respective successors in title, legal personal representatives and permitted assigns.
- 41.8 a reference to any party to this Contract includes that party's successors in title, legal personal representatives and permitted assigns.
- 41.9 a reference to "dollars" and "\$" will be taken as referring to amounts in Australian currency.
- 41.10 where a party comprises two or more persons all covenants and agreements by that party bind such two or more persons jointly and severally unless expressed to be only several.

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

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

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

WATER HEATING SUPPLY AGREEMENT

(name of Service Provider)

BAGKGROUND

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

PARTIES' OBLIGATIONS

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

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

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

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

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

Water temperature 78 degrees celsius;

Billing cycle quarterly

Water use residential and

Service Charge Rates:

Energy consumed for hot water heating

\$0.0651808 per kilowatt hour

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Under the revised [Trade Measurement Act 1960](#) the following definitions apply

"*utility*" means gas, electricity or water.

"*utility meter*" means a [measuring instrument](#) that is:

- (a) a gas meter; or
- (b) an electricity meter; or
- (c) a water meter;

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

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

[See Bulk Hot Water Charging Guidelines \(REPEALED January 2009\)](#)

Note this link is still available

[Energy Retail Code Victoria Feb2010 effective April 2010](#)

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

See [Madeleine Kingston Submission 2008 to ESC Review of Regulatory Instruments](#)

It is our understanding that the requirement for the resale of gas or electricity is an Essential Service Commission License or an exemption order (now under the control of the AER. **Service Link has neither.**

Although in regard to exemption order, it would appear that from the attached copy of

Victorian Exemption Order for Small Scale License, that this is exclusively for electricity and not gas.

PART V--GENERAL PROVISIONS ON USING MEASUREMENT IN TRADE

18H Overview

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

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

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

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

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

18HF. Unreliable methods of measurement

18HG. Limiting use of certain measuring instruments

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

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

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

MCE/AER POLICY PRINCIPLES

3.1.2 Policy principles

The proposed Retail Law specifies that the AER, in carrying out any exempt selling function or power under the Retail Law or Retail Rules, *must* take into account a number of policy principles.⁶ These are that:

‘REGULATORY ARRANGEMENTS FOR EXEMPT SELLERS SHOULD NOT UNNECESSARILY DIVERGE FROM THOSE APPLYING TO RETAILERS’

Comment MK

I could not more wholeheartedly agree. Only minimal exemption from some onerous administrative tasks should be considered.

Supply of energy (or water) and attendant service obligations conducted in a responsible manner carries enormous obligations and risks financial and in terms of safety.

Responsibility should be carefully examined in the light of these matters and comparative law issues, including adherence to national measurement laws, generic laws, corporation laws; tenancy laws, owners’ corporation laws and the like.

‘EXEMPT CUSTOMERS SHOULD, AS FAR AS PRACTICABLE, BE AFFORDED THE RIGHT TO A CHOICE OF RETAILER IN THE SAME WAY AS COMPARABLE RETAIL CUSTOMERS IN THE SAME JURISDICTION HAVE THAT RIGHT’

Comment MK

CHOICE

There is some overlap between these concepts. especially in relation to flawed perceptions that applications to VCAT or choice through installing an unacceptable cost individual gas meters and other infrastructure is a routine option. No such choices can ever be made by residential tenants, shop owners or others in multi-tenanted strata titled property either leased or purchased.

Retailer and/or service provider 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 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.

As observed by Tenants Union Victoria,³² 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”*

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”*

³² Tenants Union Victoria (2006) Further Comments on the Small Scale Licensing Framework Issues Paper (ESC) (29 September), p2)

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 geographical 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.

Those purchasing and/or occupying in multi-tenanted dwellings or occupying individual shops in shopping centres and the like, have absolutely no choice at all in terms of provider where embedded networks exist, even where direct flow of energy can be facilitated whilst using parent-child metrology procedures and unmetered supply of electricity.

The decisions about type of energy supply (i. e. gas or electricity); whether to install individual meters; whether to supply separate electricity or gas meters at least for each floor and separate boiler tanks where these are in use on each floor, are made at the time of seeking building permits by a developer.

Choice denial for Purchasers of strata titled property

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

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

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

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

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

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

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

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

[Arrow Asset Management Decision NSW Supreme Court 2007](#)

I quote from Gary Bugden's summary:

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

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

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

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

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

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

One such contract blatantly requires Owners/Occupiers to

*“assign its rights, interests and obligations under the Agreement to the purchaser of the Premises upon contacting for the sale of the Premises. In the event that the Owner/Occupier fails to assign its rights, interests and obligations under the Agreement to a purchaser, then they shall remain liable for all charges under the Agreement.”*³³

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

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

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

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

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

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

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

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

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

Gas is either directly delivered or it is not.

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

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

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

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

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

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

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

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

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

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

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

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

See:

[ASIC disqualifies Henry Kaye from managing corporations for five years 20Jul2010 MR](#)

[Henry Kaye victims win \\$3m relief](#)

[ASIC obtains undertakings from Henry Kaye and others 21Jul2003](#)

[Jenman News Story Henry Kaye](#)

[ABC News Business Report Stories Henry Kaye](#)

[ASIC Media release ASIC reveals latest host of disputes against property spruikers 14Dec2009](#)

Extract:

December 14, 2009

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

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

According to ASIC:

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

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

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

(see also: [Media Release 19Oct2006 ASIC stops Greenwood Property Development Fund Ltd Prospectus](#))

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

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

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

See also

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

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

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

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

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

Choice denial for residential tenants of all descriptions

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.

As observed by Tenants Union Victoria,³⁴ 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*”

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.

See case studies in appendices referring to those published by Tenants Union Victoria, Consumer Utilities Advocacy Centre (CUAC) and NSW Government (Fair Trading) as well as two of my own in which I have had direct involvement – one from a tenant’s perspective; and another more recent one from an Owners’ Corporation perspective, the subject of ongoing and protracted dispute.

³⁴ Tenants Union Victoria (2006) Further Comments on the Small Scale Licensing Framework Issues Paper (ESC) (29 September), p2

‘EXEMPT CUSTOMERS SHOULD, AS FAR AS PRACTICABLE, NOT BE DENIED CUSTOMER PROTECTIONS AFFORDED TO RETAIL CUSTOMERS UNDER THIS LAW AND THE RULES’.

I am concerned about the phrase *“as far as practicable.”*

This is not a good enough policy position. It predicts and excuses lack of protection for whole groups of consumers. I discuss this separately under analysis of many of the failings of the proposed national Retail Law and Rules – a theme that I have repeatedly and unashamedly exposed within the consultative arena without real hope that the issues will be addressed in a climate of lighter and lighter regulation and increasingly compromised

In the case study the subject of focus and of ongoing dispute, the Victorian Energy and Water Ombudsman has on two occasions 3 years apart refused to identify the responsible gas retailer for the property allegedly for *“privacy reasons,”* presumably because of EWOV’s loyalty to its members who make mandatory membership fees because of the requirement to belong to an approved dispute scheme.

Ultimately after some persistence and attempts to draw attention to perceived gaps in EWOV’s perception of its role under statutory provisions, the identity of the retailer was identified as being AGL, a host retailer. It should not have taken three years and this degree of persistence to obtain a simple answer to a simple question posed by the Chairperson of the Body Corporate in endeavouring, for insurance and other purposes to establish who the Responsible Person (Gas Retailer) was for the property.

EWOV’s perceived conflicts of interest and reluctance to cover exempt or unregistered providers is a topic that I have repeatedly addressed in open consultative processes, including to the AER dating back to 2007.

My direct experiences of dealing with Victorian complaints scheme somewhat misleading known as “Ombudsman” but appearing to many to be little more than a poorly resourced industry-run complaints scheme operating more as an industry-association than an objective and empowered redress option has been the subject of extensive public discussion within the consultative arenas, including during the Productivity Commission’s Consumer policy Framework

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

and in response to MCE, AEMC, and AER arenas. I reproduce by published deidentified case study in which I acted as nominated representative for a particularly disadvantaged end-consumer. It speaks for itself.

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.

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-tented dwellings.

We are using one of those ways and we need you to agree to a contract if you want your hot water supply to be continued.

We have concluded that as there are ten apartments on this block. We arranged to purchase satellite hot water flow meters so that we could claim that we are monitoring your gas consumption for the water volume used. 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 you 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.

Alternatively how about paraphrasing the terms adopted by at least one *“metering data and other services provider”* to an Owners’ Corporation who receives and processes all utility bills:

“We have a great deal for you.

We intend to lock you in to arrangements that are unilaterally imposed on either the Owners’ Corporation or on individual Owners/Occupiers, including tenants that will imposed contractual obligation in perpetuum, including after you decide to sell or leave the premises unless you can assign your rights and obligations to the next owner or occupant.

By the way we have liberally interpreted the implied and statutory warranty obligations contained in current and proposed laws, as we do not expect except in the case of provable negligence or default to honour any guarantee for service quality or continuity, though we will try to make all reasonable endeavours to ensure that your supplies of heated water and heating is maintained.

You should be aware that we reserve the right to suspend your heated water supply if at any time either owner or occupier defaults on payments. We find his works better than traditional debt collection strategies, and is much cheaper for us. A dispute can be ended so much quicker if we have leverage over an essential utility or have the right to suspend water or heating.

Sorry if this sounds a bit harsh, but we are in business to make money and succeed and we cannot waste time with delayed disconnection processes.

If you cooperate with our expectations all should be well, but your expectations of service delivery and implied warranty and guarantee should be minimized as we are offering no more than the bare minimum under the terms that we unilaterally define as reasonable.

If you wish to get out of the Contract, you will need to pay us compensation, perhaps to the tune of several million dollars.

The Contract will last at least 15 years and you will find it extremely difficult to squeeze out of it. If you insist on going to court over it, it will cost you at least as many millions as we require to buy us out, so why not cut your losses now, pay up if you wish to terminate, or hold your peace and live with the unilaterally imposed contract for the rest of your stay here – and well beyond if you cannot find someone else to take on the obligations.

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.

In Queensland those living in public housing, most disadvantaged. Even when they receive no gas at all they are required to pay FRC fees.³⁵

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);
- How they specifically relate to the *Sale of Goods Act 1896 (Qld)*³⁶ 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

³⁵ 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.

³⁶ *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 market³⁷ 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.

Similar questions are pertinent to other States. There should be a requirement for all gas and electricity supplied to be accounted for on the wholesale-retailer-other-provider data base

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.

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.

³⁷ 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.

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 license 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.

In Queensland those living in public housing, most disadvantaged. Even when they receive no gas at all they are required to pay FRC fees.³⁸

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);
- How they specifically relate to the *Sale of Goods Act 1896 (Qld)*³⁹ 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*).

³⁸ 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.

³⁹ *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*.

- 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 market⁴⁰ 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.

I disagree with the ESC perception that the *RTA* (or equivalent tenancy laws elsewhere) 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 industry-specific 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 license 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.

⁴⁰ 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.

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 licensing 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.

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

- Option 1: adjustable conversion factor: rejected
- Option 2 Fixed conversion factor (adopted) based on a conversion factor at a cents per litre hot water rate as gazetted
- Option 3 – Site specific Option – 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 terms network and embedded applies exclusively to electricity. The Order in Council (OIC) under consideration by the ESC in discussing the small scale licensing 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 often provided by the wholesaler (distributor) or its servants contractors and/or agents (for example Jemena Asset Management), and from various middlemen to owners' Corporations. Haulage reference services include such things as demand haulage reference services for the firm haulage of gas to delivery points (DPS); volume HTS; receiving as at a receipt point; odorization of gas; haulage of gas from a receipt point to a DP; allowing withdrawal of gas at a DP; provision and maintenance of metering equipment (gas or electricity) and periodic meter reading. If non-reference services to Users are negotiated on a case-by case basis and these are not essential or required for the purpose of directly supply gas or electricity to an end-user, then the contract is between Distributer and User.

It is my understanding that the Queensland Competition Council (QCA) for example has ruled that these other services" should not" be added to pass-through cost, and that only costs and amortization right-offs for assets, DuoSS costs (Distributors Use Of System Services is the data-base used of settlements and other things done by AEMO/NEMMCO) directly attributable to the supply of electricity and gas can be allowed.

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 licenses 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 Licensing Framework⁴¹ (now referred to as the Exempt Selling Regime in the NECF Package). 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 minimize 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.

⁴¹ Essential Services Commission (2007) ESC 2007 Small Scale Licensing Framework: Final Recommendations, Melbourne. (March)
<http://www.esc.vic.gov.au/NR/rdonlyres/864FF246-D12C-494F-A4CD-A22BDFD98C9C/0/Smallscalelicensingframework.pdf>

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.⁴²

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 cannot 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.

⁴² 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 license, 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 identifies.

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, onsellors 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 Licensing 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 licensing 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 Licensing 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 guesstimate 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 licensing 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 minimize 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.⁴³

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 cannot 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.

⁴³ 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 license, 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-users; 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 identifies.

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, onsellors 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 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

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.

The ESC's remarks above 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.

Temperature gauges affixed to a water heat panel (for room heating) can measure the temperature of the water in the panel, but not in the taps. In any case, temperature and energy do not equate. Either gas can be measured or it cannot. Gas is measured in cu metres and the standard unit of measurement for gas is, megajoules, whilst for electricity it is KWH.

Hot water flow meters measure water volume not heat or energy. 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.

Meanwhile the very exploitive practices of which the ESC made mention at the outset of this component of its Draft Decision on Small Scale Licensing 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 “*bulk hot water arrangements*” or serviced hot water practices are complicated, have not been shown to 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.

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 licensing 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 quote verbatim from the Tenants Union Victoria submission⁴⁴ to the ESC’s small scale licensing 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:

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.

⁴⁴ Tenants Union Victoria (2006) Submission to ESC Small Scale Licensing Review (Aug)
http://www.tuv.org.au/pdf/submissions/Small_Scale_Licensing_Review_ESC_082006.pdf

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.

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.

These matters are complex and inter-related and represent issues that 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 43 submitters to the NECF2 package raised objections and concerns about gaps and the consultation processes, albeit that different groups of stakeholders had discrepant perspectives.

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 website*⁴⁵ from the description of services by industry participations delivering alleged benefits of AMI and Smart Grid initiatives for “*electric, gas and water utilities*” using e-meter technology.

For example emeter.com describes its services as follows:

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

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

⁴⁵ 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.”⁴⁶

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 minimize 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.

⁴⁶ 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.

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 licensed 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.

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 suggests 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 licensing 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.

Finally, I reminded the AER, MCE, AEMC and AEMO 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 report⁴⁷

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

⁴⁷ Victorian Auditor-General (2009) *"Towards a smart grid: the roll out of Advanced Metering Infrastructure"* Victorian Auditor-General's November Report
http://download.audit.vic.gov.au/files/111109_AMI_Full_Report.pdf

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 consumers) with the aim of maximizing the efficient use of power generating assets and smooth out peak consumption periods which cause spikes in the cost of electricity and rate inefficiencies in the allocation of capital to new generation capacity.

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

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

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

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

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

“The department’s project governance has not been appropriate for the nature and scale of the market intervention the project poses. In particular:

Its advice to government on risk assessment has been inadequate

The level of community engagement has been inadequate, given the significant effect on consumers.

DPI has engaged with the project in only a limited way as an ‘observer’ during its implementation phase.

As there were not enough staff assigned by the DPI to the project, it has not been able to adequately engage with such a large scale and complex project. This highlights a gap in the department's understanding of its governance and accountability role in a non-budget funded project"

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

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

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

The apparent lack of effective decision-making and transparency in the smart meter roll out has implications for the entire economy. The Centurian Metering Technologies solution may have delivered a workable solution for a fifth to a third of the price paid for arrangements sanctioned under an Order in Council process where \$2.4 billion was spent. Behind-the-scenes workshops between distributors appear to have been the norm without at least adequate governance accountability and oversight evident.

The people involved in making these decisions need to be made much more accountable more so in a situation where Victoria is seen to be taking a lead with national energy reform measures.

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

In relation to smart meters, it is not that there are not compelling reasons to move metering into the 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."

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 200 litres can occur before water is of an acceptable temperature.

There is a risk of Legionnaires 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.

TENANCY LAWS IN RELATION TO COST RECOVERY

I raise tenancy issues here since there are very pertinent to the data metering provisions proposed. Though the ERC0092 is mainly focused on the shifting of responsibility in a self-regulatory model, the data metering services concept, coupled with new proposals for an exempt selling regime that is intended to capture not only shopping centres and nursing homes, but also landlords and body corporate entities. This has enormous impacts on the undermining of existing tenancy laws and the already enshrined rights of residential tenants in particular, to say nothing of rights under contract law and the common law, and unfair contract provisions within revised generic laws – soon to be renamed *Competition and Consumer Law 2010*.

There are also 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.

All these considerations appear to be related resulting to perceived 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 1997⁴⁸

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 (e.g. 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.

⁴⁸ *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>

44 The Lessor must pay the annual supply charge associated with the supply of water or sewerage.

45 If the premises are a unit under the Unit Titles Act 2001, the Lessor is responsible for all owners' corporation charges.

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 (e.g. 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 it conditions precedent and subsequent in relation to meter readings is Lessor responsibility. This is contrary to the expectations placed in the proposed National Energy Retail Laws and Rules

(2) The Lessor must provide the tenant with an opportunity to verify readings and measurements.

49 If the Lessor does not arrange reading or measurement of a service connected in the name of the Lessor by the day after the date of expiry of notice to vacate given in accordance with this tenancy agreement or the Residential Tenancies Act, the Lessor is be responsible for payment of the unread or unmeasured service after the date of the last reading or measurement.

50 (1) If the tenant vacates the premises without giving notice before departure, the Lessor must arrange a reading or measurement of services connected in the Lessor's name within a reasonable time of the Lessor becoming aware of the departure of the tenant.

(2) The tenant is responsible for payment of services to the date of that reading or measurement.

Repairs in unit title premises

58 If the premises are a unit under the Unit Titles Act 2001, and the tenant's use and enjoyment of the premises reasonably requires repairs to the common property, the Lessor must take all steps necessary to require the Owners' Corporation to make the repairs as quickly as possible.

Comment MK

These provisions make matters clear and are not as succinctly put within other tenancy provisions, though in Victoria the OC Act exists to cover common property infrastructure liability by the OC.

Hot water services where water is centrally heated and a single gas or electricity meter exists to provide the energy are under that category. The existence of hot water flow meters are irrelevant and unnecessary, and under new trade measurement provisions would not be appropriate instruments to use to make any form of calculation regarding alleged energy usage or consumption by an end-tenant receiving merely heated water in composite form reticulated in water pipes rather than at the outlet of a gas meter (or electricity meter) representing flow of energy.

The proposed National Energy Retail Rules and Laws also embrace the concept of direct flow of energy and disconnection under specified circumstances only of gas or electricity not water.

Comment MK:

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 guesstimate 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*⁴⁹ 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.

Landlord's liability for various utility charges

53. Landlord's liability for various utility charges

(1) A Landlord is liable for-

⁴⁹ [Residential Tenancies Act 1997](#) Victoria

- (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 to the AER in the JGN Gas Access matter.

“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 of those receiving heated water as a composite product under such conditions to be "embedded" this is absurd since no flow of energy ever enters the abodes of those deemed to be receiving gas.

Gas and electricity are commodities for the purposes of generic laws and the full suite of protections applies. There are implications also for statutory and implied warranty terms; unfair contract terms embedded in proposed energy rules and laws; and the pending Rule Change proposal by the AEMC, which was not made part of a transparent process at the time when the NECF2 Exposure Drafts were put forward for consideration by stakeholders.

EnergyAdvice has also raised the issue of meaningful stakeholder consultation, and queried why the Draft Decision of the AER was published without a further public forum?

Though this is not a requirement, in view of the degree to which stakeholder endorsement is compromised, and also given the massive regulatory changes on foot in generic, trade measurement, national energy laws and so on, a hasty decision without further direct consultation may be against public interest. This case is a test case and not about a particular provider. The principles will apply across the board to all energy providers and impact on all stakeholders."

Residential Tenancies Act 1997 - SECT 69 (Victoria)

Landlord must ensure replacement water appliances have A rating

69. Landlord must ensure replacement water appliances have A rating

A Landlord must ensure that if an appliance, fitting or fixture provided by the Landlord that uses or supplies water at the rented premises needs to be replaced, the replacement has at least an A rating.

55. Reimbursement

(1) If a Landlord pays for anything for which the tenant is liable under section 52, the tenant must reimburse the Landlord within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(2) If a tenant pays for anything for which the Landlord is liable under section 53 or 54, the Landlord must reimburse the tenant within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(3) Subsection (1) does not apply if there is an agreement to the contrary under section 53.

Comment MK

The problems with this cost-recovery arrangement are discussed more fully in the deidentified case study that I submitted to various arenas, including the MCE SCO NECF1 (2008) NECF2 Package (2010); the Gas Connections Framework Draft Policy Paper (2009); the Treasury's Unconscionable Conduct Issues Paper (2009) and the Senate's Economics Committee Consumer Inquiry (ACL-TPA Amendment Bill2) ((2010); and previously the Productivity Commission's Consumer Policy Inquiry (2007-2008) (subdr242 Parts 1-5 and 8).

These include:

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

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.

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

Waiting time for 28 days before VCAT reimbursement claim can be met

Dealing with recalcitrant Landlords who refuse to comply with Orders – repeatedly as documented for instance by the Tenants' Union Victoria

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

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

Possible implications for credit rating

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.

Unjust imposition of unfair substantive terms under contracts that are not reflected in parity with generic provisions existing and proposed.

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.

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 provisions⁵⁰ 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.

⁵⁰ [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](http://www.legislation.sa.gov.au/LZ/C/A/RESIDENTIAL%20TENANCIES%20ACT%201995/CURRENT/1995.63.UN.PDF)

Extract **South Australian** tenancy regulations⁵¹

8—Other amounts recoverable by the Landlord

Pursuant to section 53(2)(c) of the Act, a Landlord is also authorized 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

⁵¹ *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 website⁵²

Since the FRC date in Queensland (1st July 2007) the price of natural gas has only increased by about 10%, but the price that Origin charge for BHW has increased to a level of 39% above the Victorian Conversion Factor, and the hot water meter reading fees have increased by 50%, over the last 3 financial years Origin has refused to converse with me, or give any reason why such price gouging is justified.

In Origin's case, even when the gas went down in price (the FRC date) - the price of BHW went up!

He has referred to 44% price gouge this by 44%. In relation to supply charges and hot water charges for BHW consumers in Queensland. (p4)

Mr. McMahon further states

LANDLORDS AND PROPERTY OWNERS

Bulk hot water meter reading fees on Origin invoices, show a fee to read and service that meter. On the 1st of July, prices increase and is applied to invoices as of that date. It is back-dated for 91 days (1 Qtr). It is not pro-rated for up to 91 days Other fees and charges on the bill (Gas, Hot Water, Supply Charges), are shown with both Pre and Post fees that center around the 1st of July.

Origin retrospectively apply this hot water meter reading fee.

BHW is not mentioned in government tenancy agreements in Queensland, for Landlords know that they cannot force a tenant to buy a service from someone else (Line Forcing TPA).

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).

⁵² Submissions (2010) to Senate Economics Standing Committee Consumer Law Inquiry (completed *Trade Practices Act (Australian Consumer Law) Amendment Bill(2)*)
http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm
Published item copy of submission from Kevin McMahon Qld resident in public housing as made to the *National Energy Customer Framework 2nd Exposure Draft* (March 2010)

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, lukewarm 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

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) ⁵³ 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. ⁵⁴

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)* ⁵⁵ 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.

⁵³ Tasmanian Tenancy Regulations
http://www.austlii.edu.au/au/legis/tas/consol_act/rta1997201/s17.html

⁵⁴ 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 was to build this system, and is also the referee on this market using the MIRN meter numbering system. (Now AEMO

⁵⁵ *Sale of Goods Act 1896* (Qld) (reprinted and as in force as at 29 August 2007)

How such a contractual basis is deemed valid and will be consistent with the provisions of the *Trade Practices (Australian Consumer Law) Act 2009*, to be renamed *Competition and Consumer Law 2010* 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 market⁵⁶ 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.*”

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

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

⁵⁶ 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.

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 SOME 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 article⁵⁷ 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 individuals are

"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.

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 be contractual or common law to belong to them is inappropriate.

⁵⁷ *see www.apimagazine.com.au "Making every drop count: Article by Shane McNally.*

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:

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.

The issues listed below are in dispute between some 160 owners within a residential body corporate entity in St. Kilda, serviced by Multinet gas meters; gas supply by AGL, long-range unilaterally imposed "*service arrangements*" for utilities, infrastructure, alleged energy supplies, hot water and heating provision. The arrangements were made before any owner took possession, and were foisted on the owners as a matter of "*take-it-or-leave-it*" provisions in a BOOT scheme (buy, own, operate and transfer – compulsorily – refer to s47 of the [Trade Practices Act 1974](#), [Goods Act 1958](#) (Vic) and many other provisions) determined between Developer Inkerman Developments Pty Ltd and unlicensed "*service provider*" Service Link Australia Pty Ltd, with signatures on contracts.

I list some of the contentions of the Owners' Corporation:

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

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 Commissions Inquiry Into Australia's Consumer Policy Framework (subdr242parts 1-5 and Part 8, 2008) and other public consultation arenas.

SOME HEALTH RISKS – CONSUMER PERSPECTIVES

The BHW arrangements pose 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.

I provide an extract from that submission, with citations as assembled by me at the time.

8 PROPOSED NFREE STAGE 2 MEASURES

5. Water Heater strategy

Selected health safety and efficiency considerations:

In 2004 the Estate Strategy and Policy Directorate, UK send a memo^{58/9} to top level budget holders, CEOs, commanding officers, directors, heads of establishments, property managers, project managers, project sponsors, other managers, and those with responsibility for design, installation, operation and maintenance of water systems.

The leaflet accompanying the policy instruction contained in that memo was aimed at those who manage premises with hot/cold water services and/or wet cooling systems.

That leaflet explains in lay terms the nature of legionnaire's disease

“Legionnaires’ disease is a potentially fatal pneumonia caused by legionella bacteria. It is the most well-known and serious form of a group for diseases known as legionellosis. Other similar (but usually less serious) conditions include Pontiac fever and Lochgoilhead fever. Infection is caused by breathing in small droplets of water contaminated by the bacteria. The disease cannot be passed from one person to another. Certain groups of people are more susceptible, including those under 45, and those with respiratory problems or compromised immune systems.”

Wikipedia^{59/10} describes legionellosis as “*an infectious disease caused by bacteria belonging to the genus Legionella*^{60/11}. *Over 90% of legionellosis cases are caused by legionella pneumophila, a ubiquitous aquatic organism that thrives in warm environments (25 to 45°C with an optimum around 35°C).*^{61/12}

There are two distinct forms of legionellosis. In the more severe form of the infection Legionnaire’s disease produced pneumonia^{62/13} (ref)

Pontiac fever is caused by the same bacterium, but produces a milder respiratory illness without pneumonia which resembles acute influenza.^{63/14}

⁵⁸ ⁹ Estate Strategy and Policy Directorate Policy Instruction found at http://www.defence-estates.mod.uk/publications/policy_instructions/2004/pi_04-37.pdf.

To obtain a copy of the accompanying leaflet write to HSE Books PO Box 1999 Sudbury, Suffolk CO10 2WA or access the HSE home page at <http://hse.gov.uk>

⁵⁹ ¹⁰ <http://en.wikipedia.org/wiki/Legionellosis> Refer also to numerous sources of further information on that site

⁶⁰ ¹¹ Ryan, KJ, Ray, CJ (editors) (2004) Sherris medical microbiology, 4th ed McGraw Hill ISBN 0838585299

⁶¹ ¹² CDC Etiologic Agent

⁶² ¹³ Winn WC Jr (1996) “Legionella” Baron’s Medical Microbiology (Baron S et al eds) 4th ed Univ of Texas Medical Branch ISBN 0-9631172-1-1

⁶³ ¹⁴ Ibid Winn (1996)

Some helpful references about the nature, cause and prevention of Legionellosis can be obtained by reference to the following:

CDC Disease Info *legionellosis_t*

- • WHO LEGIONELLA and the prevention of legionellosis 2007, 276 Pages
- • Illinois Department of Public Health page on Legionellosis
- • Video on how Legionella pneumophila infects the body
- • Directors of Health Promotion and Education page on Legionellosis
- • European Working Group for Legionella Infections
- • Legionella risk management
- • Recent Outbreaks of Legionnaires' disease
- • Legionella outbreak in Murcia, Spain, 28 June to 14 July 2001
- • River Glomma may have spread the Disease
- • <http://www.legionela.info>
- • Report of the public meetings into the legionella outbreak in Barrow-in-Furness, August 2002

Other useful publications include the following^{64/15}

Health (Air Handling and Water Systems) Regulations 1994 [PDF] Mandatory Regulations governing the installation and maintenance of commercial air handling (cooling towers) and warm water systems.

Australian Standards

11 of 39

- Australian Standard AS/NZ 36666.1:2002 part 1: Design, installation and commissioning
- Australian Standard AS/NZ 36666.2:2002 part 2: Operation and Maintenance
- Australian Standard AS/NZ 36666.3.2000 part 3: Performance-based maintenance of cooling water systems

Recent Incidence

<http://www.health.wa.gov.au/envirohealth/hazards/legionella.cfm>

In Australia during 2007 an outbreak of legionella^{65,16} was believed to have started during the NYE celebrations at Circular Quay on Sydney's harbour originating in a cooling tower (where 1,400 cfu/ml Legionella was found) from an adjacent office building, four cases were initially confirmed but there were concerns due to the fact that Circular Quay is one of the most populated areas in Sydney on NYE.

⁶⁴ ¹⁵ Health Hazards in our Environment WA Health Department
<http://www.health.wa.gov.au/envirohealth/hazards/legionella.cfm>

⁶⁵ ¹⁶ <http://en.wikipedia.org/wiki/Legionellosis>

As a result there could have been potentially many more cases. By 20 January the NSW authority reported three more cases, bringing the NSW total to 7.

As recently as 8 June 2006 an outbreak of Legionnaire's disease case reported in Melbourne, Victoria by the DHS thought to have a common source.

These were related to cooling towers around Footscray and Seddon.

Health Risk, Liability, Water and Energy Efficiency – some considerations

Legionella Bacteria – courtesy Advanced Environmental technologies

Under general health and safety law in the UK and in parallel laws in other countries, certain legal responsibilities are incumbent on those managing to consider the risks from legionella that may affect staff or members of the public and to take suitable precautionary measures. An employer or a person in control of premises (e.g. a landlord) must

Identify and assess the source of risk:

Prepare a scheme (or course of action) for preventing or controlling the risk

- Implement and manage the scheme – appointing a person to be managerially responsible (the responsible person)
- Keep records and check that what has been done is effective and
- If appropriate notify the local authority if there is a cooling tower on the premises

These considerations have implications for those responsible for cooling towers, evaporative condensers, **hot water and cold water, systems**, humidifiers and spa baths.

Contractors and others under the control and direction of the responsible party (for example manager of public housing or private landlord) may nevertheless also be employees under the law with similar liability

It follows that any public policy to mandate certain types of systems, including **hot water systems (especially those receiving energy supplied to a single water tank supplying water to multiple individual apartments)**, needs to take into account any such legal and moral responsibilities applicable and to ensure that in proposed existing buildings proper protections are in place for maintenance of such property.

That is one of the many reasons why contractual responsibilities of landlords, whether of public or private rental properties must be clearly understood by all.

In private rental property especially those of sub-standards with bulk hot water systems, the responsibilities described are the minimum expected and represent an enhanced responsibility for situations where end-consumers have no choices, do not legally have contractual relationships with energy or water suppliers in the absence of separate metering for each utility consumed, including gas, electricity, and water efficient devices.

Whilst energy retailers and apparently also current state policies both implicitly and explicitly refuse to recognize the numerous contractual issues raised in passing in this document, the implications for fair trading, trade practice and trade and utility measurement provisions and consumer rights generally, the fact is that the proper contract does lie with a Body Corporate entity (Owner's Corporation) for the provision of cost of providing hot water services and air conditioning services that form part of common property infrastructure, and for ensuring through cooperative efforts that such services, particularly bulk hot water are monitored and maintained, and to have a clear plan of action for dealing with risk.

Risk from legionella in water systems can be controlled but careful planning, a successful management policy, competent staff (or body corporate entities in the case of private rental property) and attention to proper control strategies are all essential, with regular review of risk factors.

If such strategies are not part of the overall existing plan to upgrade and mandate changeover of hot water systems, and if existing sub-standard properties including public housing and private rental apartments are not covered, decades may pass before these issues are addressed at all, leaving the public at risk, and many parties facing potential legal liability.

Conditions that promote growth^{66/17}:

- **Scale and sediment** supply the environment needed for growth of Legionnaires' disease bacteria (LDB) and other microorganisms.
- **Dead legs** and non-recirculated plumbing lines that allow hot water to stagnate also provide areas for growth of the organism.
- **Temperatures** maintained below 60°C (140°F) encourage growth of LDB and other microorganisms.

Source: US Department of Labour Health Administration. Osha Technical Manual Section 2C-1 Domestic Hot-Water Systems.

<http://www.osha.gov/dts/osta/otm/legionnaires/hotwater.html>

Accepta, a company specializing in advanced environmental technologies^{67/18} reports^{68/19} new research from the US which has "*identified home hot water pipes and domestic hot water systems as common sources of Legionnaires' disease*"

Janet Stout of the Veterans' Administration Medical Center in Pittsburgh said "*The evidence suggests that the residential water system is an under-appreciated source of Legionnaire's disease,*" first identified in 1976. There is worldwide concurrence on the culprit bacteria.

As reported by Accepta, Janet Stout estimates that between 2% and 5% of the 600,000 pneumonia cases requiring hospitalization in the US each year are caused by the Legionella pneumophila bacteria, with correct diagnosis often being missed because identification requires both a bacterial culture and a special urine test.

⁶⁶ ¹⁷ US Department of Labour Health Administration. Osha Technical Manual Section 2C-1 Domestic Hot-Water Systems. <http://www.osha.gov/dts/osta/otm/legionnaires/hotwater.html>

⁶⁷ ¹⁸ A leading UK supplier of high performance industrial and process water and waste water treatment chemicals;

⁶⁸ ¹⁹ Legionnaires Disease - Domestic Hot Water Systems Accepta, http://www.accepta.com/industry_water_treatment/legionnaires-disease-domestic-hot-water.asp

In the Pennsylvania and Ohio study headed by Stout's team, 21 victims had allowed testing of their home water, with *Legionella pneumophila* bacteria being found in 24% of those tested. Two study patients died of infection so caused.^{69/20}

"The bacterium, which causes Legionnaires' disease, is widespread in nature, flourishing at temperatures of between 90 and 105 Degrees F. It mainly lives in water, for example ponds, where it does not usually cause problems. Outbreaks normally occur from purpose-built water systems where temperatures are warm enough to encourage growth of the bacteria, e.g. in cooling towers, evaporative condensers, showers, whirlpool spas and from water used for domestic purposes.

People often keep the temperature in their hot water tanks set low to prevent scalding, but to kill the Legionnaires bacteria, Stout recommends temporarily turning up the temperature to above 140 Degrees F and running the hot water outlets for half an hour. Since the bacteria quickly return, this should be done regularly, especially if people prone to the infection are using the water. If the temperature is kept high, the bacteria return much more slowly or not at all.

"The overall perception we have that drinking water in the home is free of bacteria is a misconception," said Stout. "Although Legionnaires' is a naturally occurring organism in water, people should be aware this is a potential source of disease."

As far back as 1991, *Alary and Joly* had reported^{70/21} as follows on risk factors for contamination of domestic hot water systems by legionellae.

"To assess risk factors associated with the contamination of the domestic environment by legionellae, 211 houses in the Quebec City area were randomly selected and water samples were collected from the hot water tank, the shower heads, and the most frequently used faucet. After centrifugation, concentrated samples were seeded in triplicate on BCYE and GPV media. Data on the characteristics of the hot water system and plumbing in the house and on the personal habits of the occupants were collected for each house. Among these 211 houses, hot water was provided by either an oil or gas heater in 33 and by an electric heater in 178. Legionellae were isolated from none of the samples from houses with oil or gas heaters and from 39% (69 of 178) of those with electric water heaters (P less than 0.0001). This association remained highly significant after control for water temperature and other variables in a stratified analysis. In the 178 houses with an electric heater, 12% of the faucets, 15% of the shower heads, and 37% of the water heaters were contaminated."

"Legionella pneumophila serogroups 2 and 4 were the most frequently isolated strains. Logistic regression showed that factors associated with electric water heater contamination were (i) location of the house in older districts of the city (P less than 0.0001), (ii) old age of the water heater (P = 0.003), and (iii) low water temperature (P = 0.05). Contamination of the water heater was the only factor significantly associated with the contamination of peripheral outlets (P less than 0.0001). "

⁶⁹ ²⁰ Ibid Accepta's report ref 32

⁷⁰ ²¹ M Alary and J R Joly (1991) Risk factors for contamination of domestic hot water systems by legionellae. *Environ Microbiol* > v.57(8); Aug 1991

Some of the best conditions for *Legionella* growth are found in^{71/22}:

- Large air-conditioning water-cooling towers,
- Evaporative condensers domestic hot water systems with water heaters that operate below 60°C humidifiers and
- Decorative fountains spas and
- Whirlpools warm water pipes that operate at a temperature above 20°C but below 60°C stagnant water bodies

Water stored below 20°C is generally not a source for *Legionella*.

However, high levels of the microorganism have been measured occasionally in the water supply of cold water and ice making machines.

Cooperative Research Centres (CRC) reports that^{72/23}

“The majority of communities in central Australia rely on groundwater aquifers as the primary source for the water supply. Groundwaters can contain high concentrations of dissolved minerals that reduce the functional life and increase the infrastructure maintenance requirements, such as water systems, hot water systems and air conditioners. In some cases, hard waters cause the failure of key health hardware, impacting on the health of residents.”

In May 2006 Quinlan Miller, Treston, Lawyers reported as follows^{73/24}

“As the (legionella) bacteria is inevitably present in nature, the law does not oblige the owner to eradicate it, merely minimise the risk of exposure by minimising the opportunity for growth. An owner/ building manager with well documented regular inspections and maintenance of its cooling towers and supporting mechanical equipment may satisfy a court it took a reasonable response to a recognised risk of foreseeable injury. In so doing an action in negligence may be unsuccessful by the injured party.

However, in most outbreaks investigated to date the presence of the legionella bacteria has been caused by infrequent maintenance, inadequate inspection of cooling towers, poor design making access for leaning purposes difficult, insufficient chemical additives applied to cooling tower recycled water, and breakdown of mechanical equipment causing increase in water temperature or loss or capacity to siphon and replace water.

“If investigation of an incident arising in Queensland did result in a successful prosecution by Workplace Health & Safety for unsafe plant, then an individual suffering legionnaire’s disease will have a reasonable prospect in convincing a court harm from unsafe plant was reasonably foreseeable. If it can then be shown that more regular maintenance or monitoring would have prevented the spread of airborne particles of the bacteria then it is open to a court to find the owner or manager of the cooling tower has breached its duty of care. In Queensland any damages claim brought for legionnaire’s disease must be proceeded with via compliance with the requirements of the Personal Injuries Proceedings Act 2002.

⁷¹ ²² Environmental Health Guide. Population Health. Legionnaire’s Disease. WA Health Department found at <http://www.population.health.wa.gov.au/environmental/resources/EH64%20Legionnaires%20Disease.pdf>

⁷² ²³ Small Water Systems their management and operation. CRC found at http://www.waterquality.crc.org.au/programs/program3c/small_water_systems_autumn07%20.pdf

⁷³ ²⁴ Workplace Injury Aklert May 2006 Quinlan, Miller Trestan Lawyers, found at http://www.qmtlaw.com.au/icms_docs/8236_Legionnaires_Disease_-_May_2006_.pdf

This requires a compulsory set of pre-court procedures to be completed before legal proceedings (which must be commenced within 3 years of the exposure) can be commenced. The pre-court procedures must be commenced within 9 months of the exposure although lodging at a later time is possible if there is a reasonable excuse for delay in lodging the requisite notice.

Financial dependents of an individual who dies from legionnaire's disease also have a right to make a claim where negligence can be proven for loss of the benefit of the income which they derived from the deceased."

In Australia, Australian Standard 3666.1 1995 regulates the design, installation operation and maintenance of water systems in Australian buildings. The purpose of the standard is to impose minimum preventative obligations upon owners and operators of cooling towers to minimise legionella growth to maximise health and safety.

Underpinning the Australian Standard in most states are additional guidelines and legislation, systems of registration and in some states mandatory testing by the owner or manager of the cooling tower.

The use of water heaters as a means of meeting the requirements for limiting the hot water temperature to 50°C for water used for ablutions and the use of tempering valves for tempering hot water to 50°C and thermostatic mixing valves for hospitals and aged care has been clarified.^{74/25}

The Canada Safety Council makes the following observations and recommendations^{75/26}:

To minimize bacteria contamination, water must be stored at 60 C or higher. For example, temperatures under 50 C may increase the risk of Legionnaires' disease, a form of pneumonia, due to bacterial growth in the tank. That disease is caused by Legionella bacteria, which live in water. Temperature is a critical factor for Legionella to grow. The risk of colonization in hot water tanks is significant between 40 and 50 C.

Legionella bacteria most often enter the lungs due to aspiration. (Aspiration means choking such that secretions in the mouth bypass the choking reflexes and enter the lung.) Drinking contaminated water is not a major cause of Legionnaire's disease.

The Centers for Disease Control and Prevention estimates 8,000 to 18,000 Americans contract the disease annually. Five to 30 percent of the cases are fatal. While Canada has no national statistics, Hydro-Québec says about 100 people a year are hospitalized in that province for pneumonia caused by contaminated residential water heaters.

Plumbing Code Changes on Hold

In 2001, the Canadian Commission on Building and Fire Codes (CCBFC) was informed that the Canadian Medical Association had passed a resolution urging provincial and territorial governments to amend existing building and plumbing codes to require the default setting of new residential hot water heating devices to a maximum of 49 C in order to address the safety of children and elderly who were being scalded in significant numbers.

⁷⁴ ²⁵ Australian Standards AS/NZS 2063. AS/NZS 3500.1, Water Services; AS/NZS 3500.2, Sanitary Plumbing and drainage; AS/NZS 3500.3 Stormwater; and AS/NZS 3500.4, Heated water systems.

<http://www.standards.org.au/cat.asp?catid=41&contentid=214&News=1>

⁷⁵ ²⁶ Canada Safety Council Heated Debate about Water found at <http://www.safety-council.org/info/home/hotwater.html>

The CCBFC asked the Standing Committee on Building and Plumbing Services to examine the scalding issue and to recommend changes to the National Plumbing Code of Canada.

The Standing Committee on Building and Plumbing Services has the responsibility to balance concerns about all known risks into its decisions. The Code process must scrupulously examine every possible impact of proposed changes. This level of precaution and consensus is critical to the health and safety of Canadians.

The Standing Committee did not recommend the lower maximum temperature for hot water heaters. Instead, it proposed a maximum 49 C hot water temperature at fixture outlets in residential occupancies with the exception of installed dishwashers or clothes washers. Automatic compensating mixing valves at each fixture, or a master mixing valve, could be installed to meet the objective. The change, which would only apply to new construction, was to appear in both the National Plumbing Code (NPC) and the National Building Code (NBC) in 2005.

In 2003, during the public consultation on proposed changes for the 2005 NBC and NPC, industry and some provincial governments opposed the committee's proposal. Those most likely to be held responsible for illness from contaminated water still had concerns.

In October 2004, after much discussion and consultation, the CCBFC withdrew the proposed change. It requested a national task group be set up to examine the health and safety risks associated with hot water delivery in buildings. The task group has reviewed the medical knowledge, statistics and circumstances of Legionella contamination, as well as information about injuries related to scalding. Its recommendations and a proposed course of action have been submitted to the Standing Committee on Building and Plumbing Services for consideration. That committee meets at the end of June 2005 to review the proposals of the task group, and will make recommendations on this matter to the CCBFC.

In hot water tanks, scale, corrosion, sludge and other precipitators of legionella bacterium growth are culprits. Has enough serious attention has been paid to these factors in addressing liabilities incumbent on nursing homes, public housing authorities and delegates, private landlords of apartment blocks.

Phillipa Chetman has studied the economic cost to the nation and the relative savings that could be made by adoption of proactive measures compared with the economic health burden of addressing issues after the fact, especially in terms of hospital costs.

Whilst those areas may be outside the direct scope of the E2WG brief, these issues cannot be swept aside in making recommendations for upgrading or replacement of hot water systems.

The issue of the long-term consequences removing electric hot water heaters is outside the scope of my knowledge, but these issues have been publicly raised by industry stakeholders.

This submission is primarily focused on a range of issues associated with liability, contract, maintenance and changes made with regard to both energy efficiency and competition policy initiatives in advanced stages of planning and implementation. In a climate of policy change that may allow scope for addressing issues otherwise left on backburners with inconclusive outcomes, confusion, potential for expensive litigation and complaint.

Time pressures preclude a more comprehensive examination of this topic, but the few references cited should suffice to promote discussion of appropriate measures to adopt when recommending overhaul of hot water service mandates for new and existing buildings, with particular regard to the social responsibilities to vulnerable and disadvantaged low fixed income groups living in apartment buildings; those in caravan parks and rooming houses; and other residents in nursing homes and other care situations 19 of 39

Selected control measures

Some of the recommended control measures are as follows^{76/27}:

- Ensuring that the release of water spray is properly controlled
- Avoid water temperatures and conditions that favour the growth of legionella and other microorganisms
- Ensure water cannot stagnate anywhere in the system by keeping pipe lengths as short as possible or by removing redundant pipework
- Avoid materials that encourage the growth of legionella
- Keeping the system and water in it clean and

Treating water to either kill legionella (and other micro-organisms or limit their ability to grow

Note though keeping the system clean will help prevention of legionella as well as ensure that through scaling and defouling other advantages such as improved efficiency will be gained.

The US Department of Health^{77/28} recommends the following system control measures, in addition to biocide measures and other alternatives:

Temperature

- Maintain domestic water heaters at 60°C (140°F) and water delivered at the faucet at a minimum of 50°C (122°F). Where these temperatures cannot be maintained, control LDB growth with a safe and effective alternative method. Also see What to consider in the system design.
- Proper insulation of hot-water lines and heat tracing of lines can help maintain distribution and delivery temperatures at 50°C (122°F).

If potential for scalding exists, employ appropriate fail-safe scald-protection.

System Controls:

- Run recirculation pumps continuously and exclude them from energy conservation measures.
- Eliminate or minimize the use of rubber, plastic and silicone gaskets in the plumbing system. These materials may serve as growth substrates for LDB. Frequent flushing of these lines also reduces growth.

⁷⁶ ²⁷ Ibid Estate Strategy and Policy Directorate Policy Instruction found at http://www.defence-estates.mod.uk/publications/policy_instructions/2004/pi_04-37.pdf

⁷⁷ ²⁸ Ibid US Dept or Health

- Identify and test the integrity of all backflow preventers (to ensure protection of domestic water from cross-contamination with process water) through a building code-approved method.

Biocides:

- Hot-water tanks should be drained periodically to remove scale and sediment.
- Periodically chlorinate the system at the tank to produce 10 ppm free residual chlorine and flush all taps until a distinct odor of chlorine is evident as a means of control. The tank should be thoroughly rinsed to remove excess chlorine before reuse.
- In-line chlorinators can be installed in the hot water line; however, chlorine is quite corrosive and will shorten the service life of metal plumbing.
- Control of the pH in the range of 6.8 - 7.0 is extremely important to ensure that there is adequate residual chlorine in the system.

Though raised here primarily in the context of health, legal liability and contractual considerations, the energy efficiency goals achieved secondary to meeting those responsibilities should be part of the overall agenda at the initial planning stage given the massive changes proposed with energy efficiency in mind.

Some possible solutions:

1. Withdraw the 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).
2. Allocate responsibility to the appropriate contractual parties - OCs
3. Make sure metering databases and service compliance is undertaken
4. Apply appropriate trade measurement practices using the right instrument to measure the right commodity in the correct unit of measurement and scale.
5. Ban communal hot water systems and install individual utility meters for gas electricity and water in all new buildings.
6. 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.

SELECTED CONDUCT ISSUES

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 licensed 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). Amongst the several allegations made are those of persistent harassment even after being informed of the alleged consumer's vulnerabilities, coercive threat, misleading and deceptive conduct, are.

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_Madeline.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/Madeleine%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)

Other issues of conduct are apparent to those who have a grassroots connection with the community.

Even for those who do not, it is apparent from cursory examination of the website just what has occurred since retail competition was “found” to be flourishing and since the adoption of the bizarre bulk hot water provisions, hot water service provision through metering data providers or others finding loopholes through which end-users of utilities may be exploited.

I have come across such novel operators as Meters2Cash who claim that certain body corporate entities have appointed them to undertake metering data services and charge for heated water services, threatening inappropriately to charge exorbitantly for debt collecting activities. Such providers are not under the umbrella of any regulatory control.

This is how they describe themselves:

METER2CASH SOLUTIONS provides cost-effective, timely and accurate utility billing services to our clients in the Body Corporate and Strata Title sectors. These services include meter reading, invoice production, payments and collection management as well as financial performance reporting and reconciliations.

We are a privately owned and independent company focused on providing quality solutions to our clients to ensure they remain competitive in their markets in terms of cost, quality and customer service.

They apparently have no idea how to interpret generic laws for sale and supply of goods contract or tenancy laws or the enshrined rights of residential tenants, and have ways to force explicit contractual relationships where these simply should not exist – on the basis that goods can only be sold where they are directly owned and directly supplied, and that the goods match the description of what is provided.

These providers do not own the water. They claim to be charging for heated water, calculated on a cents per litre basis, yet they cannot measure the heat, take no responsibility for the quality of what is provided; the implications for good industry practice in trade measurement, or indeed imminent lifting of utility exemptions under revised trade measurement laws, or much understanding of appropriate standard contract terms or proper conduct.

Even those who are covered under regulation, the absence of monitoring leads to many shortfalls in appropriate industry conduct.

Those deemed to be receiving energy even when none at all is received, find themselves suspended from heated water supplies as a mandated part of their tenancy leases if they refuse to “*sign up*” and form explicit contracts with energy providers or those claiming to be provided heated water supplies on behalf of body corporate entities.

The situation can only get progressively worse when the proposed exempt selling regime is adopted – which despite any consumer inputs is bound to happen, possibly in the same haphazard manner in which the Victorian provisions mushroomed, starting with an Order in Council that was intended only to provide exemptions in limited circumstances for transitory situations where electricity (not gas) was directly supplied.

See discussion under Exempt Selling, refer to case studies in appendices and examination of the original Victorian Order in Council of 20022 regarding Exempt Selling (Appendix 8).

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.

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 you 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.

For the sake of enforcement I repeat the parody outlined yester from the perspective of Owners' Corporations. Refer to the rationale behind the standard term contract until recently published by Service Link Australia Pty Ltd online in relation to a property development associated with Inkerman Developments and property pruiker Henry Kaye, who has been banned from managing corporations for five years, following his involvement in a particular St. Kilda Road development in Victoria.

The circumstances resemble those in which a landmark Supreme Court decision made in 2007 known as the Arrow Asset Management Case.

Here's a paraphrase of the terms of contract adopted by at least one "*metering data and other services provider*" to an Owners' Corporation who receives and processes all utility bills:

"We have a great deal for you.

We intend to lock you in to arrangements that are unilaterally imposed on either the Owners' Corporation or on individual Owners/Occupiers, including tenants that will imposed contractual obligation in perpetuum, including after you decide to sell or leave the premises unless you can assign your rights and obligations to the next owner or occupant.

By the way we have liberally interpreted the implied and statutory warranty obligations contained in current and proposed laws, as we do not expect except in the case of provable negligence or default to honour any guarantee for service quality or continuity, though we will try to make all reasonable endeavours to ensure that your supplies of heated water and heating is maintained.

You should be aware that we reserve the right to suspend your heated water supply if at any time either owner or occupier defaults on payments. We find his works better than traditional debt collection strategies, and is much cheaper for us. A dispute can be ended so much quicker if we have leverage over an essential utility or have the right to suspend water or heating.

Sorry if this sounds a bit harsh, but we are in business to make money and succeed and we cannot waste time with delayed disconnection processes.

If you cooperate with our expectations all should be well, but your expectations of service delivery and implied warranty and guarantee should be minimized as we are offering no more than the bare minimum under the terms that we unilaterally define as reasonable.

If you wish to get out of the Contract, you will need to pay us compensation, perhaps to the tune of several million dollars.

The Contract will last at least 15 years and you will find it extremely difficult to squeeze out of it. If you insist on going to court over it, it will cost you at least as many millions as we require to buy us out, so why not cut your losses now, pay up if you wish to terminate, or hold your peace and live with the unilaterally imposed contract for the rest of your stay here – and well beyond if you cannot find someone else to take on the obligations.

Comment MK

What's wrong with this picture?

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

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

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

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

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

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

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.

As mentioned elsewhere, the exempt selling regime was developed originally in Victoria under an OIC exclusive to onselling of electricity as directly supplied by electrical conduits in limited circumstances for transitory supply only within small scale distribution (caravan parks, nursing homes). Refer to the Victorian 2002 Order in Council for Exempt Selling of Electricity.

Instead exemptions were indiscriminately issued as applications were received. The demand for exempt selling has increased greatly, with no recognition that water infrastructure can neither calculate consumption in megajoules (gas) or kilowatt-hour (KwH) (electricity), nor measure or delivery energy in calorific value.

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

In the case of electricity, the Victorian Ministerial Order in Council of 2002 for Exempt Selling was intended to be restricted to direct supply of energy via electrical conduit to those considered “*embedded*” because of changeover of ownership or operation of the electricity network. Despite the limitations of the OIC, these provisions were seen as a go-ahead to indiscriminately provide exemptions to anyone seeking to escape licensing obligations. That risk is perpetuated with a new regime under the AER contemplated for exempt selling.

Also the distinction between gas and electricity has not been recognized in determining what should properly be called “*embedded*.” This term is incorrectly used in connection with gas – either it is directly supplied in gas service pipes, or no gas is delivered at all. Either gas or electricity can be said to be consumed or supplied unless they are directly delivered in gas service pipes or electricity conduits, regardless of any changeover of generation, distribution or transmission network operations

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:

The fact that contestability is simply not an option for the vast majority of those living in multi-tenanted dwellings;

The differences between the gas and electricity markets and the fact that gas is not and should never be part of an exempt selling

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

An unjust free retail competition charge (FRC) is applied to 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). These end-users of utilizes use no gas even for cooking or heating. But if they simply live in a multi-tenanted dwelling, such an apartment block where a communal boiler tank that is gas-fired by a single meter, an FRC charge is imposed by the retailer, passed on through the gas distributor, where for settlement purposes only a single meter exists and a single bill needs to be issued to the Developer or Owners' Corporation.

A contractual relationship for sale and supply of energy with an end user of water is not created by ownership of or the mere existence of a gas-fired boiler tank and associated water infrastructure. Collusive arrangements between Developers or Owners Corporations and energy suppliers seeking to capitalize on loopholes in energy provisions to expand on business unrelated to the sale and supply of energy or its proper measurement should not be deliberately or inadvertently facilitated by budget allowances that are not prudent, necessary or appropriate under energy provisions. The proposed National Energy Retail Laws expect a flow of energy to occur before a sale contract for energy is in place.

Retailers are arranging for asset management companies, often related entities to distributors, to disconnect heated water supplies on the basis of being unable to forge explicit contracts for the sale and supply of energy to end users of heated water, where no energy of any description is supplied or flows into their abodes.

The mere existence of a gas-fired boiler tank (or an electricity-fired one) in the care custody and control of an OC, on the basis of 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).

In addition other 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 licensing (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."*

I therefore support AER's recommendations as follows:

"the Retail Law attach a ⁷⁸ 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 effecting 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.

⁷⁸ Consumer Law Action Centre (2007) Submission to the RP{G Working Paper 2
http://www.ret.gov.au/Documents/mce/documents/Consumer_Action_Law_Centre20070130111923.pdf

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 by 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.

Since the 2006 Small Scale Licensing 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 Licensing Framework at the request of Minister Theo Theophanous as far back as March 2006.

That Minister had referred to objectives to

- Facilitate efficiency in regulated industries
- Facilitate effective competition and promote competitive market conduct; and
- 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 licensing provisions. Although the exemption process has been recently used to facilitate small scale distribution and selling activities, this is not the 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 scheme⁷⁹ saw fit to undertake a feasibility study of the small scale licensing market⁸⁰ 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 Licensing Review publicly admitted to conflicts of interests. These are discussed elsewhere.

⁷⁹ 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

⁸⁰ Energy and Water Ombudsman Victoria Ltd (2006 and 2007) Submissions to ESC Small Scale Licensing Issues Paper and Draft Decision respectively
<http://www.esc.vic.gov.au/NR/rdonlyres/695EF0E8-FBEB-4B42-879F-B233058DFAF0/0/PublicforumSmallScaleLicensing20060914.pdf>

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).

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*."

What barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market⁸¹ 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.

⁸¹ 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.

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.

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, PIAC⁸² 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 addressing of 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.⁸³

⁸² 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>

⁸³ 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>

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.

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 RPWG⁸⁴

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.*

⁸⁴ 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 the⁹ Climate Action Network Australia in their submission to the consultation on the Draft Code.

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 recently undertook an inquiry into the regulation of such networks.

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.⁸⁵

⁸⁵ See EWOV (2006) Response to ESC Small Scale Licensing Issues Paper and Final Decision EWOV's Submission to Essential Services Commission Licensing Framework Issues Paper August 2006, p 3
<http://www.ewov.com.au/site/DefaultSite/filesystem/documents/PDF/Responses/2006/060825-L-EWOV%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 Licensing Draft Decision (2007)

SOME SPECIFIC COMPETITION ISSUES IMPACTING ON CONSUMER CHOICE AND PROTECTION

I use gas examples to illustrate here, but the arguments are applicable to electricity, with the exception that gas cannot be embedded – either it is directly provided or it is not.

Unlike electricity, where, as long as flow of energy is directly achieved, change of ownership or operation does not alter the fact that electricity is received by the end-user.

This does not apply of course if a single electricity meter is used merely to provide heat to a communal water tank from which heated water is reticulated to various individual residential abodes in multi-tenanted dwellings.

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.⁸⁶

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.

⁸⁶ 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, licensed or unlicensed 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;⁸⁷ residential tenancy; trade measurement; generic laws on the brink of formalization under revised TPA provisions – to be known as *Competition and Consumer Law 2010*.

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.

⁸⁷ 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 communally heating water for multiple tenants residing in an apartment block.

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

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.”⁸⁸

⁸⁸ Elsewhere I discuss the clarity with which the ACT Residential Tenancies Act explicitly apportions to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone. Similar provisions apply in Victorian provisions. NSW permits water charges for excess water only if metered; or additional water charges by consent only. Electricity and gas charges need to be metered to show consumption. Queensland tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Qld Govt at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

Similarly, the South Australian *Residential Tenancies Act 1995*⁸⁹ refers to alternation to premises as follows:

70—Alteration of premises^{90,91}

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

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

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

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.

⁸⁹ *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>

⁹⁰ 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.

⁹¹ Tasmanian tenancy provisions under the *Residential Tenancies Act 1997* (TAS) have similar provisions about alteration to property without Landlord consent.

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 subsidise their other gas retail consumers, with cheaper gas and supply charges. This is a complete barrier to entry for other new retailers.”

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 Victoria⁹², 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).

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.

⁹² Tenants Union Victoria (2006) Further Comments on the Small Scale Licensing Framework Issues Paper (ESC) (29 September), p2)

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 Code⁹³ (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 introduced to legislation or proposed legislation.

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.*”

⁹³ 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.

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.⁹⁴

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.

⁹⁴ 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.

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)*⁹⁵ 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.

What barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market⁹⁶ 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 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.

⁹⁵ *Sale of Goods Act 1896* (Qld) (reprinted and as in force as at 29 August 2007)

⁹⁶ 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.

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.

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 sale⁹⁷

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.

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

⁹⁷ 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*” Hansard Wednesday 11 October 2006

(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 changing their gas retailer." This last comment means transfer from AGL to Origin to compound the monopoly situation so that supply charges for the actual supply of gas for heating and cooking purposes is not duplicated on the basis of alleged supply of gas from Origin for the purposes of centrally heating a communal boiler tank, but not providing any direct flow of gas to the recipients of the heated water.

See Kevin McMahon's submission to the NECF2 Package, also published on the Senate's website (TPA_ACL-Bill2).

Refer also to the Second Reading Speech by the then Treasurer The Hon Anna Bligh (now Qld Premier) and Member for South Brisbane) 'Energy Assets (Restructuring and Disposal) Bill" Hansard Wednesday 11 October 2006, especially penultimate paragraph page 1, and first paragraph p2 in which extraordinary guarantees seem to have been made regarding exemption from challenge. Perhaps Part 3 Statutory Orders of Review as contained in the Queensland Judicial Review Act 1991 need to be evoked – since one monopoly – the State Government sold energy assets (and impliedly packaged these with water assets) to another monopoly Origin in order that 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 Paper⁹⁸; 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.

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.

⁹⁸ 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

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

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 information⁹⁹ and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009¹⁰⁰ 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)¹⁰¹ 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 tenderer¹⁰² 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.

⁹⁹ <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>

¹⁰⁰ Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009

¹⁰¹ Source: <http://www.duet.net.au/duet/about-duet/structure.htm>

¹⁰² Ibid

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 (previously Alinta 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 1997¹⁰³. 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 capitalization 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.

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 Multinet¹⁰⁴ 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.

¹⁰³ <http://www.uxc.com.au>

¹⁰⁴ *“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 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.

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*
 - (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*¹⁰⁵ 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).

¹⁰⁵ *Gas Supply Act 1996* (NSW), last updated 23 March 2010, last accessed 28 May 2010
<http://www.legislation.nsw.gov.au/fullhtml/inforce/act+38+1996+cd+0+N#pt.1-sec.3>

In relation to persons involved in the reticulation of gas (authorized 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;

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, at 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 Objective¹⁰⁶

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.

(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

¹⁰⁶ 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)

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 (authorized 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 information¹⁰⁷ and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009¹⁰⁸ 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)¹⁰⁹ 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 tenderer¹¹⁰ 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.

¹⁰⁷ <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>
¹⁰⁸ Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009
¹⁰⁹ Source: <http://www.duet.net.au/duet/about-duet/structure.htm>
¹¹⁰ Ibid

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 1997¹¹¹. 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 capitalization 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.

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 Multinet¹¹² 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.

¹¹¹ <http://www.uxc.com.au>

¹¹² *“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 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:

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%) the 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 Power¹¹³ 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 AGLE Origin 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 petajoules, but most commonly in megajoules.

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

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.

¹¹³ 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/>

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.”¹¹⁴

¹¹⁴ 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” policy arrangements 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:

the [*Yallourn*](#) coal-fired power station and mine in the Latrobe Valley, Victoria

[*the Tallawarra gas-fired power station in Yallah, NSW*](#)

[*Hallett*](#) power station, a 180MW gas-fired power station in north-east South Australia

A 966MW hedge agreement with Ecogen Newport and Jeeralang power stations in Victoria

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 has 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-Bowen 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 IP¹¹⁵

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 website¹¹⁶ 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)¹¹⁷

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,¹¹⁸ 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.

¹¹⁵ <http://annualreport2009.ipplc.investis.com/overview/ourportfolio.asp>

¹¹⁶ <http://www.ipplc.com/>

¹¹⁷ <http://annualreport2009.ipplc.investis.com/>

¹¹⁸ 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 AEMC¹¹⁹ 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.

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.

¹¹⁹ Simply Energy South Australian Retail Review Response to Issues Paper 15 April 2008

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 have 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 NECF2 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 Market 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.

SOME MONITORING ISSUES

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 to form 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.

METERS2CASH

This privately-owned company was established in 2007 after the sale of energy assets in Queensland, managing through Service Essentials Pty Ltd until the Queensland Government in 2008 sold the retail customers of ENERGEX TO AGL and Origin Energy. I have discussed concerns about the disaggregation and sale of those assets elsewhere especially in relation to the assurances, warranties and guarantees that were made, with particular reference to the captured “clientele” many deemed to be receiving energy, and charged FRC fees..

3 March 2010

GAS HOT WATER SERVICES

for VISAGE – 221 SIR FRED SCHONELL DRIVE ST LUCIA, QLD, 4067

Dear Customer

*Your Body Corporate has engaged **METER2CASH Solutions** to provide hot water services on its behalf. Services provided include: meter reading, billing, receipting payments and debt collection.*

Your Body Corporate has arranged for your hot water consumption within your unit to be metered and billed directly to the customer.

Your hot water tariff is equal to the regulated rate charged by Origin Energy for serviced hot water, also known as Tariff 132. The rate structure is;

- first 44 litres/day @ \$0.01677*
- next 44 litres/day @ \$0.01109*
- remaining litres/day @ \$0.00672*
- minimum payment of \$11.78/month*
- daily supply charge of \$0.09943/day*

Please be aware that additional fees apply if you do not to pay by the due date or if any additional services are provided (such as listed below):

- Reminder Notice Fee \$3.00 + GST*
- Disconnection Warning Fee \$10.50 + GST*
- Disconnection for Debt Fee \$25.00 + GST*
- Reconnection after Debt Fee \$25.00 + GST*

*Please find enclosed your first invoice from **METER2CASH Solutions** for the period 22/12/09 to 1/3/10. Future invoices will be issued quarterly.*

We recognise that problems may be encountered during this transition, so if you do identify any anomaly or errors, please contact us so we can correct our records.

If you have any concerns whatsoever, please do not hesitate to contact our friendly staff on 07 3865 4417 or email us at enquiries@meter2cashesolutions.com.au.

We thank you for your assistance in this matter.

Comment MK

It is unclear and other material on the Meters2Cash website on what basis Meters2Cash believes it is entitled to either sell or bill for heated water – they don't own the water; are not providing a solicited services to the parties deemed to be contractually obligated, and do not claim to be energy providers either.

Therefore under no form of monitoring or regulatory umbrella, what on the face of it seems to be exploitative imposition of deemed contractual status on parties other than the Body Corporate making the contractual arrangements for this type of service, end-users of utilities appear to be facing police coercion under threat of suspension of heated water supplies that should form an integral part of tenancy arrangements, and in addition threat of debt collection activity for which there seems to be no accountability.

Those unaware of their enshrined rights under contractual laws and generic provisions may be misled and in any case unable to obtain access to justice or redress because of cost, available resources or assistance of any description.

The issues raised are discussed in more detail elsewhere but included here as conduct issues arise that remain unmonitored in connection with the mushrooming metering data service provision that is focused on heated water service provision wherein water meters and hot water flow meters are used to calculated deemed gas or electricity usage.

In Queensland some **13,700** were impacted at the time of sale and disaggregation of energy assets. Origin Energy inherited the retail arm of Energex as applicable to those captured by the gas bulk hot water "*clientele*" as a captured market deemed to be receiving energy, but apparently not covered by energy laws.

Equal concerns about conduct and detriment exist for other states adopting these provisions.

Origin claim on their website to be installing and maintaining a water heating system if applicable to gas.¹²⁰

It is extremely difficult to see within the National Gas Law, the Parliamentary Bill that led to its adoption how water meters and related water infrastructure were ever intended to be linked to the gas and electricity system where the heated water supplied is reticulated not in gas service pipes or electrical conduits but in water service pipes,, and there is complete absence of any flow of energy to the parties deemed to be contractually obligated for the heating component of the water supplied. Origin does not own the water, and nor do any of the other host retailers or third party metering data services involved.

This is discussed at length elsewhere.

¹²⁰ http://www.originenergy.com.au/files/Service_Hot_Water.pdf

SERVICE LINK AUSTRALIA PTY LTD

This unlicensed provider of apparently unsolicited and unilaterally imposed services (on the owners' corporation) of alleged energy and service provision appears to me to use coercive techniques to secure long-term enforced service arrangements that are unilaterally imposed on unsuspecting prospective purchasers purchasing from developers such as Inkerman Developments (see Oasis Development in St Kilda and their current legal dispute in both the service provider and the Developer).

I have throughout this submission discussed some issues relating to a specific example provided of dissatisfaction to a particular owners' corporation.

I repeat a section that appears elsewhere in order to preserve continuity within this section

See extract below taken from an agreement allegedly applicable to owners of a Body Corporate the subject of a case study outlined in Appendix 1. The essence of these arrangements is encapsulated in a document that until recently was transparently available online on the website of the relevant Service Provider. Seeking to promote the boot concept and force through what appear to be "*third party line forcing*" strategies calculated to ensure that service arrangements and obligations deemed to exist through unilateral imposition of obligation in perpetuum not only expected to be incumbent on immediate prospective owners or occupiers, but all successive owners and/or assignees.

42. Heating and Hot Water Energy Services Agreement

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

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

Contract of Sale

- 41.6 a reference to a statute or regulation, or to a provision of a statute or regulation, includes a reference to that statute, regulation or provision as amended, consolidated, replaced or re-enacted from time to time.
- 41.7 the obligations imposed and the benefits conferred under this Contract on each of the parties are binding upon and enure for the benefit of the respective parties and each of their respective successors in title, legal personal representatives and permitted assigns.
- 41.8 a reference to any party to this Contract includes that party's successors in title, legal personal representatives and permitted assigns.
- 41.9 a reference to "dollars" and "\$" will be taken as referring to amounts in Australian currency.
- 41.10 where a party comprises two or more persons all covenants and agreements by that party bind such two or more persons jointly and severally unless expressed to be only several.

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

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

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

WATER HEATING SUPPLY AGREEMENT

(name of Service Provider)

BAGKGROUND

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

PARTIES' OBLIGATIONS

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

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

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

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

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

Water temperature 78 degrees celsius;

Billing cycle quarterly

Water use residential and

Service Charge Rates:

Energy consumed for hot water heating

\$0.0651808 per kilowatt hour

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

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

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

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

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

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

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

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

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

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

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

The specified conditions contained in the licenses of the three host retailers, AGLE, TRUenergy and Origin Energy in terms of what are known as the bulk hot water arrangements.

**LIMITED DISCUSSION OF EMBEDDED GENERATION ISSUES AND
RELATED CONSIDERATIONS FOR THOSE LIVING IN MULTI-TENANTED
DWELLINGS RECEIVING NO ENERGY AT ALL**¹²¹

I discuss elsewhere in more detail embedded generation and the proposed exempt selling regime under NECF parameters. The comments included in this section are particularly pertinent when policy and regulatory decisions are made in relation to appropriate definition, contractual imposition, interpretation of energy laws and rules, and interpretation in terms of comparative laws, a matter also discussed in more depth in a dedicated section.

In turn the issues raised are also pertinent to how Metering Data Service Provision is seen to develop and be applied and what sort of services can possibly be legitimately claimed to be “*additional*” or “*ancillary*” to the gas distribution system or to the retail regime when such services are not part of the direct gas or electricity distribution system. The use of water infrastructure, and regardless of ownership is not merely questionable when calculating appropriate cost-recovery from end-users alleged to be receiving energy or in approving inappropriate trade measurement practices, but also seems to be a distortion of the existing and proposed energy laws and rules and the original intent of Parliament at the time that the Bill for the existing *National Gas (South Australia) Act 2008* was passed. This is besides conflict with revised current and proposed generic laws – noting that the current *Trade Practices Act 1974*, as already amended will be further amended and re-named *Competition and Consumer Law 2010*.

As concepts of embedded generation surface in the forefront of what are considered growth areas, without perhaps considered the downsides in terms of social and economic costs.

I start by referring to the paper by the paper by Guido Peperman et al¹²²

In discussing the policy issues, Peperman’s concedes that too much embedded generation may have some economic and social costs. These appear not to have been taken into account.

More to the point, in the rush to implement what may be seen as a growth industry, the fundamental contractual and other rights of individuals has been ignored, whilst at the same time the legal concept of sale and supply of goods is swept aside.

I have noted with some concern the alternative definition of the term **customer of energy** – as one who “*receives heated water in a residential unit where hot water is supplied through a centralized gas fired hot water system.*”

The alleged or implied contract for sale and/or supply of energy cannot possibly be performed – since the party allegedly supplying energy cannot possibly do “*what is necessary to enable the (alleged or implied) contract (to supply energy) to be performed.*”¹²³

¹²¹ “*Additional services*”; “*ancillary services*”; “*bulk hot water policy arrangements*” “*serviced hot water*” – as provided by energy providers licensed to distribute, transmit or retail energy not water products

¹²² Peperman, Guido, Diresen, Johan, and Haeseldonckx Diresen (2003) "Distributed generation: definition, benefits and issues," Guido Pepermans & Energy, Transport and Environment Working Papers Series ete0308, Katholieke Universiteit Leuven, Centrum voor Economische Studiën, Energy, Transport and Environment
<http://www.econ.kuleuven.ac.be/ew/academic/energimil/downloads/ete-wp-2003-08.pdf>

¹²³ See also “*implied standard terms*” – without the need for inquiry into the actual intent of the parties. In some cases, if there is a clear intention to the contrary, the terms will not be implied. – some implied terms include that the materials are of good quality, fit for purpose and that contracts for professional

Mere ownership of infrastructure of any kind does not impose a contractual obligation to the owner of infrastructure, unless the goods supplied are directly supplied through flow of energy. See also provisions in relation to direct flow of energy in the context of the tripartite contractual governance model for distributors-retailers-customers within the NECF2 package proposed as the National Energy Retail Laws and Rules (the latter in a constant state of flux providing increasing less rather than more certainty and consistency).

In addition, as observed by Peperman et al (2003), *“Ackermann et al (2001) did not consider ownership as a relevant element for the definition of distributed generation. Thus customers, IPPs, and traditional generators can own distributed generation units.”*

services will be supplied will be provided with reasonable care.

Source: Analysis by Julie Clarke, academic lawyer, Deakin University, Victoria

<http://www.australiancontractlaw.com/law/scope-terms-implied.html>

See also Julie Clarke (ibid) (copyright)

<http://www.australiancontractlaw.com/law/scope-terms.html>

Implied terms are those terms which the law implies into a contract notwithstanding the fact that they have not been discussed by the parties or referred to in a contract. They may be implied at common law or by statute: Julie Clarke (ibid) (copyright)

At common law terms are generally implied where it is necessary to give full effect to the intention of the parties – e. g. it may imply a term requiring parties to do what is necessary to enable the contract to be performed. In some cases courts will ask whether or not the parties would have expressly agreed to the term if they had considered the issue when entering into their contract (ad hoc implied terms). In some cases the courts will imply 'standard' terms without the need for inquiry into the actual intent of the parties (standard implied terms). In the case of the latter, if there is a clear intention to the contrary the terms will not be implied. Some standard implied terms include: that materials are of good quality and fit for purpose and that contracts for professional services will be supplied will be provided with reasonable care. Julie Clarke (ibid) (copyright)

At common law terms are generally implied where it is necessary to give full effect to the intention of the parties – e. g. it may imply a term requiring parties to do what is necessary to enable the contract to be performed. In some cases courts will ask whether or not the parties would have expressly agreed to the term if they had considered the issue when entering into their contract (ad hoc implied terms). In some cases the courts will imply 'standard' terms without the need for inquiry into the actual intent of the parties (standard implied terms). In the case of the latter, if there is a clear intention to the contrary the terms will not be implied. Some standard implied terms include: that materials are of good quality and fit for purpose and that contracts for professional services will be supplied will be provided with reasonable care. Julie Clarke (ibid) (copyright)

In Victoria, in addition to common law implied terms, three regimes operate to imply terms into contracts; an overview of the regimes is provided below (note, it is not designed to be comprehensive and focuses on goods rather than services). See also [sample approach to Victorian implied terms regime](#).

Goods Act: *All contracts for the sale of goods unless Part 2A of the FTA applies (s 32FA FTA). Implied terms may be excluded or modified by the parties: s 61 GA.*

Fair Trading Act: *Consumer contracts only: see 32D. Covers sales of goods valued at under \$40,000 or above that amount but of a kind ordinarily acquired for personal, household and domestic use. However, specifically excludes (s 32DA) goods bought for purpose of resale or raw materials ordinarily acquired for repairing goods or incorporation in other goods. Implied terms not excludable: 32L*

Trade Practices Act: *Consumer contracts only (s 4B) – application virtually identical to FTA but also covers commercial road vehicles. Also, supplier must be a corporation. Implied terms not excludable: s 68*

Title – right to supply Implied Term: *s17GA, ss32G and 32GA FTA, s69 TPA*

Right to sell/supply or will have at the time property is to pass (this is a condition): Niblett; Rowland.

Title may be 'fed' if acquired after property passes but before breach is claimed (Patten v Thomas Motors) and parties may agree to transfer limited title only

** right to quiet possession (warranty only)*

Services supplied

Generation units should by definition at least supply active power in order to be considered as distributed generation. The supply of reactive power and/or other ancillary services is possible and may represent an added value, but is not necessary.

That was written several years ago. Since then in Australia evolving laws in other arenas more clearly define in contractual terms.

Quoting again from *Peperman et al 2003*:

5. SUMMARY AND CONCLUSIONS

This paper started from the observed renewed interest in small-scale electricity generation. Existing small-scale generation technologies are described and the major benefits and issues of using small-scale distributed generation are discussed. The different technologies are evaluated in terms of their contribution to the listed benefits and issues.

Small-scale generation is commonly called distributed generation and we try to define this latter concept more precisely. It appears that there is no consensus on a precise definition as the concept encompasses many technologies and many applications in different environments. The best definition of distributed generation seems to be an electric power generation source that is connected directly to the distribution network or on the customer side of the meter.

The IEEE defines distributed generation as the generation of electricity by facilities that are sufficiently smaller than central generating plants so as to allow interconnection at nearly any point in a power system.¹⁰

In principle the some similar arguments apply also to gas – with a notable exception. Whilst it is possible to deliver directly energy through direct flow of energy, without direct metering, it is not possible merely on the basis of change of operation or ownership to deliver gas – in any other transmission pipe than one designed for gas. It cannot be a water transmission pipe. Gas is either directly delivered to the end-recipient deemed to be contractually responsible or it is not.

The application of “*reference services*” and “*reference tariffs*” in the context discussed remains an issue of ongoing contention from my perspective notwithstanding the decision that has been made by the AER in the JGN Gas Access matter, with echoed impacts in all other gas and electricity access matters by this company and its associated bodies and by other distributors throughout the country.

I have noted with some concern the alternative definition of the term *customer of energy* – as one who “*receives heated water in a residential unit where hot water is supplied through a centralized gas fired hot water system.*”

The alleged or implied contract for sale and/or supply of energy cannot possibly be performed – since the party allegedly supplying energy cannot possibly do “*what is necessary to enable the (alleged or implied)¹²⁴ contract (to supply energy) to be performed.*”¹²⁵

¹²⁴ Implied terms are those terms which the law implies into a contract notwithstanding the fact that they have not been discussed by the parties or referred to in a contract. They may be implied at common law or by statute c/f Julie Clarke

¹²⁵ <http://www.australiancontractlaw.com/law/scope-terms-implied.html>
See also <http://www.australiancontractlaw.com/law/scope-terms.html>

The National Gas Law was always intended to refer to gas distribution and transmission not to the transmission of water or the use of water infrastructure as substitute gas or electricity meters or water service pipes to represent substitute pipeline haulage or unsolicited services for which contractual status is unjustly imposed on end-users of heated water.

Under the National Gas Law *upstream location* means a location at which natural gas is injected into a pipeline.

Under the National Gas Law and the *National Gas (Australian Energy Market Operator) Amendment Rule) 2008*¹²⁶ meter means the devise that measures and records the quantities of gas by reference to energy, mass or energy content.¹²⁷

This does not mean water or water service pipes. Gas is measured in joules (and multiples of joules) and does not pass through a water meter and cannot be measured by a water meter or a hot water flow meter. The only commodity that a water meter or a hot water flow meter can measure is water by volume in cubic litres.

I refer to the Second Reading Speech on 9 April 2008 (Hansard Legislative Assembly, SA,) of The Hon Patrick F Conlon, MP associated with the framework to enable third parties to gain access to certain *natural gas pipeline services*; to repeal the *Gas Pipelines Access (South Australia) Act 1997*; to amend the Australian Energy Market Commission Establishment Act 2004; and for other purposes, viz the *National Gas Law Bill (2008)*. The Bill and the ensuing Act is about governance arrangements for the regulation of **natural gas pipeline services**. Such services are not about imposing contractual status on recipients of heated water in the absence of any flow of energy to their individual abodes.

Not that water should not be unregulated.

Nowhere in that Bill, nor in the NGL nor anywhere in the jurisdictional provisions, nor in the proposed National Energy Laws can I see intent to include as pipelines anything but gas distribution and/or transmission pipes that convey gas. Nowhere does mention of water meters or water infrastructure appear within the legislation.

Nowhere do deemed provisions for alleged sale or supply of energy specify that in default of conditions precedent or subsequent imposed on end users of heated water centrally heated, the terms and processes for disconnection should include disconnection or suspension of heated water supplies.

Yet this is the only sort of disconnection undertaken in the circumstances – by the clamping of hot water flow meters that measure water volume only but not gas or heat.

¹²⁶ National Gas (Australian Energy Market Operator) Amendment Rule 2009. Refer Section 294A [http://www.aemc.gov.au/Media/docs/National%20Gas%20\(Australian%20Energy%20Market%20Operator\)%20Amendments%20Rules-eec7290c-e54f-407f-8b9d-eea8d5a642fe-0.pdf](http://www.aemc.gov.au/Media/docs/National%20Gas%20(Australian%20Energy%20Market%20Operator)%20Amendments%20Rules-eec7290c-e54f-407f-8b9d-eea8d5a642fe-0.pdf)

¹²⁷ Please also refer to the revised *National Measurement Act 1960* and its updated regulations in terms of trade measuring, noting also remaining exemptions for utilities are imminent, starting with electricity during 2010.

A meter is not, as held by the Victorian Energy Retail Code for the purposes of the “bulk hot water” provisions, under clause 3.2 a device that measures the consumption of hot water.

I refer to the following:

The Hon. P.F. CONLON (Elder—Minister for Transport, Minister for Infrastructure, Minister for Energy) (12:01): Obtained leave and introduced a bill for an act to establish a framework to enable third parties to gain access to certain natural gas pipeline services; to repeal the *Gas Pipelines Access (South Australia) Act 1997*; to amend the Australian Energy Market Commission Establishment Act 2004; and for other purposes. Read a first time.

No amount of window dressing can alter the fact that water meters are unnecessary in the calculation of gas and electricity consumption; and further that they are unsuitable trade measurement instruments – using the wrong instruments, with the wrong units of measurement and the wrong scale of measurement. Gas and electricity consumption can only be measured using the appropriate instruments. See Trade Measurement provisions and the intent to lift remaining utility exemptions.

The Objective of the National Gas Law refer to natural gas not water or water infrastructure, not water infrastructure or any other form of infrastructure.

The National Gas Objective

The national gas objective, as stated in the National Gas Law, is to:

“promote efficient investment in, and efficient operation and use of, natural gas services for the long-term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.”

Investment in water infrastructure, especially as entirely unnecessary for the distribution or transmission of gas. Gas and electricity are goods for the purposes of sale of goods acts and generic laws. They are not services. Whilst certain services may need to be undertaken to make sure that gas is delivered and meets price, quality, safety, reliability and security of supply standards as and expectations, it seems to me that cross-subsidization of water infrastructure investment and provision of water of varying temperature is stretching a little far the concept of efficient investment in and efficient operation and use of *“natural gas services.”*

In cases where only a single gas or electricity meter exists, only a single meter reading is required – of the energy meter in order to calculate how much is used. If that energy meter supplies a communal boiler tank in multi-tenanted dwellings, the contractual party for the sale and supply of gas, supply charges, other bundled or bundled costs and meter data services costs belong either to the Developer or Owners’ Corporation hot to the end users of heated water.

The market demand for additional and ancillary services that appear to be consistent with the wishes of Developers and/or Landlords to escape their obligations under tenancy and/or owners corporation laws, or of obligations under generic laws with respect to conduct and contract by utilizing third party providers with or without energy licences is not a justification for the policies and practices seemingly endorsed and in operation amongst providers utilities licensed to sell gas and electricity and in some cases other forms of energy, but not composite water products.

They DO NOT own the water, the provision of heated water in multi-tenanted dwellings is outside their parameters of licensing, and they are unable to effect a contract for sale and supply of the commodity which they purport to sell to the end user of those heated water supplies.

Additional information is available for the following [registered](#) author(s):

<http://ideas.repec.org/p/ete/etewps/ete0308.html#author>

This paper starts from the observation that there is a renewed interest in small-scale electricity generation. The authors start with a survey of existing small-scale generation technologies and then move on with a discussion of the major benefits and issues of small-scale electricity generation. Different technologies are evaluated in terms of their possible contribution to the listed benefits and issues. Small-scale generation is also commonly called distributed generation, embedded generation or decentralized generation. In a final section, an attempt is made to define the latter concepts more precisely. It appears that there is no consensus on a precise definition as the concept encompasses many technologies and applications.

METERING DATA SERVICE AND METROLOGY PROCEDURES CONTEXT AND IMPLICATIONS OF THE PROPOSED RULE CHANGE

Historical Background

I quote directly from AEMC online material:

Following submission on 18 June 2009 by the AEMO (formerly NEMMCO) a Rule Change request had sought to achieve

“...transfer the current arrangements governing metering data service providers from a deed-based framework to a framework contained in Chapter 7 of the National Electricity Rules (Rules). On 15 April 2010, the Commission published a notice under section 107 of the National Electricity Law (NEL) to extend the publication date of the draft Rule determination to 6 May 2010.

This Rule Change Request proposes to:

- create a new category of person in the Rules called a Metering Data Provider; and*
- transfer responsibility for collecting metering data from Type 1, 2, 3 and 4 metering installations from AEMO to the Responsible Person.*

The Rule Change Request also seeks to make certain other amendments to Chapter 7 of the Rules. Summarized briefly, the proposed changes would:

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

- clarify AEMO's power to establish service level procedures for Metering Data Providers and specify the scope and purpose of the procedures AEMO can make;*
- vary, delete or introduce definitions to clarify the roles and obligations of service providers, improve the clarity of and reduce duplication within the Rules, and standardise 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.*

Consultation commenced on 27 August when the AEMC gave notice under s95 of the NEL. Submissions to the first round, which closed on 16 October 2009 attracted submissions from AGL, Jemena and United Energy, who have the same parentage as the Singapore Power Consortium

Other consultations in the first round were exclusive to industry, and included Citipower and Powercor and Grid Australia.

Each of these companies has a vested interest in distribution and metering data services, some of which are not in any sense associated with the gas or electricity distribution system, but represent ancillary or additional services that are not provided to or at the request of end-users of utilities in a market predominantly of a monopoly nature.

On 27 August 2009, the Commission gave notice under section 95 of the NEL to commence consultation on the Rule Change Request. On 16 October 2009 submissions on first round consultation closed. On 10 December 2009, the Commission published a notice under section 107 of NEL to extend the publication date of the draft Rule determination to 1 April 2010.

The Commission considered that this extension of time was 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 further 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.

On 15 April 2010, the Commission published a third notice under section 107 of the NEL to further 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.

My particular interest is in those groups of end-consumers whether private individuals or **businesses which parties receive neither electricity nor gas and cannot be deemed to be sold or** supplied either in the absence of any flow of energy at all, and regardless of any changeover of ownership or operation.

Amongst the various groups impacted are those whose heated water supplies are reticulated in water pipes from a single communal boiler tank in multi-tenanted dwellings. That extends to both tenants and owners' corporations.

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 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. In addition, distributor(s) such as those which are subsidiaries, with Jemena Gas Networks (NSW) Pty Ltd as an example, propose to replace WATER meters, including hot water flow meters with RF heads at high capital cost to be cost-recovered from end-users not of energy, but of heated water where such infrastructure is neither required nor part of the gas distribution system.

The idea of installing the RF heads is to enable remote reading, which places the matter in the category of communications technology that should properly be part of the portfolio of the Department of Climate Change Energy Efficiency and Water. The potential exists for the same problems to arise with cost-blow outs as did for the Victorian mandated ill-fated and ill-considered Victorian Advanced Infrastructure Meter roll-out. I discuss that matter and cost-blow out possibilities for any investment in water meter infrastructure by gas and electricity companies believing these to be either necessary or desirable "additional services" to the distribution and transmission of gas or electricity.

With the possibility that developing technology or new policy initiatives, it cannot be 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 be adopted in relation to gas.

Having said that based on policy decisions that have not to have been made, already operating and massive capital expenditure cost allocations have been granted by the AER in relation to gas (see for example the Jemena Gas Networks (NSW) Pty Ltd. Final Determination 11 June 2010

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.¹²⁸

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.

Page 595 of 1164 pages of the AEMC Proposed Rule Change to the National Electricity Rules v25¹²⁹ 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.

¹²⁸ ² www.aemc.gov.au

¹²⁹ 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>

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.

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 (AEMC) 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 re-structuring 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;*

Metering Providers are already recognized as a service provider (refer to Rule 7.4).

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.¹³⁰ 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.

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

¹³⁰ www.aemc.gov.au

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.^{131/7}

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.^{132/8} 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.^{133/9}

Some stakeholders made comments against specific clauses in this Rule change where there would be, in their view, significant national smart meter infrastructure implications.^{134/10}

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.

¹³¹ ⁷ SP AusNet, Integral Energy, Jemena, EnergyAustralia and United Energy Distribution.

¹³² ⁸ EnergyAustralia submission p 3; Integral Energy submission p 2.

¹³³ ⁹ AGL submission p 1; Jemena submission p 2.

¹³⁴ ¹⁰ SP AusNet submission p 1; Jemena submission p 5.

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 10,¹³⁵ 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 with that submission and this one to the AER I have included some responses and case studies that are relevant as provided by the Tenants Union Victoria in direct response to that consultation,¹³⁶ 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 aspects AEMC proposal.¹³⁷ 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).

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.

¹³⁵ 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>

¹³⁶ 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)

¹³⁷ AEMC Draft Decision (6 May 2010) ERC0092 Proposed Rule Change Provision of MDS and Metrology Requirements Section 107 Notice (response date 1 July 2010)

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 16¹³⁸ 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.

¹³⁸ 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-3622a3fcca22-0.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>

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.

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.
----	---	---

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.

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.

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 (VGDSVC9)/Connect (VERC)/Connection Point

The joining of a gas installation to a distribution supply point to allow the flow of gas

(a) for electricity, the making and maintaining of contact between the electrical systems of two persons allowing the supply of electricity between those systems; and

(b) for gas, the joining of a **natural gas installation** to a distribution system **supply point** to allow the flow of gas.

See all comments under disconnection

No such connection takes place for those receiving heated water centrally heated in a communal boiler tank belonging to a Landlord, and where a single energization point exists responsible for heating the Landlord's boiler tank. Heated water is reticulated in water pipes to each residential tenant's apartment or flat.

It would seem quite clear cut, yet the BHW policy arrangements contained within the same code develop a new lexicon exclusive to the bulk hot water arrangements in defining meters, implicitly endorsing disconnection or suspension of water; considering poor credit rating with "*water bills*" to be relevant to credit history, security deposit, overdue 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 block 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 VENCORP purposes, consistent with the existing legislation, the single energization point represents a single supply point, single billing point. Therefore all supply and bundled charges, and all charges for the sale of energy belong to the Landlord.

Under residential tenancy laws, unless a separate energization point exists for residential tenants for the supply of any component of energy, the landlord is the responsible contractual party. Therefore the energy legislation needs to explicitly reflect and acknowledge this.

Disconnection/Decommissioning/Disconnection-Reconnection

As mentioned the term supply point is synonymous with supply address and implies an energized or new connection in relation to gas (or electricity). For gas these terms are together defined within the existing legislation as synonymous with ancillary supply point. For gas energization points that were installed prior to 1 July 1997, the existing legislation

considers these to be single billing points. Refer to Gas (Residual Provisions) Act 1994 which is one with the *Gas Industry Act 2001* (GIA).

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

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

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

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

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

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

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

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

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

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

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

It does not appear to me that robust inter-body collaboration occurs. For example, matters relating to an access arrangement may have implications for parallel current or future

determinations or enquiries re cost allocation, on rule changes regarding outsourcing of metering data services; on competition issues and others.

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

Before examining 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 sent 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.

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>

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.

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.

National Electricity Amendment (Aggregation of Ancillary Service Loads Rule 2010 **Rule Proponent** Australian Energy Market Operator 25 March 2010.¹³⁹

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).¹⁴⁰

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

¹³⁹ 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

¹⁴⁰ 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/mce/documents/Energy%20Market%20Reform/National%20Energy%20Customer%20Framework/Kevin%20McMahon.pdf>

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 that 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.

CAPITAL AND OPERATING EXPENDITURE CONSIDERATIONS

I recognize that the AEMC Draft Determination has been made in relation to limited aspects of the operation of metering data services and metrology procedures. In that context the following material regulated to capital and operating expenditure may seem irrelevant.

However, I discuss such matters here, having already brought the issues to the attention of the AER on the basis that decisions taken out of context and possibly without regard as to impacts in order directions may hamper robust consideration of impacts and outcomes. For the particular matters that I wish to raise, where metering data services are not being routinely used in the context of direct supply of either gas or electricity (and regardless of changeover of ownership or operation).

Whichever costs are uncured at the wholesale end considered to be appropriate for cost-recovery processes in relation to end-users, are extremely relevant, especially if such costs including metering data services and the like, and asset bases that are unrelated to the sale and supply of gas or electricity, and not required for either distribution or transmission of gas.

Whilst there are many capital and operational costs that are legitimate, the issues that I especially raise in this response to the AEMC's Draft Decision is focused on infrastructure, assets, operating costs, including in-house or out-sourced metering data services costs that are being claimed where no sale or supply of gas and energy occurs, and where substitute infrastructure, providing an alternative business building opportunity outside of the distribution and transmission networks and outside the proper definition of sale and supply of commodities that match the description of the goods purported to be sold. I discuss elsewhere in relation to generic laws and how sale and supply of commodities is properly definite and interpreted

These circumstances are where infrastructure entirely unrelated to the distribution or transmission systems (for example water meters, meter reading and billing costs that have nothing to do with sale and supply of gas or electricity, but wherein water meters are effectively posing as such instruments in measuring alleged sale and supply of those commodities to end-users of heated water. No flow of energy occurs in these cases, except to a single gas or electricity meter, where the sale and supply of energy is to the Owners' Corporation or Developer not to the recipients of the heated water.

The arguments apply equally to both gas and electricity where these practices are engaged, apparently with full policy and regulatory sanction, whilst the original definitions of metering, pipelines and "reference services" in relation to the settlement of the wholesale gas market appear to have become distorted, leaving aside for a moment the comparative law considerations.

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 is 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.

In this context, though referring to gas network capital expenditure forecasts in cost allocation proposals, I refer to those of Jemena Gas Networks (NSW) Pty Ltd, and of ActewAGL Distribution, which in turn is 50% owned by Jemena Ltd.

On page 34 of its Gas Access Proposal for the 2010-2015 regulatory period ActewAGL Distribution makes the following statements in discussing capital redundancy mechanisms. The principles illustrated here, though in relation to gas, are as applicable to electricity where assets for which capital and operating expenditure, including depreciation costs may relate to services that are not associated in any way with the delivery of gas pipeline or electricity network distribution and transmission services, or any associated *“metering data services costs.”*

That are normally passed on to end-users deemed to be receiving either gas or electricity. I am also concerned about possible looseness in interpretation of the term “tariff meter” if these apply to **WATER METERS** rather than gas or electricity meters in the proposals and/or determinations for either commodity. I stress that electricity and gas are commodities for the purposes for sale of goods acts and within generic laws current and proposed.

On page 33 of its Additional information document in connection with ActewAGL Distribution's regulatory proposal to the AER for the 2010-2015 regulatory period, forecast capital base is discussed as follows

3.3 Forecast capital base

3.3.1 AER Draft Decision

The projected capital base was calculated in accordance with Rule 78 as the opening capital base, plus forecast conforming capital expenditure, less forecast depreciation and forecast value of assets to be disposed of in the period.⁶² The AER accepted ActewAGL Distribution's general method of rolling the forecast capital base forward. However, due to the amendments to the capital expenditures and the inflation forecast, the forecast capital base was updated to incorporate these changes.

In particular, the AER requires the following amendments to the forecast capital base:

- incorporate updated capital expenditure forecasts (AER amendment 3.7);
- amend inflation forecast to apply AER preferred methodology (AER amendment 3.6); and update forecast depreciation to reflect changed capital and inflation forecasts (AER amendment 3.6).

3.3.2 ActewAGL Distribution response

ActewAGL Distribution has used the opening capital base of \$278.0 million derived in section 3.1 above. The capital base has been forecast consistent with Rule 78 using the elements discussed above.

Asset standard lives applied are consistent with the original proposal. However, due to updates to the opening capital base, the remaining lives as at 1 July 2010 have been amended as set out in Table 3.7, replacing Table 7.5 in the original proposal.

Comment MK:

My concerns are regarding the asset infrastructure which forms part of such a forecast, and the ripple effect on other expenditure considerations, including those related to additional or ancillary services that are not in any way part of the distribution or transmission system. Ultimately it is the end user who pays, whilst cost-smearing practices; inclusion of asset-building and depreciation unrelated to and entirely unnecessary for the distribution and transmission of either gas or electricity form an integral part of cost allocation in regulatory decision-making; and contractual arrangements with the wrong parties (end0-users of heated water supplies) for unsolicited "*additional services*" and "*ancillary services*" that become the subject of metering data services

On page 34 of the same document, ActewAGL Distribution discusses capital redundancy mechanism along these lines:

"3.4 Capital redundancy mechanism (p34

3.4.1 AER Draft Decision

Rule 85 provides that a service provider may include, and the AER may require it to include, a mechanism to ensure that assets that cease to contribute in any way to the delivery of pipeline services are removed from the capital base.

In the draft decision, the AER requires ActewAGL Distribution to remove the capital redundancy mechanism proposed by ActewAGL Distribution on the grounds that it is inconsistent with Rule 77(2)(e) which provides no discretion to the regulator on whether or not redundant assets are removed from the capital base in the subsequent access arrangement period."

“This is set out in AER amendment 3.8. The AER also requires ActewAGL Distribution to amend its access arrangement information to reflect this amendment.

3.4.2 ActewAGL Distribution response

ActewAGL Distribution accepts AER amendment 3.8 to delete its proposed capital redundancy mechanism from the access arrangement. ActewAGL Distribution does not propose an alternative capital redundancy mechanism.

In relation to the ActewAGL Distribution Gas Access Proposal, the following capital expenditure considerations were raised on page 51¹⁴¹

“In requiring ActewAGL Distribution to amend its access arrangement to remove its capitalized regulatory costs in the final years of the earlier access arrangement period, the AER notes that these costs were not forecast as part of the earlier access arrangement and therefore not recovered through tariffs in the earlier access arrangement period.²⁰ In the absence of a forecast amount included in capital expenditure, the AER has determined that costs incurred in the earlier access arrangement period should be judged against the requirements of the NGR for conforming capital expenditure stating:

Capital expenditure is defined in the NGR as costs and expenditure of a capital nature incurred to provide, or in providing, pipeline services. The AER does not consider that the regulatory costs incurred by ActewAGL in the earlier access arrangement period represent expenditure of a capital nature.²¹

ActewAGL Distribution notes that the phrase “of a capital nature” (reflecting the requirement of Rule 69) is not defined in the NGL or NGR. ActewAGL Distribution considers that the essential nature of capital expenditure is that of future economic benefits accruing over time.

Comment MK

In relation to pipeline services, within the NGL and NGR this term surely were intended to refer to gas pipelines not any other form of pipeline reticulating, water, honey, milk not any other substances

Capital costs for assets, and associated costs and depreciation for another form of infrastructure are clearly not part of a gas or electricity law, and appear not to have ever been at the time that the Bill was adopted for the NGL.

As mentioned elsewhere

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.

On p 31 under 3.4.1 of the same document, ActewAGL made the following statement:

¹⁴¹ ActewAGL Distribution Addendum to Access Arrangement for the ACT, Queanbeyan and Palerang Gas Distribution Network January 2009

ActewAGL Distribution reiterates that the forecast capital expenditure should be used to calculate depreciation in establishing the opening capital base for the access arrangement period commencing 1 July 2015. This is consistent with ActewAGL Distribution's original proposal in June 2009 and the AER's draft decision.⁶¹

Rule 85 provides that a service provider may include, and the AER may require it to include, a mechanism to ensure that assets that cease to contribute in any way to the delivery of pipeline services are removed from the capital base.

In the draft decision, the AER requires ActewAGL Distribution to remove the capital redundancy mechanism proposed by ActewAGL Distribution on the grounds that it is inconsistent with Rule 77(2)(e) which provides no discretion to the regulator on whether or not redundant assets are removed from the capital base in the subsequent access arrangement period. This is set out in AER amendment 3.8. The AER also requires ActewAGL Distribution to amend its access arrangement information to reflect this amendment.

3.4.2 ActewAGL Distribution response

ActewAGL Distribution accepts AER amendment 3.8 to delete its proposed capital redundancy mechanism from the access arrangement. ActewAGL Distribution does not propose an alternative capital redundancy mechanism

In their Gas Access Proposal Jemena Gas Networks (NSW) Ltd (JGN) a subsidiary of Jemena Limited, in turn owned by the Singapore Power Consortium, has spoken of rodent activity and safety risks, whilst discussing both capital expenditure and operating costs in relation to water meters that do not form part of the gas distribution system

In their operating costs rodent activity and safety risks, whilst discussing both capital expenditure and operating costs in relation to water meters that do not form part of the gas distribution system. Those focusing on gas, similar practices appear to be part of the norm when considering electricity

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.¹⁴² 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.

¹⁴² Victorian Auditor-General (Des Pearson) (2009) *Towards a smart grid the roll-out of Advanced. Metering Infrastructure.*” (AMI) (Nov)

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.

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 also 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 Age¹⁴³ that

“Last year an Auditor-General's report said the cost of smart meters could blow out to \$2.25 billion, and criticized 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.

¹⁴³ 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 CoAG 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 Energy¹⁴⁴ 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 Report¹⁴⁵

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.”

¹⁴⁴ Current Membership source: www.wiki.com.au

The Hon. Julia Gillard [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]

¹⁴⁵ See Victorian Auditor-General (2009) “*Towards a smart grid: the roll out of Advanced Metering Infrastructure*” Victorian Auditor-General's November Report http://download.audit.vic.gov.au/files/111109_AMI_Full_Report.pdf

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

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

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

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

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

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

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

The department's project governance has not been appropriate for the nature and scale of the market intervention the project poses. In particular:

Its advice to government on risk assessment has been inadequate.

The level of community engagement has been inadequate, given the significant effect on consumers.

DPI has engaged with the project in only a limited way as an 'observer' during its implementation phase.

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."

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 avoid 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 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.”

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 recognize 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.”¹⁴⁶

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.

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 2010¹⁴⁷ 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.

¹⁴⁶ 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>

¹⁴⁷ 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.

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.¹⁴⁸

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.

¹⁴⁸ Only one such physical energization or connection point exists where a single gas meter is used to centrally heat a communal boiler tank on common property. There is but one MIRN 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 off 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.

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.¹⁴⁹

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 of 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

What recommendations can be made to rectify this matter within both generic and energy laws?

¹⁴⁹ With respect to services, included those considered “*additional*” or “*ancillary*” on the basis of “*significant market demand*” these surely cannot be services involving infrastructure other than that necessary and prudent to the distribution and/or transmission of gas or electricity, whilst a budget under energy laws is sought to cross-subsidize such new ventures. Replacement, maintenance, reading of WATER METERS and associated billing services sought by segments of the market forming what appear to be collusive arrangements with Developers and/or Landlords seeking to escape their obligations under tenancy and owners’ corporations provisions; or perhaps tax obligations by utilizing “*see through tax advantages*.”

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)?¹⁵⁰

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.?

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.

How can any authority regulating the energy industry under energy provisions have control in the first place of water provisions?

Who should or will take charge of this matter and ensure that fairness is delivered?

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).

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.

¹⁵⁰ 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 also the reservations of Dr. Cleeg (LP Mogill)

In my view those matters inequitably and inappropriately impacting on end users of heated water products, whilst the matter related to divestment of energy infrastructure assets needs to be re-examined.

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WE_EKLY.pdf

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

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?

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).

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

What was meant in the (then Treasurer’s Second Reading Speech of 11 October 2006, *“Energy Assets (Restructuring and Disposal) Bill”*¹⁵¹ regarding alleged:

“transfer process(es)...utilized in South Australia, Western Australian and Victorian legislation relation to the alleged “rationalization of their electricity entities.”

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”*)

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”*

¹⁵¹ 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

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.

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?

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.”

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 her 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.

The matter was continued on 12 October¹⁵²

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.

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

¹⁵² 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_WEE_KLY.pdf

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."

Exactly what arrangements were made, or will be made?

In Queensland?

In South Australia?

In New South Wales?

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 or serviced 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?

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-Bowen 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)

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,¹⁵³ (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.”

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 ort calculated deemed gas (or electricity usage)

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?

¹⁵³ AEMC National Gas Rules, published 27 May 2010, operational since 7 May 2010, Part 30 Short Term Trading Market Rules Davison 1, clause 364, Definitions p 323

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 .

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.

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

What do policy makers, rule makers and regulators intend to do to correct this anomaly

How will these matters impact on consumer confidence and proper market functioning?

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 12 2006 Hansard), the question of water rebates arose as a separate issue.

Mrs. Cunningham (Independent Member) said on 12 October during the Parliamentary debate:

“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.

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

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?

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).

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

What was meant in the (then Treasure’s Second Reading Speech of 11 October 2006, *“Energy Assets (Restructuring and Disposal) Bill”*¹⁵⁴ regarding alleged:

“transfer process(es)...utilized in South Australia, Western Australian and Victorian legislation relation to the alleged “rationalization of their electricity entities.”

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)

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”*

¹⁵⁴ 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 see also 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

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 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

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.

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?

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.

Were similar arrangements made in other States?

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?

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 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-Bowen 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)

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. It is questionable whether any costs incurred may be considered "*prudent.*" In relation to water infrastructure that is not necessary for the distribution or transmission of gas.

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;¹⁵⁵ 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.

¹⁵⁵ 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

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.

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://smartgridaustralia.com) website¹⁵⁶ 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.

¹⁵⁶ www.smartgridaustralia.com

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.

JGN¹⁵⁷ 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 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.”

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:

“1.8 Water Meters: JGN has a population of hot water meters, usually located in apartment buildings that are used for network purposes.”¹⁵⁸

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 minimize the cost of establishing the replacement program. JGN will continue to monitor the data of the performance of in field.

¹⁵⁷ *Jemena* <http://www.jemena.com.au>

¹⁵⁸ 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.”

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.

I raise however the question of prudent and necessary costs and good industry practice of the regulated industry – in this case energy, whilst business building with what are creatively termed as “*additional*” or “*ancillary*” services that are unrelated to the regulated industry, unnecessary for their operation, and in particular superfluous for the distribution and transmission of gas or electricity. There is a requirement for only one energy meter to be read in a multi-tenanted dwelling served by a single gas or electricity meter used to heat a communal water tank on common property infrastructure. Only one bill is required at the determined frequency.

That bill belongs to either Developer or Owners’ Corporation entity, not to the several occupants of individual abodes who receive no energy of any description, and in the absence of pre-fitted dedicated gas or electricity meters at the Developer’s or Owners’ Corporation expense, expect to have all costs associated with the heating and provision of heated water to be met by those parties.

Consistent with tenancy provisions; with owners’ corporations provisions, with generic laws and sale of goods provisions in particularly; with proper trade measurement practice; and with the terms of all other energy provisions, including the concept of flow of energy as embraced by the proposed National retail 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 water. Not only are “*free retail completion charges*” included, but also massive supply and meter reading fees included in in-house 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 related concerns in various public submissions

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/Madeline%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)

AER Exempt Selling Issues Paper 2010
Madeleine Kingston Private Stakeholder, August 2010
Open Submission with appendices including case studies

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 recent submission to the AER and the current submission to the AEMC 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%201-4448ce8f-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)

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 package of some 422 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.

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;¹⁵⁹ to various MCE arenas, including NECF1 and NECF2¹⁶⁰; (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) Bill2*), under current review¹⁶¹.

In addition, I refer to my limited belated submissions 16 and 27 April 2010)¹⁶² 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.

¹⁵⁹ 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>

¹⁶⁰ 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>

¹⁶¹ Madeleine Kingston (2010) Submission to the Senate Economics Committee Review of the Trade Practices Amendment (Australian Consumer Law) Bill(2)

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

¹⁶² 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-3622a3fcca22-0.pdf>

SELECTED DISCUSSION OF SOME METERING DATA PROVIDERS

There is a growing trend in outsourcing of specialist IT backroom and data management

Some major players include UXC ABN 65-067-682-028, described on the UXC website as “a leading provider of meter reading and related services throughout Australia and had been part of the UXC acquired the remaining 50% interest in Skilltech Consulting Services in 2004. Prior to that UXC had been part of the UXC Utility Services Group for several years.

Australian Stock Exchange Company Announcements Platform

12 January 2004

UXC Limited

ABN 65 067 682 928

MARKET ANNOUNCEMENT

Acquisition of Remaining Interest in Skilltech

UXC Limited is pleased to announce that it has acquired the remaining 50% interest in Skilltech Consulting Services that it did not previously hold, for a combination of cash and shares.

Skilltech is a leading provider of meter reading and related services throughout Australia, and has been a part of the UXC Utility Services Group for the last several years. Skilltech has recently been successful in expanding its business nationally, having established operations in Queensland and experienced an extension of services in Western Australia.

Skilltech is now poised to further expand its services both nationally and internationally with the focus on the development of new technology for real-time meter reading, data management, and the introduction of automatic meter reading products.

Mr Bob Skillen, the co-founder of Skilltech and UXC’s previous partner in the business, will remain on the Board and continue to provide consulting services to Skilltech, focussing on business development and contract bids. Skilltech has developed a very strong and experienced management team in preparation for the transition to full ownership by UXC.

UXC Executive Chairman Mr Geoff Lord noted that “Skilltech has been extremely successful in growing its business, having doubled its earnings in every year since 2001. We are pleased to finalize our purchase of the remainder of the company, as we expect to continue to build on this remarkable record of growth in line with UXC philosophy. There are many exciting projects due to be awarded in the next three to six months, and with the efforts of the Skilltech management team, Mr. Skillen’s ongoing involvement, and UXC’s support we are confident of winning our share of these contracts and providing a superior service to our customers.”

Additional growth is expected through the introduction of technology in order to transition away from the traditional labour-based meter reading and services market towards the development of a range of products and services that are more technology-based. UXC’s

Business Solutions Group is ideally placed to participate in this technological transition, and this will create further synergies between the two operating divisions of UXC.

www.uxc.com.au

www.skilltech.com.au

ABOUT UXC LIMITED

UXC Limited is an S&P / ASX 300 listed Australian business solutions company that has grown its market capitalization from some \$7 million in 1998 to over \$110 million today. UXC Limited offered a dividend yield of over 6.25% fully franked in 2003, and expects to at least maintain the current dividend rate. Revenue is running at an annual rate approaching \$180 million and the group employs more than 900 employees. The company has substantial resources with which to fund further acquisitive growth.

UXC provides its services through three divisions:

***Utility Services Group**, which is engaged in asset and data management for utilities, including electricity distribution asset inspection, management and maintenance services; the provision of utility meter installation and reading services; related data management and GIS services; mobile telephony and industrial design;*

***Business Solutions Group**, which is involved in consulting, implementation and integration, application, and infrastructure services, including knowledge management; project and change management; CRM, ERP, financial and business information applications; technology architecture; IT security; and data storage and management;*

***Intellectual Property Ventures Group**, which is concerned with identifying, developing and commercializing intellectual property to realize associated capital gains.*

ABOUT SKILLTECH CONSULTING SERVICES PTY LIMITED

Established in 1991, Skilltech Consulting Services has rapidly become a leading national provider of contract meter reading and related services to the Utility Industry.

Skilltech has enjoyed strong growth and staff levels have increased from a core of three people in 1991 to a current team of 270 field and office based personnel. Skilltech is located in NSW, Victoria, Queensland and Western Australia servicing major ongoing contracts with the various gas, water and electricity authorities in those states.

Services offered include meter reading, management of metered data, meter maintenance and installation services, automated meter reading, and billing services.

http://uxc.com.au/documents/091126ChairmansAddresstoShareholders_000.pdf

UXC Limited is an S&P / ASX 300 listed Australian business solutions company that has grown its market capitalization from some \$7 million in 1998 to over \$110 million today. UXC Limited offered a dividend yield of over 6.25% fully franked in 2003, and expects to at least maintain the current dividend rate. Revenue is running at an annual rate approaching \$180 million and the group employs more than 900 employees. The company has substantial resources with which to fund further acquisitive growth.

UXC provides its services through three divisions:

Utility Services Group, which is engaged in asset and data management for utilities, including electricity distribution asset inspection, management and maintenance services; the provision of utility meter installation and reading services; related data management and GIS services; mobile telephony and industrial design;

Business Solutions Group, which is involved in consulting, implementation and integration, application, and infrastructure services, including knowledge management; project and change management; CRM, ERP, financial and business information applications; technology architecture; IT security; and data storage and management;

Intellectual Property Ventures Group, which is concerned with identifying, developing and commercializing intellectual property to realize associated capital gains.

ABOUT SKILLTECH CONSULTING SERVICES PTY LIMITED

Established in 1991, Skilltech Consulting Services has rapidly become

Energy-Tec, the trading name for Energy Data Services (WA) Pty Ltd, was founded in 1993 to meet the demand for meter reading and allied energy related services for retail and commercial organizations in Western Australia.

The enterprise was incorporated as a company in 1994.

Fieldforce, a UXC company

<http://www.fieldforce.net.au/about.shtml>

ServiceLink (www.servicelink.com) ACN 102 296 088

http://www.servicelink.com.au/index.php?option=com_content&task=view&id=17&Itemid=51

re premises heating supply and other matters

See current legal matter – Members of Owners Corporation and Service Link Australia Pty L:td re 33 Inkerman St Kilda, Melbourne, Victoria. There is another similar property at Richmond with identical challengeable arrangements in place as agreements between Property Developer(s) and energy providers, their in-house or outsourced providers

See Origin Energy:

http://www.originenergy.com.au/files/Service_Hot_Water.pdf

Many others

Please note that I have gathered considered data but not in a for, that canm be published at this stage.

Please do not hesitate to ask!

OTHER METERING DATA PROVIDERS

Meters2Cash

METER2CASH SOLUTIONS provides cost-effective, timely and accurate utility billing services to our clients in the Body Corporate and Strata Title sectors. These services include meter reading, invoice production, payments and collection management as well as financial performance reporting and reconciliations.

We are a privately owned and independent company focused on providing quality solutions to our clients to ensure they remain competitive in their markets in terms of cost, quality and customer service.

The team at METER2CASH SOLUTIONS have extensive experience in the operation of revenue services and systems support, particularly in the utilities environment.

Before establishing METER2CASH SOLUTIONS in 2007, our team managed the billing and debt collection arms of ENERGEX and Ergon Energy in Queensland via Service Essentials Pty Ltd until the Queensland Government, in 2008, sold the retail customers of ENERGEX to AGL and Origin Energy.

METER2CASH SOLUTIONS was established to share the expertise of its founders with our clients and improve services within the utilities industry.

Since our inception some key achievements to supplement the expertise of the METER2CASH SOLUTIONS team have been the inclusion of meter provisioning, energy audits and regulatory reporting. We are proud to offer our valued clients the full range of utility management services.

Meters2Cash

Link:

<http://www.meter2cashesolutions.com.au/index.html>

This company provides Electricity Meter Provision, Meter Reading Management, Reports and Reconciliations, Invoice Calculations, Collections Management, Payments Management, Invoice Production and Postage

<http://www.meter2cashesolutions.com.au/Forms/Residential%20Application%20for%20Supply.pdf>

The

Meters2Cash also *provides and installs electricity meters and you will have access to our team of experts who can provide advice on energy contracts and tariffs, perform energy efficiency audits as well analyse your current energy usage to identify if savings can be achieved and then work with you to achieve these savings.*

Bulk conversions of electricity supply is another facet of the services we provide. Under a bulk conversion arrangement we provide expertise in helping you convert from a retailer invoicing individual owners and tenants in your complex, to a consolidated retailer bill. Bulk conversions can save you substantial costs in electricity and we will work with you to pass these savings on to your customers.

Meters2Cash say that they are

“....are independent of any network provider, utility retailer, Body Corporate or Strata Title management company so you can be assured the solutions we provide are in your best interests and come with no strings attached.”

I have cited above from the welcome letter dated 3 March that is sent to residential tenants in what may be student accommodation situated at 221 Sir Fred Schonell Drive, St. Lucia Qld referring to arrangements made with a body corporate to provide hot water services on its behalf. Services provided include: meter reading, billing, receipting payments and debt collection.

3 March 2010

GAS HOT WATER SERVICES

for VISAGE – 221 SIR FRED SCHONELL DRIVE ST LUCIA, QLD, 4067

Dear Customer

*Your Body Corporate has engaged **METER2CASH Solutions** to provide hot water services on its behalf. Services provided include: meter reading, billing, receipting payments and debt collection.*

Your Body Corporate has arranged for your hot water consumption within your unit to be metered and billed directly to the customer.

Your hot water tariff is equal to the regulated rate charged by Origin Energy for serviced hot water, also known as Tariff 132. The rate structure is;

- first 44 litres/day @ \$0.01677*
- next 44 litres/day @ \$0.01109*
- remaining litres/day @ \$0.00672*
- minimum payment of \$11.78/month*
- daily supply charge of \$0.09943/day*

Please be aware that additional fees apply if you do not to pay by the due date or if any additional services are provided (such as listed below):

- Reminder Notice Fee \$3.00 + GST*
- Disconnection Warning Fee \$10.50 + GST*
- Disconnection for Debt Fee \$25.00 + GST*
- Reconnection after Debt Fee \$25.00 + GST*

*Please find enclosed your first invoice from **METER2CASH Solutions** for the period 22/12/09 to 1/3/10. Future invoices will be issued quarterly.*

We recognise that problems may be encountered during this transition, so if you do identify any anomaly or errors, please contact us so we can correct our records.

If you have any concerns whatsoever, please do not hesitate to contact our friendly staff on 07 3865 4417 or email us at enquiries@meter2cashesolutions.com.au.

We thank you for your assistance in this matter.

[Service link](#)

SERVICE LINK AUSTRALIA PTY LTD

This unlicensed provider of apparently unsolicited and unilaterally imposed services (on the owners' corporation) of alleged energy and service provision appears to me to use coercive techniques to secure long-term enforced service arrangements that are unilaterally imposed on unsuspecting prospective purchasers purchasing from developers such as Inkerman Developments (see Oasis Development in St Kilda and their current legal dispute in both the service provider and the Developer).

I have throughout this submission discussed some issues relating to a specific example provided of dissatisfaction to a particular owners' corporation.

I repeat a section that appears elsewhere in order to preserve continuity within this section

See extract below taken from an agreement allegedly applicable to owners of a Body Corporate the subject of a case study outlined in Appendix 1. The essence of these arrangements is encapsulated in a document that until recently was transparently available online on the website of the relevant Service Provider. Seeking to promote the boot concept and force through what appear to be "*third party line forcing*" strategies calculated to ensure that service arrangements and obligations deemed to exist through unilateral imposition of obligation in perpetuum not only expected to be encumbent on immediate prospective owners or occupiers, but all successive owners and/or assignees.

42. Heating and Hot Water Energy Services Agreement

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

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

Contract of Sale

- 41.6 a reference to a statute or regulation, or to a provision of a statute or regulation, includes a reference to that statute, regulation or provision as amended, consolidated, replaced or re-enacted from time to time.
- 41.7 the obligations imposed and the benefits conferred under this Contract on each of the parties are binding upon and enure for the benefit of the respective parties and each of their respective successors in title, legal personal representatives and permitted assigns.
- 41.8 a reference to any party to this Contract includes that party's successors in title, legal personal representatives and permitted assigns.
- 41.9 a reference to "dollars" and "\$" will be taken as referring to amounts in Australian currency.
- 41.10 where a party comprises two or more persons all covenants and agreements by that party bind such two or more persons jointly and severally unless expressed to be only several.

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

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

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

WATER HEATING SUPPLY AGREEMENT

(name of Service Provider)

BAGKGROUND

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

PARTIES' OBLIGATIONS

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

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

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

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

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

Water temperature 78 degrees celsius;

Billing cycle quarterly

Water use residential and

Service Charge Rates:

Energy consumed for hot water heating

\$0.0651808 per kilowatt hour

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

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

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

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

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

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

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

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

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

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

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

The specified conditions contained in the licenses of the three host retailers, AGLE, TRUenergy and Origin Energy in terms of what are known as the bulk hot water arrangements.

SOME MONITORING ISSUES

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 to form part of the proposed *Competition and Consumer Law 2010* (to be renamed from *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.

SOME SPECIFIC COMPETITION ISSUES

I use gas examples to illustrate here, but the arguments are applicable to electricity, with the exception that gas cannot be embedded – either it is directly provided or it is not in gas service pipes.

Unlike electricity, where, as long as flow of energy is directly achieved, change of ownership or operation does not alter the fact that electricity is received by the end-user.

This does not apply of course if a single electricity meter is used merely to provide heat to a communal water tank from which heated water is reticulated to various individual residential abodes in multi-tenanted dwellings.

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.¹⁶³

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.

¹⁶³ 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, licensed or unlicensed 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;¹⁶⁴ residential tenancy; trade measurement; generic laws on the brink of formalization under revised TPA provisions – to be known as *Competition and Consumer Law 2010*.

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.

¹⁶⁴ 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 communally heating water for multiple tenants residing in an apartment block.

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

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.”¹⁶⁵

Similarly, the South Australian *Residential Tenancies Act 1995*¹⁶⁶ refers to alternation to premises as follows:

¹⁶⁵ Elsewhere I discuss the clarity with which the ACT Residential Tenancies Act explicitly apportions to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone. Similar provisions apply in Victorian provisions. NSW permits water charges for excess water only if metered; or additional water charges by consent only. Electricity and gas charges need to be metered to show consumption. Queensland tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Qld Govt at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

¹⁶⁶ *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>

70—Alteration of premises^{167/168}

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

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

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

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.

¹⁶⁷ 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.

¹⁶⁸ Tasmanian tenancy provisions under the *Residential Tenancies Act 1997* (TAS) have similar provisions about alteration to property without Landlord consent.

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 subsidise their other gas retail consumers, with cheaper gas and supply charges. This is a complete barrier to entry for other new retailers.”

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 Victoria¹⁶⁹, 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).

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.

¹⁶⁹ Tenants Union Victoria (2006) Further Comments on the Small Scale Licensing Framework Issues Paper (ESC) (29 September), p2)

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 Code¹⁷⁰ (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 introduced to legislation or proposed legislation.

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.*”

¹⁷⁰ 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.

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.¹⁷¹

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.

¹⁷¹ 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.

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)*¹⁷² 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.

What barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market¹⁷³ 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 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.

¹⁷² *Sale of Goods Act 1896* (Qld) (reprinted and as in force as at 29 August 2007)

¹⁷³ 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.

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.

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 sale¹⁷⁴

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.

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

¹⁷⁴ 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*” Hansard Wednesday 11 October 2006

(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 changing their gas retailer." This last comment means transfer from AGL to Origin to compound the monopoly situation so that supply charges for the actual supply of gas for heating and cooking purposes is not duplicated on the basis of alleged supply of gas from Origin for the purposes of centrally heating a communal boiler tank, but not providing any direct flow of gas to the recipients of the heated water.

See Kevin McMahon's submission to the NECF2 Package, also published on the Senate's website (TPA_ACL-Bill2).

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

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

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

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

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 Paper¹⁷⁵; 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.

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.

¹⁷⁵ 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

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.

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 information¹⁷⁶ and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009¹⁷⁷ 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)¹⁷⁸ 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 tenderer¹⁷⁹ 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.

¹⁷⁶ <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>

¹⁷⁷ Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009

¹⁷⁸ Source: <http://www.duet.net.au/duet/about-duet/structure.htm>

¹⁷⁹ Ibid

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 (previously Alinta 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 1997¹⁸⁰. 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 capitalization 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.

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 Multinet¹⁸¹ 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.

¹⁸⁰ <http://www.uxc.com.au>

¹⁸¹ *“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 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.

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*
 - (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*¹⁸² 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).

¹⁸² *Gas Supply Act 1996* (NSW), last updated 23 March 2010, last accessed 28 May 2010
<http://www.legislation.nsw.gov.au/fullhtml/inforce/act+38+1996+cd+0+N#pt.1-sec.3>

In relation to persons involved in the reticulation of gas (authorized 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;

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 amends will be made under the Second Bill, at 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 Objective¹⁸³

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.

(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.

¹⁸³ 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)

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 (authorized 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 information¹⁸⁴ and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009¹⁸⁵ 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)¹⁸⁶ 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 tenderer¹⁸⁷ 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.

¹⁸⁴ <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>

¹⁸⁵ Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009

¹⁸⁶ Source: <http://www.duet.net.au/duet/about-duet/structure.htm>

¹⁸⁷ Ibid

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 1997¹⁸⁸. 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 capitalization 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.

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 Multinet¹⁸⁹ 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.

¹⁸⁸ <http://www.uxc.com.au>

¹⁸⁹ *“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 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:

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%) the 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 Power¹⁹⁰ 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 AGLE Origin 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 petajoules, but most commonly in megajoules.

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

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.

¹⁹⁰ 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/>

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.”¹⁹¹

¹⁹¹ 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” policy arrangements 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:

the [*Yallourn*](#) coal-fired power station and mine in the Latrobe Valley, Victoria

[*the Tallawarra gas-fired power station in Yallah, NSW*](#)

[*Hallett*](#) power station, a 180MW gas-fired power station in north-east South Australia

A 966MW hedge agreement with Ecogen Newport and Jeeralang power stations in Victoria

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 has 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-Bowen 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 IP¹⁹²

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 website¹⁹³ 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)¹⁹⁴

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,¹⁹⁵ 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.

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.

¹⁹² <http://annualreport2009.ipplc.investis.com/overview/ourportfolio.asp>

¹⁹³ <http://www.ipplc.com/>

¹⁹⁴ <http://annualreport2009.ipplc.investis.com/>

¹⁹⁵ 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>

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 AEMC¹⁹⁶ 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.

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 have significant implications for all components of the market, as will revised national measurement regulations and pending lifting of utility exemptions.

¹⁹⁶ Simply Energy South Australian Retail Review Response to Issues Paper 15 April 2008

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 NECF2 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 Market 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.

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 licensing; 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.¹⁹⁷

¹⁹⁷ 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

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 contract 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.

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*.

(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 flaws¹⁹⁸. 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.

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.*”

¹⁹⁸ 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)

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 licensed 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.

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:

- an area of land or any other place (whether or not it is enclosed or built on); or
- a building or other structure; or
- A vehicle, vessel or aircraft; or
- 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.¹⁹⁹

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.

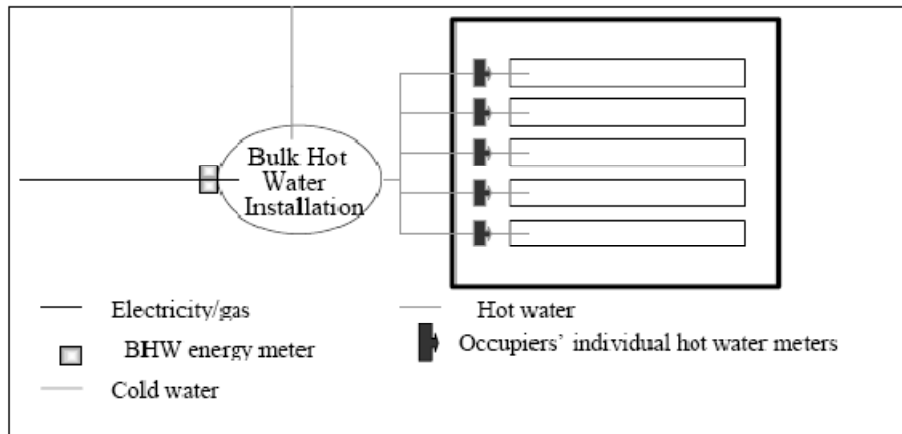
¹⁹⁹ See detailed analysis of this matter in my several submissions to the ESC, MCE arenas and the Commonwealth Treasury including case study material
See in particular
Kingston Madeleine (2009) Submission to Commonwealth Treasury Unconscionable Conduct Issues Paper: Can Statutory Unconscionable Conduct 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

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.

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 no 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 licensed or unlicensed 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 Service Link 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

- (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; licensing 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—

(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 (not water)

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 gas 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 licensing 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 licensed 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 retails 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.

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

There are no MORNs 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 Guideline20(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 licensed 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 licensing 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.

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**²⁰⁰ – 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.²⁰¹

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

²⁰⁰ 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

²⁰¹ 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 licensed 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

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 measurement²⁰²

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.

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.

²⁰² 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

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 framework²⁰³

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.”

²⁰³ National Measurement Institute Guide
<http://www.measurement.gov.au/trademeasurement/Documents/Guide%20to%20the%20New%20National%20Trade%20Measurement%20Regulations.pdf>

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.”

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 licensing,²⁰⁴ inconsistencies in regulation of gas meters.²⁰⁵

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.

²⁰⁴ 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

²⁰⁵ 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

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 of 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 matters, 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 licensed 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.²⁰⁶

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

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.

²⁰⁶ Personal communication

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 suppliers 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.

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 Licensing Framework Final Recommendations (2007) – see especially Overview p vi and vii; page 24

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 licensing 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, licensing 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:

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 gain refer to the findings of the Final Report dated October 2009 of the Commonwealth Consumer Advisory Committee observed that:²⁰⁷ 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).

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.

²⁰⁷ 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 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.²⁰⁸

The AEMC's cursory consideration of the wholesale market and focus on one component of a market may have contributed to distorted results.

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.

²⁰⁸ 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).

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.²⁰⁹

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.

²⁰⁹ 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 OC²¹⁰ and raises many issues that are pertinent to contractual matters, even though renting tenants are not part of the equation.

²¹⁰ 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;
- 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
- operational design – relating to flow rate of the hot water being greater than the cold water.
- the quality of supply and service of all the above alleged supplies and services over a period of six years.

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 VGDCS 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.

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

See also 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

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 mislead 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.

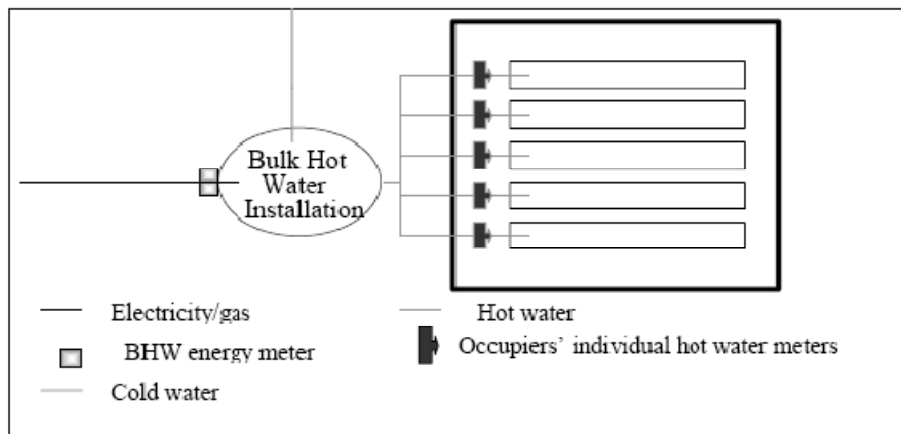
The Deidentified case study already published with my response to the Gas Connections Framework Draft Policy Paper (2009) (as a component of the NECF) and to the Treasury’s Unconscionable Conduct Issues Paper (2009) – appended here once again to draw attention to the injustices.

(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 no 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:

1. 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.
2. Allocate responsibility to the appropriate contractual parties - OCs
3. Make sure metering databases and service compliance is undertaken
4. Apply appropriate trade measurement practices using the right instrument to measure the right commodity in the correct unit of measurement and scale.
5. Ban communal hot water systems and install individual utility meters for gas electricity and water in all new buildings.
6. 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.

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 Guideline20(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 licensed 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 licensing 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 overdues 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 licensing 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 licensed 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.

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.²¹¹

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)*²¹² 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

²¹¹ 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.

²¹² *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 market²¹³ 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 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

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

²¹³ 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.

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 defense 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

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 AEMC MCE and AER of new provisions to include substantive unfair contact 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; licensing 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—
 - (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.

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 view that notwithstanding jurisdictional limitations there is a requirement for better inter-body collaboration 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 of provisions that appear to be facilitating conduct that could be interpreted as substantively or procedurally unconscionable
6. Appear to defy the fundamental and broader precepts of contractual law;
7. Appear to facilitate the provision of inaccurate and misleading online, oral and written information by policy-makers and economic regulators; by industry-specific complaints schemes
8. Appear to implement of practices that appear to defy the fundamental and broader precepts of contractual law, including under energy and other provisions in the written and unwritten law.
9. Appear to provide inaccurate information to consumers through policy makers, regulators and complaints schemes with implications for legal compliance
10. Appear to fail to target the right groups of consumers in terms of contractual liability. **(Targetting)**
11. Appear to have failed to address market failure in a timely or appropriate manner (Timeliness)
17. 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)**

18. 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**))
19. 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**)
20. **Appear** from the outset to have failed to demonstrate transparent consultation processes (**Consultation test**)
21. 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:

1. aids, abets, counsels or procures a corporation to contravene the applicable industry code; or
2. induces, whether by threats or promises or otherwise, a corporation to contravene the applicable industry code; or
3. is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention by a corporation of the applicable industry code; or
4. 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; 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),²¹⁴ is one in a series of many to various arenas in which I have reinforced similar unaddressed concerns

In a further submission, the Senate 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 goals.

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 2006)* (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.

²¹⁴ Madeleine Kingston (2010) Submission 25 to Senate Inquiry Consumer Law TPA_ACL Bill2) (April) with 11 appendices
http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_consumer_law_10/submissions.htm

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 concertinaed 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 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 Greenberg²¹⁵ 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.

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.

²¹⁵ Greenberg, D (2007 CALC in The Loophole p15).

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 p15:²¹⁶

“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.

²¹⁶ Greenberg: Daniel Statute Law Review 27(1) 15-28, p15

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.”

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 presentation²¹⁷

“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)²¹⁸, 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)

See Laws, Stephen (2009) discussion of consistency vs innovation²¹⁹

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’s²²⁰. (2007) analysis of the nature of legislation intention and implications for drafting²²¹ prepared for CALC²²²

²¹⁷ Moran, E (2005) *“Interpreting legislation: providing a variety of outcomes Current developments – Statutory interpretation.”* PowerPoint presentation 4 August 2005

²¹⁸ 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

²¹⁹ 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

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.

²²⁰ Daniel Greenberg of Lincoln's Inn, Barrister, Parliamentary Counsel

²²¹ 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

²²² 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

Duncan Berry is Editor of CALC 's journal *"The Loophole"* He is Secretary, Commonwealth Association of Legislative Counsel, and Consultant Legislative Counsel, Australia and Ireland 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: cited above

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.²²³

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 Parliament.²²⁴

“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 Counsel²²⁵ 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.

Other useful citations from *“The Loophole”* the journal of the Commonwealth Legislative Assembly Counsel includes 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).

²²³ Greenberg, Daniel, (ed) *Craies on Legislation* (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12

²²⁴ Greenberg, Daniel *Statute Law Review* 27(1) 15-28, p15

²²⁵ 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>

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 Artifact²²⁶ 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”*”

This would not be necessary if the principles of best practice legislative drafting from the outset.

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.

²²⁶ Hills, Rodger (2007) The Consensus Artifact. AstroProject. Sydney NSW.

“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.

Finally, I note the ACCC’s interpretation of current provisions regarding private actions.²²⁷

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.”²²⁸

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.

²²⁷ 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

²²⁸ 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/now advertising and claims about food, health, environmental impact and business opportunities.

"Where the ACCC has reasonable grounds, it may now issue an infringement notice in cases of suspected unconscionable conduct, some false or misleading conduct, pyramid selling and various product safety provisions.

Infringement notices will enable the ACCC to respond quickly to alleged breaches of these parts of the law and help facilitate a quick resolution of ACCC concerns with traders.

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

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

Unfair contract terms are also covered in the new legislation with provisions applying to standard form consumer contracts. These come into effect on 1 July 2010 and public guidance will be circulated to major business and consumer 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 of decommissioning of water suppliers using methods that clamp hot water flow meters to prevent supply of heated water.

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

None of these issues has been appropriately aired and discussed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION OF NATIONAL ENERGY RETAIL LAW AND RULES 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 of 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.

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-confessed 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 licensing 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 ad 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 or 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.

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

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

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 Oaks ²²⁹ 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;

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.

²²⁹ 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>

In their online article A Brave New World - Senate endorses unfair terms regulation, commercial law firm Mallesons, Stephens and Jacques²³⁰ 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.”*

Malleson’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 (such as telecommunications and fitness).... With the view of persuading various industries to change their contract terms.”

Mallesons has speculated as to whether the ACCC and ASIC will follow suit is unknown.

Should they not, in order to uphold their own provisions?

What about substantive unfair terms that are adopted or recommended by policy-makers and regulators? Where does this leave suppliers in the event of pen court litigation, even if statutory authorities don’t come to the party in consumer protection?

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.

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)²³¹ 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.

²³⁰ 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>

²³¹ 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

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.

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

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.²³²

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.”

²³² Note there are further explanations about financial products and services as covered by Corporations Agreement

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.

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 recently published Media Release says:²³³

“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. Kill 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.

²³³ <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, with recent updates.

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 of 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:²³⁴

“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.”

²³⁴ 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

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' Corporation entities.

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.

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:²³⁵

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, 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.

²³⁵ 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

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, adoption of 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 seem 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”

The NECF Package detailing the proposed Energy Law Regulations and Rules outlined in Part 1 Div 3

National Gas (South Australia) Act 2008, Part 2, National Gas objective and principles, and Division 1, 23

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:²³⁶

“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.

²³⁶ 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 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, it seems that the approach taken by the MCE has been characterized by 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)²³⁷ MCE (2008)²³⁸ and 2009)²³⁹; the Productivity Commission (2008)²⁴⁰ and (2009)²⁴¹ 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.

²³⁷ 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>

²³⁸ Kingston, M (2008) Submission (2-parts)²³⁸ 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)²³⁸
http://www.ret.gov.au/Documents/mce/ documents/Madeleine_Kingston_part320081208120718.pdf
(Part 3)

²³⁹ Kingston, M (2009) Submission to the Gas Connections Framework (GCF) Draft Policy Paper, as a component of the MCE SCO NECF²³⁹. 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

²⁴⁰ Kingston, M (2008) Submission to Productivity Commission's Review of Australia's Consumer Policy Framework (subdr242) (parts 1-5, 8)

²⁴¹ 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

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).²⁴²

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.

²⁴² Essential Services Commission (2009) Energy Retail Code version 6, effective February 2010, effective from April 2010

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*.”^{243/}

²⁴³ 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 Paper²⁴⁴ (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".²⁴⁵

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.

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.

²⁴⁴ 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

²⁴⁵ A copy of the report is available from the Parliamentary website, at www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08.

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 licensing (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.²⁴⁶ 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.

²⁴⁶ 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*

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 licensed and unlicensed 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.

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 licensing 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.”²⁴⁷ 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.

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.

²⁴⁷ *ibid*, page 37.

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:²⁴⁸

“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 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.

²⁴⁸ 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

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 EWOF, 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). It seems that the MCE has adopted 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.

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)²⁴⁹ and the PC’s Regulatory Burden Research Report (2009) (Social and Infrastructure).²⁵⁰

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.

²⁴⁹ 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

²⁵⁰ Refer to Productivity Commission (2009) Review of Regulatory Burden Social and Infrastructure. Research Report

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 reconsider 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).

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 end-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.²⁵¹

²⁵¹ 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>

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 2007²⁵² can be viewed also online²⁵³ 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.

I refer to that submission made by the Tenants Union Victoria²⁵⁴ 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.

²⁵² 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>

²⁵³ 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>

²⁵⁴ 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 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.

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 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 utilize 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.

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:

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 should 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*

(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 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 RPWG²⁵⁵ in full:

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).

²⁵⁵ 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>

The House of Representatives Standing Committee on Industry and Resources is undertaking a “*Case study into selected renewable energy sectors*” (June 2007).

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.

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.”*²⁵⁶

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 2010.²⁵⁷

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.

²⁵⁶ http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf

²⁵⁷ 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

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).

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’.

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 presentation²⁵⁸

“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)²⁵⁹, 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)

See Laws, Stephen (2009) discussion of consistency vs innovation²⁶⁰

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.

²⁵⁸ Moran, E (2005) *“Interpreting legislation: providing a variety of outcomes Current developments – Statutory interpretation.”* PowerPoint presentation 4 August 2005

²⁵⁹ 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

²⁶⁰ 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

See Daniel Greenberg's²⁶¹ (2007) analysis of the nature of legislation intention and implications for drafting²⁶² prepared for CALC²⁶³

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.

²⁶¹ Daniel Greenberg of Lincoln's Inn, Barrister, Parliamentary Counsel

²⁶² 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

²⁶³ 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

Duncan Berry is Editor of CALC 's journal *"The Loophole"* He is Secretary, Commonwealth Association of Legislative Counsel, and Consultant Legislative Counsel, Australia and Ireland

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

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.²⁶⁴

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 Parliament²⁶⁵

“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 Counsel²⁶⁶ 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.

²⁶⁴ Greenberg, Daniel, (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12

²⁶⁵ Greenberg, Daniel Statute Law Review 27(1) 15-28, p15

²⁶⁶ 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>

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.

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.

In discussing the Fuel and Energy's Terms of Reference No. 10 – the impact of the Government's emissions trading scheme and a rising carbon price in all years that the scheme is in place, the commissioned report from Concept Economics made these observations²⁶⁷:

10.2. COST OF LIVING PRESSURES FOR HOUSEHOLDS, PENSIONERS AND INDIVIDUALS MORE GENERALLY;

As the Treasury notes (Treasury 2008a, p. 199) the 'initial impact on households will be through increases in electricity and gas prices'. The Treasury further notes (p. 199) that 'While the price impact of the scheme is estimated to be relatively larger for low-income households, these impacts will be offset by the Government's commitment to help households adjust'. The burden of the scheme on households depends crucially on the actual permit prices that result under the scheme and the way other policies (such as the commitment to a fuel tax offset) interact with the scheme. As mentioned above there is considerable uncertainty about the level of the projected permit prices as there is about future government policy.

²⁶⁷ Concept Economics (2010) Final Report to Fuel and Energy Senate Select Committee (June),"A Peer review of the Treasury modeling of the economic impacts of reducing emissions pp 56 and 57 www.aph.gov.au/Senate/committee/fuelenergy_ctte/senate_ets_report_020209_final.pdf

The Treasury (2008a, p.192) notes that the G-Cubed model was used to make estimates of the impact of the scheme on inflation and the possible monetary policy response. The Treasury (2008a, p.192) notes that 'In Australia, the CPI rises by 0.7 per cent in 2010 in the CPRS -5 scenario and by around 1.1 per cent in the CPRS -15 scenario' and that 'After the initial spike, inflation continues to be slightly higher than the reference scenario'. This result appears to arise from the way in which future permit prices have been constructed.

What needs to be considered is the way in which permit prices will unfold in the real world – in a real permit market prices will not follow a smooth path with no variability at the Treasury's assumed real rate of interest. The ongoing increases in permit prices (and therefore the price of energy) will have implications for the conduct of monetary policy. Ongoing relative price changes (which require no monetary policy response) may be mistaken for ongoing changes in the general price level (inflation), and vice versa. This complicates the task of monetary policy.

These considerations should be taken into account when non-prudent unnecessary costs are sanctioned, say for example through metering data costs that are unrelated to sale and supply of energy, or to its distribution and transmission.

Business building by extending product ranges is one thing, but provisions that have the effect of distorting the scope of legislation governing energy, and are in conflict with other laws, pushing up even further the price of energy is another matter.

That will affect not only those facing hardship but the entire population.

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.²⁶⁸:

8.1 Rule Change proponent's view

The Rule Change Request addresses the recovery of costs from market participants by introducing regionalization 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”.^{269/23}

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”.^{270/24} 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 (i.e. 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.

²⁶⁸ 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>

²⁶⁹ ²³ Cost Recovery for "Other" Services Directions

²⁷⁰ ²⁴ NGF submission, 24 August 2009, p. 2

See submission of UnitingCare to AER

[Electricity distribution networks UnitingCare submission](#)

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 lines²⁷¹ 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 recognizing that economic wealth alone is not an adequate measure of a society's development.^{272/73} 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.

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.

²⁷¹ 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.

²⁷² Hart, M (1999) Guide to sustainable indicators 2nd edn Sustainable Measures Inc. Andover c/f Cameron, J. W. *ibid*, p35, citation 73 Notes

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,²⁷³ the United Nations,²⁴ the Organization for Economic Cooperation and Development²⁵ and the International Labour Organisation²⁶ recognize 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)*

"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.

See 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).

²⁷³ www.worldbank.org. Cited from ibid Cameron JW (former Victorian Auditor General) 2004) citation 23

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 2006²⁷⁴ 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 privatization 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 privatization 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 privatized energy entities that will operate in the full retail competition market after 1 July 2007. The government has recognized 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.

²⁷⁴ 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.

Refer to submission by public housing tenant Queensland Mr. Kevin 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 analyzed 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

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-dramatizing 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 privatization 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 privatization have been deprived of the opportunity to participate in this debate."

SOME SPECIFIC COMPETITION ISSUES

Jemena Gas Access Networks (NSW) Ltd (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.²⁷⁵

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.

²⁷⁵ 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.apf.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.apf.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.

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 off-load certain responsibilities to Metering Data Service Providers, licensed or unlicensed 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;²⁷⁶ residential tenancy; trade measurement; generic laws on the brink of formalization under revised TPA provisions – to be known as *Competition and Consumer Law 2010*.

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.

²⁷⁶ 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 communally heating water for multiple tenants residing in an apartment block.

I have had direct contact with many recipients of centrally heated water – all with negative stories about water quality, maintenance, and dispute over contractual and maintenance and safety matters. Pipes are not lagged, water temperature is variable and there is huge wastage of water when supplied in this way.

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.”²⁷⁷

²⁷⁷ Elsewhere I discuss the clarity with which the ACT *Residential Tenancies Act 1997* explicitly apportions to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone. Similar provisions apply in Victorian provisions. NSW permits water charges for excess water only if metered; or additional water charges by consent only. Electricity and gas charges need to be metered to show consumption.

Queensland tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Qld Govt at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

Similarly, the South Australian Residential Tenancies Act 1995²⁷⁸ refers to alternation to premises as follows:

70—Alteration of premises^{279,280}

- (1) *It is a term of a residential tenancy agreement that a tenant must not, without the Landlord's written consent, make an alteration or addition to the premises.*
- (2) *A tenant may remove a fixture affixed to the premises by the tenant unless its removal would cause damage to the premises.*
- (3) *If a tenant causes damage to the premises by removing a fixture, the tenant must notify the Landlord and, at the option of the Landlord, repair the damage or compensate the Landlord for the reasonable cost of repairing the damage.*

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.

²⁷⁸ *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>

²⁷⁹ 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.

²⁸⁰ Tasmanian tenancy provisions under the *Residential Tenancies Act 1997 (TAS)* have similar provisions about alteration to property without Landlord consent.

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.”

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 is 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.

In previous submissions I had stated that an Owners' Corporation makes that choice for bulk energy supplies" (for lack of a better term)²⁸¹ 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 Victoria²⁸², 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.

²⁸¹ It is clear from recent anecdotal material of which I have had direct knowledge and involvement that Owners' Corporations are as much victims as tenants on many occasions with these arrangements. Since it is the Developer who makes the decisions, in apparently collusive arrangements with chosen service-providers.

²⁸² Tenants Union Victoria (2006) Further Comments on the Small Scale Silencing Framework Issues Paper (ESC) (29 September), p2)

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).

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 Code²⁸³ (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 introduced to legislation or proposed legislation.

²⁸³ 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 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. Refer also to Auditor-General Report No. 9 to the Queensland Parliament for the 2006-2007 financial year discussed elsewhere

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.²⁸⁴

²⁸⁴ 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.

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)*²⁸⁵ 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.
- What barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market²⁸⁶ 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 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.

²⁸⁵ *Sale of Goods Act 1896* (Qld) (reprinted and as in force as at 29 August 2007)

²⁸⁶ 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.

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.

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 sale.²⁸⁷

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 *Qld Dept of Infrastructure and Planning Plumbing Newsflash 2008 (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.”

²⁸⁷ 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”* Hansard Wednesday 11 October 2006

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.

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 changing their gas retailer." This last comment means transfer from AGL to Origin to compound the monopoly situation so that supply charges for the actual supply of gas for heating and cooking purposes is not duplicated on the basis of alleged supply of gas from Origin for the purposes of centrally heating a communal boiler tank, but not providing any direct flow of gas to the recipients of the heated water. See Kevin McMahon's submission to the NECF2 Package, also published on the Senate's website (TPA_ACL-Bill2).

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

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

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

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

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 Paper²⁸⁸; 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.

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.

²⁸⁸ 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

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.

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 you 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 Jemena Gas Networks (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 information²⁸⁹ and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009²⁹⁰ 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 68% 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)²⁹¹ 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 tenderer²⁹² 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.

²⁸⁹ <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>

²⁹⁰ = Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009

²⁹¹ Source: <http://www.duet.net.au/duet/about-duet/structure.htm>

²⁹² Ibid

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 1997²⁹³. 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 capitalization 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.

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 Multinet²⁹⁴ 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.

²⁹³ <http://www.uxc.com.au>

²⁹⁴ *“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 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.

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*
 - (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 broad objects of the NSW *Gas Supply Act 1996*²⁹⁵ include

The objects of this Act are as follows:

3 Objects

(1) *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 ,*
 - (b) *to regulate gas reticulation and gas supply, so as to protect the interests of customers and to promote customer choice in relation to gas supply,*
 - (b1) *to facilitate the continuity of supply of natural gas to customers,*
 - (c) *to promote the safe use of gas.*
- (2) *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).*
- (3) *In relation to licensed distributors involved in the reticulation of gas, 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,*
 - (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,*

²⁹⁵ *Gas Supply Act 1996* (NSW), last updated 23 March 2010, last accessed 28 May 2010
<http://www.legislation.nsw.gov.au/fullhtml/inforce/act+38+1996+cd+0+N#pt.1-sec.3>

- (c) (d) *(Repealed)*
- (e) *to take proper account of the interests of gas users in respect of transportation tariffs and other terms of service.*
- (3A) *In relation to authorized reticulators and licensed distributors involved in the distribution or reticulation of gas, the duties are as follows:*
 - (a) *to consider the development of efficient and safe gas distribution pipelines and gas distribution systems,*
 - (b) *to promote the efficient and safe operation of gas distribution pipelines and gas distribution systems.*
- (4) *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,*
 - (b) *to take proper account of the interests of small retail customers in respect of gas pricing and other terms of gas supply,*
 - (c) *to take proper account of the business interests of persons supplying gas to small retail customers,*
 - (d) *to promote a competitive gas market.*
- (5) *In relation to gas users, the duties are to promote the efficient and safe use of gas.*
- (6) *Nothing in this section permits or requires this Act to be construed in a way that is inconsistent with the National Gas (NSW) Law or the National Gas (NSW) Regulations.*
- (7) *Nothing in subsections (2)–(6) gives rise to, or can be taken into account in, any civil cause of action.*

Comment MK

I discuss briefly some of these objects in relation to customer choice:

Gas Act NSW (amended to 23 Mar2010) 3 Objects

- (4) *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,*
 - (b) *to take proper account of the interests of small retail customers in respect of gas pricing and other terms of gas supply,*
 - (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,*

The public receives no benefit, real or imagined by being imposed with a contractual status for the alleged deemed supply of gas that is not supplied at all in circumstances where a single gas meter supplies a single communal boiler tank on common property infrastructure in the care custody and control of an Owners' Corporation and/or Landlord/Lessor purporting to uphold mandated residential tenancy agreements.

Heated water supplies form an integral part of such a lease agreement. If no separate meter exists, and gas is not directly delivered through the gas distribution system by means of demonstrable direct flow of gas, no sale or supply of gas is effected. This is analyzed further elsewhere and also in a dedicated analysis of the [Gas Industry Act 2001](#) (Victoria) wherein similar arguments apply. See also Major Deidentified Case Study as Appendix 1.

Thus competitiveness, efficiency and sustainability are not met by

- a) imposing contractual status on the wrong parties;
- b) using the wrong trade instruments for the wrong commodity, thus applying inaccurate use of trade measurement instruments;
- c) centrally heating water in archaic poorly maintained stationery water-tanks in multi-tenanted dwellings;
- d) 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.

The provisions either tacitly or explicitly endorsed which permit certain practices and unjustly impose contractual responsibility for the alleged sale and supply of gas in the circumstances described violates the fundamentals of the requirement to adopt best practice and recognition of the validity and weight of other laws including those under the common law.

To suggest that the best way for anomalies to be ironed out and proper interpretation of who the relevant customer is to wait for case law to determine the contested interpretations and application of deemed or standard contracts for the alleged sale and supply of gas (or electricity) in the circumstances described is to circumvent the issue; avoid proactive commitment to ironing out discrepancies, confusion and unfair substantive terms implicitly included within the proposed national Model Terms and Conditions of the National Energy Retail Laws and Rules and all ancillary provisions, including under Rule Changes relating to Metering Data Service Provision.

These comments are applicable to all jurisdictional laws implicitly allowing these practices to continue. It was Victoria that first introduced the Bulk Hot Water Metering and Charging arrangements, whilst most other States follows, even if not explicitly iterating the Victorian provisions under individual Codes Guidelines or other such provisions.

For from achieving the stated goals of preventing price shock, these perpetuated arrangements have cause direct and extensive detriment; have produced unnecessary and non-transparent costs for commodities not provided in the first place; have resulted in unwarranted threats of and actual disconnection of heated water supplies where none of the energy provisions so much as mentions sanction of such a process, and generally distorts the intended meaning of deemed gas supply (or deemed electricity supply provisions. Please refer for the explicit procedures and practices iterated in the revised Queensland [Gas Act 2003](#) also discussed elsewhere; and the Victorian instrument [Gas Industry Act 2001](#), revised to 1 January 2010.

The practices may be seen to be exploitive, and part of what appear to be collusive arrangements between Owners' Corporations or Developers and energy providers of various descriptions, apparently facilitated by flawed policies that ought to be abolished.

To suggest that an end-user receiving heated water in water pipes has a choice by way of an option at his or her own expense to install water infrastructure, separate boiler tank, or any other infrastructure is to misunderstand the problem, even if the question of proper contractual party were to be momentarily set aside. I discuss this furthering the context of each jurisdictional tenancy provision.

It is clearly the Landlord's or Owners' Corporations responsibility to arrange for, maintain and take direct responsibility for infrastructure that communally serves multiple occupiers in multi-tenanted residential premises.

In distinguishing between customers which include body corporate entities such as developers and landlords, and end-users of utilities the preferred term is end-user; compared with a body corporate with whom a supplier makes arrangements to supply gas to a communal water tank reticulated water supplies in water pipes after heating).

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

(2) *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 (authorized 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;*

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)

The *Gas Act 2006* (NSW) describes distribution pipeline as follows

"distribution pipeline" means the gas pipes and associated equipment that are used to convey and control the conveyance of natural gas to the premises of customers, but does not include:

(a) *any pipeline in respect of which a licence is in force under the Pipelines Act 1967 (other than a pipeline that the regulations declare to be, or to form part of, a distribution pipeline), or*

(b) *any gas installation, or*

(c) *any gas pipe or associated equipment that is wholly situated on land owned by the person who owns or controls the gas pipe or equipment, or*

(d) *any gas pipe or associated equipment that the regulations declare not to be, or not to form part of, a distribution pipeline.*

Water infrastructure and water services pipes reticulated from a single boiler tank heated water after being supplied with gas to heat that water are not part of that system or gas conveyance equipment.

Similar arguments apply to other jurisdictional or national provisions in place or contemplated.”

No direct flow of gas (or electricity) – no sale or supply of those commodities. His simple concept has been rendered unjust by using water meters and infrastructure to attempt to calculate alleged consumption of gas when none is delivered.

A single reading of a single gas meter needs to occur; the proper calculation of total gas supplied to a single boiler tanks; the proper contractual relationship determined and acknowledged and a single bill for total gas supplied sent to the Developer or Owners’ Corporation who requested the gas equipment and/or servicing of unnecessary water infrastructure in connection with calculation of consumption.

For renting residential tenants, heated water is an integral part of mandated lease agreements between landlords and tenants; if after is to be charged for, a separate water meter measuring solely consumption of water – in some states relating only to excess water; in others only chargeable if water efficient devices exist; in all cases at the cold water rate unless there is a separate gas meter through which direct and accurate actual gas consumption can be calculated for individuals.

It is impossible to understand how JGN believes that NSW end-users of heated water are treated any differently if in fact the same practices are adopted in calculating alleged gas usage by individuals.

I site from s33R of the *Gas Act 1996* (NSW) regarding consumption of natural gas, which is a concept embraced in other such provisions, including at national level, tip-toeing around what is known to be usual and common-place practice in deeming a party who receives no gas at all to be “consuming” this commodity.

These provisions have been taken from the *Electricity Supply Act* without considering the differences between the markets, and the fact that gas supply cannot be “*embedded*” it is either directly supplied or it is not to the party deemed to be receiving it, regardless of any changeover of operations or ownership of infrastructure.

33R Small retail customers

(cf section 92 of Electricity Supply Act 1995)

- (1) For the purposes of this Act, a "small retail customer" is:*
- (a) a person who consumes or is expected to consume natural gas at premises at a rate that is less than the prescribed rate, determined in accordance with any relevant provisions of the regulations, or*
 - (b) a person who consumes or is expected to consume natural gas at premises used for a purpose prescribed by the regulations, or*
 - (c) a person who is treated in accordance with any relevant provisions of the regulations as a small retail customer, even though the person is not a person described in paragraph (a) or (b).*

To suggest that choice exists simply because the regulations require it, is ridiculous. To suggest that such a choice means fitting of an individual gas meter and other infrastructure at the expense of the end-user is also ridiculous and inconsistent with tenancy provisions and likely consent of the Landlord. If the Landlord has chosen not to fit separate meters – the cost must be borne by the Owners' Corporation.

In older buildings the unjustness of these arrangements are compounded since the water is rarely consistently hot; there is huge wastage since often up to 200 litres needs to be drawn before the water is even hot (therefore the heat supplied is unfit for the purposes intended when heating a communal water tank from cold start); the pipes are not normally appropriately lagged; the boiler tank is a health risk of Legionnaires and other serious bacterial disease; the Landlord or Owners' Corporation has no incentive to maintain water infrastructure, boiler tanks etc.

Should there be a water pipe leak, the heated water deemed to be consumed by the end-user receiving heated water through often poorly maintained equipment, is wasted en route – leading to wastage of a scarce commodity, inconsistent with the objects of this and many other provisions in terms of energy and water efficiency.

Even in new luxury buildings, the most efficient communal water heating design is not always chosen by Developers at the time of building construction – see a live legal dispute in the open courts on this and related matters; alleged excessive charging and dispute over contractual status.

End-consumer interests are not best served by the current arrangements, and they do not have effective choice in a monopoly-like market, wherein host retailers have a monopoly, but in fact do not even supply direct gas to the end-users deemed to be contractual liable, including for unreasonable conditions precedent and subsequent (for example access to meters), when the water meters are normally behind locked doors and inaccessible to renting tenants.

The proper contractual party is the Developer or Owners Corporation. Such contracts are not transferrable under contract or common law.

Since unfair substantive terms exist that are inherent in the Model Terms of Contract for alleged sale and supply of gas, under revised consumer and competition laws these terms are potentially voidable.

It should not take expensive litigation to sort this out.

(2)

(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

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.

It is regrettable that some of the protections inherent in the ACT Gas Act provisions have now been repealed. The objectives of that act when in force were as follows:

Database last updated: 31 May 2010

http://portsea.austlii.edu.au/au/legis/act/repealed_act/

Section 3(e) of the *Gas Supply Act 1997* (South Australia) includes under Objects without pretending to cater for unspecified and unsubstantiated claims as to the alleged “*long-term interests of consumers of gas.*”

- (e) *to protect the interests of consumers of gas.*

This legislation has been repealed.

GAS ACT 1992 - SECT 6

Objectives

- 6. (1)** *In the performance of any function under this Act, the Authority and each Review Panel shall have regard to the following objectives:*
- (a) *to ensure that authorized distributors satisfy, so far as it is economical to do so, all reasonable demands for gas;*
 - (b) *to ensure that authorized distributors are able to finance the provision of gas supply services;*
 - (c) *to protect the interests of consumers in relation to prices charged for the supply of gas, other terms on which gas is supplied, the continuity of the supply of gas and the quality of services connected with the supply of gas that are provided by authorized distributors;*
 - (d) *to protect the public from dangers arising from the transmission, distribution or use of gas;*
 - (e) *to protect the interests of consumers in relation to the development, extraction, provision, allocation, transportation, distribution, pricing, conservation, utilization and conditions of supply, of gas;*

- (f) *subject to paragraphs (a) to (e) (inclusive)—to promote efficiency and productivity of authorized distributors in reticulating gas and the efficient use of gas by consumers;*
 - (g) *subject to paragraphs (a) to (e) (inclusive)—to promote effective competition in the interests of consumers.*
- (2) *In making a decision under subsection 36 (1), paragraph 36 (5) (b) or subsection 39 (3), 40 (1) or 41 (1), the Minister shall have regard to the objectives listed in subsection (1).*

Gas Supply Act 1998 has also been repealed – see previous s16

http://portsea.austlii.edu.au/au/legis/act/repealed_act/gsa1998148/s16.html

GAS SUPPLY ACT 1998 - SECT 16 (ACT)

Gas supply to be metered

- (1) *An authorized transporter shall ensure that any gas leaving the possession, custody or control of the transporter to—*
- (a) *another authorized transporter; or*
 - (b) *an authorized distributor;*

passes through a meter on so leaving.

(2) *An authorized supplier shall ensure that any gas supplied by the supplier to another person by means of a distribution pipeline passes through a meter on being so supplied.*

Penalty:

- (a) *if the offender is a natural person—50 penalty units;*
- (b) *if the offender is a body corporate—250 penalty units.*

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 amends will be made under the Second Bill, at 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 Objective²⁹⁶

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.*
- 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.

(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.

²⁹⁶ 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)

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 (authorized 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 monopoly 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 information²⁹⁷ and from one of the slides presented by Jemena at the Public Forum on 23 September 2009 and on 17 December 2009²⁹⁸ 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 68% 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)²⁹⁹ 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 tenderer³⁰⁰ UED's website describes its OSA as follows:

²⁹⁷ <http://www.jemena.com.au/company/downloads/Corporate%20Profile2009.pdf>

²⁹⁸ Jemena Gas Access Revised Access Arrangement Public Meeting 23 September 2009

²⁹⁹ Source: <http://www.duet.net.au/duet/about-duet/structure.htm>

³⁰⁰ 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 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 1997³⁰¹. 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 capitalization 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.

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, ActewAGL, Ergon. IT Service Group: broad range of clients from government to medium to large end of the corporate market.”

³⁰¹ <http://www.uxc.com.au>

United Energy (UED) and Multinet³⁰² 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 incorporation of further major revisions sanctioned by Parliament 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.

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.

³⁰² *"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."*

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

Comment MK

It is my understanding that in Queensland Envestra owns the **hot water flow meter infrastructure** as an additional non-energy related asset that is leased out to Origin Energy, who inherited a “*sitting duck*” monopoly clientele of those receiving heated water supplies that are communally heated – a significant proportion from public housing. Some do not have any gas entering their abodes as for safety and health reasons they may not use naked flames for cooking.

Nevertheless pass-on costs include what retailers are charged for water meter infrastructure maintenance, meter reading fees, transport for visiting hot water flow meters; commodity charges, free retail competition charges (when no gas is supplied directly to any end-user of communally heated water).

The question of creeping acquisition arises.

This also may be said of IT and other backroom costs associated with billing practices that are unnecessary and entirely irrelevant to the proper calculation of gas consumption – the customer is the Owners' Corporation. The end user receives heated water supplies within mandated tenancy terms.

This means that they are forced to pay free retail charges and other gas-related costs when they receive none at all. See Kevin McMahon's public submission to both the Senate Economics Committee's TPA-ACL-Bill2 (sub 46) as was also submitted to the National Energy Customer Framework 2 (NECF2) Package in March.

It is my understanding that in Victoria ENVESTRA maintains the hot water flow meters that are unnecessary for the calculation of gas consumption and imposes similar charges to that mentioned above, but that the hot water flow meters are owned by TRUenergy a host retailer, who delegates to Envestra maintains of hot water flow meters theoretically used to calculate gas consumption – a scientific impossibility.

In turn, I believe that either Envestra or TRUenergy sub-contracts IT and backroom tasks to third parties. Thus costs become unnecessarily inflated and the system certainly does not prevent price shock to end-consumers of heated water – who pay through the nose unnecessarily and are held contractually liable for sale and supply of energy.

These practices are not only known but actively sanctioned and condoned by policy makers and regulators. When coercion to establish an explicit contractual relationship with the retailer does not eventuate, it is hot gas or electricity but heated water supplies that are suspended. These provisions are grossly unjust.

Similarly JGN manages by farming out tasks associated with billing and data metering services that are unnecessarily incurred where SPAusnet is the distributor.

AGLE may or may not use JGN for such billing, metering and backroom tasks associated with hot water flow meters effectively posting as gas or electricity meters.

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 Power³⁰³ 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 (AGLE); Origin 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 petajoules, but most commonly in megajoules.

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

AGLE may or may not use JGN for such billing, metering and backroom tasks associated with hot water flow meters effectively posting as gas or electricity meters.

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.

³⁰³ 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/>

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."*³⁰⁴

³⁰⁴ 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"* policy arrangements 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

Please see discussion under **ENERGEX** and Ergon Energy, previously owned by the Queensland Government

The competitive retail business of **ERGON ENERGY** (mainly commercial and industrial customers) were sold by the QLD Government as part of the PowerDirect package

As noted in ENERGEX's Annual Report

*ERPL was renamed **Sun Retail** and was structured to include approximately 800,000 existing electricity customers, approximately 53, 000 LPG customers, approximately 13,700 serviced hot water customers and Sun Gas' approximately 70,500 natural gas customers.*

***Sun Retail** was purchased by Origin Energy in October 2006. The sale was supported by transitional services agreements under which Origin Energy receives a range of services from ENERGEX, and its related parties, including it services provided by **SPARQ**, until the end of April 2008.*

It would appear that these business are operating cooperatively as a happy family unit, using the term loosely

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 40's 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 AGLE 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-Bowen 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.

AGLE may or may not use JGN for such billing, metering and backroom tasks associated with hot water flow meters effectively posting as gas or electricity meters.

The three host retailers and their associated distributors for the purposes of supply of gas to a single gas or electricity meter in multi-tenanted dwellings are of the belief encouraged by policies and practices that are either explicitly or implicitly endorsed by policy makers, that mere ownership or maintenance of hot water flow meters creates a contractual relationship with end-users of heated water where no flow of energy occurs.

It remains unclear on what basis energy policy makers believe they have jurisdiction over water infrastructure of any kind or that it is acceptable to over look that disconnection processes in these circumstances involved disconnection of heated water supplies and not gas or electricity.

ENERGEX reports in their Annual Report 2007 that they completed the transition of the retail and network natural gas businesses to AGL and APT respectively on 30 June 2007. This included services such as billing, receipting, metering and credit management.

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 IP³⁰⁵

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 website³⁰⁶ 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)³⁰⁷

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,³⁰⁸ 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.”

³⁰⁵ <http://annualreport2009.ipplc.investis.com/overview/ourportfolio.asp>

³⁰⁶ <http://www.ipplc.com/>

³⁰⁷ <http://annualreport2009.ipplc.investis.com/>

³⁰⁸ 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 AEMC³⁰⁹ 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.

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.

³⁰⁹ Simply Energy South Australian Retail Review Response to Issues Paper 15 April 2008

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 2010* 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 have 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 Market 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.

Queensland Gas consumption³¹⁰

Queensland's gas consumption has risen significantly since 2004. It is estimated that gas consumption in Queensland in 2009 was around 166 petajoules, up from around 157 petajoules in 2008. There are approximately 150,000 natural gas residential and small commercial users in Queensland (using less than one terajoule a year). Most of these customers are located in Brisbane. Large industrial customers are in regional centres such as Gladstone and Mt Isa, as well as Brisbane.

Electricity generation, fertilizer production and mineral processing accounts for over 95 per cent of Queensland gas consumption. Residential use of gas accounts for just over 3 per cent of the state's total gas consumption. This is significantly lower than in southern states due to Queensland's warmer climate and resulting lack of use of gas for heating purposes.

Brisbane

South East Queensland, which includes Brisbane, has the largest number of residential and small commercial gas customers, but fewer large industrial customers than some of the regional markets.

Gladstone

The Gladstone market is largely an industrial load with a small number of large customers who use gas mineral processing and the manufacture of fertilizer. The emerging LNG industry around Gladstone is expected to drive further growth in gas consumption for the area.

Mt Isa

The Mt Isa market also has a small number of large customers, who use gas in their mineral processing operations or for electricity generation.

For further information about CSG / LNG contact:

³¹⁰ Queensland Department of Mines and Energy website “Gas Consumption”

ENERGEX

Please refer to ENERGEX'S pass-through submission 2007 which on page 37 mentions on p37 of 135 pages that *“13,700 serviced bulk hot water customers”* were sold to Origin (see appendix and refer to paragraph 4, page 37 of the final supplementary submission by ENERGEX Supplementary Cost Pass Through Submission 2007.³¹¹

This has implications for current and future regulatory determinations and cost allocations and for policy matters impacting on Metering Data Services and Metrology Procedures, as distinct from trade measurement, though the two are related and do overlap.

The Queensland Government Department of Mines and Energy Fact Sheet *“Sale of the Queensland Government Energy Retail Businesses”* outlines how and why assets were sold.

That Fact Sheet explains that

“The decision to sell the assets was made in April 2008, following an independent review of the Government’s energy businesses which recommended that the Queensland retail businesses of ENERGEX and Ergon Energy be sold to assist with the introduction of full retail competition for domestic and small businesses customers in Queensland on 1 July 2007

The Fact Sheet cheerily announces that from 1 July 2007 households and small business customers in Queensland are able to choose their retailer for the first time – with full retail competition being expected to *“deliver greater choice, better services and more competitive prices, particularly for customers in south-east Queensland.”*

The Fact Sheets suggests that the only change was to the name of the company sending customers their bills.

Not put in quite such rosy terms are the disadvantage to the captured market of some 2500 *“gas customers”* who would now receive two bills (impliedly each with FRC costs and GST included) if they were serviced hot water and natural gas (AGL) customers.

The question of the use of hot water meters to calculate alleged gas usage in the communal heating of water was not highlighted to illustrate that hot water flow meters cannot possibly measure gas consumption or energy, but merely water volume.

Even those not receiving any gas at all if for health and safety reasons associated perhaps with disability no naked flame was permitted (and therefore cooking was electric only) those alleged customers of gas (on the basis of receiving in water pipes communally heated water) are also paying FRC charges

³¹¹ Energex Supplementary Cost Pass Through Submission 2007 to Queensland Competition Commission (QCC), page 37 of 125 pages, para 4

http://www.qca.org.au/files/E-SuppFRC_Cost_Pass-throughEnergexSep-07.PDF

See also other associated documents on QCA website www.qca.org.au

See asp *Sale of*

http://www.dme.qld.gov.au/zone_files/Electricity/sale_of_retail_businesses_factsheet.pdf

Sale of the Queensland Government’s Energy Retail Businesses.” Department of Mines and Energy 2006

http://www.dme.qld.gov.au/zone_files/Electricity/sale_of_retail_businesses_factsheet.pdf

To clarify water supply sub-meter requirements in community titles and buildings with community bulk hot water services

See also Body Corporate and Community Management and Other Legislation Amendment Bill First and Second Reading Speech and Explanatory Notes. Hansard 11 October, pp68-71

This proportion of the **13,700** customers receiving gas-fired centrally heated water (reticulated from a single boiler tank in water pipes – i.e. **2,500** were particularly disadvantaged to the extent that they were and continue to be unjustly imposed with a contractual relationship with an energy provider (under energy laws and ancillary provisions, written or otherwise) for conditions, precedent and subsequent, and financial responsibility for a commodity simply not received.

This has implications also billing practices. It had originally been envisaged that the Government would retain the billing for composite service charges in the case of social housing (public housing tenants). Public housing authorities in Queensland are not apparently taking direct responsibility for billing for service costs on the basis of all services provided to renting tenants. Instead, energy retailers (in the case of gas Origin, who inherited the serviced *“bulk hot water clients”* as a captured monopoly market for unregulated water products (not gas or electricity) despite being charged as if for gas, including massive supply costs and FRC costs that are unwarranted. That leaves aside the maintenance costs, outsourcing costs and the like.

For the remainder, presumably served by boiler tanks heated by a single electricity meter similar disadvantage applies, since they simply do not receive electricity at all through flow of energy or any legally traceable means.

All **13,700** receive a heated water product not energy at all, either gas or electricity

I refer also to the transfer of water infrastructure *assets from councils to the State Government*, which is referred to in the Auditor-General’s 2007 Report

In terms of the hot water flow meters that may be owned by Envestra and leased out to Origin, the presumption has been made that mere ownership of that equipment and associated infrastructure (water and hot water flow meters) gives energy retailers and/or other corporations the right to impose contractual status by over-riding enshrined protections under contract and common law provisions and any protections within generic laws. The States will in any case be required to comply with national generic laws by the end of 2010. There is also the question of trade measurement provisions and pending lifting of remaining utility exemptions.

Further detail is provided in the Auditor General’s 9th Report to the Queensland Parliament which is in part discussed shortly in the section dedicated to Corporations Law.

In terms of **ENERGEX’S** structure and the sale of both **ENERGEX** and **ERGON ENERGY**, apparently sold *“to assist with the introduction of full retail competition for domestic and small business customers in Queensland on 1 July 2007.”*

This was some nine months after the rushed *Energy Assets (Restructuring and Disposal) Bill 2006* was passed through the Queensland Parliament on 11, 12 and 31 October 2006 respectively.

My understanding is that the sale process was well advanced at the time and that there was never an opportunity to separate out the non-contestable customers in relation to gas (and possibly also electricity, including in rural areas. I have not had a proper chance to verify this perception so can only suggest perusal of all the documentation on the QCA website that relates to ENERGEX’s and/or Ergon Energy’s submissions as well as the Australian Energy Regulator website for similar information in connection with regulatory determination for cost allocation and the like.

Besides that the Queensland Auditor-General's Report will provide further pertinent information as directed cited below

“Sale of energy retail companies (Section 3.3)

On 26 April 2006, the then Premier announced that in preparation for the introduction of full retail competition into the domestic electricity market, the retail business arm of ENERGEX Limited and the contestable elements of Ergon Energy Corporation Limited would be sold.

Subsequently, Allgas Energy Pty Ltd, Sun Retail Pty Ltd, Sun Gas Pty Ltd, Powerdirect Australia Pty Ltd and Powerdirect Utility Services Pty Ltd were all sold between November 2006 and March 2007. The total sale proceeds amounted to \$3.028b.

I have completed my audits of ENERGEX Limited and Ergon Energy Corporation Limited for 2006-07, which included the audit of the respective disclosures and results regarding the above sales. I issued unmodified auditor's opinions on their respective financial statements.

In accordance with legislative provisions, the proceeds of these sales that are available for distribution have been transferred into the newly created Future Growth Fund, the audit of which I have also completed.

Shared Service Initiative update (Section 3.4)

Audits of entities forming part of the Shared Service Initiative (SSI) have been finalized for 2006-07. Interim and final referral letters issued since I reported on the SSI in Report to Parliament No. 5 for 2007 included details of control breakdowns that continued to be identified at CorpTech and the shared service providers (SSPs).

I have received generally positive responses from management.

Consultation between CorpTech, SSPs and their clients was another significant issue which could be addressed in part by the implementation of a robust management assurance framework. Through this mechanism, CorpTech and the Shared Service Agency could give all client agencies serviced by the SSPs a formal assurance report over their control environment in a timely manner.

This report would also help departmental CEOs in meeting their accountability responsibilities under the FA&A Act and the FMS.

Responsibility for Queensland's poles and wires – the electricity network was retained by the Qld Government, being the ENERGEX and Ergon Energy networks. These remain in Government ownership as will the investment in network infrastructure and maintenance (including construction), fault repair and upgrading of poles, wires, substations and cables) (see Qld Govt Fact Sheet p2 *“Sale of the Queensland Government's Energy Retail Businesses.*

Minter Ellison as the law firm acting for ENERGEX, reports online as follows³¹²:

“Minister Ellison was a key adviser to ENERGEX in the transaction. Initially (they) worked with ENERGEX on the disaggregation of the electricity and gas retailing business units and their conversion into stand alone businesses capable of being sold separately. This involved not only separately IT, business and HR systems and personnel, but also developing new individual systems for each of the businesses being sold.

“The sale of Sun Retail presented some unique challenges – including a complex regulatory regime, an abbreviated sale timetable and a governance arrangement whereby the State ran the sale process but ENERGEX was the vendor and provided warranties under the various sale contracts.”

The article also mentions the transitional arrangements that complicated matters during the sale period, with which they offered ENERGEX assistance.”

I also refer to mention in the Auditor-General’s Report of the sale of water infrastructure assets and some implications.

I quote now from ENERGEX’S Supplementary Submission Cost Pass Through Submission 2007 to Queensland Competition Commission (QCC), page 37 of 125 pages, para 4.

ENERGEX Retail Pty Ltd (ERPL)

Energex’s Annual Report 2007 reports as follow:

ENERGEX AND Ergon Energy’s decision on 21 February 2006 to release EEPL from the need to acquire its future IT systems capability through SPARQ was also extended to ENERGEX’S retail business, ERPL,.

However, ERPL initially chose to retain a watching brief on the Joint FRC IT Systems Strategy and Architecture Team in case it might be able to leverage some IT systems capability that might be useful to it under FRC. However, ERPL also formally withdrew from the joint work when the Government announced on 26 April 2007 that it would also be sold.

*ERPL was renamed **Sun Retail** and was structured to include approximately 800,000 existing electricity customers, approximately 53, 000 LPG customers, approximately 13, 700 serviced hot water customers and Sun Gas’ approximately 70,500 natural gas customers.*

***Sun Retail** was purchased by Origin Energy in October 2006. The sale was supported by transitional services agreements under which Origin Energy receives a range of services from ENERGEX, and its related parties, including it services provided by **SPARQ**, until the end of April 2008.*

ERGON ENERGY CORPORATION LIMITED (EECL)

In April 2006, EECL gained approval from the ECC to apply a Minimalist Transitioning Approach (MTA) to readying itself for FRC. The MTA relied upon:

³¹² Minter Ellison Lawyers “Sale of Queensland Government’s retail energy assets.”
<http://www.minterellison.com/public/connect/Internet/Home/Expertise/Track+Records/TR+-+Sale+of+Sun+Retail>

An assumption that customer churn would be low in most of EECL's area. Whilst all of the more than 600,000 customers in EECL's distribution area would become eligible for contestability from 1 July 2007, it was estimated that only a very small percentage of customers could benefit by moving from the Maximum Uniform Tariff (i.e. Standard Offer Contract) to a contestable market contract with either EEPL or a 2nd Tier retailer;

The continuation of the Community Service Obligation (CSO) arrangement that equalizes the Maximum Uniform Tariff being paid by the Queensland Government to EEQ.

The absence of these factors in ENERGEX'S area meant that the MTA was not a viable option for ENERGEX and that instead it needed to have a full volume capability" approach from Day 1.

Under the MTA, EECL would retain manual or semi-automated systems and processes for Day 1 and augment this capability with additional automation as required in order to be able to:

- Collate NMI Standing Data on receiving a NMI Directory request and return that data to the retailer within a defined period. At the same time, EECL would populate an in-house database for future reference and later synchronization with MSTAS; and*
- Populate and maintain 2nd Tier NMI Standing Data in NEMMCO's MSTAS as a customer transfer request is received from a retailer.*

Comment MK

Of the **13,700 serviced hot water customers**" providing a lucrative businesses not involving direct supply of other electricity or gas, but nevertheless deemed to be receiving one or the other, some **2,500** were in the "*gas bulk hot water*" captured unregulated market.

In its 2007 Annual Report ENERGEX claimed that they

"would continue to support Origin Energy's LPG and Gas Serviced Hot Water customers using the ACIS System until the transfer of that service later this year."

It is unclear what exactly the sale arrangements were and what sort of warranties were made, or under which energy provisions it was considered that a hot water service would be offered by energy providers to end-users of water, who receive no gas at all. The logic of transferring a whole group of captured "customers" of heated water (rather than energy) instead of simplifying billing and costs by billing the public housing authority Owners' Corporation and having that authority calculate a fair service fee for costs incurred. For settlement purposes only a single meter exists, a single supply charge and a single FRC charge.

It is clear from the statements made by public housing tenants in Queensland that they feel unsupported and bewildered by the unjust arrangements that were imposed on them, binding them contractually to an energy provider who provides them with no energy at all. Their efforts to seek recourse or redress have consistently failed, and a blind eye has been turned to the situation in this and other States.

In a submission by ENERGEX'S CEO dated 22 August 2008 to the CEO of the Queensland Competition Authority, Brisbane, dealt with ENERGEX FRC pass-through application and response to the QCA'S draft decision,

In that correspondence ENERGEX referred to changed commercial circumstances

“with respect to ENERGEX FACOM IT asset. ENERGEX has recently been in negotiations with a third party for the purchase of this software asset.”

On the basis that ENERGEX “Now expected to receive some value for the cost of developing and upgrading its FACOM software asset from this transaction, ENERGEX no longer considered it *“appropriate to include such costs as pass-through costs for the purposes of FRC expenditure.”*

Those costs were therefore removed from the Pass-Through Application, being costs *“associated with upgrading FACOM to facilitate network FRC capability. The values of the application were therefore reduced.”*

MK Comment

A briefing had been provided by the Minister prior to the election, but the Bill dropped off the list after Parliament was prorogued (see speech of Mrs. Cunningham 11 October, [61]).

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.

The speech by Mrs. Cunningham on 12 October 2006 during the Hansard reported debate on the *Energy (Restructuring and Disposal) Bill 2006*³¹³ is discussed here as well as elsewhere. It gives rise to significant concerns that I share and reflect as does Mr. Knuth’s speech and that of Dr. Flegg.

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.

³¹³ *Energy Assets (Restructuring and Disposal Bill 2006* Queensland. Legislative Assembly Queensland Parliament

Whole transcript the following Queensland Hansard pages are relevant: **53; 61, 62, 64 (resumed); 164, 167-178** (12Oct06) (First and second readings reintroduction) 231 (31Oct06, 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_WEKLY.pdf

Home page Parliament www.Queensland.gov.au Hansard ISSN 1322 0330 Record of Proceedings

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WEKLY.pdf

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_12WEEKLY.pdf

http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_31WEEKLY.pdf

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.

The second issue that I want to seek clarification on relates to clause 6 regarding the meaning of the project. It states—

... to facilitate the disposal of particular gas and electricity businesses of energy entities

It then goes on to qualify other projects. At the time of the briefing I questioned whether, given the scope of the legislation, the bill would empower the government to sell other arms of the energy business without recourse to parliament for further debate.

I was advised that the elements of the electricity business and the gas entity which were to be disposed of or quantified by the bill were the commercial parts of Ergon but not the franchise entities and the gas distribution, that is, Allgas and Sun Retail, which would be divided into two groups—800,000 customers would be the first tranche and 400,000 customers would be the second tranche. I am just clarifying that that has not changed—not that the words have changed but that the intent or the implications of the legislation as it is written could 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.

“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 privatization 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 privatization 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 privatized energy entities that will operate in the full retail competition market after 1 July 2007.

The government has recognized 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-dramatizing 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 privatization 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 privatization have been deprived of the opportunity to participate in this debate."

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."

ERGON ENERGY CORPORATION LTD 2007 Annual Report³¹⁴

The ENERGEX Supplementary Past-Through submission 207 to the QCA discusses *EECL* as follows:

ERGON ENERGY CORPORATON LTD (EECL)

In April 2006 EECL gained approval from the ECC to apply a Minimalist Transitioning Approach (MTA) to readying itself for FRC. The MTA relied upon:

An assumption that customer churn would be low in most of EECL's area. Whilst all of the more than 600, 000 customers in EECL's distribution area would become eligible for contestability from 1 July 2007, it was estimated that only a very small percentage of customers could benefit by moving from these Maximum Uniform Tariffs (i.e. Standard Offer Contract) to a contestable market contract with either EEPL or a 2nd Tier retailer.

These factors are seen by ENERGEX to have impacted on MTA since this was not an option for ENERGEX – apparently requiring “full volume capability” approach from Day 1.”

The continuation of the Community Service Obligation (CS) arrangement that equalizes the Maximum Uniform Tariff being paid by the Queensland Government to EEQ.

*ERLP was renamed **Sun Retail**, structured to include approx 800,000 existing electricity customers, approx 53,000 LPG customers; approx 13,700 “serviced hot water customers” and Sun Gas; approx 70,500 gas customers. **Sun Retail** was purchased by **Origin Energy** in October 2006.*

*The sale was supported by transitional service agreements under which Origin Energy receives a range of services from Energex and is related parties, including it services provided by Sparq until the end of April 2008. (para 4, p37)The former natural gas business of ENERGEX was sold separately as **Sun Gas Retail**. Of the approx 2,500 customers of alleged gas, including those receiving none at all, but rather a composite water product were being charged minimal usage charges for both domestic supply of gas for cooking. Even if they did not have a gas stove or receive any direct flow of gas into their abodes, but simply communally heated water) and for alleged supply and FRC costs “gas customers.”³¹⁵*

Ergon Energy Corporation Ltd 2007 Annual Report³¹⁶

Comments had been made by the three speakers publicly making speeches about their grounds for opposition including references to guillotining of debate over the issue.

I cite from each of the three speeches recorded by Hansard on those dates, Queensland Legislative Assembly³¹⁷

This matter has ongoing implications for regulatory decisions not restricted to the affairs of

³¹⁴ Energex 2007 Annual Report 2007, CEO's Report, pp 19-21

http://www.energex.com.au/pdf/about_energex/annualreportpdfs07/4_business_review.pdf

³¹⁵ Queensland Govt Department of Mines and Energy Fact Sheet September

³¹⁶ Ergon Energy Annual Report c/f ENERGEX'S Supplementary Submission Cost Pass Through Submission 2007 to Queensland Competition Commission (QCC), p37 of 125 (ENERGRX ABN 40 078 49 055)

http://www.qca.org.au/files/E-SuppFRC_Cost_Pass-throughEnergexSep-07.PDF

³¹⁷ Whole transcript the following Queensland Hansard pages are relevant: 53; 61, 62, 64 (resumed); 164, 167-178 (12Oct06) (First and second readings reintroduction) 231 (31Oct06, 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

Energex Retail Pty Ltd (ERPL).

“Considerable change has been occurring to Queensland public sector entities:

Amendments to the Government Owned Corporations Act 1993 have provided that statutory government owned corporations will become company government owned corporations.

The Government has approved the recommendations of the Local Government Reform Commission that 156 local government areas will be amalgamated into 72 councils by 14 March 2008.

The transfer of water infrastructure assets from councils to the State Government has been announced.”

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 changing their gas retailer.”

Comment MK

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). He is a direct victim of the Queensland *“bulk hot water policies”* as a residential tenant in public housing. Others have brought to my attention what is seen as unfair price gouging and unjust practices. No-one wishes to listen or resolve the matter.

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 Legislative Assembly Queensland Wednesday 11 October 2006, especially penultimate paragraph page 1, and first paragraph p2 in which extraordinary guarantees seem to have been made regarding exemption from challenge.

Perhaps Part 3 Statutory Orders of Review as contained in the Queensland *Judicial Review Act 1991* need to be evoked – since one monopoly – the state Government sold energy assets (and impliedly packaged these with **the “bulk hot water clientele”**) 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.

Some Corporations Act considerations

Some Specifics – Associated with Corporations Law and related

Queensland Issues

Refer to substantial discussion under Market Structure – Specific Competition Issues (Energex and Ergon Energy; AND Origin Energy in which the details of the sale of energy and mention of transfer of water infrastructure from local to State authorities in Queensland following the introduction of *the Energy Assets (Restructuring and Disposal) Bill 2006*. The Auditor-General had his own concerns

Around the same time changes to the legislation governing Government Owned Corporations and also Body Corporate Community Management deal with by the Legislative Assembly in mid-October 2006 had impacts on the rights and protections of consumers. (see Hansard 11-12 October 2006).

Please refer to Energex’s pass-through submission 2007 which on page 37 mentions on p37 of 135 pages that “13,700 services *“bulk hot water customers”* were sold to Origin (see appendix and refer to paragraph 4, page 37 of the final supplementary submission by Energex Supplementary Cost Pass Through Submission 2007.³¹⁸

ERLP was renamed **Sun Retail**, structured to include approx 800,000 existing electricity customers, approx **53,000** LPG customers; approx **13,700** *“serviced hot water customers”* and Sun Gas; approx **70,500** gas customers. **Sun Retail** was purchased by Origin Energy in October 2006. The sale was supported by transitional service agreements under which Origin Energy receives a range of services from Energex and is related parties, including it services provided by Sparq until the end of April 2008.³¹⁹

Source for above: ibid Energex Supplementary Cost Pass Through Submission 2007 to Queensland Competition Commission (QCC), page 37 of 125 pages, para 4 (ENERGRX ABN 40 078 49 055)

The former natural gas business of ENERGEX was sold separately as **Sun Gas Retail**. Of the approx **2,500 customers of alleged gas sale and supply**, including those receiving none at all, but rather a composite water product were being charged minimal usage charges for both domestic supply of gas for cooking. Even if they did not have a gas stove or receive any direct flow of gas into their abodes, but simply communally heated water) and for alleged supply and FRC costs *“gas customers”*³²⁰

³¹⁸ Energex Supplementary Cost Pass Through Submission 2007 to Queensland Competition Commission (QCC), page 37 of 125 pages, para 4

http://www.qca.org.au/files/E-SuppFRC_Cost_Pass-throughEnergexSep-07.PDF

See also other associated documents on QCA website www.qca.org.au

This matter has ongoing implications for regulatory decisions not restricted to the affairs of Energex Retail Pty Ltd (ERPL),

Of the 13,700 serviced hot water customers” providing a lucrative business not involving direct supply of other electricity or gas, but nevertheless deemed to be receiving one or the other, some 2,500 were in the *“gas bulk hot water”* captured unregulated market

³¹⁹ Ibid Energex Supp Cost Pass Through Sub 2007

³²⁰ Queensland Govt Department of Mines and Energy Fact Sheet September

Please also refer to the [Queensland Auditor-General’s Report 2007](#),

I have included the material below, extracted and directly cited from the Auditor-General's 9th 2007 Report,³²¹ below in case it is at all relevant in expressing, under the obligations of the Queensland Auditor-General under s99 of the F&A Act.

Since the Queensland Auditor-General has for the reasons been circumspect about the particular matters of concern; I cannot be sure that they do bear relationship to the issues I have raised following cursory perusal of documents referred to; nor do I mean to imply anything untoward, except to suggest that further scrutiny of the nature of the disaggregation of energy and water infrastructure assets, and any warranties, guarantees and arrangements made, as referred to in publicly available documentation, should be further scrutinized.

I note that the Queensland First and Second Reading Speech for the Energy Assets Restructuring and Disposal Bill 2006 and ensuing debate took place three days on 11, 12 and 31 October 2006, the last date being when the votes were cast and counted and the Bill passed at top speed within the one afternoon, wherein many participants including the three speakers delivering speeches in opposition referred to rushed processes and implied stifling and guillotining of debate.

See Auditor-General's Report on the sale of energy assets, water infrastructure, changes to *Govt Owned Corporations Act 1993* amendments whereby statutory Govt owned corporations become government-owned corporations.

On the issue of **sale of energy retail companies** (Section 3.3 Exec Summary) in the same Report (2007) the Queensland Auditor-General said:

"On 26 April 2006, the then Premier announced that in preparation for the introduction of full retail competition into the domestic electricity market, the retail business arm of ENERGEX Limited and the contestable elements of Ergon Energy Corporation Limited would be sold."

The Auditor General has referred to

"...the obligation under s99 of the F&A Act to draw attention to any case in which financial management of a public sector entity was not adequate and properly performed if, in (his) opinion, the matter is of sufficient significance to require inclusion in a report to Parliament. A suspected significant contravention of the Corporations Act 2001 would usually be included in a report to Parliament, however, to report these matters publicly might in some cases prejudice the outcome of investigations being conducted by ASIC.

It is imperative that Parliament is fully informed of all matters of significance affecting public administration and to ensure this, I have agreed a protocol with the Public Accounts Committee for referring these matters to the Public Accounts Committee for referring these matters to them at the time that I report the matter to ASIC. One matter has been reported to the Public Accounts Committee under this protocol."

It contains the results of the 2006-07 financial and compliance audits of departments, statutory bodies and government owned corporations and their controlled entities completed at 31 October 2007. This report also includes details of significant issues that arose during

³²¹ Queensland Auditor-General's Office (OA) Report to Parliament No. 9 for 2007 Results of Audits as at 31 October 2007. Executive Summary as at 31 October 2007
http://www.qao.qld.gov.au/downloadables/publications/auditor_general_reports/2007%20Report%20No%209%20Executive%20Summary.pdf

the 2006-07 audits.”

The Overview of the Auditor-General’s Executive Summary refers to the significant changes that had occurred to Queensland public sector entities.

He also discussed changes to Government Owners Corporations Act 1993, local Government reform and transfer of water infrastructure assets from councils to the State Government.

It is not clear whether the Report included the hot water flow meters in that statement that are inappropriately used in order to calculate individual consumption of gas – with individual bills issued to each public housing tenant (and presumably all others receiving heated water centrally heated by a single gas or electricity meter on common property infrastructure the proper responsibility of the Owners’ Corporation, public or private. No gas or electricity is received. Water meters and hot water flow meters do not measure energy or gas volume or electricity. They measure water volume only and withstand heat poorly.

He noted that

“Amendments to the Government Owned Corporations Act 1993 have provided that statutory government owned corporations will become company government owned corporations.

The Government has approved the recommendations of the Local Government Reform Commission that 156 local government areas will be amalgamated into 72 councils by 14 March 2008.

The transfer of water infrastructure assets from councils to the State Government has been announced.

These changes, coupled with changes to statutory reporting deadlines proposed by the Treasurer to ensure more timely completion and certification of financial statements and annual reporting to Parliament, will have significant implications for our 2007-08 audits. We are assessing what we need to do to ensure we are fully prepared to meet any audit challenges from these changes.

I strongly support earlier preparation and audit of financial statements as I believe that it will improve the accountability of the public sector to Parliament and the community. I have outlined some strategies in Section 2.5 of this report that entities can consider to ensure earlier financial statement completion.

Earlier completion of financial statements by our audit clients will help us in balancing our workload during the year ahead particularly if entities are carrying out early closes and reviewing accounting policies earlier.

In 2006-07, 94 per cent of departments, 95 per cent of GOCs and 94 per cent of statutory bodies met the statutory timeframe by having their financial statements completed and audited by 30 September 2007 (refer Section 2.4). The entities that could not achieve the timeframe this year will find it difficult to achieve the earlier financial reporting timeframes next year unless significant work is undertaken to change their current processes.

Good financial management throughout the year enables better management of risks and a more efficient financial statement process. With shortening timeframes, it is not enough to just have year-end financial reporting processes to produce the financial statements.

Good quality quarterly or monthly reporting allows management to identify and address issues that have the potential to adversely affect the year-end financial statement preparation.

The FA&A Act places an obligation on departments and statutory bodies to negotiate a timeframe with me to enable the preparation and audit of their financial statements within the timeframe set by legislation.

Sections 40AA and 46FA of the Act require a date to be agreed between myself and the accountable officer or statutory body for the financial statements to be given to me for audit.

In recent years, we have used informal processes to agree timeframes at officer level to support the requirements of the legislation. For the 2007-08 financial year, when the proposed changes to timeframes take effect, I intend to require a more formal protocol to highlight the importance of adhering to agreed timeframes for providing quality financial statements for audit.

I require a minimum of ten clear working days between management finalization of the financial statements and audit certification, provided only minimal changes are required after the statements are provided to audit.

QAO auditors have been able to finalize audits within the current 30 September statutory timeframe even when the agreed time available to audit has been reduced because of delays by entities in finalizing their financial statements.

However, the more onerous obligations of the auditing standards and earlier deadlines proposed for the 2007-08 and 2008-09 financial years mean that entities' statutory obligations to finalize their financial statements will be compromised if timeframes agreed with audit cannot be met.

Even with this more formal process, I am prepared to adjust my audit program where possible to help entities to achieve this deadline. But I expect similar support to be shown to my auditors by accountable officers, chief executive officers, boards and audit committees when managing the financial statement process.

1.2 Summary of key audit findings

Results of audits (Section 2)

I issued unmodified audit certification for the Consolidated Fund Financial Report on 28 September 2007 and the consolidated whole-of-government financial statement on 26 October 2007.

At 31 October 2007, 379 audits (or 98 per cent) of the 388 audits completed or required to be completed by this date had been finalized.

I issued five qualified auditor's opinions for 2006-07 and five qualified auditor's opinions for 2005-06 financial year statements. Emphasis of matter references were included in the audit opinions for the 2006-07 financial statements of nine public sector entities. Full details are provided in Section 4 of this report.

Local government reform (Section 3.1)

The Report of the Local Government Reform Commission released on 27 July 2007 recommended significant changes to the local government sector, including merging 156 local government areas into 72 councils.

My officers have been meeting regularly with the Department of Local Government, Sport and Recreation's Local Government Reform

I require a minimum of ten clear working days between management finalization of the financial statements and audit certification, provided only minimal changes are required after the statements are provided to audit.

QAO auditors have been able to finalize audits within the current 30 September statutory timeframe even when the agreed time available to audit has been reduced because of delays by entities in finalizing their financial statements.

However, the more onerous obligations of the auditing standards and earlier deadlines proposed for the 2007-08 and 2008-09 financial years mean that entities' statutory obligations to finalize their financial statements will be compromised if timeframes agreed with audit cannot be met.

Even with this more formal process, I am prepared to adjust my audit program where possible to help entities to achieve this deadline. But I expect similar support to be shown to my auditors by accountable officers, chief executive officers, boards and audit committees when managing the financial statement process.

1.2 Summary of key audit findings

Results of audits (Section 2)

I issued unmodified audit certification for the Consolidated Fund Financial Report on 28 September 2007 and the consolidated whole-of-government financial statement on 26 October 2007.

At 31 October 2007, 379 audits (or 98 per cent) of the 388 audits completed or required to be completed by this date had been finalized.

I issued five qualified auditor's opinions for 2006-07 and five qualified auditor's opinions for 2005-06 financial year statements. Emphasis of matter references were included in the audit opinions for the 2006-07 financial statements of nine public sector entities. Full details are provided in Section 4 of this report.

Local government reform (Section 3.1)

The Report of the Local Government Reform Commission released on 27 July 2007 recommended significant changes to the local government sector, including merging 156 local government areas into 72 councils.

My officers have been meeting regularly with the Department of Local Government, Sport and Recreation's Local Government Reform Task Force (LGRTF) to discuss the impact of the reform process from an audit perspective, particularly in the areas of financial reporting and the transfer of assets and liabilities.

I have detailed a number of audit and accounting considerations that require a final resolution to ensure a smooth and successful transition to the new arrangements. These include when the first set of financial statements by the amalgamation of councils need to be prepared, who will accept responsibility for certifying the financial statements of the ceasing local governments and other issues related to revenue apportionment, probity and propriety.

Bringing together councils' assets, liabilities and accounting systems and making decisions about future accounting policies and practices in the early months of the new councils will be a difficult task. To support the new councils during this period, my auditors will be contacting chief executive officers to arrange interim audit visits to provide assistance in dealing with accounting issues.

I will progressively report to Parliament on the outcomes of the reform process from a financial and audit perspective.

South East Queensland water reform (Section 3.2)

On 24 May 2007, the Queensland Water Commission released its final report to the Queensland Government on the urban water supply arrangement in South East Queensland. The report outlined a range of structural and regulatory reforms which will impact on public sector entities including water infrastructure and pipeline companies, electricity generating companies and 17 local governments.

Under the Government's approved model for the institutional reform of water supply in South East Queensland, bulk water supply, manufactured water and major water transportation infrastructure will be the responsibility of the Government with the required asset transfers occurring from 1 January 2008.

The timing of the Queensland Water Commission's report and the Government's initial response created uncertainty for public sector entities in respect of the amount of compensation to be paid for assets to be transferred; the impact on asset values due to a lack of certainty over the longer term cost of water; and the continuing operation of infrastructure and other companies in their current form and structure.

As a minimum level of disclosure, I recommended that a significant note should appear in the 2006-07 accounts of all affected public sector entities. This was to alert readers of the financial statements to the potential impact of the reform measures on the entity and their financial statements and the uncertainty that existed about these issues when the statements were signed.

Sale of energy retail companies (Section 3.3)

On 26 April 2006, the then Premier announced that in preparation for the introduction of full retail competition into the domestic electricity market, the retail business arm of ENERGEX Limited and the contestable elements of Ergon Energy Corporation Limited would be sold.

Subsequently, Allgas Energy Pty Ltd, Sun Retail Pty Ltd, Sun Gas Pty Ltd, Powerdirect Australia Pty Ltd and Powerdirect Utility Services Pty Ltd were all sold between November 2006 and March 2007. The total sale proceeds amounted to \$3.028b.

I have completed my audits of ENERGEX Limited and Ergon Energy Corporation Limited for 2006-07, which included the audit of the respective disclosures and results regarding the above sales. I issued unmodified auditor's opinions on their respective financial statements.

In accordance with legislative provisions, the proceeds of these sales that are available for distribution have been transferred into the newly created Future Growth Fund, the audit of which I have also completed.

Shared Service Initiative update (Section 3.4)

Audits of entities forming part of the Shared Service Initiative (SSI) have been finalized for 2006-07. Interim and final referral letters issued since I reported on the SSI in Report to Parliament No. 5 for 2007 included details of control breakdowns that continued to be identified at CorpTech and the shared service providers (SSPs).

I have received generally positive responses from management.

Consultation between CorpTech, SSPs and their clients was another significant issue which could be addressed in part by the implementation of a robust management assurance framework. Through this mechanism, CorpTech and the Shared Service Agency could give all client agencies serviced by the SSPs a formal assurance report over their control environment in a timely manner.

This report would also help departmental CEOs in meeting their accountability responsibilities under the FA&A Act and the FMS.

Update on impact of Update on impact of AeIFRS on dividend payment arrangements for government owned corporations (Section 3.5)

In my Report to Parliament No. 2 for 2005, I provided an overview of the impact of the transition to Australian equivalents to International Financial Reporting Standards (AeIFRS) on GOCs' financial reports. I outlined the first time implementation impact of AeIFRS and the possible recognition of accumulated losses and negative retained earnings balances by GOCs. I also outlined the continuing impact that Australian Accounting Standard AASB 139 Financial Instruments: Recognition and Measurement may have upon the volatility of reported profits between annual reporting periods.

On 20 March 2007, Parliament assented to the Government Owned Corporations Act 2007 which amended the Government Owned Corporations Act 1993.

Amongst other things, this amended s.159 on payment of dividends and s.160 on interim dividends. A GOC board can now make dividend recommendations to the shareholding Ministers and include any adjustments to the estimated profits providing the amount of and reason for each adjustment is stated. As a result of these amendments, the issues I raised in my 2005 report have been appropriately addressed.

Contraventions of the Corporations Act 2001 (Section 3.6)

The Corporations Act 2001 requires me, as the auditor of public sector companies, to notify the Australian Securities and Investment Commission (ASIC) when I have reasonable grounds to suspect there has been a significant contravention of the Corporations Act. I must also report to ASIC those contraventions which may not be significant but which I believe have not or will not adequately be dealt with by commenting on it in the independent auditor's report or by bringing it to the attention of directors.

I am also obligated under s.99(2)(b) of the FA&A Act to draw attention to any case in which the financial management of a public sector entity was not adequately and properly performed if, in my opinion, the matter is of sufficient significance to require inclusion in a report to Parliament.

A suspected significant contravention of the Corporations Act would usually be included in a report to Parliament, however, to report these matters publicly might in some cases prejudice the outcome of investigations being conducted by ASIC.

It is imperative that Parliament is fully informed of all matters of significance affecting public administration and to ensure this, I have agreed a protocol with the Public Accounts Committee for referring these matters to them at the time that I report the matter to ASIC. One matter has been reported to the Public Accounts Committee under this protocol.

Government shareholdings in jointly owned entities (Section 3.7)

Shareholdings in companies in the public sector by multiple entities provide additional challenges from a coordination and governance perspective. This situation is particularly apparent where the government has an equal or minority legal interest in the company although its perceived power may indicate that its real influence on the actions of the company is greater.

Where the government becomes involved in the establishment of a company and for policy reasons determines that it will have less than a full controlling interest, I consider it essential for the government and the shareholding departments to ensure that the legal control position outlined in the company's constitution and other management documents are strictly observed in the interaction with the company and its operations.

I note that the Queensland First and Second Reading Speech for the *Energy Assets Restructuring Bill 2006* and ensuing debate took place three days on 11, 12 and 31 October 2006, the last date being when the votes were cast and counted and the Bill passed at top speed within the one afternoon, wherein many participants including the three speakers delivering speeches in opposition referred to rushed processes and implied stifling and guillotining of debate.

I note also from the Auditor-General's Report that:

“Considerable change has been occurring to Queensland public sector entities:

Amendments to the Government Owned Corporations Act 1993 have provided that statutory government owned corporations will become company government owned corporations.

The Government has approved the recommendations of the Local Government Reform Commission that 156 local government areas will be amalgamated into 72 councils by 14 March 2008.

The transfer of water infrastructure assets from councils to the State Government has been announced.

These changes, coupled with changes to statutory reporting deadlines proposed by the Treasurer to ensure more timely completion and certification of financial statements and annual reporting to Parliament, will have significant implications for our 2007-08 audits. We are assessing what we need to do to ensure we are fully prepared to meet any audit challenges from these changes.”

See Auditor-General's Report on the sale of energy assets, water infrastructure, changes to Govt *Owned Corporations Act 1993* amendments whereby statutory Govt owned corporations become government-owned corporations.

ERLP was renamed **Sun Retail**, structured to include approx 800,000 existing electricity customers, approx 53,000 LPG customers; approx 13,700 "*serviced hot water customers*" and Sun Gas; approx 70,500 gas customers. Sun Retail was purchased by Origin Energy in October 2006.

The sale was supported by transitional service agreements under which Origin Energy receives a range of services from Energex and its related parties, including its services provided by Sparq until the end of April 2008.

Source for above: *ibid* Energex Supplementary Cost Pass Through Submission 2007 to Queensland Competition Commission (QCC), page 37 of 125 pages, para 4 (ENERGRX ABN 40 078 49 055)

http://www.qca.org.au/files/E-SuppFRC_Cost_Pass-throughEnergexSep-07.PDF

The former natural gas business of ENERGEX was sold separately as Sun Gas Retail. Of the approx **2,500** customers of alleged gas, including those receiving none at all, but rather a composite water product were being charged minimal usage charges for both domestic supply of gas for cooking. Even if they did not have a gas stove or receive any direct flow of gas into their abodes, but simply communally heated water) and for alleged supply and FRC costs "*gas customers*"

Source: Queensland Govt Department of Mines and Energy Fact Sheet September

Please also refer to the [Queensland Auditor-General's Report 2007](#).

See FRC Pass-Through Submission to Queensland Competition discussed under specific competition issues above

Apparently Energex did not have a chance to separate out of its business, the uncontested goods and services, including the bulk hot water ("*BHW*") captured market clientele.

In the perceived "*panic*" to sell off assets at top speed and have passed through the Queensland Parliament what appears to have been an accelerated decision-making process in considering the [Energy Assets \(Restructuring and Disposal\) Bill 2006 \(Qld\)](#) (Hansard 11, 12, 31 October) it would seem that many things were missed, including appropriate consumer protection

For the sake of completeness I again repeat the online report of the facts regarding the sale of assets:

Minter Ellison as the law firm acting for ENERGEX, reports online as follows³²²:

"Minister Ellison was a key adviser to ENERGEX in the transaction. Initially (they) worked with ENERGEX on the disaggregation of the electricity and gas retailing business units and their conversion into stand alone businesses capable of being sold separately. This involved not only separately IT, business and HR systems and personnel, but also developing new individual systems for each of the businesses being sold."

³²² Minter Ellison Lawyers "[Sale of Queensland Government's retail energy assets.](http://www.minterellison.com/public/connect/Internet/Home/Expertise/Track+Records/TR++Sale+of+Sun+Retail)"

“The sale of Sun Retail presented some unique challenges – including a complex regulatory regime, an abbreviated sale timetable and a governance arrangement whereby the State ran the sale process but ENERGEX was the vendor and provided warranties under the various sale contracts.”

The article also mentions the transitional arrangements that complicated matters during the sale period, with which they offered ENERGEX assistance.”

VICTORIA

TRUenergy, the trading name for China Lighting and Power, a Hong Kong based company is the third host retailer, predominantly operating in Victoria whose practices are similar to those of the other two with regard to the *“bulk hot water policy arrangements”*

The advent of a new category of provider that of Metering and Data Service Provider and revised Metrology Provisions (initially for electricity) has occasioned resurrection of this unaddressed issue.

I discuss this matter in more detail later but have already provided supporting data and some comment to the F&E SSC by way of correspondence but have questioned 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* (pg1 second reading speech 11 October 2006) under Supreme Court or other action?

Please also refer to the Fact Sheet issued by the Queensland Dept of Infrastructure and Planning Fact Sheet *“Plumbing Newsflash”* Fact Sheet,³²³ which explicitly discusses how *“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.”*

In these circumstances and in all States where the lucrative monopoly-like *“bulk hot water service”* market under energy provisions with its associated IT arms and other support services supporting the completely unnecessary hot water flow meter infrastructure purporting to be a suitable consumption calculation methods of gas and electricity that is never received at all in the case of those occupying multi-tenanted dwellings wherein their water is heated in a single boiler tank by a single gas or electricity meter – which for distributor-retailer or other third party purposes represents a single meter cost for FRC, GST, maintenance, meter reading, and all other commodity or associated costs that serve to inflate costs generally to all consumers, and unnecessarily impose contractual status on the wrong parties.

³²³ Fact Sheet (2008) issued by the Queensland Dept of Infrastructure and Planning Fact Sheet *“Plumbing Newsflash”*
<http://www.dip.qld.gov.au/resources/newsletter/newsflash-311.pdf> Issued: 08/04/2008 Newsflash 311
Purpose of Fact Sheet: *To clarify water supply sub-meter requirements in community titles and buildings with community bulk hot water services.* Disclaimers contained as to legality in particular circumstances but nevertheless impacting adversely on public housing tenants and others in similar circumstances residing in flats and apartments and or occupying other residential or non-residential premises
See also *Body Corporate and Community Management and Other Legislation Amendment Bill 2006* First and Second Reading Speech and Explanatory Notes. Hansard 11 October, pp68-71

The Queensland Fact Sheet entitled Plumbing Newsflash and any associated implicit or explicit codes guidelines or fact sheets such as this one, with all its disclaimers regarding accuracy and legal weight, mere ownership and maintenance of water infrastructure is taken as the right to impose on individuals receiving no energy at all a contractual obligation not only for payment of energy costs or costs for *“heating water communally and reticulated in water pipes,”* but also, supply charges, transport costs for water meter readings; meter reading fees (remote or manual with the former costing approximately three times as much); free retail competition fees associated with energy (when none is supplied).

The list is endless in terms of how these bizarre provisions, whether or not associated with disaggregation and supply of infrastructure assets – such as previously owned government energy-businesses, contestable or non-contestable.

Refer to the explicit provisions of the Queensland Competition Commission (QCC), equivalents in other states, and the national competition policy with regard to government-owned or non-government owned monopolies.

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:

The Victorian *Gas Industry Act 2001* discusses corporations law implications as below

Gas Industry Act 2001 - SECT 117

References to Corporations Act

117. References to Corporations Act

A reference in this Part to the Corporations Act is a reference to that Act as it would apply if references in that Act to a body corporate, corporation or company included references to-

- (a) a body corporate that is related within the meaning of section 74 to another body corporate ("the primary body corporate") has, or 2 or more bodies corporate each of which is related to the same body corporate ("the primary body corporate") together have, a substantial degree of power in a Victorian gas market; or*
 - (b) a body corporate ("the primary body corporate") and another body corporate that is, or a body corporate ("the primary body corporate") and 2 or more bodies corporate each of which is, related within the meaning of section 74³²⁴ to the primary body corporate, together have a substantial degree of power in a Victorian gas market; or*
 - (c) a body corporate ("the primary body corporate") has more than a 20% interest in a joint venture within the meaning of section 75³²⁵ the parties to which together in that capacity have a substantial degree of market power in a Victorian gas market-
the primary body corporate shall be taken for the purposes of this Act to have a substantial degree of power in that market.*
- (2) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a Victorian gas market, regard shall be had to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of-*
- (a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or*
 - (c) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires gas in that market.*
- (3) In this section and in the definition of significant producer in section 3, a reference to power in relation to, or to conduct in, a Victorian gas market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of gas in that market.*

³²⁴ s74 appears to have been repealed so the reference terms are inaccessible or may have been changed

³²⁵ s75 appears to have been repealed so the reference terms are inaccessible or may have been changed

I cite below sections of the *Corporations Act 2001* without comment

CORPORATIONS ACT 2001 - SECT 10

Effect of Division

- (1) *This Division has effect for the purposes of interpreting a reference (in this Division called the associate reference), in relation to a person (in this Division called the primary person), to an associate.*
- (2) *A person is not an associate of the primary person except as provided in this Division.*
- (3) *Nothing in this Division limits the generality of anything else in it.*

CORPORATIONS ACT 2001 - SECT 12

References in Chapters 6 to 6C, and other references relating to voting power and takeovers etc.

- (1) *Subject to subsection 16(1), but despite anything else in this Part, this section applies for the purposes of interpreting a reference to an associate (the associate reference), in relation to a designated body, if:*
 - (a) *the reference occurs in a provision of Chapter 6, 6A, 6B or 6C; or*
 - (b) *the reference occurs in a provision outside those Chapters that relates to any of the following matters:*
 - (i) *the extent, or restriction, of a power to exercise, or to control the exercise of, the votes attached to voting shares in the designated body;*
 - (ii) *the primary person's voting power in the designated body;*
 - (iii) *relevant interests in securities in the designated body;*
 - (iv) *a substantial holding in the designated body;*
 - (v) *a takeover bid for securities in the designated body;*
 - (vi) *the compulsory acquisition, or compulsory buy-out, of securities in the designated body.*
- (2) *For the purposes of the application of the associate reference in relation to the designated body, a person (the **second person**) is an associate of the primary person if, and only if, one or more of the following paragraphs applies:*
 - (a) *the primary person is a body corporate and the second person is:*
 - (i) *a body corporate the primary person controls; or*
 - (ii) *a body corporate that controls the primary person; or*
 - (iii) *a body corporate that is controlled by an entity that controls the primary person;*
 - (b) *the second person is a person with whom the primary person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs;*

- (c) the second person is a person with whom the primary person is acting, or proposing to act, in concert in relation to the designated body's affairs.
- (3) For the purposes of the application of this section in relation to a designated body that is a managed investment scheme:
- (a) a reference to controlling or influencing the composition of the designated body's board is taken to be a reference to controlling or influencing:
- (i) if the scheme is a registered scheme--whether a particular company becomes or remains the scheme's responsible entity; or
- (ii) if the scheme is not a registered scheme--whether a particular person is appointed, or remains appointed, to the office (by whatever name it is known) in relation to the scheme that corresponds most closely to the office of responsible entity of a registered scheme; and
- (b) a reference to voting shares in the designated body is taken to be a reference to voting interests in the managed investment scheme.
- (4) In relation to a matter relating to securities in a designated body, a person may be an associate of the body and the body may be an associate of the person.
- (5) In this section:
- "designated body" means:**
- (a) a body; or
- (b) a managed investment scheme.

CORPORATIONS ACT 2001 - SECT 13

References in Chapter 7

If the associate reference occurs in Chapter 7, it includes a reference to:

- (a) a person in partnership with whom the primary person carries on a financial services business; and
- (b) subject to subsection 16(2), a person who is a partner of the primary person otherwise than because of carrying on a financial services business in partnership with the primary person; and
- (c) a trustee of a trust in relation to which the primary person benefits, or is capable of benefiting, otherwise than because of transactions entered into in the ordinary course of business in connection with the lending of money; and
- (d) a director of a body corporate of which the primary person is also a director and that carries on a financial services business; and
- (e) subject to subsection 16(2), a director of a body corporate of which the primary person is also a director and that does not carry on a financial services business.

CORPORATIONS ACT 2001 - SECT 15

General

(1) The associate reference includes a reference to:

- (a) a person in concert with whom the primary person is acting, or proposes to act; and
- (b) a person who, under the regulations, is, for the purposes of the provision in which the associate reference occurs, an associate of the primary person; and
- (c) a person with whom the primary person is, or proposes to become, associated, whether formally or informally, in any other way;

in respect of the matter to which the associate reference relates.

(2) If the primary person has entered, or proposes to enter, into a transaction, or has done, or proposes to do, any act or thing, in order to become associated with another person as mentioned in an applicable provision of this Division, the associate reference includes a reference to that other person.

CORPORATIONS ACT 2001 - SECT 16

Exclusions

- (1) A person is not an associate of another person by virtue of section 12 or subsection 15(1), or by virtue of subsection 15(2) as it applies in relation to section 12 or subsection 15(1), merely because of one or more of the following:
 - (a) one gives advice to the other, or acts on the other's behalf, in the proper performance of the functions attaching to a professional capacity or a business relationship;

- (b) one, a client, gives specific instructions to the other, whose ordinary business includes dealing in financial products, to acquire financial products on the client's behalf in the ordinary course of that business;
 - (c) one had sent, or proposes to send, to the other an offer under a takeover bid for shares held by the other;
 - (d) one has appointed the other, otherwise than for valuable consideration given by the other or by an associate of the other, to vote as a proxy or representative at a meeting of members, or of a class of members, of a body corporate.
- (2) For the purposes of proceedings under this Act in which it is alleged that a person was an associate of another person by virtue of paragraph 13(b) or (e), the first-mentioned person is not taken to have been an associate of the other person in relation to a matter by virtue of that paragraph unless it is proved that the first-mentioned person knew, or ought to have known, at that time, the material particulars of that matter.

Division 6--Subsidiaries and related bodies corporate

CORPORATIONS ACT 2001 - SECT 21

Carrying on business in Australia or a State or Territory

- (1) A body corporate that has a place of business in Australia, or in a State or Territory, carries on business in Australia, or in that State or Territory, as the case may be.
- (2) A reference to a body corporate carrying on business in Australia, or in a State or Territory, includes a reference to the body:
 - (a) establishing or using a share transfer office or share registration office in Australia, or in the State or Territory, as the case may be; or
 - (b) administering, managing, or otherwise dealing with, property situated in Australia, or in the State or Territory, as the case may be, as an agent, legal personal representative or trustee, whether by employees or agents or otherwise.
- (3) Despite subsection (2), a body corporate does not carry on business in Australia, or in a State or Territory, merely because, in Australia, or in the State or Territory, as the case may be, the body:
 - (a) is or becomes a party to a proceeding or effects settlement of a proceeding or of a claim or dispute; or
 - (b) holds meetings of its directors or shareholders or carries on other activities concerning its internal affairs; or
 - (c) maintains a bank account; or
 - (d) effects a sale through an independent contractor; or
 - (e) solicits or procures an order that becomes a binding contract only if the order is accepted outside Australia, or the State or Territory, as the case may be; or
 - (f) creates evidence of a debt, or creates a charge on property; or

- (g) *secures or collects any of its debts or enforces its rights in regard to any securities relating to such debts; or*
- (h) *conducts an isolated transaction that is completed within a period of 31 days, not being one of a number of similar transactions repeated from time to time; or*
- (j) *invests any of its funds or holds any property.*

CORPORATIONS ACT 2001 - SECT 46

What is a subsidiary

A body corporate (in this section called the **first body**) is a subsidiary of another body corporate if, and only if:

- (a) *the other body:*
 - (i) *controls the composition of the first body's board; or*
 - (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 body; or*
 - (iii) *holds more than one-half of the issued share capital of the first body (excluding any part of that issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital); or*
- (b) *the first body is a subsidiary of a subsidiary of the other body.*

CORPORATIONS ACT 2001 - SECT 47

Control of a body corporate's board

Without limiting by implication the circumstances in which the composition of a body corporate's board is taken to be controlled by another body corporate, the composition of the board is taken to be so controlled if the other body, by exercising a power exercisable (whether with or without the consent or concurrence of any other person) by it, can appoint or remove all, or the majority, of the directors of the first-mentioned body, and, for the purposes of this Division, the other body is taken to have power to make such an appointment if:

- (a) *a person cannot be appointed as a director of the first-mentioned body without the exercise by the other body of such a power in the person's favour; or*
- (b) *a person's appointment as a director of the first-mentioned body follows necessarily from the person being a director or other officer of the other body.*

CORPORATIONS ACT 2001 - SECT 48

Matters to be disregarded

- (1) *This section applies for the purposes of determining whether a body corporate (in this section called the **first body**) is a subsidiary of another body corporate.*
- (2) *Any shares held, or power exercisable, by the other body in a fiduciary capacity are treated as not held or exercisable by it.*

- (3) Subject to subsections (4) and (5), any shares held, or power exercisable:
- (a) by a person as a nominee for the other body (except where the other body is concerned only in a fiduciary capacity); or
 - (b) by, or by a nominee for, a subsidiary of the other body (not being a subsidiary that is concerned only in a fiduciary capacity);
- are treated as held or exercisable by the other body.
- (4) Any shares held, or power exercisable, by a person by virtue of the provisions of debentures of the first body, or of a trust deed for securing an issue of such debentures, are to be disregarded.
- (5) Any shares held, or power exercisable, otherwise than as mentioned in subsection (4), by, or by a nominee for, the other body or a subsidiary of it are to be treated as not held or exercisable by the other body if:
- (a) the ordinary business of the other body or that subsidiary, as the case may be, includes lending money; and
 - (b) the shares are held, or the power is exercisable, only by way of security given for the purposes of a transaction entered into in the ordinary course of business in connection with lending money, not being a transaction entered into with an associate of the other body, or of that subsidiary, as the case may be.

CORPORATIONS ACT 2001 - SECT 49

References in this Division to a subsidiary

A reference in paragraph 46(b) or 48(3)(b) or subsection 48(5) to being a subsidiary, or to a subsidiary, of a body corporate includes a reference to being a subsidiary, or to a body corporate that is a subsidiary, as the case may be, of the first-mentioned body by virtue of any other application or applications of this Division.

CORPORATIONS ACT 2001 - SECT 50

Related bodies corporate

Where a body corporate is:

- (a) a holding company of another body corporate; or
- (b) a subsidiary of another body corporate; or
- (c) a subsidiary of a holding company of another body corporate;
the first-mentioned body and the other body are related to each other.

http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/index.html#s50

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. Whilst it may be understandable that in some circumstances there is difficulty fitting separate gas meters, in most cases careful planning can avoid some of the pitfalls highlighted.

In any case, the Owners’ Corporation in multi-tenanted dwellings can normally be presented with a single bill for gas consumption for common property usage, and a separate bill for collective consumption by owner-occupiers or tenants. There is necessity to read but a single meter, keep appropriate settlement records and make billing transparent.

Attempting to re-write trade measurement, tenancy, owners’ corporation, contractual, generic and common laws is not the answer. Nor is fair or reasonable or cost effective for billing to occur in the way that it does.

The National Measurement Institute intends to remove remaining exemptions for utilities, which include gas electricity and water.

Hot water flow meters are unnecessary, do not provide the required data and rely on imprecise methodologies and rule of thumb calculations as well as contractual precepts that defy existing and proposed laws and the concept of legal traceability of goods. Electricity and gas are goods not services.

The pretext used by “metering data service providers” and “asset management companies” to use alternative trade measurement instruments and proffer services to unsuspecting owners, whilst locking them into long-range service arrangements that may be interpreted as third party line forcing is hardly an appropriate way for a marketplace to function.

Neither explicit or tacit endorsement of these practices is acceptable.

Yet the policy principles and regulatory proposals managed by ignoring market distortions to condone practices that lead to unjust outcomes most without accessible and affordable redress.

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*”³²⁶ 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 6-8 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

³²⁶ Refer for instance to AEMC/AEMO Draft Rule Determination National Electricity Amendment (Cost Recovery for “Other” Services Directions Rule 2010
“Conclusion 6.4 The changes proposed in the Rule Change Request would address the issues identified by AEMO by putting in place regionalization of cost recovery. It would also remove the now redundant reference to the fixed component of participant fees, promoting good regulatory practice

disconnection practice (of heated water supplied in water service pipes) in place in relation to bulk hot water arrangements.

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) has sanctioned Jemena's Revised Gas Access Proposal for the 2010-2015 regulatory period a decision. The outcomes in terms of cost recovery for unnecessary capital and operating expenditure 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 extends 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 sanction, 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,³²⁷” pages 1 and 2. Hansard Wednesday 11 October 2006. See also First Reading Speech August 2006. file name bli2006_10_11_38.fm

³²⁷ 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 Mogill) 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 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

“**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.*”

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 Minster Ellison: Sale of Queensland Government's retail energy assets

<http://www.minterellison.com/public/connect/Internet/Home/Expertise/Track+Records/TR+>

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.

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.

Sweeping these concerns under the carpet will ensure that they will rebound like a boomerang. Some eggs just cannot be unscrambled.

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 particularly those most affected by the power imbalances that exist – the *“inarticulate, vulnerable and disadvantaged.”*

[*+Sale+of+Sun+Retail \(1 of 2\) 28/09/2009 last accessed 2 June 2010*](#)

See discussion under “[Competition Issues](#)”

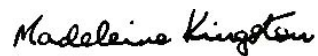
Refer also to Kevin McMahon’s submission to the NECF2 Package as a victim of the bulk hot water policies and residential tenant of public housing authorities in Queensland. As also included as sub 46 to the Senate Standing Committee’s Consumer Policy Inquiry TPA-TPA-Bill2, to which I have referred in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

I repeat the findings of the Senate Select Committee 2000 Enquiry that effective management of hardship policies as implemented by the government or contracted out has not been adequately addressed by shifting of financial responsibility to “*bloody awful agencies which ought to be defunded.*”

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 to the AER and many others.



Madeleine Kingston

Private Stakeholder

LIST OF APPENDICES

Separate .pdf documents

Body Corporate Issues

Major Case Study 1 Body Corporate Entity Appendix 1

Tenant Issue

Major Deidentified Case Study 2³²⁸ Appendix 4

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 Appendix 2

Analysis of the *Gas Industry Act 2001* (Victoria) in relation to flawed interpretation of existence of any contract, deemed or otherwise Appendix 3

OTHER CASE STUDIES APPENDICES

Tenants Issues

Case Study per CUAC *Winters v Buttigieg* VCAT 2004 Appendix 3

“Bulk hot water charges”; inadequate redress Appendix 4

Case Studies courtesy Tenants Union Victoria – open submission to ESC Small Scale Licencing Review 2006 Appendix 5

Further comment Tenants Union Victoria open submission to ESC Small Scale Licencing Review 2006 Appendix 6

Reproduced comments Tenants Union Victoria open submission to ESC Small Scale Licencing Review Draft Decision 2007 Appendix 7

Reproduced extract NSW Govt Tenants matter parks landlord prosecution *Fair Trading Act* Appendix 8

³²⁸ Updated from version submitted to Senate Economics Committee’s Consumer Enquiry (TPA-ACL-Bill 2) (2010). Report completed. Bill passed. *Trade Practices Act 1974* to be renamed Competition and Consumer Law; and earlier version submitted to the NECF2 Package and published on the MCE website

EXTRACTS Of COPIES OF LEGAL INSTRUMENTS

Copy of *Electricity Industry Act 2000* (Vic) Ministerial Order in Council 2002³²⁹ Exemption Order (DPI Victoria) (re small scale licensing exemption) Appendix 9

EXTRACTS PERTINENT PROVISIONS

Energy Retail Code v7 (Vic) February 2010 extracts Appendix 10

Comparative analysis trade measurement and energy provisions in relation to contract, inconsistency, legal traceability, consequences Appendix 11

Work in progress document

NMI General Information Appendix 12

National Measurement Amendment Bill 2008 Explanatory Memorandum Appendix 13

COPIES OF PERTINENT SUBMISSION(S)

Copy of correspondence to the AEMC dated 3 July 2010 re Rule Change Proposal ERC0092 Metering Data Services and Metrology Procedures Appendix 14

Some Evaluative Theory Principles (upon request) Appendix 15

³²⁹ 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

LIST OF APPENDICES

Separate .pdf documents

Body Corporate Issues

Major Case Study 1 Body Corporate Entity Appendix 1

Tenant Issue

Major Deidentified Case Study 2¹ Appendix 4

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 Appendix 2

Analysis of the *Gas Industry Act 2001* (Victoria) in relation to flawed interpretation of existence of any contract, deemed or otherwise Appendix 3

OTHER CASE STUDIES APPENDICES

Tenants Issues

Case Study per CUAC *Winters v Buttigieg* VCAT 2004 Appendix 3

“Bulk hot water charges”; inadequate redress Appendix 4

Case Studies courtesy Tenants Union Victoria – open submission to ESC Small Scale Licencing Review 2006 Appendix 5

Further comment Tenants Union Victoria open submission to ESC Small Scale Licencing Review 2006 Appendix 6

Reproduced comments Tenants Union Victoria open submission to ESC Small Scale Licencing Review Draft Decision 2007 Appendix 7

Reproduced extract NSW Govt Tenants matter parks landlord prosecution *Fair Trading Act* Appendix 8

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

EXTRACTS Of COPIES OF LEGAL INSTRUMENTS

Copy of *Electricity Industry Act 2000* (Vic) Ministerial Order in Council 2002² Exemption Order (DPI Victoria) (re small scale licensing exemption) Appendix 9

EXTRACTS PERTINENT PROVISIONS

Energy Retail Code v7 (Vic) February 2010 extracts Appendix 10

Comparative analysis trade measurement and energy provisions in relation to contract, inconsistency, legal traceability, consequences Appendix 11

Work in progress document

NMI General Information Appendix 12

National Measurement Amendment Bill 2008 Explanatory Memorandum Appendix 13

COPIES OF PERTINENT SUBMISSION(S)

Copy of correspondence to the AEMC dated 3 July 2010 re Rule Change Proposal ERC0092 Metering Data Services and Metrology Procedures Appendix 14

Some Evaluative Theory Principles (upon request) Appendix 15

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

Appendix 1

CASE STUDY

2010

LEGAL DISPUTE

OWNERS' CORPORATION

VS

SERVICE PROVIDER

and

DEVELOPER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. Heating and Hot Water Energy Services Agreement

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

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

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

Contract of Sale

- 41.6 a reference to a statute or regulation, or to a provision of a statute or regulation, includes a reference to that statute, regulation or provision as amended, consolidated, replaced or re-enacted from time to time.
- 41.7 the obligations imposed and the benefits conferred under this Contract on each of the parties are binding upon and enure for the benefit of the respective parties and each of their respective successors in title, legal personal representatives and permitted assigns.
- 41.8 a reference to any party to this Contract includes that party's successors in title, legal personal representatives and permitted assigns.
- 41.9 a reference to "dollars" and "\$" will be taken as referring to amounts in Australian currency.
- 41.10 where a party comprises two or more persons all covenants and agreements by that party bind such two or more persons jointly and severally unless expressed to be only several.

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

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

WATER HEATING SUPPLY AGREEMENT

(name of Service Provider)

BAGKGROUND

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

PARTIES' OBLIGATIONS

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

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

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

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

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

Water temperature 78 degrees celsius;

Billing cycle quarterly

Water use residential and

Service Charge Rates:

Energy consumed for hot water heating

\$0.0651808 per kilowatt hour

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

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

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

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

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

[Arrow Asset Management Decision NSW Supreme Court 2007](#)

I quote from Gary Bugden’s summary:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To expect tenants to do so is absurd and normally not permitted by the OC or Landlord in any case.

In the case of renting tenants the issue of inappropriate imposition of contractual status raises issues of inadequate and poorly conceived policies and practices that appear to be 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 Commission Inquiry Into Australia’s Consumer Policy Framework (subdr242parts 1-5 and Part 8, 2008) and other public consultation arenas.

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

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

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

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

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

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

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

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

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

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

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

Under the revised [Trade Measurement Act 1960](#) the following definitions apply

"*utility*" means gas, electricity or water.

"*utility meter*" means a [measuring instrument](#) that is:

- (a) a gas meter; or
- (b) an electricity meter; or
- (c) a water meter;

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

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

[See Bulk Hot Water Charging Guidelines \(REPEALED January 2009\)](#)

Note this link is still available

[Energy Retail Code Victoria Feb2010 effective April 2010](#)

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

See [Madeleine Kingston Submission 2008 to ESC Review of Regulatory Instruments](#)

National Measurement Act 1960 revised:

PART V--GENERAL PROVISIONS ON USING MEASUREMENT IN TRADE

[18H](#) Overview

[18HA](#) When is an [article packed in advance ready for sale](#)?

[18HB](#) Certain [articles](#) must be sold by [measurement](#)--articles [packed in advance ready for sale](#)

[18HC](#). Certain [articles](#) must be sold by [measurement](#)--other [articles](#)

[18HD](#). Transactions based on [measurement](#) to be in prescribed units of [measurement](#)

[18HE](#). [Measuring instruments](#) used in transactions to have prescribed scale intervals

[18HF](#). Unreliable methods of [measurement](#)

[18HG](#). Limiting use of certain [measuring instruments](#)

[18HH](#). [Measuring instruments](#) and methods of [measurement](#) used in monitoring compliance with the Act

[18HI](#). [Articles](#) sold by [measurement](#) to be sold by net [measurement](#)

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

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

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

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

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

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

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

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

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

I note with concern that the views and interpretation of the original General Licence Exemption of Victoria issued by the Victorian Minister of Energy and sanctioned by the Governor-General in 2002 as expressed online by the Body Corporate Managers' Institute on the website of Owners' Corporation Victoria¹

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

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

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

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

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

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

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

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

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

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

[Ministerial Order in Council May 2002 Electricity License Exemption Victoria](#)

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

[Ltr Minister for Energy Theophanous Victoria re Small Scale Licensing Exemptions March 2006](#)

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

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

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

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

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

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

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

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

No-one quite knows the extent of the “[*self-assessed exempt licence*](#)” market, but my private efforts are beginning to uncover anecdotal evidence.

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

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

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

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

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

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

Choice denial for Purchasers of strata titled property

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

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

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

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

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

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

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

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

One such contract blatantly requires Owners/Occupiers to

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

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

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

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

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

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

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

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

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

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

Gas is either directly delivered or it is not.

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

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

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

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

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

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

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

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

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

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

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

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

See:

[ASIC disqualifies Henry Kaye from managing corporations for five years 20Jul2010 MR](#)

[Henry Kaye victims win \\$3m relief](#)

[ASIC obtains undertakings from Henry Kaye and others 21Jul2003](#)

[Jenman News Story Henry Kaye](#)

[ABC News Business Report Stories Henry Kaye](#)

[ASIC Media release ASIC reveals latest host of disputes against property spruikers 14Dec2009](#)

Extract:

December 14, 2009

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

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

According to ASIC:

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

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

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

(see also:

[Media Release 19Oct2006 ASIC stops Greenwood Property Development Fund Ltd Prospectus](#)

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

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

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

See also

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

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

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

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

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

What's wrong with this picture?

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

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

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

14. Present risk management threats through risks through supplier liability under multiple generic laws (TPA, FPA, Unfair Trade Practices); and trade measurement provisions, conflict potential, expensive complaints handling (**Risk Management**)
15. Appear from the outset to have failed to demonstrate transparent consultation processes (**Consultation test**)
16. Appear to provide non-existent consumer protection and enforcement by authorizing, even directing retailers to adopt practices that conflict with existing consumer protections under tenancy and unfair contract laws and defy the spirit and intent of trade practice provisions (**Consumer protection and enforcement test**).

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

The same meter also provides gas for cooking purposes.

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

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

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

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

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

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

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

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

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

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

I note with concern that the views and interpretation of the original General Licence Exemption of Victoria issued by the Victorian Minister of Energy and sanctioned by the Governor-General in 2002 as expressed online by the Body Corporate Managers' Institute on the website of Owners' Corporation Victoria³

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

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

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

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

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

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

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

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

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

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

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

[Ministerial Order in Council May 2002 Electricity License Exemption Victoria](#)

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

[Ltr Minister for Energy Theophanous Victoria re Small Scale Licensing Exemptions March 2006](#)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX 2

DEIDENTIFIED CASE STUDY

TENANT

INDIVIDUAL VICTIM OF CURRENT REGULATORY PRACTICES –

BULK HOT WATER –

DISPUTE ALLEGED ENERGY CONTRACT WITH RETAILERS AND DISTRIBUTORS UNDER JURISDICTIONAL PROVISIONS

(see Energy Retail Code v7 (Victoria))

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

CASE STUDY 1– COMPROMISED CONSUMER PROTECTION

Details of complaint lodgment, scope of complaint and management issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

² This term implies separate metering of gas. The Tenant in this real-life case study has a separate gas meter for the provision of domestic gas for cooking, and a separate meter for electricity for heating, and has entered into a legitimate dual fuel contract with a host supplier for these utilities. However, in relation to bulk hot water, no separate meters or supply points exist for this purpose. There is a single gas bulk hot water meter with an allocated MIRN No. The meter is transparently available for reading.

Bills issued to other tenants on the block show a unique “meter number” for “gas usage” and a unique “meter number” for “gas hot water” for an identified billing period. In addition to charges for “gas hot water: an “deemed gas usage” that is based on algorithm formulae calculations evidently sanctioned by the regulator and/or policy-maker contained in policy and deliberative documents with no legal weight (see ESC Bulk Hot Water Charging Arrangements and Bills Based on Interval Meters, ESC Guideline 20 (1) 2005 (effective dated 1 March 2006) found at

http://www.esc.vic.gov.au/NR/rdonlyres/COE6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf

See also all associated deliberative documents notably

Final Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (December) (23 pages) found at

http://www.esc.vic.gov.au/NR/rdonlyres/4554EA66-6F9E-49C8-934E-1E8232D989AC/0/FDP_EnergyRetailCodeAmendmentsFinalDec05.pdf

Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August)

http://www.esc.vic.gov.au/NR/rdonlyres/37078658-5212-4FA7-8A8E-AC42AB12BDDC/0/DDP_EnergyRetailCodeTechAmend20050810_CommissionPap_C_05_8007.pdf

ESC (2005) Final Report Review of Bulk Hot Water Billing Arrangements (September) found at

<http://www.esc.vic.gov.au/NR/rdonlyres/20C3454F-0A47-428B-845B-1D7D85FBE572/0/FinalReviewBulkHotWaterBillingSept04.pdf>

ESC (2004) Draft Report Review of Bulk Hot Water Billing Arrangements (July) found at

http://www.esc.vic.gov.au/NR/rdonlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf

Correspondence between February and August 2004 between Department of Primary Industries {DPI} (Victoria) and VESC February – August 2004, notably dated 13 May; 16 July; 11 August 2004 respectively from Richard Bolt, then Executive Director Energy and Security DPI expressing concerns about BHW billing arrangements Other DPI correspondence and replies from VESC same sources not available online as submissions and concerns from DPI on this matter.

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

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

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

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

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

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

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

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

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

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

Option 1: adjustable conversion factor: rejected

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

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

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

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

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

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

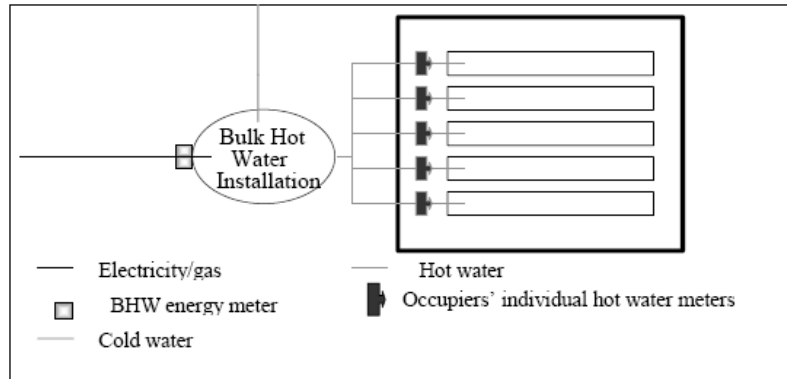
Subsequently upon direct enquiry (twice) that water authority had again confirmed that the landlord through the Owners' Corporation (previously Body Corporate) had accepted responsibility for water charges. No water efficient devices fitted at any of the apartments at the property supply address, so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

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

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

Configuration and meter details

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Historical details

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disconnection

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

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

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

4.1 (iv) Disconnection

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

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

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

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

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

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

The VGMRR define a *retail licence* as:

“A licence to sell gas granted by the ORG under section 48E of the GIA.”

Such a licence is not for the sale of water products, value added products, composite products or other products or services. Specifically heated water is not part of the licence. Notwithstanding current policy and the content of deliberative documents of no legal weight, endeavours to sell the heating component of heated water without being able to show legally traceable measurements beings into question whether any contract at all exists for the provision of such a product

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

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

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

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

The BHW arrangements fail to acknowledge this legislative requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Guidelines to justify inexcusable conduct.

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

Therefore the provision that:

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

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

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

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

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

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

The Victorian Regulator has proposed in relation to a Retailers Obligation to connect⁵ that the clause relating to connection will be retained in the ERC with “*minor re-drafting*” but no precise wording.

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

The proposed change is that the Commission will clarify that:

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

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

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

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

Small business also need to be protected and guaranteed supply

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

The DPI now has policy control over the BWH provisions

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

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

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

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

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

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

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

The Residential Tenancies provisions are clear enough.

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

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

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

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

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

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

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

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

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

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

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

For electricity this can change network operations and ownership.

The Victorian OIC for exempt selling refers exclusively to electricity.

The TUV has recommended a proper framework for the BHW groups

Allegations in this case

Allegation 1 unconscionable conduct

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Allegation 3 Threats, intimidation and coercion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is no ancillary supply point.

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

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

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

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

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

Allegation 4 Breach of Fair Trading Act 1999

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

Failing to redirect to complaints scheme

Failure to direct to any applicable hardship policies

Allegation 2 Breach of implied contract

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

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

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

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

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

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

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

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

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

He has a legitimate lease under standard residential tenancy terms which cover consumption of water, hot and cold. The water authority has confirmed that the landlord has accepted responsibility for all water supplied. The rent includes water charges. In addition a recent rent increase has occurred.

It is the OC's responsibility to accept all charges for bulk energy, supply charges, meter reading charges. There is only one supply point applicable for bulk energy on common property infrastructure. VENCORP records that supply point as a single supply point. There is a supply charge before any tap is turned on, and commencement to take supply began when the landlord agreed to have the bulk meter installed. The supplier alluded to that agreement in the first letter of threat.

The Complainant did not agree to accept supply. s46 of the *Gas Industry Act 2001* specifically refers to agreement to take supply of energy to the premises and then failure to meet contractual and responsibilities or follow identification processes. This is not the case here. No supply of energy enters the apartment by any means in relation to the heating of the bulk hot water. Supply is taken of a composite water product in water pipes. Disconnection of heated water is being relied upon in interpreting the deemed provisions under an energy law. Water and energy are not interchangeable.

They are quite different delivery systems. Gas consumption cannot be legally measured with a water meter.

Notwithstanding that the Tenant continues to deny any contract at all or any requirement to form one with the energy supplier, given the energy supplier's perception of a contract, there is an implied breach of such a contract through failure by one of the parties to the contract (real or imagined) to satisfactorily perform the service or action agreed to in the contract.

The water quality is not consistently hot. There are variations in ambience, temperature and heating value, none of which can be measured through water meters. The composite product is not fit for the purpose intended on a consistent basis. The cold-start water is supplied through pipes that have to travel up a flight of stairs. It takes many litres before the water begins to show signs of being adequately heated.

The intended charges, based on the bills received by other tenants on the same block do not appear to be supplied at off-peak rates or rates that reflect the nature of supply and sub-standard quality. Unfair supply charges and meter reading charges may be hidden in the "*commodity charge*" intended

The energy supplied purporting to be covered by a contract with the Tenant is not achieving its goal and not fit for the purpose designed.

The trade measurement practices used, albeit seen to have been sanctioned by the regulator in deliberative and policy documents that appear to have no legal weight are contrary to the intent and spirit of national trade measurement laws applicable as the default laws in Victoria *National Trade Measurement Act 1960* and will soon become illegal and invalid

The bulk hot water pricing and charging provisions and the interpretations made by policy-makers, regulators, complaints schemes and energy suppliers seem to be representing attempts to re-write contract law.

Energy suppliers may have seen a loophole through which inarticulate vulnerable, and disadvantaged end-consumers of bulk energy not contractually liable can be imposed with financial and other obligations, including unjust requirements to provide safe, convenient and unhindered access to meters (whether or not appropriate instruments through which gas can be measured) behind locked doors and in the care, custody and control of Owners Corporation entities.

The provisions of the *Essential Services Act 2001* require that there is regulatory overlap between schemes.

This has been reinforced by way of a revised Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria and Essential Services Commission specifically requiring

"overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries"

The MOU also requires adoption of best practice.

Besides conflict with regulatory schemes there is the issue of conflict with rights enshrined within common law contract provisions.

The absence of a contract being central to the complaint, and endeavours to improperly coerce the Tenant into accepting such a contract under pain of disconnection of essential services.

The general perception that existing interpretations apply simply because of pragmatic arrangements that do not even uphold the intent and spirit of trade measurement provisions has given rise to apparent exploitation of those least able to fight back – the soft targets who have faced detriment from the outset.

These anomalies will continue to impose detriment on such end-consumers unless the future regulatory design rights these wrongs.

Allegation 3 Unfair business practices (Fair Trading Act 1999); Unfair Contract provisions

Victoria's regime

Part 2B of Victoria's *Fair Trading Act 1999* prohibits 'unfair terms' in consumer contracts. A term is 'unfair' if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. Examples of unfair terms might include those which allow a supplier to unilaterally vary a contract, or those which allow the supplier, but not the consumer, to terminate the contract.

The supplier and Complainant (and others like him) do not have equal responsibilities and rights.

The Complainant is penalized if the implied contract (which the complainant denies exists or ought to exist is terminated. Nevertheless he stands to lose water or heated water though the supply and cost of these are already included in his rental agreement directly with the landlord.

The supplier can apparently vary the contract terms, price and goods without involvement of the deemed recipient under an implied and unjustly imposed contract.

The supplier and others appear to have assumed sole right to interpret the meaning of the deemed contract, notwithstanding that there are many discrepancies within the legislation and many overlaps with other schemes, with common law provisions and contractual provisions and the rights of social and natural justice.

The supplier appears to have sole rights to determine whether the contract has been breached.

The contract contains confusing terms and inappropriately implies through wording that either a licence exists for supply of composite products; or alternatively that the energy can be separately measured; or alternatively that the practices are legitimate.

Includes the expectation that the end-consumer, who has no obligation to form a contract and is not the '*relevant customer*' in this case, assumes all contractual responsibility and then battles to address merely the cost-recovery component.

Cost recovery through VCAT requires 28 days notice to the landlord; repeated trips and filing fees; inconvenience and stress and acceptance of unfair contractual terms and legal responsibility for bills that should be sent directly to the proper contractual party.

The repeated cost of filing fees would outweigh any benefit from cost recovery.

Such a process would not deal with the root problem, the policy provisions; the conduct of the supplier

In this case the Complainant is a most unsuitable candidate for repeated tribunal or court appearances for such a purpose and this would place an undue and unfair burden on him.

One of the unreasonable contractual terms of the contract that the supplier wished unilaterally to impose was provision of safe, convenient unhindered access to meters behind locked doors in the care custody and control of the Owners Corporation.

Those meters are satellite water meters owned by the bulk energy supplier and installed for the express purpose of using them as substitute gas meter.

Such practices appear to have been endorsed by existing provisions.

Gas does not pass through water meters.

Electricity does not pass through water meters.

Water meters are unsuitable instruments for measurement of energy.

Gas is measured in megajoules (MJ).

Electricity is measured in KW-h.

Any measurement that allows for water volume calculations or some other bizarre equivalent, to be part of the equation that calculates energy consumption is fundamentally flawed. These provisions do not uphold public interest, best practice standards or the spirit and intent of existing provisions. The provisions are as good as relying on an oil funnel to measure the weight of a bag of apples.

Energy retailers are licenced to sell gas and electricity not water products or heated water. In some cases where exemption granted non-licenced embedded network distributors are using similar methods without accountability through energy regulations (see for example [Winters v Buttigeig](#) VCAT 2004).

There is an imbalance of power; the end-consumer has no provider choice; contractual status has been unilaterally and inappropriately imposed through misinterpretation of the intent of existing legislation regarding relevant customer and deemed contracts; demands were made to form an explicit contract under pain of threat of disconnection of hot water; the cost-recovery mechanism through s55 of the [RTA](#) imposes additional and unnecessary burdens on the end-consumer including filing fees through VCAT which would offset cost recovery, and in this case not readily achievable since the Complainant is unable to participate in legal proceedings without detriment.

The misleading and deceptive conduct referred to elsewhere includes behaviour that leads another person into error, and thus unfair.

Examples include the use of terminology, for example reference to meters implying gas meters, allegations of denial to meters, meaning water meters; intended use of an identifying number of the bills other than the MIRN.

The implied and unilaterally imposed contract requires the end-consumer as a renting tenant to provide safe, unhindered and convenient access to meters where such meters may be in the care custody and control of the Owners Corporation, who are under the law responsible for supply and consumption charges of energy or other utilities unless separately metered.

The energy supplier is endeavouring to charge for gas, gas meter reading and gas supply for the heating component of the water. A meter is described under the *Energy Retail Code* and the *Gas Distribution System Code* as an instrument that measures the quantity of gas that passes through it and its associated metering equipment to filter, control and regulate the flow of gas. Water meters do not represent such instruments, though they appear to be posing as gas meters.

Though the water meters are owned by the energy supplier, and though these are behind locked doors; these instruments are not the type of instrument referred to in the energy provisions and were not designed for the purposes intended. Therefore notwithstanding allegations of denial of access to meters, the Tenant continues to deny that allegation, and in any case is unable to deliver unfair contract provisions concerning safe convenient and unhindered access to meters that are not in his care custody and control, leaving aside for the moment the ongoing contractual debate, which is really a matter for the policy maker(s) and/or responsible regulators to address rather than EWOV as a conciliatory complaints scheme with no jurisdictional powers to address policy, legislative and tariff matters. However, EWOV is capable of gathering and clarifying factual matters.

As to denial of access of meters relied upon in previous EWOV correspondence under Clause 13 of the *Energy Retail Code*, there has been no such denial of access to meters as defined in the legislation and codes, namely a single gas meter on each of twin-buildings. These bulk gas meters are considered by VENCORP to be single supply points for the purposes of settlement between distributor and retailer.

The law requires a retailer to be licenced. Those licences are for the selling of energy not water. If retailers or their servants/contractors or agents are behaving as billing agents for the landlord for water products; value added products, heating components of composite products that cannot be separated from the product, this is an anomaly that may need to be reconsidered by the policy-makers and regulators. Meanwhile, EWOV should be cautious about making determinations outside of their jurisdiction.

The licences appear to be referring to a business customer to whom the metering and billing services apply and any choice that that party may have to change to another retailer, notwithstanding that distributors are most reluctant to see changes from original host retailer arrangements, and this may make such a choice expensive. In any case it is not the end-user of heated water communally heated who has any choice with provider for either water or energy.

Allegation 4 Unfair and inappropriate trade measurement

Adversely impacting on the consumer, even if a contract is somehow shown to exist yet this issue has not been mentioned. At least the intent of existing provisions appears to have been breached.

Finally there is the question of risk of a rise in rent following negotiations with the landlord. The premises were accepted in the expectation that all water charges would be met by the landlord in the absence of separate gas meters for bulk hot water (*especially as the previous tenants had confirmed that they never had to pay during their three years of tenancy*); and that the rent incorporated all utility charges other than dual fuel for domestic cooking and heating.

There is nothing in the energy legislation that deems the Tenant to be contractually obligated. Neither EWOV nor ESC has been able to substantiate that claim with reference to the legislation but have referred instead to deliberative documents and guidelines considered to be flawed and inappropriate using trade measurement practices that are unacceptable, interpretation of “relevant customer” that are not consistent with broader definitions within legislation.

Again, the previous deemed clauses under s42-46 of the *Gas Industry Act 2001* refer to those on standing contracts at the time that Full Retail Contestability became operational. Those deemed clauses were extended to 31 December 2008.

The unacceptable market conduct has been made possible by existing statutory public policy provisions under guidelines authored by the Essential Services Commission.

Allegations that these bizarre policies were adopted to prevent “*price shock*” to end-consumers appear to be weak and invalid since they are not the proper contractual parties.

These issues remain in contention and cannot be resolved with creative interpretation of the *Gas Industry Act 2001*

The deemed provisions had never been intended to not to residential tenants, legally taking occupation of premises with stand lease provisions implicitly deeming the supply of water and other utilities to be the responsibility of the OC, unless water efficient devices were fitted; and secondly unless each utility could be individually metered.

In Victoria these represent some 26,000 end consumers of bulk energy that cannot be measured using an instrument designed for the purpose, who are not properly the contractual parties, yet being held responsible, in breach of their several rights under multiple jurisdictions not only for the costs of energy calculated in cents per litre using bizarre algorithm conversion formula, without the benefit of site reading, and using water meters posing as gas meters. This contravenes the spirit and intent of trade measurement regulations.

After some three months delay, some clarification was ultimately provided directly by ESC by way of provision by e-mail of a single deliberative document Final Decision dated December 2005.⁷ Subsequently through independent efforts access to all available deliberative documents was obtained, most of which are now published online on the ESC website, so far more accessible than at the time of lodgment of complaint 20 months ago.

The bulk hot water pricing and charging provisions were adopted on 1 March 2006 and were intended also to apply to interval meters.

These provisions have been seen as drivers for unacceptable market conduct and practices. The consequences impacts on some 26,000 Victorian consumed based on figures published in ESC documentation dated 2004. Many end-consumers unaware of their rights and entitlements have been coercively intimidated into accepting contractual status.

Though seemingly adopted with the goal of preventing price shock to end-consumers, this argument does not stand up to scrutiny since the contractual party under the law is the Landlord or OC. The goals of preventing price shock have not been met. Landlords continue to impose rent increases every six months as allowed by law, and as has occurred in this case.

The original rental lease included the supply of heated and cold water. Charges for consumption, supply and any meter reading charges belong properly to the Owners Corporation.

Allegation 5 Failure to follow appropriate disconnection notice procedures

Notwithstanding that the Complainant denies any contract existed or ought to exist, the supplier failed to follow prescribed disconnection processes.

The two letters of coercive threat of disconnection from the energy supplier dignified by EWOV staff by referring to a single "*vacant consumption letter.*" These were considered to be junk mail addressed to the Occupier of the Tenant's address and no considered to be relevant to him.

⁷ ESC Final Decision Bulk Hot Water Arrangements and Bill Based on Interval Meters

One of these letters was issued during the course of an unresolved complaint before EWOV which remains unresolved. This is a breach of both the Energy Retail Code and fair trading provisions.

Pre-disconnection practices were not followed including failure to provide at least 10 days notice of intent to disconnect, at least twice over by the supplier's own admission, once during the course of an open complaint before a complaints body, and use of wording that has already caused considerable material detriment given the Complainant's vulnerabilities.

The wording of the letters were not in accordance with provisions

No informed consent was provided. No clarification was provided. Misleading terminology was used.

Ownership of the meters does not allow the supplier to disconnect hot water supplies. Disconnection in the *Energy Retail Code* refers to disconnection of gas as follows:

(b) for gas

the separation of a natural gas installation from a distribution system to prevent the flow of gas.

Disconnection of hot water does not fit that description.

It was unclear whether the intended disconnection was of hot water suppliers or energy. If energy presumably this meant cutting off the supply to all other residential tenants on the block supplied by that single bulk gas meter as the single supply point on common property infrastructure of the OC.

Until all of these issues are addressed at all possible levels of redress, including by the statutory authorities responsible under the *Gas Industry Act 2001* this issue remains unresolved and the subject of complaint and enquiry that has been delayed. Under s14 of the *Energy Retail Code*, and despite clause 13, a retailer must not disconnect a customer:

If the customer has made a complaint directly related to the non- payment of the bill, to the Energy and Water Ombudsman Victoria or another external dispute resolution body and the complaint remains unresolved;

Though a final decision from EWOV is imminent, the complaints processes are not exhausted, the Internal EWOV Review process allows 60 days for lodgment.

Advice has been sought from the ESC and DPI as to the most appropriate next steps, with reservations being expressed about the value of a Merits process in these circumstances. Nonetheless this remains a theoretical option and other complaints avenues are being considered with regulator, policy-maker and Ministerial advice sought and awaited.

Unconscionable conduct is already on the list of allegations, whether or not EWOV, DPI or VESC choose to accept this.

All parties should consider the trade practice considerations.

Given the Tenant's previously identified vulnerabilities and new considerations with further illness complications resulting from a rare auto-immune arterial disease, a leg ulcer requiring wound care and access to hot water, ongoing permanent psychiatric illness and history of parasuicide, it would be considered unconscionable for the supplier to effect disconnection under the circumstances.

There is an enhanced obligation of the regulator and policy-maker to embrace social and natural justice principles and to protect the rights of vulnerable end-consumers of energy as an essential service.

The energy supplier has no direct right to effect disconnection, as discussed below citing Sec 36.1 of the *Energy Retail Code*.

Under s36 of the *Energy Retail Code* v4 October 2007, a retailer is not in a position to connect, disconnect or reconnect the electrical system or natural gas installation at a customer's⁸ supply address to a distributor's distribution system. The Code unless otherwise stated requires in this context interpretation to be a reference to procure disconnection through the distributor.

I will endeavour to collate these when time permits, though I should not have to repeat any of this time and again.

Meanwhile I mention stress again that the proper interpretation of supply address; ancillary supply address; customer; relevant customer; meter; metering installation and the like needs to take account multiple references within the legislation or expired legislation (for assessing past matters) and any associated Orders in Council past,⁹ current or proposed as well as the *Gas Distribution System Code* and *Energy Retail Code* wherein there are some noticeable discrepancies, on the one hand indirectly sanctioning the use of water meters posing as gas meters, and on the other clearly defining meter with reference to the legislation as an instrument designed for measuring the quantity of gas that passes through it and its associated metering equipment to filter control and regulate the flow of gas. Such a process does not occur with hot water flow meters.

⁸ However the terms customer; supply address; meter; metering installation; distribution supply point; ancillary supply point and other definitions are applied, and remembering that the deemed provisions when they did apply in these circumstances referred to "relevant customer" not just customer, with that definition under an expired OIC associated with the expired deemed provisions referring merely to annual consumption levels, and applying equally in the law to some 1.4-1.6 million customers not necessarily of natural person status. The discussion referred to in deliberative documents about BHW arrangements are not legally enforceable as these documents have no legal status, and in any case represent regulatory overlap with other schemes, common law, trade measurement and other considerations.

⁹ The Order in Council that I brought to EWOV's attention in the first place is now obsolete since it was associated with the now expired deemed provisions under s42-46 of the *Gas Industry Act 2001*.

ENERGY RETAIL CODE V4 October 2007

36. INTERPRETATION

36.1 Connection, disconnection and reconnection

A retailer is not in a position to connect, disconnect or reconnect the electrical system or natural gas installation at a customer's supply address to a distributor's distribution system. In this Code unless the context otherwise requires, a reference in a term or condition to a retailer:

(a) having a right or not having a right to disconnect a customer is to be construed as a reference to the retailer having a right or not having a right to procure the distributor to disconnect; or

(b) being obliged to connect, disconnect or reconnect a customer is to be construed as a reference to the retailer being obliged to use its best endeavours to procure the distributor to connect, disconnect or reconnect, the electrical system or natural gas installation at the customer's supply address to the distributor's distribution system.

If it is the case that the wrongful disconnection payment has had the effect of deterring disconnection in hardship cases, the plight of those whose central issue not hardship or over-due payment of bills, but rather dispute over the existence at all of any contract or requirement for there to be a contract.

Allegation 6 Breach of Gas Distribution Code

All definitions, including meter, metering installation; distribution supply point which includes ancillary supply points as energy (not water meters); VENCORP rules and policies wherein bulk energy meters are considered as single supply points; other legislative energy-specific provisions and definitions, defining supply point, ancillary supply point, supply address and other such pertinent definitions

Allegation 7 Breach of ESC Product Disclosure Statement Guideline 19

The letters of threat required personal data beyond that required by these provisions, leaving aside the contractual debate and denial that any contract exists or ought to exist

Allegation 8 Breach of Informed Consent

For example failing to properly clarify directly in the letters of coercive threat and subsequently through EWOV a range of enquiries or explain adequately the unjust imposition of deemed contractual status, method of calculation, now energy was monitored, the meaning of the term "hot water services" when the supplier is licenced to sell gas or electricity not hot water products or composite products

It was unclear from the threats of disconnection whether the intent was to disconnect hot water suppliers or energy. If energy presumably this meant cutting off the supply to all

other residential tenants on the block supplied by that single bulk gas meter as the single supply point on common property infrastructure of the Owners Corporation.

Perhaps this more extended paraphrased version of the implicit messages contained in the two intercepted threats of disconnection of essential services

It is unclear whether the threat of disconnection of essential services relates to water, heated water as a composite product; energy used to heat that water – this has not been clarified yet by anyone despite repeated enquiry for clarification will serve to clarify how these coercive threats have been conveyed by the energy supplier will convey a more honest transparent disclosure of the implicit message intended.

The two known threats of disconnection on seven days notice, without informed consent for an explicit contract with an end-user of bulk energy not legally the contractual party, and not bound to accept such a contract, could be undertaken:

On the other side of the coin there is the disclosure that providers of goods and services can or do demand whether or not the guidelines allow this.

The information required by the energy supplier, leaving aside misconceptions about where the contractual obligation lay, required disclosure of information far in excess of that allowed under the Product Disclosure Statement. Retailers have argued that they need this information so that if the imposed contract on the tenant reneges, the landlord can be held accountable. All of this does seem rather bizarre application of contract law.

Allegation 9 Misleading and deceptive conduct

This is alleged on the part of the supplier the subject of complaint

For example inconsistent and misleading statements as to the basis for assuming that a contract existed; use of terminology implying the existence of gas meters; allocation of a meter number implying a separate gas meter, other than the MIRN.

Allegation 10 Misleading details in bills issued to other tenants on same block

For example using terminology and meter identification numbering that implies separate gas meters. Massive supply charges are being apportioned to individual tenants, though only one common property supply point exists with a meter supplying heat to a communal water tank.

Allegation 11 Similar inappropriate and unacceptable business conduct

Alleged towards the tenant and other tenants living on the same block

Other tenants on the same block have complained about inappropriate conduct and have supplied me with some of the bills issued. One tenant received an absurd estimated bill for \$500 from the same bulk energy supplier. There had been a burst water pipe in one tenant's apartment. Perhaps the endeavours were made to apportion equal responsibility amongst the tenants for any hot water wastage activated by that incident.

Whatever the reasons for bills of this nature, something needs to be done about giving leave to suppliers to charge what they will; except high costs of challenge with accuracy of meter readings, notwithstanding the meters relied upon are not energy meters, but instead water meters through which no gas passes, thus being unsuitable instruments for

the purpose. The range of conduct issues are applied as a matter of policy by the supplier in more than one state.

Allegation 12 Use of trade measurement practices that are against the intent and spirit of national and state trade and utility measurement provisions¹⁰

The current trade measurement practices will become invalid and illegal once existing utility exemptions are lifted, as is the intent and as has already commenced (using water meters posing as gas meters to calculate estimated and actual gas consumption for gas used to heat water centrally heated water.

Meanwhile the provisions and use of these practices breach trade measurement provisions with regard to spirit, intent and best practice approaches, and notwithstanding any instruction or perceived instruction from the regulator or the documentation relied upon in these assertions.¹¹

It was recognized and noted in the Deliberative Document Review of Bulk Hot Water dated July 2004 that these practices were breaching the intent of trade measurement law and fair trading provisions.

Allegation 13 Contravention of the intent of trade measurement and utility provisions

Notwithstanding existing policy provisions which appear to have been the drivers for inappropriate market conduct, the spirit and intent of existing national trade measurement and utility provisions have been violated. In Victoria the default provisions are the *National Trade Measurement Act 1960* and accompanying provisions.

Allegation 14 Probable intent to apply inappropriate supply and possibly meter reading charges (?rolled over into a commodity charge)

Inappropriately applied to end-consumers, including additional hidden charges that may also be incorporating water meter reading charges as well as gas meter reading, if meters are read at all, since site-specific reading was rejected as an option.

This is notwithstanding the claims of absence of any contract with the end-consumer (Complainant) or obligation to form one.

No bills were ever issued. The circumstances were associated with coercive attempts to force an explicit market contract at what was believed to be expiry of the deemed contract for sale and supply of energy. The Tenant denied the existence of such a contract and

¹⁰ Note as reported in the CAV Annual Report 2006/2007, Director's Report, p9 "*A major historic development...during the past year was the agreement that the Commonwealth will assume its full constitutional responsibility for trade measurement (weights and measures). In 2010 the Commonwealth will take over functions relating to weights and measures, which the State has performed since the mid-nineteenth century.*"

The default provisions are under the *National Measurement Act 1960 Act No 64 of 1960 (with amendments to Act No 27 of 2004* Transactions by utility meters to be in prescribed units of measurement

¹¹ Refer to *National Trade Measurement Act 1960* and corollary provisions; refer also to Memorandum of Understanding between Consumer Affairs Victoria and Essential Services Commission dated 18 October 2007 both available online

through a representative endeavoured to retain his enshrined rights under multiple provisions and the common law

However, at the end of 21 months of abortive complaints handling by EWOV, the intervention of the energy regulator (ESC) (who upheld the retailer's position) and the DPI (who claimed no power over EWPOV or the Regulator despite both bodies being set up under statutory enactments under DPI control), disconnection of heated water supplies was effected by clamping of hot water flow meters recording water volume usage to the Tenant's individual residential premises in a multi-tenanted block of apartments poorly maintained.

The grey areas of water quality, consistency of temperature etc were never addressed, yet the Tenant was alleged to have a contract for the heating component of communally heated water the quality of which no-one seemed interested in taking responsibility for.

The collusive arrangement between the Landlord/Owner's Corporation and the energy supplier was facilitated by flawed policy and philosophical beliefs held by the DPI and ESC regarding perceived deemed contract and confusion over water and energy provisions, generic laws, contractual provision under the common, residential tenancies acts and Owners' Corporations provisions.

Allegation 16 Inaccuracy of deemed consumption of gas and charges applied

Apparently there are previous issues of over-charging by a Tier 1 supplier wherein the Department of Infrastructure (DOI) at that time with the energy portfolio demanded prepayment of overcharges to consumers to the tune of some \$800,000.

Allegation 17 Compromised protections and adequate access to appropriate recourses

This allegation is leveled at the policy-makers and regulators and the inadequately resourced and informed industry-specific complaints scheme.

There are concerns about the impacts on some 26,000+ Victorians using bulk gas energy centrally heated; and some 200+ of bulk energy used to heat single boiler tanks with a single bulk meter at the property of the oc.

Existing policy arrangements affect those in embedded networks, caravan parks, rooming houses, nursing homes. Embedded networks are those where unlicensed distributors not covered by Energy Codes and legislation can purchase gas or electricity from the original network, transfer to another network and on-sell at inflated prices without recourses available to consumers other than through common law provisions.

Despite the intent of provisions under the *National Measurement Act 1960 18R*, delays with the lifting of certain utility exemptions have left loopholes in legislation that allow unacceptable market conduct. The default provisions are under this Act, since the mirrored provisions under the Victorian *Utilities (Metrological Controls) Act 2002* remains impotent without regulations to accompany it. This has been the case for some four years. Delays will now be perpetuated till around 2011 when National trade measurement provisions will be adopted for all states and territories.

If apportioning amongst Owners is deemed appropriate, the current arrangements are not appropriate for rented apartments and those tenants in an “*embedded situation*” even if the term embedded network is not strictly applicable.

The only recourse suggested by EWOV after sixteen months of handling the matter as a predominantly policy issues was a cost-recovery mechanism retrospectively against the landlord through s55 of the *Residential Tenancies Act 1997*.

This does not address the contractual issues, conduct of the supplier of inadequate policies and leaves a vulnerable end-user not contractually obligated to carry contractual status, outlay funds to pay bills that are not the Tenant’s responsibility, and endeavour to either negotiate with his landlord or make repeated appearances before VCAT to recover costs, thus offsetting any cost recovery benefits.

It also leaves the Tenant liable for provision of safe convenient and unhindered access to meters which are not in his care custody and control, since the water meters theoretically relied upon for meter reading of energy consumption reside behind locked doors in the boiler room, These meters are owned by the energy supplier, but the water is supplied by the water authority, who has confirmed that the OC accepts all responsibility for water charges and supply costs.

Without policy change these issues will continue to compromise consumer protection, already at low ebbs.

Existing policy arrangements affect those in embedded networks, caravan parks, rooming houses, nursing homes. Embedded networks are those where unlicensed distributors not covered by Energy Codes and legislation can purchase gas or electricity from the original network, transfer to another network and on-sell at inflated prices without recourses available to consumers other than through common law provisions.

Despite pressure from community organizations such as Consumer Utilities Advocacy Centre (see for instance reference to *Winter v Buttigeig* before VCAT December 2004, article in Spring Quarterly September 2005 CUAC – “*Embedded Networks – Disconnected Consumers*”); these practices continue and appear to be endorsed by statutory policy deemed to be flawed and detrimental to community interests.

Revised Body Corporate provisions under the *Owners’ Corporation Act 2006* effective from 31 December 2007 do not address tenant issues but rather owner and administration issues and the complexities of the many issues raised regarding bulk hot water arrangements are not addressed at all. I disagree with any perception that these arrangements are appropriate in multi-tenanted dwellings or that consumer protections are adequate.

Note the *Owners’ Corporation Act 2006* is another example of legislation not echoed in other states, but nevertheless lends important clarity and protection that should be echoed in similar provisions elsewhere instead of repealed because other states have not adopted the provisions

Despite the intent of provisions under the *National Measurement Act 1960 18R*, delays with the lifting of certain utility exemptions have left loopholes in legislation that allow unacceptable market conduct. The default provisions are under this Act, since the

mirrored provisions under the Victorian *Utilities (Metrological Controls) Act 2002* remains impotent without regulations to accompany it.

This has been the case for some four years. Delays will now be perpetuated till around 2010 or 2011 when National Trade Measurement provisions will be adopted for all states and territories.

If apportioning amongst Owners' Corporation is deemed appropriate, the current arrangements are not appropriate for rented apartments and those tenants in an "*embedded situation*" even if the term embedded network is not strictly applicable.

Energy retailers are licenced to sell gas and electricity not water products or heated water. In some cases where exemption granted non-licenced embedded network distributors are using similar methods without accountability through energy regulations (see for example *Winters v Buttigeig* VCAT 2004).¹²

There is an imbalance of power; the end-consumer has no provider choice; contractual status has been unilaterally and inappropriately imposed through misinterpretation of the intent of existing legislation regarding relevant customer and deemed contracts; demands were made to form an explicit contract under pain of threat of disconnection of hot water; the cost-recovery mechanism through s55 of the *RTA* imposes additional and unnecessary burdens on the end-consumer including filing fees through VCAT which would offset cost recovery, and in this case not readily achievable because of the complainant's condition.

The last allegation of inadequate and compromised protections and adequate access to appropriate recourses is leveled at policy-makers and regulators and the inadequately resourced and informed industry-specific complaints scheme.

I refer to the *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* as approved by the Federal Government in 1997¹³ which include:

Accessibility; Independence; Fairness; Accountability; Efficiency and Effectiveness. As noted by Denis Nelthorpe, Solicitor and Consumer Advocate:

these benchmarks were drafted by a national committee made up of government, regulatory, industry and consumer representatives as a guide to an increasing number of industries looking to establish industry based complaint schemes (IS ECS) as opposed to internal complaints handling mechanisms (IS- ICS)

The values embraced by those benchmarks are similar to those identified as core values of the Attorney-General's Justice Statement (May 2004).

¹² CUAC September 2550 Quarterly "*Embedded Networks – Disconnected Consumers*". Article by Tim Brook, pp11-12

¹³ Federal Government (1997) *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*

There are many myths about ADR provision. Industry specific complaints schemes do not mediate. They are essentially complaints schemes who investigate facts and perspectives without assuming a mediation role, a central component of true ADR. The structure of these schemes has the potential to introduce perceptions of bias. When independent legal advice is sought by the complaints scheme, the power imbalances are further increased.

It cannot be procedurally fair, for example to tip the market power imbalance scales by taking independent legal advice without even consultation with the regulator to seek creative ways in which to interpret the legislation or policy in support of the complaints scheme member, or to issue threats of premature closure of a complaints fails before investigation of the substantial issues of complaint, relating say to conduct or procedural breach by way of endeavouring to force a conciliatory outcome.

It cannot be procedurally fair to without clarification of policy information or to make direct referral to the regulator(s) involved if these issues are out of jurisdiction. It cannot be procedurally fair to fail to report an outstanding matter in the complaints reports or annual reports if a complaint is carried forward to the following year, or to delay direct external referral unduly.

Whilst a Merits Review process does exist within complaints schemes such as EWOV, this is an internal one. It remains unclear how a matter is dealt with when there is dissatisfaction with complaints handling and perceptions of bias or undue delay in dealing with a matter warrants external input. These matters are discussed in considerable detail in subdr242part4.

Within that submission a full account of a case study example of unsatisfactory case handling is cited as well as a full case study the subject of complaint against the energy supplier involved (supplying bulk “*hot water services*” through licenced to sell only energy) and also about the policies seen to be driving unacceptable conduct.

In this case, it was appropriate to make timely external referrals since many matters were out of jurisdiction, such as policies, tariffs, legal interpretation of policies and legislative enactments. That was a matter in which clear cut debtor issues or hardship policies were not in issue in the substantive components of the complaint which were essentially about a dispute over the legitimate existence at all of any contract, despite the existence of policies. Thus there were many matters entirely out of jurisdiction that ought to have been referred. There was no doubt that these issues were systemic, even by the admission of the subject of complaint, who expected to continue unacceptable conduct unless restrained by the regulator.

Therefore, at least this example was one of perceived procedural unfairness unlikely to be resolved internally, since the decision to seek legal advice and use flawed legal argument to bring the complaint to a close must have been a policy one. Further explanations concerning this case example are provided in ssubdr242part4.

Consistency of the quality of service provisions and in decision-making varies enormously between schemes, despite any efforts to minimize this. Peter Mair’s

submission 112 and Professor Luke Nottage's submission 114 to the PC highlight some concerns and these are further discussed in considerable detail in subdr242part4.

Investigations of complaints by industry-specific complaints schemes do not involve direct mediation with face to face contact between disputing parties, or any mediation or advocacy at all, and therefore the procedures are more about complaints handling than anything else with conciliatory powers; weak binding powers only if the scheme member is agreeable; and limited jurisdiction. These issues are a significant focus of Part 4, as well as examination of the ADR scenario and the extent to which most of the schemes so labeled can be appropriately included under that heading

There have been no binding decisions made by EWOV in the last four years. At the time of the FOI examination of records by EAG and their disturbing report, only two binding decisions had been made by EWOV between 1998 and 2004.

I refer to the views expressed by Professor Luke Nottage¹⁴ about the remarkable uncertainties surround industry-specific complaints scheme, and in particular the issue of governance under administrative law or contract law in binding decisions.

I also refer to the views expressed by Peter Mair¹⁵ in relation to industry-specific schemes as submitted to the Productivity Commission's now completed Review of Australia's Consumer Policy Framework.

There is also the report by Andrea Sharam (2004),¹⁶ it had been reported that:

“.....taking complaints to the EWOV frequently leaves the customer in the position of having an unaffordable instalment plan.”

Complaints figures on their own mean very little without looking at the seriousness of the complaint, how indicative this may be of systemic problems and the generally low figures amongst those who don't complain at all, but silently suffer. That is why EWOV took the step of expressing discomfort in their submission to the AEMC's First Draft Report concerning the use made of relatively low numbers of complaints.

These details are provided to illustrate what has been happening through the existing jurisdiction BHW arrangements in three jurisdictions, Victoria, South Australia and Queensland.

The Complainant's current position is that no contract with the energy supplier existed, ought to have existed or should exist.

The letters of threat have resumed. EWOV has been informed. Further correspondence with the DPI is pending.

¹⁴ Nottage, Luke (Prof) (2008) Response to Productivity Commission's Draft Report subdr114

¹⁵ Mair, Peter (2008) Response to Productivity Commission's Draft Report sub 112

¹⁶ Sharam A (2004) *“Power Markets and Exclusions”* Financial and Consumer Rights Council, Melbourne Found at <http://www.vcross.org.au/images/reports/Full%20Report.pdf>

I cite below the deidentified contents of the letters of coercive threat issued addressed to “*The Occupier*” of the Tenant’s premises, being his apartment. There is no energy of any kind associated with hot water provision supplied to his premises facilitating the flow of gas to his premises. Yet he is being held contractually liable for sale and supply of energy and threatened with disconnection of his heated water unless he accepts an explicit contract with the supplier.

He is not prepared to undertake this and believes that the supplier should contact the Landlord directly.

That this was clear evidence of a systemic problem is unquestionable. It was a photocopied letter-box drop and issued to all new tenants taking over tenancy who had not already been coerced in a similar way into forming an explicit contract under pain of disconnection of essential services.

The letters of threat have been resumed.

Both VESC and EWOV refused to deal with the matter as a systemic issue from a statutory policy perspective or from the perspective of supplier conduct.

The first statement of Letter No. 1,¹⁷ taken from the actual wording of a letter received in a letter-box drop addressed to “*The Occupier*” of a residential apartment supplied with bulk hot water through a single bulk gas meter on the common property infrastructure of an OC entity¹⁸ is misleading where gas or electricity provided is not individually measured on site using meter as an instrument that measures the quantity of gas passing through it and associated equipment attachment to that meter. Gas does not pass through water, and neither do individual tenants have separate gas meters to measure actual consumption.

The quoted deidentified letters of coercive threat from a bulk energy supplier is taken from an actual letters of threat received in a letter box drop by an inarticulate, vulnerable and disadvantaged end-consumer of bulk energy with a serious incurable mental illness and a parasuicide history at an exceptionally vulnerable point in his medical history who had no previous knowledge of the existence or the bulk energy supplier; nor any perception of any contractual obligation to that supplier; nor indeed any legal obligation under common law contractual provisions and the specific terms of his residential tenancy lease to form any contractual relationship with that supplier, but was nevertheless the victim of more than one unconscionable letter of coercive threat of disconnection

¹⁷ Though listed as Letter No. 1 may have been the second such letter, with the first being inadvertently discarded as junk mail, being addressed to the new “The Occupier” of rented premises. The previous tenants had explicitly confirmed that no water charges hot or cold were applicable in the absence of water efficient devices, and secondly, in the absence of individual gas meters measuring the heating component of bulk hot water. The residential tenancy lease made no mention of additional charges water, hot or cold, or for the heated component of water provided.

¹⁸ Refer to *Owners Corporation Act 2006* and responsibilities of such entities
Refer also to the specific terms of the revised Memorandum of Understanding dated 21 October 2007 between the Essential Services Commission (Victoria) and Consumer Affairs Victoria, the peak Victorian consumer body with regulatory responsibility for the Owners Corporation Act, 2006, the *Residential Tenancies Act 1997*; the *Fair Trading Act 1999*, and some 47 other enactments.

within seven days of essential services (hot water supplies) already included under the terms of his rental lease.

Even after establishing from the energy-specific complaints scheme that the recipient had such a history and peculiar vulnerabilities, the retail energy supplier of bulk energy to a multi-tenanted property shamelessly stated that the same conduct would be perpetuated anyway, on the basis that current regulatory policy sanctioned it. If that is the interpretation made of policy, or indeed the intent of the policy, something is wrong, and needs to be urgently corrected in the public interest.

Letter 1

Reproduced deidentified contents of coercive letter of threat delivered as a photocopied letter-box drop to a real-life residential tenant, in this case an inarticulate vulnerable and disadvantaged end-consumer of bulk energy whose energy consumption could not possibly be accurately measured through the methodologies sanctioned by policy-makers and energy regulators, being such methodologies as contravene the intent and spirit of trade measurement practice and equivalent to measuring a bag of apples with an oil funnel.

Date

“As you may be aware your hot water supply is provided through a communal or ‘bulk’ service and its body corporate. We are writing to advise that the body corporate has chosen (name of company) to supply the gas for this service.”¹⁹

This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment²⁰. In order to do this we need to set up an account for you.²¹

¹⁹ This first sentence implies a contract with the Body Corporate who chose the supplier. A supply charge applies before any tap is turned on simply because of the provisions for the gas to be supplied to the metering infrastructure. The landlord commences to take supply from the moment of accepting the arrangements and allowing the metering equipment to be installed. The single bulk gas meter for each building is readily accessible and situated on common property infrastructure. Under the law the Landlord or OC is responsible for common property infrastructure. The landlord cannot charge for gas that cannot be measured with an instrument designed for the purpose that can be accurately apportioned to the end-user.

²⁰ This statement is misleading and does not explain what is meant by individual monitoring. Some would take it to mean that separate gas meters existed

²¹ This statement does not in any way explain the implications of a deemed contract unilaterally imposed, the basis for calculation of contractual imposition or the obligations expected under the implied contract.

Please contact us on (telephone number provided) to set up your account or alternatively complete the form below and return it in the reply paid envelope provided (no stamp required).

If we don't hear from you within seven (7) days from the date of this letter, your apartment's hot water supply may be disconnected until we receive your details.²² Please note that any of the information you give to us is treated confidentially, in line with privacy laws.

As a gas and electricity retailer, we can also supply your other household energy needs. If you would like more information on this, please mention it when calling and we'll be happy to help.²³

We'd like to thank you in advance for your assistance and take this opportunity to welcome you to (name of energy supplier)"

Signed: Billing Manager

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title_____ 2. First name_____ 3. Surname_____
4. Supply address <<street>>, <<suburb>><<state>><<postcode>>
5. Supply address (if different from above)_____
6. Postal address (if different from above)_____
7. Telephone number (B/H)_____ 8. Telephone number (A/H)_____
9. What date did you take possession of the property_____
10. Do you own or rent the property? (please tick) Owner (if owner, go to question 14) Tenant
11. If tenant – Landlord/Agent name_____
12. Landlord/Agent address_____
13. Landlord/Agent telephone number_____
14. Your Date of Birth_____ 15. Drivers Licence number_____
16. Do you qualify for a Concession? (please tick) Yes (if yes, go to question 17) No
17. Concession type_____ Card number_____ Expiry date_____

²² This is where the threat lies. It is an unwarranted and unjust demand to form a contractual relationship with the wrong party. The notice time is 7 days not 10 and is an unjustified coercive demand to set up an explicit contract without explanation as to why a deemed contract is assumed

²³ Following on from a coercive threat to disconnect without showing just cause this is an insult. The letter does not specify whether the intent was to disconnect water or gas

Letter 2

Further Deidentified coercive letter of threat send to a real-life residential tenant:
(this was taken to be the second such letter, but on reflection and looking at the dates again there may have been one that was missed altogether as junk mail addressed to “The Occupier” of rented premises who had recently assumed tenancy

Issued during the course of an unresolved complaint before the industry-specific complaints body in contravention of the provisions of the *Fair Trading Act 1997* and the applicable *Energy Retail Code*, besides being an unconscionable letter of threat after being notified of the peculiar vulnerabilities of the recipient of coercive threat. That the breaches occurred is unquestionable

“Your hot water supply is provided through a communal bulk service by your building or body corporate. (Name of energy supplier) owns the water meters and supplies the gas for this service.”²⁴ The hot water is individually monitored and the quantity used by each apartment is billed directly to each apartment.”²⁵

“This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment. In order to do this we need to set up an account for you.”²⁶

“Our records show that hot water is being consumed through your meter²⁷ but an account has not yet been established for you. Please contact us on (telephone number given of energy supplier) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required).”

²⁴ Ownership of the water meters does not impose any contractual relationship. The supplier is licenced to sell gas not water.

²⁵ The phrase individually monitored is misleading

²⁶ No gas passes through water meters. Individual consumption of the energy used to heat each tenant’s actual share of energy cannot be calculated using the practices in place. These will in any case become invalid and illegal when the remaining utility restrictions are lifted under national trade measurement laws and meanwhile contravene the spirit and intent of those laws and best practice.

²⁷ The use of the term meter misleadingly implies a gas meter that is individual to the tenant. Retailers are licenced to sell gas or electricity not composite products. The water is supplied by the water authority and paid for by the Owners Corporation. The cost of water hot and cold is included in the rent.

“If we don’t hear from you within seven days from the date on this letter²⁸ we may need to initiate steps for disconnection of your apartment’s hot water supply.²⁹ If this occurs we will not be able to connect this service until we receive your details.³⁰ Please note that any of the information you give us is treated confidentially in line with privacy laws.”

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title _____ 2. First name _____ 3. Surname _____
4. Supply address <<street>>, <<suburb>><<state>><<postcode>>
5. Supply address (if different from above) _____
6. Postal address (if different from above) _____
7. Telephone number (B/H) _____ 8. Telephone number (A/H) _____
9. What date did you take possession of the property _____
10. Do you own or rent the property? (please tick) Owner (if owner, go to question 14) Tenant
11. If tenant – Landlord/Agent name _____
12. Landlord/Agent address _____
13. Landlord/Agent telephone number _____
14. Your Date of Birth _____ 15. Drivers Licence number _____
16. Do you qualify for a Concession? (please tick) Yes (if yes, go to question 17) No
17. Concession type _____ Card number _____ Expiry date _____

²⁸ This was a junk mail letter that was placed in the letter box of the Tenant. It had a most detrimental impact on the consumer at a time of instability and stress. Again it was an unjustified and coercive threat of disconnection of essential services, with reconnection only possible after formation of a contract by identifying. Such a communication assumes that the complaint has seen and understood it. There was no follow up or further explanation. This communication was issued whilst a complaint was still open before the Complaints Scheme and therefore in contravention of the provisions.

²⁹ This is a further threat of disconnection that is coercive, unwarranted and unjust. This time it is clearly that the intent is to disconnect hot water supplies. Again the licence covers gas not hot water supplies.

³⁰ This is a further threatening an coercive statement that is unjustified

Letter 3

Further Deidentified coercive letter of threat send to a real-life residential tenant:

This third letter was received by post some weeks after closure of a file that had remained open before EWOV, the industry-specific complaints scheme for 18 months. Despite regulator and policy-maker involvement (VESC and DPI) the matter remains unresolved and contested as to the existence of any contractual relationship with the supplier, necessity to form one, or to facilitate one

This letter refers to a previous letter of a month earlier which appears to have been either missed, not sent or discarded as junk mail

Dear Sir/Madam

Your Hot Water Supply

Further to our recent letter dated (date given) we are writing to request your assistance once again.

Your hot water supply is provided through a communal to "bulk service" by your building and/or its body corporate. (Supplier's name) owns the hot water meters and supplies the gas for this service. The hot water is individually monitored and the quantity used by each apartment is billed directly to the respective apartment

Our records show that hot water is being consumer through your meter but an account has not yet been established for you. Please contact us on (Telephone number provided) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required)

If we don't hear from you within (7) days from the date on this letter, we may need to initiate the steps for disconnection of your apartment's hot water supply. If this occurs, we will not be able to reconnect this service till we receive your details. Please note that any of the information you give to us is treated confidentially, in line with privacy laws

As a supplier of gas and electricity, we can also assist you with your other household energy needs. If you would like more information on this, please mention it when calling and we'll be happy to help.

Thank you for your corporation

Yours sincerely

(name) Billing Manager (host energy retailer)

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title _____ 2. First name _____ 3. Surname _____

4: Supply address³¹ (apartment no and street address inserted)

5. Supply address (if different from above) _____

6. Postal address (if different from above) _____

7. Telephone number (B/H) _____ 8. Telephone number (A/H) _____

9. What date did you take possession of the property _____

10. Do you own or rent the property? (please tick) Owner (if owner, go to question 14) Tenant

11. If tenant – Landlord/Agent name _____

12. Landlord/Agent address _____

13. Landlord/Agent telephone number _____

14. Your Date of Birth _____ 15. Drivers Licence number _____

16. Do you qualify for a Concession? (please tick) Yes (if yes, go to question 17) No

17. Concession type _____ Card number _____ Expiry date _____

³¹ Supply address and supply point are synonymous terms meaning gas connection facilitating the flow of energy to identified premises. These terms do not have postal connotations and do not refer to living space. They are very specific in the legislation and the Gas Code in relating to an energy connection point. No such connection point in relation to the hot water supplied exists. The heated water is reticulated in water pipes to the individual apartments after being heated in a communal water tank on common property infrastructure. There is no authority within current provisions to disconnect water. The provisions relate to gas or electricity.

Ownership of the hot water flow meters does not create a contractual relationship. There is no evidence that the meters were fitted in accordance with water authority regulations or licencing. Even if they had, the supplier is endeavouring to charge for energy, which cannot be measured with a water meter, and notwithstanding policies in place.

Madeleine Kingston

Prepared by Madeleine Kingston

**LETTERS OF COERCIVE THREAT BY A
HOST ENERGY SUPPLIER (actual
wording)**

PARODIED VERSION ANALYSIS

**DISCUSSION OF IMPLICATIONS OF
UNJUST DEEMED CONTRACTUAL
STATUS FOR RECIPIENTS OF
COMMUNALLY HEATED WATER
RECEIVING NO FLOW OF ENERGY**

³² Attachment 10 Deidentified Case Study refers. See also other case studies as attachments and main submission

PARODIED PARAPHRASED VERSION OF LETTERS OF THREAT

Providing modified informed consent under threat

See legal metrology and contractual implications, as well as conflict and overlap with other schemes, including residential tenancy; owners' corporation and the spirit and intent of national trade measurement regulations current and proposed Perhaps this more extended paraphrased version of the implicit messages contained in the two intercepted threats of disconnection of essential services.

“The Policy-Maker and Regulator have allowed retailers directly or through various ‘metering services’ and ‘billing services’ to use water meters to pose as gas meters.”³³

It would take too long to explain to you the confusing practically unintelligible algorithm formula used to calculate the deemed heating component of your heated water consumption. The use of such formulae means that we don’t have to bother about any of those issues which saves processing time and means we can outsource metering and billing issues, factor in the add-on costs and still make a profit – at your expense.

I don’t understand the Guidelines myself, which will soon be transferred to the Energy Retail Code, which will make it look more formal³⁴.

I don’t have any copies with me but the Regulator will confirm that this practice is fine.

We just do the best we can with estimates and deemed consumption and notify you of your deemed status just as soon as we are able. It is no use talking to me about contract law or legal traceability as that is too complicated for me to go into.

Though we are licenced only to sell energy, we arranged to purchase satellite water meters so that we could claim that we are monitoring your “hot water consumption” for the water used and if necessary force you into a contract by threatening disconnection of your hot water.

These hot water flow meters are theoretically used to calculate your gas usage for the heated component of the water you actually use. We know you don’t have keys to the boiler room and probably don’t feel very comfortable about a contract which forces you to recognize the gas meter as an appropriate instrument through which gas can be measured for your individual consumption of the heated component of your water.

³³ Policy guidelines and deliberative documents do exist. These carry no weight in law. Transfer from deliberative documents and Guidelines to an Energy Code will not help to validate them any further. The energy legislation refers to a meters as instrument that measure the quantity of gas that pass through that instrument and its associated metering installation to filter control and regulate the flow of gas through that equipment. Water meters are not such instruments, but they pose well as ancillary gas meters and they are allocated them proper meter numbers under the “gas usage” column of the bill so everything looks to be in order. The actual energy meter is given a number with an MIRN prefix, and there is normally only one of these in a bulk hot water gas installation. However, many apply supply charges just the same; and some apply commodity and water meter reading charges as well, which escalate the costs

³⁴ This occurred following the 2008 ESC Review of Regulator Instruments, creating v6 of the Energy Retail Code. Further amendments were made in February 2010, effective from April 2010. The entire interpretation section is included as an Appendix elsewhere.

We just divide amount of water used by the number of tenants on the block and that is how we can make estimates how much deemed gas was actually used to heat the water you actually receive.

The hot water flow meters (or in some cases just a master cold water meter) are there mostly for looks because we are not actually required to read any meters on site. This was thought to be too expensive an exercise and time-consuming and may lead to price shock to end-consumers.

Many claim that they are not legally contractually obligated in any case, and the bills should go to the Landlord or Owners Corporation, but that is beside the point.

When smart meters go in remote disconnection can occur, but for water meters effectively used as gas or electricity meters this presents a problem for us since for multi-tenanted dwellings we are disconnecting hot water flow meters instead of gas and electricity meters.

In Victoria the calculation formulae policy used is subject to change by the policy maker Department of Primary Industries or the Essential Services Commission, whichever of the two is holding the ball at the time. The repeal of the Guideline may mean that the some of the crucial documents providing information about how calculations are made may not be as available as before online. Whilst I cannot predict precisely how the formulae will work, I know a little about the rationale that was adopted without altogether understanding the finer details.

Algebra was never by strong point at school so no use asking me how to interpret it all. In any case I am only the messenger as the energy supplier has offloaded these unattractive duties to third parties. As far as I can recall, the formulae goes something like this, but don't ask me to explain what each of the letters mean, I couldn't tell you and I am no good at maths as I said

Definition

*Cost of supply (Charge) 'theoretical' revenue = (B) = (L * X) + (M * Y) + (N * Z)*

No site readings necessary but we can charge supply and other commodity charges to everyone and perhaps even water meter readings. We do not have to declare each component of non-energy charges.

Where L = megajoules recorded as master meters (supplied by retailers)

X – Tariff 10 commodity charge (as per government gazette)

M= Tariff 10 commodity charge (as per government gazette)

Y = Tariff 10 per site supply charge (as per government gazette)

I don't understand the Guideline or Code myself and I don't have any copies to provide you or the deliberative documents that explain it further but the Regulator will confirm that this practice is just fine. They will stand by us on this so we have every confidence that you will eventually be forced to accept this deemed contract.

Even though gas does not pass through water meters we have been allowed to make a magical calculation by dividing this number by that in a process of complicated algebraic algorithm formulae. This helps us to can figure out with some creative

guesswork how much heat is used in your portion of the heated water supplied from the communal water tank.

We were even told that we don't need to read the meters, but we've installed water meters just in case. These are either leased or purchased outright by retailers. We can apply a water meter reading charge, and meter maintenance charges, either bundled or unbundled (for example supply charges, commodity charges, hidden FRC charges, other cost-recovery for unrelated costs incurred) directly or through our contracted metering and billing service every two months. These services are known as backroom tasks and are generally arranged through Distributors. The retailers' job is just to sell energy.

The charges will be in cents per litre even though gas does not pass through water meters and gas is normally measured in megajoules. But in Victoria and South Australia we will place MJ/litre also on the bill so it looks as if gas is involved in the calculation. In Queensland we only have to show cents/litre. Either way we use water volume to calculate actual gas usage by each individual in separate residential premises in multi-tenanted dwellings. However, all we are required to do theoretically is to read the water meters. Site reading is not essential.

Even though we don't have to take a meter reading, we are entitled to charge each tenant on the block for water meter reading. This is because the gas (or electricity) distributor charges us. The charge for manual reading is much lower than for remote reading, but we only have to worry about manual reading if your meter was installed before July 2003. Eventually for those using electricity and hopefully also gas they will be able to make a remote disconnection so it saves us all this walking around and extra costs.

You will be charged according to how many litres of hot water is registered on your hot water flow meter, that is water volume, (or as calculated from a master cold water meter) even though we cannot precisely measure the amount of gas used or how hot or satisfactory it is, or whether you were actually residing in the apartment during part of all of the billing period. We also cannot know how many residential tenants or visitors may be using heated water, and this does not matter since we are just required to divide the total usage of gas by the number of residential premises involved to calculate each party's share or deemed gas or electricity usage.

Billing cycles that fall between move-in and move-out events cannot take account of these movements, since because of the method used to calculate cost, whoever is in tenancy at the time the bill must pay for "hot water services" according to the billing cycle. This means some new tenants may finish up paying for part of someone's bill. Unfortunately there are no provisions to lodge complaints to energy and water ombudsmen on issues such as this.

Supply charges will be calculated by reading a single bulk gas meter and dividing the supply costs to a single energization point by the number of tenants (or other occupiers) residing in the apartment block. If someone leaves during a billing cycle the next person inherits the bill. If someone is staying elsewhere for the whole billing period, the simple calculations permitted mean that everyone has to take equal share.

If there are several parties living in one apartment and only one occupier in another, the deemed share of energy is evenly divided.

Some retailers charge for a water meter reading fee because the distributor charges for that so they have to make a cost-recovery, even though we are not licenced to sell water and do not own the water in any case. We are entitled to charge each tenant on the block for water meter reading, but sometimes it is just call it a supply charge, rolled over charge or commodity charge.

There is really only one master gas meter (or electricity meter) with a single number called an MIRN. For settlement purposes through VENCORP³⁵ regards the gas meter as a single supply point. In addition, as far as I know the Gas (Residual Provisions) Act 1994 regards supply points used to heat communal water tanks as single supply and billing points, but these new rules mean we don't have to bother about those things. We can make cost-recovery many times over by charging each individual tenant for services supplied to a single gas master meter for which the landlord contracted, all the better.

For our purposes we regard your apartment as being the supply address. Some people say that supply address/supply point are technical terms meaning energy connection energization or re-energization point, we prefer to use it as a postal term referring to your premises. It is no use talking to me about "flow of energy" as I am only the messenger instructed to issue you with disconnection warnings if you don't sign up.

We know you do not have a supply (re-energization) point in your apartment associated with your bulk hot water supplies, and that the water is reticulated to your residential premises in water pipes through which no gas can pass.

In any case the water meter does a pretty good job as a substitute ancillary meter so we just measure the quantity of hot water you consume and work out by a deemed guess how much gas it took to heat it.

However, we can't vouch for water temperature or quality or anything else and there seem to be no real rules about water meter maintenance.

Ambient pressure and temperature also affect the relationship between volume and heating value supplied. For example, a 2.7 degree Celsius change in air temperature will result in a 1% change in accuracy of gas supplied.

However, these are not matters that can be addressed when considering water quality and temperature, since our focus is on water volume only.

The regulator told us this would be a fair and reasonable way so we can just determine how much water in total everyone has used and then make a guess as to how much gas was used to heat that water and then determine how much deemed hot water you actually received.

As mentioned, we just divide volume of water used by the number of tenants on the block and that is how we calculate how much gas was actually used to heat the water you are using.

We don't concern ourselves too much about heating value, ambience or any of the other technical details since the focus of our trade measurement practices is simply water volume and guesstimates about individual usage by tenants in apartment blocks and flats

³⁵ Now incorporated under the Australian Energy Market Operator

Some say that there is an important relationship between the energy supplied to a customer versus the volume supplied to a customer. The gas meter records gas volume. The gas bill normally is based on energy supplied. The hot water flow meter can only calculate water volume not heat or energy.

The Code that the Regulator provides says we don't have to actually do any meter reading because site visits are too expensive for us and mean two trips to read the gas meter on the wall of the car park and also the water meters in the boiler room. We need the water meters so that if we find that a tenant is not really cooperative about signing up we can threaten to disconnect his hot water supplies. That is a strategy that normally works.

Sometimes we go ahead with the disconnection of heated water by clamping the hot water flow meters. In those cases unless a tenant signs up and pays a reconnection fee, hot water services are permanently suspended. I read about a case like that not so long ago, but can't remember where I saw it.

The energy laws say disconnection refers to gas or electricity, but it is overlooked if we choose to suspend the heated water supplies instead. It is not practical to cut off the gas or electricity in these cases as there is only one master gas meter and it would affect all the other tenants.

You probably would not buy a bag of apples if someone tried to weigh them in an oil funnel but this is just hot water and there are many ways to find out how much as you use that don't rely on a separate gas meter for you or any party uses in multi-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. These arrangements were adopted prevent price shock to you. They won't guarantee prevention of rent hikes, and there is the question of additional charges for water meter reading fees, commodity and other supply costs and water meter maintenance costs which will bump up your bill. It must be confusing for you to figure out whether this is a water or energy market but those are the Rule or Codes.

Just for our protection we need you to take contractual responsibility for paying all gas consumption charges that we can individually monitor through your water meter theoretically reading the single master gas meter on the wall of the car park and the satellite water meters in the locked boiler room. We calculate volume of water used in total and how much gas in total was used to heat the boiler tank.

The main thing is that we can individually monitor your consumption through your water meter.

Even if you have an arrangement with the landlord and your mandated lease arrangement indicates that hot and cold water are included in your rent, those are matters for you and your landlord.

We just act as metering and billing agents and have the Landlord's or Owners' Corporation blessing to bill you directly under pain of disconnection of your heated

water services. The energy retailer and distributor believe that if they own or lease the water infrastructure hot water or cold flow meters), a contact with you is immediately determined even if you receive no flow of energy to your apartment.

The energy regulator says it is OK for us to bill you a second time for water because the Tenancy Act does not cover it, so we are in the clear with that.

Metering services have become a new and mushrooming industry, and does not carry as much risk as the hedging arrangements that retailers are obliged to cover.

The distributors set the price; retailers carry the risk and arrange for the marketing of energy, metering services can focus on issues that carry minimal risk.

In outsourcing metering, backroom and IT tasks to others we have to up the costs to cover middlemen expenses, but we just add this to your end-user costs and don't have to bear this cost personally as a commercial company. We have enough to worry about with hedging arrangements so can't take on all price shocks and feel these should be equally shared.

Even if you have an arrangement with the landlord and your lease indicates that heated water is included in your rent because of the standard lease protections in the Tenancy Act and the absence of a separate gas meter for the heating component, that is a matter for your and your landlord.

The Water Authority sells the water to the Owners Corporation at the outlet of the mains meter and after that it is a free for all. The commercial opportunities are huge.

I don't know anything much about the Residential Tenancies Act, but someone mentioned that if you think these arrangements are unfair you can always pay us upfront, give the bill to your landlord, allow him 28 days to pay and if he does not agree to reimburse you can pay filing fees to VCAT every three months to reclaim the money. We know it's inconvenient and costly and your filing fees over several visits might diminish or even cancel out the value of reimbursement. But that's the best we can suggest for you. Life is full of things that are unfair and VCAT understands that. That is what s55 is for.

It's just that we don't have the time to chase up the landlord and he is never around when we need to get to the meter, so we need to hold someone responsible.

If you have a problem with this you can always ask you landlord to refund you, but if he does not agree you can reclaim costs through VCAT after paying a filing fee. You need to give your landlord 28 days to decide whether he will reimburse you before you can go to VACT to reclaim the money, so we know it's inconvenient and costly and your filing fees over several visits might diminish the value of reimbursement. Sometimes even VCAT Orders for reimbursement don't work out as the Landlord refuses to pay.

It's just that we don't have the time to chase up the landlord and he is never around when we require to get to the meter, so we need to hold someone responsible. Therefore once you sign up with us and provide your details, we will hold you responsible to provide us with safe unhindered and convenient access to the water meters, even if they are locked up and you don't have the key. The energy laws call this a "condition precedent."

These hot water flow meters are theoretically used to calculate your gas usage for the heated component of the water you actually use. We know you don't have keys to the boiler room and probably don't feel very comfortable about a contract which forces you

to recognize the gas meter as an appropriate instrument through which gas can be measured for your individual consumption of the heated component of your water.

Even though we don't have to take a meter reading, we are entitled to charge each tenant on the block for water meter reading. This is because the gas (or electricity) distributor charges us. The charge for manual reading is much lower than for remote reading, but we only have to worry about manual reading if your meter was installed before July 2003.

Even though there is only one gas bulk meter supplying the single boiler tank that sends water to each tenant on the block, we can charge for water meter reading costs we can charge each tenant for calculating their gas consumption. That is part of the deal.

No-one has taught us much about contract law, substantive unfair terms or principles of legal traceability in calculating consumption of measurable commodities, but if you need a lawyer I am sure Legal Aid or one of the community agencies can get you the advice you need about that. Poor funding may mean a long wait or no assistance at all, so I urge you to sign up if you want your heated water supplies to continue.

The reason that we prefer also to have landlord details is that if anything goes wrong and you are unable to pay up for energy that you don't receive in the first place, we can always shift the contract back to the Owners' Corporation who permitted us to install the water meters and requested the installation of the single gas meter used to heat the single boiler tank at the time that the building was erected.

These letters are addressed to "The Occupier" until we can get someone to sign an explicit contract. Most people feel a bit intimidated by the prospect of losing their hot water within a week to ten days, so they give in without a fuss. After that it is plain sailing because we can quickly set up an account for you and make you contractually responsible.

The quickest way for us to let everyone know what we expect is to send a "vacant consumption letter" like this to everyone by making a letter box drop. It may sound like a threat to you but its all part of a normal day for us. It's not intended personally so you should not let it upset you. You have 7 days to pay up but we can stretch it to 10 to meet the regulatory requirements, but that is all. Sign up or lose your hot water services altogether. Our excuse is that you have not provided your personal identification details or provided access to the water meters that we use to calculate your gas consumption.

Therefore once you sign up with us and provide your personal identification details and those of your landlord, we will hold you responsible to provide us with safe unhindered and convenient access to the water meters that are theoretically used to calculate your gas usage for the heated component of the water you actually use. These are called conditions precedent and subsequent.

The Guideline that the Regulator provides says we don't have to actually do any meter reading because site visits are too expensive for us and mean two trips to read the gas meter on the wall of the car park and also the water meters in the boiler room. These readings are often taken two or three months apart so very difficult to match up dates and actual consumption and does not take account of any tenant movement or absence from

the property. We knew there would be some inequities built in to the scheme but we can't please everyone.

Some of the information required is beyond what the Energy Code actually requires but we need this for our own records.

We know you don't have keys to the boiler room and probably don't feel very comfortable about a contract which forces you to recognize the water meter as an appropriate instrument through which gas can be measured for your individual consumption of the heated component of your water.

It's just that we don't have the time to chase up the landlord and he is never around when we need to get to the meter, so we need to hold someone responsible. Therefore once you sign up with us and provide your details, we will hold you responsible to provide us with safe unhindered and convenient access to the water meters, even if they are locked up and you don't have the key. The energy laws call this a "condition precedent."

Sometimes we go ahead with the disconnection of heated water by clamping the hot water flow meters. In those cases unless a tenant signs up and pays a reconnection fee, hot water services are permanently suspended. I read about a case like that not so long ago, but can't remember where I saw it.

The laws say disconnection refers to gas or electricity under the energy laws, but it is overlooked if we choose to suspend the heated water supplies instead. It is not practical to cut off the gas or electricity in these cases as there is only one master gas meter and it would affect all the other tenants.

The reason that we prefer also to have landlord details is that if anything goes wrong and you are unable to pay up for energy that you don't receive in the first place, we can always shift the contract back to the Owners' Corporation who permitted us to install the water meters and requested the installation of the single gas meter used to heat the single boiler tank at the time that the building was erected.

We need the water meters so that if we find that a tenant is not really cooperative about signing up we can threaten to disconnect his or her hot water supplies. That is a strategy that normally works but you are not meant to take it personally; it's just part of the process. You will have to be a bit more diligent about protecting your rights when the remote control options for disconnection become available.

You will find these definitions in the Energy Retail Code as transferred from the existing Bulk Hot Water Charging Guideline 20(1). One revision of the Energy Retail Code (Vict) became effective on 1 January 2009

gas bill means a bill or account issued by a licensee to a customer for the supply or sale of gas;³⁶

³⁶ Gas cannot be said to be sold or supplied unless there is a) an actual connection facilitating the flow of gas; the gas is transmitted in gas service pipes directly to the alleged recipient of that gas. Neither is the case when end-users of heated water receive a composite water product that contains no gas at all. The water meters measuring water consumption cannot measure either heat or gas. No gas pipes lead from the water tank, misleadingly referred to as a bulk gas hot water system, which implies that it is gas that is reticulated in gas service pipes. No such thing occurs. Water is transmitted in water service pipes not gas pipes or electrical conduits. No gas passes through hot water flow meters. No energy at all is

gas bulk hot water means water centrally heated by gas and delivered to a number of customer supply addresses³⁷ where the customer's consumption of hot water is measured with a meter³⁸ and where an energy bill is issued by a retailer.

gas bulk hot water rate means the gas price in cents per litre³⁹ that is used by a retailer to charge customers for energy in delivering gas bulk hot water.

received by end-users of “bulk hot water” and no legally traceable measures are available through which alleged gas or electricity consumption can be achieved within the existing BHW arrangements in three jurisdictions.

³⁷ The term supply address is mistakenly used within the *Energy Retail Code* as implying the residential premises of an end-user of utilities. In fact for energy it is a technical term meaning supply or connection point in which a flow of energy is facilitated directly to the premises deemed to be receiving the energy. In the case of heated water, the energy is not so supplied and there is no flow of energy except to a single supply point/supply address on common property infrastructure supplying heat to a single communal water tank from which water as a composite product is reticulated to individual residential premises within multi-tenanted dwellings

³⁸ The volume of water consumed can indeed be measured with a hot water flow meter. This device cannot measure heat or gas volume or electricity. It simply measures water volume. The BHW arrangements endorse the application of conversion factors that cannot possibly calculate or approximate the amount of gas used. Though bills issued show a column marked “gas usage” with precise figures in this column, as well as entries against heating value, which also cannot be calculated; and a meter identifying number other than an MIRN, all implying the existence of a gas meter, there is in fact no question of being able to calculate gas usage by using a hot water flow meter. By referring simply to meter and not clarifying this on communications or on the bills, a misleading impression as to the validity of the calculation is gained.

Energy providers are licenced to sell gas or electricity not heated water supplies. Disconnection notices not blatantly refer to disconnection of hot water services, though and energy provider has no licence from the economic regulator or water provider to sell, supply or disconnect this.

Disconnection under the *Gas Distribution System Code* has a particular meaning “*the separation of a natural gas installation from a distribution system to prevent the flow of gas.*”

Alternatively *decommissioning* in relation to a *distribution supply point*, is to take action to preclude gas being supplied at that *distribution supply point* (e. g. by plugging or removing the *meter* relating to that *distribution supply point*”

³⁹ This represents appalling trade measurement practice and against the spirit and intent of trade measurement laws. When remaining utility exemptions are lifted this will be an invalid calculation and will show inaccurate measurements of the commodity being supplied – i.e. energy. Yet retailers see fit to disconnect water supplies if an alleged energy bill is not paid or contractual relationship formed.

69 of 97

*Regarding billing, there were to be new additions to the Victorian Energy Retail Code which became effective on 1 January 2009. The changes represented mostly transfer from the Bulk Hot Water Charging Guideline 20(1) which is to be repealed. This apparently means that where a **retailer** charges for energy⁴⁰ in delivering either **gas bulk hot water** or **electric bulk hot water** to a **relevant customer**, the **retailer** must include at least the following information (as applicable) in the **relevant customer's** bill:*

*the relevant **gas bulk hot water rate** applicable to the **relevant customer** in cents per litre*

- the relevant **electric bulk hot water conversion factor** for **electric bulk hot water** in kWh/kilolitre;*
- the relevant **electricity rate(s)** being charged to the **relevant customer**⁴¹ for the electricity consumed in the **electric bulk hot water** unit in cents per kWh;*
- the relevant **electric bulk hot water conversion factor** for **electric bulk hot water** in kWh/kilolitre*

⁴⁰ The retailer does not deliver energy at all to the end-user of heated water products. The water received is a composite product delivered in water pipes. The energy is supplied to a single gas meter (or electricity meter) on common property infrastructure and is used to heat a communal water tank belonging to the Landlord. The heated water is a mandated part of residential tenancy leases in the absence of a gas meter (or electricity meter) and an integral part of the tenancy arrangements. The energy regulator and policy-maker have made arrangements that could be construed as 3-way cartel arrangements, encouraging landlords to dishonour their residential tenancy obligations; forcing retailers to use methods that are legally and technically unsustainable and unsound; that violate best practice trade measurement practice; that conflict and overlap with other regulatory schemes and with the enshrined rights of individuals under multiple provisions in the written and unwritten laws.

⁴¹ A relevant customer under the legislation is one who consumes no more than 10,000 GJ of gas per annum, and is not restricted to a natural person. The ERC has endeavoured to re-define legislated definitions such as meter (*Gas Industry Act 2001*) which in the legislation and the Gas Distribution System Code is defined as an instrument through which gas flows, instead of the new creative definition for BWH provisions as a meter as a device that measures the volume of water consumed. In the context of the deemed provisions under s46 of the *GIA*, the sale and supply of gas it is not my view that the express use of the term relevant can be at will substituted for simply the term "*customer*" within the more general provisions of the *GIA* without distorting the intent of the deemed provisions. Such a substitution which extends the definition of the term "customer" to include "a person to whom a gas company transmits, distributes or supplies gas or provides goods or services" (s3) disregards that the unqualified term "customer" (rather than "relevant customer" is intended to include services such as metering services provided to Landlords and owners/Corporations. These are not the type of goods and services referred to where gas is supplied to end-users of heated water, where no direct connection point exists (supply point or supply address; where no gas of any description enters the residential premises of such an end user of composite water products and where no gas infrastructure. In any case if the term relevant customer can be taken to mean both a Landlord and/or Body Corporate and a residential tenant, for example a user of heated water services

- the total amount of **gas bulk hot water**⁴² or **electric bulk hot water** in kilolitres or litres consumed in each period or class of period in respect of which the relevant **gas bulk hot water rate** or electricity tariffs apply to the **relevant customer** and, if the **customer's meter** measures and records consumption data only on the accumulation basis, the dates and total amounts of the immediately previous and current **meter** readings or estimates;
- the deemed **energy** used for **electric bulk hot water** (in kWh); and
- separately identified charges for **gas bulk hot water** or **electric bulk hot water** on the **customer's bill**.

CF = the gas bulk hot water conversion factor = 0.49724 MJ per litre

gas bulk hot water tariff = the market tariff applicable to the bulk hot water unit B. Retailer provided gas bulk hot water per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant gas bulk hot water unit divided by the number of customers supplied by the relevant gas bulk hot water unit.

Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.

C. Customer gas bulk hot water charge (cents) = the customer's metered consumption of hot water (litres

** gas bulk hot water price (cents per litre)*

+ customer's supply charge (cents)

A. Where customers are charged for energy in delivering electric bulk hot water either by their local retailer or pursuant to a market contract the Customer electricity bulk hot water charge (cents) = the customer's metered consumption of hot water (kilolitres)

A further revision to the Energy Retail Code, v 7 (February 2010) becomes effective in April 2010

This is how we have been asked to charge from April 2010:

Gas Bulk Hot Water Pricing Formulae

A. Gas bulk hot water rate (cents per litre) = CF (MJ per litre)

** gas bulk hot water tariff (cents per MJ)*

⁴² The term hot is almost extraneous. The hot water flow meter can withstand heat but cannot possibly measure the amount of heat used by individual end-recipients of heated water a composite product from which the heat cannot be separated.

These devices cannot measure gas volume or electricity or heat (energy). Even a gas meter cannot measure heat. (energy) It can only measure gas volume. Bills are expressed in energy. When water meters are used to calculate heat by conversion factor the result is a rule-of-thumb, imprecise and inaccurate and invalid measurement using an instrument not designed for the purpose. Differentiated between heated and cold water is impermissible if a water meter is being used as the device to measure heat. Even where water meters do exist, a licence to on-sell exists to sell that water, it must be at the cold water rate. No utility that does not have a separate meter is the contractual responsibility of the Landlord under tenancy provisions. The existing energy provisions under codes, guidelines and deliberative documents attempt to re-write contractual law, tenancy and owners' corporation laws and trade measurement laws in spirit and intent.

Where customers are charged by their retailer for energy in delivering gas bulk hot water:

$CF = \text{the gas bulk hot water conversion factor} = 0.49724 \text{ MJ per litre}$

$\text{gas bulk hot water tariff} = \text{the standing offer tariff applicable to the gas bulk hot water unit (gas tariff 10/11)}$

Where customers are charged for energy in delivering gas bulk hot water pursuant to a market contract:

$CF = \text{the gas bulk hot water conversion factor} = 0.49724 \text{ MJ per litre}$
 $\text{gas bulk hot water tariff} = \text{the market tariff applicable to the bulk hot water unit B.}$

$\text{Retailer provided gas bulk hot water per customer supply charge (cents)} = \text{the supply charge under the tariff applicable to the relevant gas bulk hot water unit divided by the number of customers supplied by the relevant gas bulk hot water unit.}$

Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.

$C. \text{ Customer gas bulk hot water charge (cents)} = \text{the customer's metered consumption of hot water (litres)}$

* $\text{gas bulk hot water price (cents per litre)}$

+ $\text{customer's supply charge (cents)}$

—

No-one has taught us much about contract law or informed consent or your common law rights, human rights issues, of regulatory overlap matters but if you need a lawyer I am sure Legal Aid or one of the community agencies can get you the advice you need about that.

$C. \text{ Customer gas bulk hot water charge (cents)} = \text{the customer's metered consumption of hot water (litres)}$

* $\text{gas bulk hot water price (cents per litre)}$

+ $\text{customer's supply charge (cents)}$

A. Where customers are charged for energy in delivering electric bulk hot water either by their local retailer or pursuant to a market contract the

$\text{Customer electricity bulk hot water charge (cents)} = \text{the customer's metered consumption of hot water (kilolitres)}$

* $\text{electricity tariff rate(s) applicable to the customer for the applicable electric bulk hot water unit (cents per kWh)}$

* $CF \text{ (kWh per kilolitre)}$

Where:

$CF = \text{electric bulk hot water conversion factor used by retailers to bill electric bulk hot water customers. The electric bulk hot water conversion factor will have a maximum value of 89 kWh per kilolitre. Where customers are currently billed using a lower electric}$

bulk hot water conversion factor, or a lower electric bulk hot water conversion factor for the site is assessed, retailers must bill customers using the lower electric bulk hot water conversion factor

The customer's electricity tariff must be an off-peak tariff if supplied from an off-peak electric bulk hot water unit.

I shouldn't be saying this but you won't get far with any complaints made as the industry complaints scheme and regulator usually take no action over these matters or have no power to do so, or believe that the policy matters belong somewhere else. The main thing is that competition goals are properly met.

The disconnection part is tricky. If we cut off the gas everyone on the block is affected. If we cut off heated water, we can target just the one tenant but it does mean cold showers and very few comforts. No-one is game to face that especially in winter.

The good thing about deregulation and cost-recovery policies is that we just cannot lose, especially in areas where retail choice is denied to individuals, they are a captured market, live in poorly maintained facilities, have few options for alternative rental property, and find the redress options, if they exist at all intimidating, expensive and stressful.

So the bottom line is that you need to form a contract with us or risk having your water cut off. I shouldn't be saying this but you won't get far with any complaints made and the Regulator usually takes no action over these matters because we are following guidelines codes or Rules made.

If you don't sign up and don't pay then we will consider you to be a bad debtor under a deemed contract. At least that is what I believe the regulations will allow, but no-one is clear enough about the contract law part. I am just doing as instructed because of the guidelines. As far as I know the deemed contract expires after two bills, so after that we have an entitlement to disconnect your water supplies under energy Codes and you will in any case be forced to sign a market contract and a re-connection fee to have your water supply reinstated.

Are there any other services that we can offer you today whilst we are discussing your deemed contract with us for deemed use of gas for heating the apartment block's bulk hot water?"

Letter 1 (actual wording)

Reproduced deidentified contents of coercive letter of threat delivered as a photocopied letter-box drop to a real-life residential tenant, in this case an inarticulate vulnerable and disadvantaged end-consumer of bulk energy whose energy consumption could not possibly be accurately measured through the methodologies sanctioned by policy-makers and energy regulators, being such methodologies as contravene the intent and spirit of trade measurement practice and equivalent to measuring a bag of apples with an oil funnel.

Date

“As you may be aware your hot water supply is provided through a communal or ‘bulk’ service and its body corporate. We are writing to advise that the body corporate has chosen (name of company) to supply the gas for this service.⁴³

This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment⁴⁴. In order to do this we need to set up an account for you.⁴⁵

Please contact us on (telephone number provided) to set up your account or alternatively complete the form below and return it in the reply paid envelope provided (no stamp required).

If we don’t hear from you within seven (7) days from the date of this letter, your apartment’s hot water supply may be disconnected until we receive your details.⁴⁶ Please note that any of the information you give to us is treated confidentially, in line with privacy laws.

As a gas and electricity retailer, we can also supply your other household energy needs. If you would like more information on this, please mention it when calling and we’ll be happy to help.⁴⁷

We’d like to thank you in advance for your assistance and take this opportunity to welcome you to (name of energy supplier)”

Signed: Billing Manager

⁴³ This first sentence implies a contract with the Body Corporate who chose the supplier. A supply charge applies before any tap is turned on simply because of the provisions for the gas to be supplied to the metering infrastructure. The landlord commences to take supply from the moment of accepting the arrangements and allowing the metering equipment to be installed. The single bulk gas meter for each building is readily accessible and situated on common property infrastructure. Under the law the Landlord or OC is responsible for common property infrastructure. The landlord cannot charge for gas that cannot be measured with an instrument designed for the purpose that can be accurately apportioned to the end-user.

⁴⁴ This statement is misleading and does not explain what is meant by individual monitoring. Some would take it to mean that separate gas meters existed

⁴⁵ This statement does not in any way explain the implications of a deemed contract unilaterally imposed, the basis for calculation of contractual imposition or the obligations expected under the implied contract.

⁴⁶ This is where the threat lies. It is an unwarranted and unjust demand to form a contractual relationship with the wrong party. The notice time is 7 days not 10 and is an unjustified coercive demand to set up an explicit contract without explanation as to why a deemed contract is assumed

⁴⁷ Following on from a coercive threat to disconnect without showing just cause this is an insult. The letter does not specify whether the intent was to disconnect water or gas

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title_____ 2. First name_____ 3. Surname_____
4. Supply address <<street>>, <<suburb>><<state>><<postcode>>
5. Supply address (if different from above)_____
6. Postal address (if different from above)_____
7. Telephone number (B/H)_____ 8. Telephone number (A/H)_____
9. What date did you take possession of the property_____
10. Do you own or rent the property? (please tick) Owner (if owner, go to question 14) Tenant
11. If tenant – Landlord/Agent name_____
12. Landlord/Agent address_____
13. Landlord/Agent telephone number_____
14. Your Date of Birth_____ 15. Drivers Licence number_____
16. Do you qualify for a Concession? (please tick) Yes (if yes, go to question 17) No
17. Concession type_____ Card number_____ Expiry date_____

Letter 2 (actual wording)

Further Deidentified coercive letter of threat send to a real-life residential tenant:

(this was taken to be the second such letter, but on reflection and looking at the dates again there may have been one that was missed altogether as junk mail

addressed to “The Occupier” of rented premises who had recently assumed tenancy Issued during the course of an unresolved complaint before the industry-specific complaints body in contravention of the provisions of the [Fair Trading Act 1997](#) and the applicable [Energy Retail Code](#), besides being an unconscionable letter of threat after being notified of the peculiar vulnerabilities of the recipient of coercive threat. That the breaches occurred is unquestionable

“Your hot water supply is provided through a communal bulk service by your building or body corporate. (Name of energy supplier) owns the water meters and supplies the gas for this service.⁴⁸ The hot water is individually monitored and the quantity used by each apartment is billed directly to each apartment.”⁴⁹

“This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment. In order to do this we need to set up an account for you.”⁵⁰

“Our records show that hot water is being consumed through your meter⁵¹ but an account has not yet been established for you. Please contact us on (telephone number given of energy supplier) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required).”

“If we don’t hear from you within seven days from the date on this letter⁵² we may need to initiate steps for disconnection of your apartment’s hot water supply.⁵³

⁴⁸ Ownership of the water meters does not impose any contractual relationship. The supplier is licenced to sell gas not water.

⁴⁹ The phrase individually monitored is misleading

⁵⁰ No gas passes through water meters. Individual consumption of the energy used to heat each tenant’s actual share of energy cannot be calculated using the practices in place. These will in any case become invalid and illegal when the remaining utility restrictions are lifted under national trade measurement laws and meanwhile contravene the spirit and intent of those laws and best practice.

⁵¹ The use of the term meter misleadingly implies a gas meter that is individual to the tenant. Retailers are licenced to sell gas or electricity not composite products. The water is supplied by the water authority and paid for by the Owners Corporation. The cost of water hot and cold is included in the rent.

⁵² This was a junk mail letter that was placed in the letter box of the Tenant. It had a most detrimental impact on the consumer at a time of instability and stress. Again it was an unjustified and coercive threat of disconnection of essential services, with reconnection only possible after formation of a contract by identifying. Such a communication assumes that the complaint has seen and understood it. There was no follow up or further explanation. This communication was issued whilst a complaint was still open before the Complaints Scheme and therefore in contravention of the provisions.

⁵³ This is a further threat of disconnection that is coercive, unwarranted and unjust. This time it is clearly that the intent is to disconnect hot water supplies. Again the licence covers gas not hot water supplies.

If this occurs we will not be able to connect this service until we receive your details.⁵⁴ Please note that any of the information you give us is treated confidentially in line with privacy laws.”

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title _____ 2. First name _____ 3. Surname _____

4. Supply address <<street>>, <<suburb>><<state>><<postcode>>
5. Supply address (if different from above) _____
6. Postal address (if different from above) _____
7. Telephone number (B/H) _____ 8. Telephone number (A/H) _____
9. What date did you take possession of the property _____
10. Do you own or rent the property? (please tick) Owner (if owner, go to question 14) Tenant
11. If tenant – Landlord/Agent name _____
12. Landlord/Agent address _____
13. Landlord/Agent telephone number _____
14. Your Date of Birth _____ 15. Drivers Licence number _____
16. Do you qualify for a Concession? (please tick) Yes (if yes, go to question 17) No
17. Concession type _____ Card number _____ Expiry date _____

Letter 3 (actual wording)

Further Deidentified coercive letter of threat send to a real-life residential tenant:

*This third letter was received by post some weeks after closure of a file that had remained open before EWOV, the industry-specific complaints scheme for 18 months. Despite regulator and policy-maker involvement (VESC and DPI) the matter remains unresolved and contested as to the existence of any contractual relationship with the supplier, necessity to form one, or to facilitate one This letter refers to a previous letter of a month earlier which appears to have been either missed, not sent or discarded as junk mail
Dear Sir/Madam*

Your Hot Water Supply

Further to our recent letter dated (date given) we are writing to request your assistance once again.

Your hot water supply is provided through a communal to ‘bulk service’ by your building and/or its body corporate. (Supplier’s name) owns the hot water meters and supplies the gas for this service. The hot water is individually monitored and the quantity used by each apartment is billed directly to the respective apartment.

Our records show that hot water is being consumer through your meter but an account has not yet been established for you. Please contact us on (Telephone number provided) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required) If we don’t hear from you within (7)

⁵⁴ This is a further threatening an coercive statement that is unjustified

days from the date on this letter, we may need to initiate the steps for disconnection of your apartment's hot water supply.

If this occurs, we will not be able to reconnect this service till we receive your details. Please note that any of the information you give to us is treated confidentially, in line with privacy laws.

As a supplier of gas and electricity, we can also assist you with your other household energy needs. If you would like more information on this, please mention it when calling and we'll be happy to help.

Thank you for your corporation

Yours sincerely

(name) Billing Manager (host energy retailer)

Please complete your details below, detach the form and return in the reply-paid envelope provided (no stamp required).

1. Title _____ 2. First name _____ 3. Surname _____

4: Supply address⁵⁵ (apartment no and street address inserted)

5. Supply address (if different from above) _____
6. Postal address (if different from above) _____
7. Telephone number (B/H) _____ 8. Telephone number (A/H) _____
9. What date did you take possession of the property _____
10. Do you own or rent the property? (please tick) Owner (if owner, go to question 14) Tenant
11. If tenant – Landlord/Agent name _____
12. Landlord/Agent address _____
13. Landlord/Agent telephone number _____
14. Your Date of Birth _____ 15. Drivers Licence number _____
16. Do you qualify for a Concession? (please tick) Yes (if yes, go to question 17) No
17. Concession type _____ Card number _____ Expiry date _____

Letter 4 and 5 (similar)

Further Deidentified coercive letter of threat send to a real-life residential tenant:

This fourth letter was received by post some weeks after closure of a file that had remained open before EWOV, the industry-specific complaints scheme for 18 months.

This letter refers to a previous letter of a month earlier which appears to have been either missed, not sent or discarded as junk mail. Despite regulator and policy-maker involvement (VESC and DPI) the issue of debate over contract remained unresolved. Resumption of letters of threat occurred following closure of the file, till ultimate disconnection was effected, not of energy as the only commodity authorized for energy, but of heated water supplies to the tenant's residential premises (abode).

The energy supplied is not to the apartment through facilitation of the flow of gas, but rather to a single supply point on common property infrastructure which supplies a single communal water tank also on common property infrastructure from which heated water is reticulated to individual apartments. Residential tenancies provisions hold landlords

⁵⁵ Supply address and supply point are synonymous terms meaning gas connection facilitating the flow of energy to identified premises. These terms do not have postal connotations and do not refer to living space. They are very specific in the legislation and the Gas Code in relating to an energy connection point. No such connection point in relation to the hot water supplied exists. The heated water is reticulated in water pipes to the individual apartments after being heated in a communal water tank on common property infrastructure. There is no authority within current provisions to disconnect water. The provisions relate to gas or electricity.

Ownership of the hot water flow meters does not create a contractual relationship. There is no evidence that the meters were fitted in accordance with water authority regulations or licencing.

Even if they had, the supplier is endeavouring to charge for energy, which cannot be measured with a water meter, and notwithstanding policies in place.

contractually responsible for consumption and supply charges (other than for bottled gas) were no separate meter exists for gas or electricity. The Essential Services Commission Act 2001 s15 prohibits overlap and conflict with other regulatory schemes present and future. The Gas Distribution System Code permits disconnection of energy only, in the case.

In the event, disconnection of heated water occurred not energy. No energy enters the residential premises of the end-user of heated water as a composite product as an integral part of residential tenancy provisions

Dear Sir/Madam

Your Hot Water Supply

Further to our recent letter dated (date given) we are writing to request your assistance once again.

Your hot water supply is provided through a communal to ‘bulk service’ by your building and/or its body corporate. (Supplier’s name) owns the hot water meters and supplies the gas for this service. The hot water is individually monitored and the quantity used by each apartment is billed directly to the respective apartment.

Our records show that hot water is being consumer through your meter but an account has not yet been established for you. Please contact us on (Telephone number provided) to set up your account, or alternatively complete the form below and return it in the postage paid envelope provided (no stamp required)

If we don’t hear from you within (7) days from the date on this letter, we may need to initiate the steps for disconnection of your apartment’s hot water supply.

If this occurs, we will not be able to reconnect this service till we receive your details. Please note that any of the information you give to us is treated confidentially, in line with privacy laws

Reproduced Disconnection notice issued an energy retailer licenced to sell gas or electricity and to disconnect energy only not water products, pursuant to the Gas Distribution System Code defining disconnection and decommissioning processes⁵⁶

“Disconnection of bulk hot water supply”

(Host retailer) has requested your bulk hot water supply be disconnected for _(box not ticked) unknown usage

*(box not ticked) Non-payment*⁵⁷

This occurred on:

Date: (entered)

Time (entered)

Meter No (shown)

Premises address: (the residential address showing flat number and street address of the Tenant)

“As this meter is owned by (energy retailers name), please call us on (telephone number shown) to arrange reconnection, and quote your meter number as shown above”

For more information about (energy retailer’s name shown), please visit our website at (website address of energy retailer shown)

⁵⁶ This disconnection notice and all that preceded it, including resumed letters of coercive threat by an energy supplier whose actions and approaches have been implicitly and explicitly endorsed, supported, condoned and accepted by the current Victorian Energy Regulator, notwithstanding the empty provisions of Wrongful Disconnection Procedures published by them to which lip service is accorded in many instances, Neither box shown on the form replicated above was ticked. Neither reason was applicable. The timelines for disconnection were not adhered to. The wrong commodity (water not energy) was disconnected. No energy at all enters the residential premises of the party held contractually responsible. However, this consideration is consistently overlooked by regulators and policymakers quite determined to uphold legally and technically unsustainable policies. Leaving aside the policy considerations, nothing in the processes undertaken meets prescribed criteria. The complaints scheme purporting to represent consumer interests took an inflexible decision in this matter as did its guiding body, the VESC, and his nominally overseeing body DPI. The consumer protections believed to be in place for certain categories of consumers simply do not exist.

It is inarguable that the prescribed processes were not followed, leaving aside all of the legal and technical arguments provided elsewhere

⁵⁷ This did not apply. No bills have ever been issued. The matter was one of disputed contract under deemed provisions, since no energy enters the residential premises of the end-user of heated water reticulated in water pipes. The energy is supplied to a single supply point/supply address on common property infrastructure used to heat a communal water tank supplying heated water to tenants. The landlord is disallowed to differentiate between hot and cold water or to charge for the heating component of heated water where no gas or electricity exists. The supplier is not licenced to sell anything but energy. An energy retailer is permitted only to disconnect gas under the *Gas Distribution System Code*. For VenCorp purposes only a single supply/point/supply address and single billing point exists for all supply points providing energy to hot water storage tanks (BHW). This is consistent with the legislation, which deems as a single supply and billing point any gas connection point in existence prior to 1 July 1997, as is the case with most supplies serving BWH systems.

If the disconnection is a result of non-payment and we receive your payment before 3 PM on X/X/X (date not filled in) your bulk hot water service will be reconnected on the same day. A reconnection fee may apply.

Background

I believe that many provisions, including those left under jurisdictional control (such as the policy provisions known as the “bulk hot water arrangements (BHW)), or dismissed as being of an entirely economic focus rather than relating to components of both economic and non-economic considerations (for example, BHW arrangements; embedded consumers and small scale licencing (electricity only); the issue of regulatory overlap with other schemes has been ignored; and the proposed protections under generic laws, including substantive unfair terms within both standard and market contracts; and unconscionable conduct considerations which are the subject of ongoing evaluation by the Treasury following receipt of expert panel advice.

For further discussion see pages X – X of this attachment, case studies also as attachments, Deidentified Case Study, and body of main submission

Victorian situation

These matters have been repeatedly raised by community organizations during the consultative dialogue and beyond that in efforts to effectively engage with certain jurisdictions, including Victoria’s Department of Primary Industries and energy regulator Essential Services Commission.

It is interesting to note from examination of the Licences issued by the ESC to the three incumbent host retailers, Origin Energy, AGL and TRUenergy, the following precise wording was used when gas licences were issued to each party:

“9. HOT WATER METERING

9.1 The Licensee must, for a customer for which it is providing services associated with bulk hot water, ensure that each hot water metering installation is provided, replaced, installed, repaired and maintained in accordance with all applicable laws and any applicable guideline.

9.2 Without limiting clause 9.1, within 20 business days after receiving a request for the provision, replacement, installation, repair or maintenance of a hot water metering installation which is not functioning in accordance with all applicable laws and any applicable guideline, the Licensee must offer to provide the service requested on terms which are fair and reasonable and which are not inconsistent in the opinion of the Commission with any applicable guideline.

9.3 If a customer replaces the Licensee with another retailer as the supplier of bulk hot water services for a multi-unit dwelling, the Licensee must, if it is the owner of the relevant hot water metering installation, on request offer to sell that hot water metering installation to the other retailer on fair and reasonable terms and conditions.

9.4 Any question as to the fairness and reasonableness of the terms and conditions of an offer made under clause 9.3 shall be decided by the Commission on the basis of the Commission’s opinion of the fairness and reasonableness of the terms and conditions.”

It is implicit in these licence provisions that the intended customer is the one who had control of the multi-tenanted dwelling, i.e. Landlord or Body Corporate as the controller of premises, rather than a succession of residential tenants who have no choice whatsoever in the arrangements made between Landlords and energy suppliers either providing gas to a single communal gas master meter; or with responsibility for “*hot water system*” meaning the boiler tank and its associated water metering infrastructure. It is never the case that a renting tenant requests an installation associated either with the gas master meter or the associated boiler tank or its water infrastructure that communally heats water reticulated to those individual tenants. The contract lies with the Landlord/Body Corporate.

In Victoria under tenancy laws a Landlord may not charge for water other than a cold water rate in the absence of a separate gas meter associated with the heating of water provided to individual tenants.

In addition, where water meters do exist, only charges for the actual consumption of water, as calculated by individual reading of water meters is permitted, not any associated supply or meter reading charges. If no separate water meters exist, the Landlord must absorb the whole cost of supply of heated water as an integral part of the rent charged to tenants, in the same way as public lighting of stairwells and maintenance of communal grounds are also Landlord or Owners’ Corporation responsibility.

Despite the existence of *Residential Tenancies Act 1997* provisions, the DPI and ESC together saw fit to over-ride these rights, expecting the RTA to change its provisions to suit their philosophies and flawed interpretation of the deemed provisions of the *Gas Industry Act 2001*

In Victoria are currently two separate contractual arrangements used by retailers to deliver its gas BHW service. These two arrangements are:

- Arrangement 1 - involves the retailer billing individual occupiers directly by using a conversion factor associated with the readings from a hot water flow meter.
- Arrangement 2- involves the retailer billing the body corporate for the gas or electricity consumed by the BHW system as measured by the BHW energy meter, with the body corporate apportioning consumption, determining individual bills and charging individual customers.

The scope of the Essential Services Commission’s review of BHW arrangements undertaken in 2004 and 2005, with policy decisions becoming effective from 1 March 2006 was limited to billing arrangement 1 that involves retailers billing individual occupiers directly.

Less transparent are the arrangements made regarding public housing tenants. The Tenants Union Victoria advises as an advocacy organization and specialist community legal centre providing information and advice to residential tenants, rooming house and caravan park residents across Victoria with the aim of improving the status rights and conditions of all tenants in Victoria.

Queensland situation⁵⁸

⁵⁸ Origin Energy FAQ’s Service Property Charge online tariffs

In Queensland are those living in public housing, most disadvantaged. Even when they receive no gas at all they are required to pay FRC fees.⁵⁹

There is no competition in the Queensland “*bulk hot water market*” wherein residential tenants are charged for deemed gas usage. Origin Energy has a monopoly of supplying to Landlords and Owners’ Corporations, including public housing authorities or delegates.

Whilst this may be dismissed as a water issue or under the control of the Department of Infrastructure and Planning, Queensland, it is in fact energy that is being charged for with massive supply charges, FRC charges and other charges imposed, mostly on those who are the most vulnerable. This is entirely unacceptable.

I have direct knowledge of certain individuals who have been adversely impacted by the existing “*bulk hot water energy policies*” as described wherein water volume usage is used to calculate deemed energy usage of situations in which even those who receive not a joule of gas to their abodes, even for cooking purposes are charged “*free retail competition*” charges on their bills, allegedly for the direct sale and supply of energy.⁶⁰

In Queensland bills for alleged supply of energy⁶¹ associated with “*bulk hot water*” are frankly issued in cents per litre with no cursory attempt to imply that is gas that is actually being measured.

For electricity, the service to property charge may cover part of the provision and maintenance of the meters, poles, wires and billing and some retail operating costs. It is applicable to each electricity account.

For gas, customers are charged a supply charge which may cover part of the cost of maintaining and extending the gas distribution network e. g. transmission pipes, gas mains, and some retail operating costs.

<http://www.originenergy.com.au/1254/About-tariffs-rates-and-pricing>

⁵⁹ FRC means “*Freedom of Retail Contestability*.” It is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place. In Qld It is imposed on natural gas customers accounts, and is about \$25 per year for the first 5 years after the FRC date : 1st June 2007. It accumulates over this first 5 years as a “*pass through cost*” of about \$20 million and will be phased out in a couple of years.

Vencorp is to build this system, and is also the referee on this market using the MORN meter numbering system.

⁶⁰ See for Example Newsflash Dept of Infrastructure and Planning Qld referred to under Objective, Competition Issues

It is staggering to see from Origin Energy’s website that “*In addition to the charges above customers should note that in certain circumstances Origin Energy Retail Limited may require lodgment of security deposits or may impose fees and charges that are incidental to the supply of Bulk Hot Water to a customer, including but not limited to an account establishment fee, site call out fee, disconnection fee, reconnection fee, dishonoured cheque fee and special meter reading fee.*”

See

<http://www.originenergy.com.au/bhwtariff>

Bulk Hot Water Tariffs [Queensland Bulk Hot Water](#)

“*Gas fired bulk hot water systems are installed in some apartment blocks. A bulk hot water system supplies all the hot water to the apartments using a centralised water heater(s), rather than a water heater in each apartment.*

Customers in apartments using gas fired bulk hot water systems are charged on the basis of their hot water usage as measured by a hot water meter located at each apartment. The current usage rates are provided in the attached table.

This does not alter the fact that they are energy bills for the alleged (deemed) gas consumption that cannot possibly be calculated by legally traceable means, as for Victoria and South Australia.⁶²

In Queensland Origin has a complete monopoly of the “*bulk hot water client group*”. Elsewhere under Objective (Competition issues) I have discussed the disaggregation of energy assets and how this may have impacted on the several rights of individuals (including possibly privacy rights), if a non-negotiable “*monopoly-type*” situation was allowed to arise during the arrangements and any warranties and assurances that may have been made during the privatization arrangements.

There are no published records as to how much gas is being transported via pipelines to heat communal water tanks (many in public housing; others in owner/occupier dwellings; others possibly in the private rental market without owner occupation; or those with owner-occupation, or how calculations regarding gas consumption (using hot water flow meters that measure water volume not gas or heat) were made regarding the alleged sale of gas to end-users of heated water, and on what basis under the provisions of contractual law.

Other aspects Queensland provisions as they relate to energy provided in the bizarre and inappropriate “*bulk hot water provisions*” are discussed elsewhere under Objective, (BHW provisions)

Some apartments may also have a separately metered gas cooking appliance while other apartments have an un-metered gas cooking appliance.’

62 *Gas fired bulk hot water systems are installed in some apartment blocks. A bulk hot water system supplies all the hot water to the apartments using a centralised water heater(s), rather than a water heater in each apartment.*

Customers in apartments using gas fired bulk hot water systems are charged for deemed gas usage at the applicable natural gas rate for their region.

The amount of gas deemed to be consumed by you to supply hot water to your apartment is calculated on the basis of the:

gas consumed by the bulk hot water system, as measured by the master gas meter at your apartment site during the billing period;

*allocated to each apartment on a prorata basis using the **measured consumption of hot water at each apartment during the billing period.***

Some apartments may also have a metered gas cooking appliance. The total usage for that apartment will be calculated on the basis of the total gas used for both cooking and hot water.

Water Meter Fee: *Each consumer of hot water from a bulk hot water system will be charged an additional **water meter fee.***

These charges are largely required because the company responsible for the supply and maintenance of the water meter equipment and water meter reading services (Envestra Ltd) charge Origin Energy for these additional services. Effective 1st July 2009, the GST inclusive charges are listed below:

Water Meter Fee – Manual; Read: \$7.96 per quarter Water Meter Fee – Remote; Read: \$27.78 per quarter

Note 1: Charges will be calculated on your bill on the basis of a daily rate. Note 2: For new apartment developments, these fees may vary, depending on the developers’ specifications for metering equipment. Note 3: All apartments established and occupied prior to 1 July 2003 will be charged the Manual Read fee. Note 4: Prices are subject to CPI based increases in July each year or at other times if the costs to Origin Energy for these services are amended.

CONTEXT

(Victorian Deidentified Principal Case Example -

This attachment is focused on conduct issues associated with the adoption of and discrepantly applied provisions for trade measurement calculation, pricing and contractual apportionment under misguided interpretations of the deemed provisions under State policy provisions applying to providers of gas and electricity

The background history and adoption of the “*bulk hot water provisions*” previously contained within the Bulk Hot Water Pricing and Charging Guideline 20(1) (repealed 2009), and now within the Victorian Energy Retail Code v9 (commencement date 1 January 2009)⁶³ were mimicked but discrepantly applied in two other jurisdictions, South Australia and Queensland

For further details please refer to companion Attachment Deidentified Case Study (56 pages) detailing each of the allegations and the circumstances in which a particularly disadvantaged and vulnerable end-consumer of utilities was allegedly badgered, harassed and intimidated by a host retailer who from a residential tenant’s perspective had monopoly status in supplying through a single master gas meter on common property infrastructure⁶⁴ belonging to an Owners’ Corporation/Landlord as Controller of Premises⁶⁵

Note that monopoly provisions under both national and jurisdictional competition policies are discrepantly and frequently inappropriately interpreted, especially in the context of the provision of communally heated water, whilst provisions regarding cost-recovery and non-existent parallel consumer protection for residential tenants is based on alleged energy consumption using a trade measurement instrument designed to measure water volume only but not heat or energy.

Not even gas meters measure energy – they measure gas volume, which under standard units of measurement is expressed in either joules or megajoules based on gas volume. The difference between gas volume and energy is poorly understood

⁶³ Essential Services Commission (Vic) Energy Retail Code v6

⁶⁴ The Owners’ Corporation Act (2006) defines the responsibilities and rights of Owners’ Corporations. The extent to which these provisions may contravene legal traceability considerations within national measurement provisions is yet to be explored

⁶⁵ See definitions of Controller of Premises; Premises; Residential Customer as contained within the revised National Measurement regulations which became effective on 1 July 2009, and in all jurisdictions will become fully operational on 1 July 2010, with the National Measurement Institute taking full control of all trade measurement nationwide. This will make NMI responsible for the full spectrum of measurement, from the peak primary standards of measurement to measurements made at the domestic trade level, and will provide the NMI with administrative and regulatory oversight in the area of trade measurement. Implementation is expected to take place at State and Territory level to uphold the fundamental principles of legal traceability in trade measurement, including for utilities. The interests of economic infrastructure, including the goal of securing the confidence of all stakeholders depends on the concept of legal traceability being upheld in all trade measurement transactions so that Australia and New Zealand “*establish and maintain a national and international reputation for equitable trading*”

Allegations in this case in brief

The range of allegations included unconscionable conduct, harassment and coercion

Allegation 1 unconscionable conduct; harassment and coercion

Allegation 2 Threats, intimidation and coercion⁶⁶

Allegation 3 Breach of implied contract⁶⁷

⁶⁶ Under s21 the Fair Trading Act prohibits “*undue harassment or coercion in connection with the supply or possible supply of goods or services to another person.*” If a supplier is squarely on notice as to the vulnerable position of a deemed recipient of goods or services, it could be interpreted that certain approaches by a company may be in breach of s21 of the *FTA*. The supplier had been put on notice at the outset before the issue of the second letter of threat and whilst the file lay open before the complaints scheme. Later, the supplier was put on similar notice through the complaints scheme and/or regulator, who were provided with written evidence as to those vulnerabilities.

⁶⁷ The supplier alleged a contract with the Tenant for the supply of energy used to heat a bulk hot water tank centrally heating water supplied to several groups of tenants (four in one building and six in another, each supplied through a single supply point bulk meter residing in each of two car parks. The Tenant denies the existence of such a contract or requirement to form one.

The implied contract is an issue of debate between the parties. No contract exists except in the mind of the retailer; in faulty interpretation; or else in the intent behind the deliberative documents, final decisions, and bulk hot water charging guidelines.

Allegation 4 Breaches of Fair Trading Act 1999 (Vic) provisions – unfair business practice and unfair substantive terms of implied an/or alleged or deemed contract.⁶⁸

(note also proposed changes to generic laws – all State Fair Trading Laws must be consistent with generic by 2010 noting all changes to proposed generic laws under Australian Consumer Law (TPA), including under unfair contract provisions and any clarification re unconscionable conduct

Allegation 6 Unfair and inappropriate trade measurement

(refer also to further changes to Trade Measurement laws which will become fully operational from 1 July 2010 with regard to regulations and enforcement provisions; the provisions are intended to apply to utility meters, for some of which exemptions have already been lifted; others pending)

Allegation 7 Use of trade measurement practices that are against the intent and spirit of national and state trade and utility measurement provisions

⁶⁸ **Victoria's regime**

Part 2B of Victoria's *Fair Trading Act 1999* prohibits 'unfair terms' in consumer contracts. A term is 'unfair' if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

Examples of unfair terms might include those which allow a supplier to unilaterally vary a contract, or those which allow the supplier, but not the consumer, to terminate the contract. The supplier and Tenant unjust imposed with an energy contract for energy not sold or supplied to him (and others like him) do not have equal responsibilities and rights.

The Tenant is penalized if the implied contract (which the complainant denies exists or ought to exist is terminated. Nevertheless he stands to lose water or heated water though the supply and cost of these are already included in his rental agreement directly with the landlord. The supplier can apparently vary the contract terms, price and goods without involvement of the deemed recipient under an implied and unjustly imposed contract. The supplier and others appear to have assumed sole right to interpret the meaning of the deemed contract, notwithstanding that there are many discrepancies within the legislation and many overlaps with other schemes, with common law provisions and contractual provisions and the rights of social and natural justice. The supplier appears to have sole rights to determine whether the contract has been breached. The contract contains confusing terms and inappropriately implies through wording that either a licence exists for supply of composite products; or alternatively that the energy can be separately measured; or alternatively that the practices are legitimate. Terms include the expectation that the end-consumer of water products, who has no obligation to form a contract and is not the *'relevant customer'* in this case, assumes all contractual responsibility and then battles to address merely the cost-recovery component.

There is an imbalance of power; the end-consumer has no provider choice; contractual status has been unilaterally and inappropriately imposed through misinterpretation of the intent of existing legislation regarding relevant customer and deemed contracts; demands were made to form an explicit contract under pain of threat of disconnection of hot water; the cost-recovery mechanism through s55 of the *RTA* imposes additional and unnecessary burdens on the end-consumer including filing fees through VCAT which would offset cost recovery, and in this case not readily achievable since the Complainant is unable to participant in legal proceedings without detriment. The misleading and deceptive conduct referred to elsewhere includes behaviour that leads another person into error, and thus unfair. Examples include the use of terminology, for example reference to meters implying gas meters, allegations of denial to meters, meaning water meters; intended use of an identifying number of the bills other than the MIRN. The implied and unilaterally imposed contract requires the end-consumer as a renting tenant to provide safe, unhindered and convenient access to meters where such meters may be in the care custody and control of the Owners Corporation, who are under the law responsible for supply and consumption charges of energy or other utilities unless separately metered.

Any measurement that allows for water volume calculations or some other bizarre equivalent, to be part of the equation that calculates energy consumption is fundamentally flawed. These provisions do not uphold public interest, best practice standards or the spirit and intent of existing provisions. The provisions are as good as relying on an oil funnel to measure the weight of a bag of apples. Energy retailers are licenced to sell gas and electricity not water products or heated water. Such practices appear to have been endorsed by existing provisions. The MCE seems to have made a decision to refrain from intervening, requiring policy changes or making sure that jurisdictional and national energy laws are consistent or that confusion does not arise between water and energy laws. In some cases where exemption granted non-licenced embedded network distributors are using similar methods without accountability through energy regulations Gas does not pass through water meters. Electricity does not pass through water meters. Water meters are unsuitable instruments for measurement of energy Gas is measured in megajoules (MJ). . Electricity is measured in KW-h. See these revised provisions and any others that may be considered as exclusive to utilities:

18GD Inaccurate use of measuring instruments

18HE Measuring instruments used in transactions to have prescribed scale intervals

18HF Unreliable methods of measurement

18HG Limiting use of certain measuring instruments

18HH apply “correct use of ...utility”

18GE apply using or supplying inaccurate measuring instrument

18GE Using or supplying inaccurate measuring instruments

Allegation 8 Failure to follow appropriate disconnection notice procedures (wrong commodity; wrong notice period; procedural irregularities)

Allegation 9 Breach of Gas Distribution Code

(see [Gas Industry Act 2001](#) wherein provisions must not be inconsistent with the Gas Code – as they are within the BHW provisions contained in the Energy Retail Code v6. Disconnection and decommissioning have particular meanings and do not refer to disconnection of water but to separation of the flow of gas from the gas distribution system, which does not include any aspect of water infrastructure).

Allegation 10 Breach of ESC Product Disclosure Statement Guideline 19

Allegation 11 Breach of Informed Consent

Allegation 12 Misleading and deceptive conduct

(this is discussed in the extended Deidentified Case study as a separate attachment – see especially wording of the letters to “The Occupier” purporting to represent “[vacant consumption letters](#)” and wording contained in bills issued to other residential tenants)

Allegation 13 Misleading details in bills issued to other tenants on same block

Allegation 14 Similar inappropriate and unacceptable business conduct

Allegation 15 Contravention of the intent of trade measurement and utility provisions

Allegation 16 Probable intent to apply inappropriate supply and possibly meter reading charges (?rolled over into a bundled or unbundled charge perhaps including FRC charges and the like).⁶⁹

Allegation 17 Inaccuracy of deemed consumption of gas and charges applied

(refers to the principles of best practice in adopting trade measurement practices that show legal traceability)

Allegation 18 Compromised protections and adequate access to appropriate recourses

(refer to EWOV's self-confessed conflicts of interest in dealing with those in situations referred to as "embedded" leaving aside that in a strict sense;

See also extensive discussion within this submission and other public submissions⁷⁰ regarding EWOV's limited jurisdiction and poor quality handling of the matter in question

The vexatious issue is illustrated here and Major Deidentified Case Study as Appendix 11 of compromised consumer protections for proportions of the community impacted by embedded situations and for the "BHW end-consumer groups" who neither consume nor receive energy at all

The limited jurisdictional powers of most non-statutory industry-specific complaints schemes known as Energy Ombudsman or Energy and Water Ombudsmen, forbids most ombudsmen schemes predominantly funded by industry, but some like EWOV also receiving funding from Consumer Affairs Victoria, which though set up as statutory enactments and considered to be "one-stop" complaints schemes for matters relating to energy or energy and water.

The gaps in consumer protection become more significant for the BHW groups and embedded electricity recipients (who do receive direct flow of energy but through changed ownership and/or operations) as well as those who will be defined under Exempt Selling regimes under the AER's jurisdiction.

For discussion of each of the above allegations refer to Deidentified case study as a separate attachment

[Brief comment on unconscionable conduct – see full details of the specific instance used to illustrate the claims made \(Deidentified Case Study Attachment X 56 pages\)](#)

⁶⁹ No bills were actually issued to the subject of the extensive case study. The threats of disconnection were associated with coercive attempts to force an explicit market contract. However, I personally sighted bills issued to others residing on the same block of rented apartments, and have also sighted bills issued to other residential tenants, including from other States so am aware of the wording and implied gas usage, heating value, pressure factors and the like included on bills whereas a hot water flow meter cannot possibly provide this information and a single master gas meter cannot through legally traceable means show individual consumption of gas volume, let alone energy consumption when a single master gas meter is used to communally heat a hot water tank.

⁷⁰ Kingston, M (2008a) Productivity Commission's (PC) Review of Australia's Consumer Policy Framework (subdr242parts1-5, 8_; Kingston, M (2009a) Submission to PC Review of Regulatory Burdens, parts 1 & 3); Kingston, M (2009b) Submission to MCE NECF1 Consultation RIS; Kingston, M (2009c) Submission to MCE Gas Connections Framework Draft Policy Paper; Kingston, M (2009d) Submission to CCAC Review Statutory and Implied Warranty Kingston M, (2009e) Submission to Commonwealth Treasury Unconscionable Conduct Issues Paper – Can Statutory Conduct be better clarified? Submissions to National Measurement Institute (2007-2010); individual submissions to numerous State and Federal bodies and Ministers; and to selected community organizations

In determining whether unconscionable conduct had occurred the conduct set out in Section 8 of the Fair Trading Act may be regarded by a Court. Persistence in engaging unconscionable conduct may be interpreted in such a way, once a company has been made aware of a particular party's vulnerabilities, as was the case early in the piece.

The second, third, fourth and fifth communications from the supplier to the deemed contractual party (a recipient of water products not energy at all to his apartment, reticulated in water pipes not energy pipes, on the basis of ownership by the energy supplier of water meters, not gas infrastructure) were issued as coercive letters of threat after the supplier had been made aware of the peculiar vulnerabilities of the deemed contractual party as a residential tenant receiving water not energy.

Continued contact along similar lines to the correspondence generated after issue of the first letter of coercive threat issued prior to this knowledge being conveyed may be interpreted as breach of Section 8 of the *FTA*.

The supplier had after the issue of the first letter of coercive threat been made aware of the Tenant's peculiar vulnerabilities but persisted with similar correspondence, issued a second letter of threat despite being asked to communicate directly with another party; and finally resumed a series of similar threats after complaint file closure, ultimately disconnecting altogether heated water supplies

In this case the Tenant has alleged **unconscionable conduct**, by virtue of issuing unwarranted coercive threat of disconnection of hot water services by an energy supplier licenced only to sell gas and electricity in circumstances where no contract existed and without identifying the vulnerabilities of the subject of threat, who in this case is an exceptionally vulnerable and disadvantaged individual with permanent psychiatric disability, a history of parasuicide; ongoing suicidality; recently hospitalized and discharged on community treatment orders to aid in compliance with his treatment.

No redirection was offered in the content of the letters of threat to any industry-specific complaints scheme or any other redress option; and in the personal details sought by way of forcing the Tenant into an explicit contract were in contravention of the Product Disclosure Statement (ESC 19); the provisions of the *Energy Retail Code 2006 v2* and now 2007 v3 and of the *Fair Trading Act 1999*, including the issue of further threat during the course of an as yet incomplete investigation of the complaint by EWOV, whose conduct has been the subject of separate concern.

In the circumstances during a particularly low mood instability bout, the fear of losing essential services could have had a disastrous effect and has similar potential in the future.

The conduct of the provider appeared unconscionable because no due care was taken to assess the risk imposed and the threat was issued as a deliberate coercive attempt to secure an unwarranted contractual relationship. Even after the supplier became aware of the Tenant's vulnerabilities, further threat was issued to him as "The Occupier" in a letter-box drop whilst the complaint remained open before EWOV.

At the time of issue of the very first letter of coercive threat of disconnection of essential services the supplier was not aware of the tenant's vulnerabilities. However, immediately

upon discovery of that letter, EWOV was informed of this and passed that information on to the supplier.

Nonetheless, the supplier, having been put on notice of those vulnerabilities issued a second letter of threat, though later claiming an error. There was no error, as attested in EWOV's original letter laying out the supplier's perspectives.

Notwithstanding that both the *Energy Retail Code* and the *Fair Trading Act* prohibit such action whilst a complaint lays open. In addition, the peculiar vulnerabilities of the Tenant required that no harassment be continued, and a request was made via the Complaints scheme that all correspondence in the matter be directed to a third party. Section 21 of the *FTA* prohibits "*undue harassment or coercion in connection with the supply of possible supply of goods or services to another person.*"

Though for the remainder of the time that the complaint lay open, nothing further occurred, the moment that EWOV's files were closed and the ESC had completed its cursory enquiries, with the full sanction of both bodies, a series of similar communications was resumed until disconnection not of energy, but rather of water occurred, simply on the basis that the supplier owned the "*meter*" meaning but not specifying that this was a device not designed for or capable of measuring gas but rather water volume only.

The supplier is not licenced to sell water at all or to authorized to on-sell it. The elaborate plans by either distributors to purchase or lease water meter infrastructure, including a subsidiary cold water meter and satellite hot water flow meters for the purpose of calculating through these of an inappropriate trade measurement instrument deemed gas or electricity usage facilitates disconnection of heated water when attempts to coerce an explicit energy contract with an end-user of heated water fail, as is amply illustrated in arguments in the main body and in various other attachments.

No attempt was made to redirect to complaint or redress recourses. Instead the supplier shamelessly advised EWOV that it would continue to rely on its perceived rights under sanctioned policies (seen to be the drivers for unacceptable market conduct and in Victoria impacting on some 40,000-50,000 Victorian residential tenants and thousands small businesses in shopping centres and the like many vulnerable and disadvantaged.

In the body of this submission; in submissions to the Productivity Commission, previous submissions to the MCE, and to the Commonwealth Treasury I have referred to both perceived conflicts of interests and self-confessed?⁷¹

Does the current economic regulator have any idea what is going on and does it have sufficient, if any control of this situation?

The subject of the Deidentified Case study and of the letters of coercive threat with accompanied parodied version analysis has a serious irreversible psychiatric illness and vulnerability to stress, as well as a serious medical condition as referred to in medical reports provided to the self-run industry-specific complaints scheme through the

⁷¹ See for example the submission of Energy and Water Ombudsman (Victoria) to the Essential Services Commission (Victoria) Small Scale Licencing Review 2006
See my submissions to the Productivity Commission (2008 & 2009) to the MCE SCO to the Commonwealth Treasury; and other bodies, Ministers and organizations

economic regulator, Essential Services Commission. This is besides financial hardship and difficulty managing bills. Any future contractual relationship with the supplier or imposed contractual obligation will impose further difficulties and stresses on him in dealing with a provider imposed on him without choice who has already demonstrated inappropriate market conduct.

The Tenant and his supporters were anxious about the prospect of further badgering coercive behaviour and potential loss of essential services (water) that the provider is not even licenced to sell.

In the circumstances this had promoted fear and dissonance about accepting premises that have unexpectedly come with so much baggage notably lack of choice in changing a provider of essential services with a contract more properly belonging to the Owners' Corporation where that provider's conduct has been unacceptable, reflects business practices that are unfair and inappropriate and appears to reflect predatory market conduct in a clear-cut case of power imbalance. This is a detrimental outcome from the practices alleged.

This does not excuse the manner in which threats were issued to the vulnerable tenant, one of them during the course of an as yet unresolved complaint before EWOV. This was in contradiction of the provisions of both the *Energy Retail Code* and the *Fair Trading Act*.

The issuer of those threats, the Tier 1 energy supplier of energy to a single communal gas master meter belonging to the Owners' Corporation (with a single gas meter regarded for distributor-retailer settlement purposes), has no contract with the Tenant, is not licenced to sell the water that the supplier intended to disconnect; and was using instruments to measure energy that were not designed to measure such a commodity.

That the threats were issued at all is a problem. There is never any justification for the issue of threats. This is a complex contractual issue.

There are issues of the absence of implied contract; unfair and inappropriate practices; the nature of the threats and the pretext and purpose of issuing such threats – by way of endeavouring to force a contract that should not exist at all.

There are further health complications that have been explained. There is a requirement for ongoing supply of hot water.

Beyond the conduct of the supplier, it could be held that strategies used by complaints schemes, regulators and even policy-makers could also be viewed as coercive techniques or at best “*high pressure conciliation techniques*.” Using phrases suggesting the “*prudence;*” as “*as a matter of urgency*” of signing an explicit contract in order to avoid disconnection (of an unspecified utility).

In the event, this turned out to be water supplies, disconnected by energy suppliers licenced only to sell and supply energy through provision of energy that demonstrates the flow of energy to the premises deemed to be receiving that energy, using a meter as defined in the *Gas Industry Act 2001* and the *Gas Distribution System Code*. Regulatory provisions that are inconsistent with these provisions are frowned upon by the *GIA*.

The VESC have as the overseeing body responsible for guiding have seemingly recklessly put in place and are seeking to consolidate under revised *Energy Retail Code*

provisions (notably the BHW provisions) that have no legal or technical sustainability, represent gross overlap and conflict with other schemes, including residential tenancy provisions, owners' corporation provisions, as is specifically forbidden under s15 of the *Essential Services Commission Act 2001*, as well as conflict with the provisions of the unwritten laws, notably the natural and social justice rights of individuals.

No justification exists for disconnection warning or threat.⁷² The Energy Retail Code was breached on a number of counts including it would seem ss8, 9 and 11 and 21 of the *FTA*. Whether or not *FTA* provisions are included in the ERC, utility providers are required to abide by all laws. Provisions should not make it difficult to choose which to uphold.

Threats, coercion and intimidation are covered under the criminal code also. These may be politely phrased, but still constitute threat if undue power and pressure is used to obtain an outcome. In this case threat of disconnection of an essential service is being unjustly used as leveraged through which to obtain an explicit contract with a utility provider not licenced to sell the product the subject of disconnection threat. Neither is he permitted to disconnect that composite water product. No energy is involved. The threats are improper and tacitly upheld by regulators, policy-makers and complaints schemes.

The energy supplier is endeavouring to charge for gas, gas meter reading and gas supply for the heating component of the water. A meter is described under the *Energy Retail Code* and the *Gas Distribution System Code* as an instrument that measures the quantity of gas that passes through it and its associated metering equipment to filter, control and regulate the flow of gas. Water meters do not represent such instruments, though they appear to be posing as gas meters.

Though the water meters are owned by the energy supplier, and though these are behind locked doors; these instruments are not the type of instrument referred to in the energy provisions and were not designed for the purposes intended.

Therefore notwithstanding allegations of denial of access to meters, the Tenant continues to deny that allegation, and in any case is unable to deliver unfair contract provisions concerning safe convenient and unhindered access to meters that are not in his care custody and control, leaving aside for the moment the ongoing contractual debate, which is really a matter for the policy maker(s) and/or responsible regulators to address rather than EWOV as a conciliatory complaints scheme with no jurisdictional powers to address policy, legislative and tariff matters. However, EWOV is capable of gathering and clarifying factual matters.

As to denial of access of meters relied upon in previous EWOV correspondence under Clause 13 of the *Energy Retail Code*, there has been no such denial of access to meters as defined in the legislation and codes, namely a single gas meter on each of twin buildings.

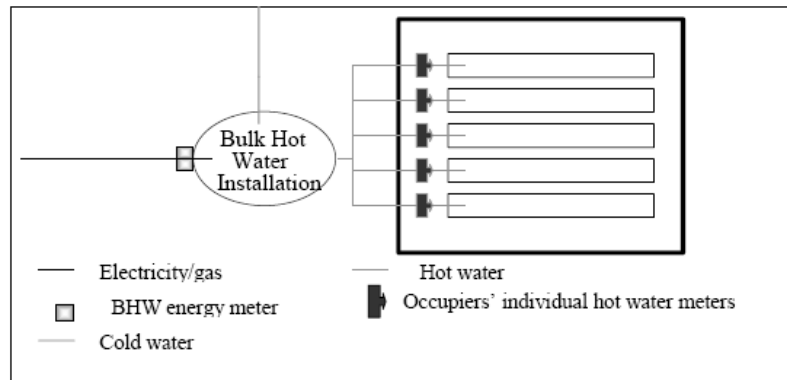
These bulk gas meters are considered by VENCORP to be single supply points for the purposes of settlement between distributor and retailer.

⁷² These threats were dignified by EWOV as "*vacant consumption letters*" with the finding in that the supplier's conduct was in line with obligations.

The law requires a retailer to be licenced. Those licences are for the selling of energy not water. If retailers or their servants/contractors or agents are behaving as billing agents for the landlord for water products; value added products, heating components of composite products that cannot be separated from the product, this is an anomaly that may need to be reconsidered by the policy-makers and regulators. Meanwhile, EWOV should be cautious about making determinations outside of their jurisdiction.

Configuration and meter details

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

The item marked Bulk Hot Water Installation has no gas or electricity meters. It comprises a communal boiler tank, with several satellite hot water flow meters. These hot water flow meters are represented by the black items labeled Occupiers' individual hot water meters. The latter can measure water volume only as individually proportion, but not heat or energy. Heated water of varying quality is reticulated in water service pipes to each individual apartment.

The item marked BHW energy meter has nothing to do with water. It is a single master gas meter or a single master electricity meter installed at the time the building was erected.

The cold water is supplied at the mains by the Water Authority. There is no licence provided for onselling of water. The Owners' Corporation takes direct responsibility for provision of cold water and all associated charges

The small black

In this case (Victoria) site-specific reading of meters was considered to be too onerous. Most alleged meter readings are estimates. Bills issued to others erroneously show a separate meter identifying number against gas usage on each individual bill. It is technically impossible to show gas usage individually, or heating, pressure or any other factor associated with gas since water meters of any description measure water volume only, not gas or energy. No bills were ever issued in this particular case. The dispute was over the existence in the first place for any energy contract (under contract law) for the sale and supply of energy since none is received through the flow of energy to the premises deemed to be receiving it.

The excuse that the arrangements were put in place to prevent price shock are unsustainable. The practices have not contained rent hikes, but have served to feather the nests of Landlords and Owners' Corporations endeavouring to escape their responsibilities under tenancy and Owners' Corporations provisions, by engaging third party billing and metering agents, either the retailer, a contractor to the retailer, or a contractor to the distributor.

Massive additional supply and other bundled or unbundled charges, including FRC charges are added, including water meter reading fees and the costs of alleged maintenance of the water meters, which are not suitable trade measurement instruments with which to calculate gas or electricity consumption.

The decision by the MCE to allow jurisdictions to adopt these practices in certain jurisdictions; apply them discrepantly when measured against each other; to fail to recognize the fundamentals of comparative laws or respect for other jurisdictional regulations; or to observe the fundamentals of contract law under the common law is regrettable.

Or the record I have once again provided substantiation of my concerns that the so-called national energy law is not a national law at all, and has failed its single objective for certain classes of end-consumers of utilities to sustain safety, security and reliability of supply of energy= or fair pricing – whilst at the same time confusing water provisions with energy provisions by allowing these practices to continue.

Electricity and gas are commodities. Their continued supply represent services.

The services such as billing and metering are fairly and squarely Owners' Corporation responsibility. The correct contractual arrangements should be adopted and reflected in all provisions.

Most communal water tanks are far removed from the individual occupants of multi-tenanted buildings. An enormous quantity of water has to be supplied before the water is heated when multi-storied buildings are involved. The end-user of the water pays for every drop and there is much wastage besides cost.

Inefficient hot water heating systems, including non-instantaneous boiler systems such as are in operation in older buildings and many new buildings should be banned. Existing inefficient boiler tanks and associated apparatus should be retrofitted with Govt grants made to assist with retro-fitting

Besides energy efficiency there are the health risks associated with these boiler systems, discussed in my submission to the MCE National Energy Efficiency Framework2 (NFEE2) consultation in 2007

APPENDIX 3

SELECTED ANALYSIS OF GAS INDUSTRY PROVISIONS, PROPOSED NATIONAL ENERGY RETAIL LAWS AND IMPACTS ON TENANCY LAWS

DEEMED CONTRACTS

**RELATIONSHIPS BETWEEN RETAILERS
DISTRIBUTORS AND CUSTOMERS**

INTERPRETATION

Preamble – Some comparative tenancy law considerations

I refer to case studies cited by TUV and consistent findings by VCAT that tenants of premises not separately metered for gas cannot be charged for energy consumption. Water may only be charged in separately metered and only for actual consumption costs not supply or other costs, as upheld by most other state tenancy laws, though there are differences that deserve attention in the interests of parity, with the desirability to embrace consistent fair and equitable national tenancy laws that reflect ongoing changes to other laws including generic laws that will include substantive unfair terms provisions.

Under the ACT *Residential Tenancies Act 1997*¹ amongst several other obligations the Lessor (Landlord or OC) must pay for

42 (c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;

42 (d) all services up to the time of measurement or reading at the beginning of the tenancy

43 (1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

These provisions make it very plain that supply charges for water and sewage are Lessor responsibility, and also that the lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

These issues are not clarified in other tenancy provisions, but it is a matter of common sense that no tenant should be liable for installation costs of this kind, or that competition for utilities be deemed to exist because a theoretical but inaccessible “choice” may exist to install such infrastructure in order to ensure direct consumption of energy used to heat water.

Hot water services are normally an integral part of the rental costs in multi-tenanted dwellings where a single gas meter and a single boiler tank exists for the supply of heated water.

¹ *Residential Tenancies Act 1997 (ACT)* A1997-84 Republication No. 324 effective 22 December 2009.
Last amendment made by A2009-44
<http://www.legislation.act.gov.au/a/1997-84/current/pdf/1997-84.pdf>

Repair, maintenance and safety

NSW tenancy laws holds that:

*“If a tenant is willing to meet the costs and repair any damage when they leave the review can see no justification for a Landlord having an absolute right of refusal, **unless it involves alterations of a structural nature**. Excising the alleged choice to have a separate gas meter to heat water in individual residential premises situated in multi-tenanted dwellings represents a structural change such as referred to.”²*

Similarly, the South Australian tenancy provisions under the Residential Tenancies Act 1995³ refers to alteration to premises as follows:

70—Alteration of premises^{4/5}

- (1) It is a term of a residential tenancy agreement that a tenant must not, without the Landlord's written consent, make an alteration or addition to the premises.
- (2) A tenant may remove a fixture affixed to the premises by the tenant unless its removal would cause damage to the premises.
- (3) If a tenant causes damage to the premises by removing a fixture, the tenant must notify the Landlord and, at the option of the Landlord, repair the damage or compensate the Landlord for the reasonable cost of repairing the damage.

² Elsewhere I discuss the clarity with which the ACT *Residential Tenancies Act* explicitly apportions to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone. Similar provisions apply in Victorian provisions. NSW permits water charges for excess water only if metered; or additional water charges by consent only. Electricity and gas charges need to be metered to show consumption. Queensland tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Qld Govt at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

³ *Residential Tenancies Act 1995* (SA), clause 70
<http://www.legislation.sa.gov.au/LZ/C/A/RESIDENTIAL%20TENANCIES%20ACT%201995/CURRENT/1995.63.UN.PDF>

⁴ The South Australian *Residential Tenancies Act 1995* contains very similar provisions regarding alteration to premises – for which Landlord prior consent is always required – and in the case of attempting to fit gas meters and other such infrastructure such consent is almost always likely to be refused as discussed. Therefore using this as evidence that “choice” exists in order to fit infrastructure and receive direct supply of gas for water heating – which would also require a boiler tank would be ridiculous and unjust in the case of residential tenants. If this is what JGN means – and it certainly seems that it is what the Dept of Industry and Investment NSW means – in relation to choice of energy retailer – then the rationale needs to be vigorously challenged.

It is not the prerogative of other jurisdictions to attempt to re-write laws under other jurisdictional control, including the enshrined protections of tenancy acts, generic laws, trade measurement laws and generic laws current and proposed, not to over-ride enshrined rights in the unwritten laws = the common law including the rights of natural and social justice.

⁵ Tasmanian tenancy provisions under the Residential Tenancies Act 1997 (TAS) have similar provisions about alteration to property without Landlord consent.

In addition, requirements imposed on a renting tenant under any circumstances to supply and fit at own cost water or any other utility infrastructure, including gas or electricity, would represent unreasonable and substantive unfair terms, especially if this is the justification provided for the misleading statement that “*competition*” exists in that a renting tenant or other occupant is at liberty to create a legitimate contract for sale and supply of energy or water by installing his own infrastructure.

Such infrastructure and their maintenance are always the responsibility of the Owners Corporation or other third party appointed to maintain these assets.

Most residential tenancy provisions in various states and territories contain very similar provisions regarding alteration to premises for which Landlord prior consent is always required. Structural alteration is normally not permitted especially if this involves fitting of utility infrastructure of any description.

The ACT tenancy provisions are explicit that such responsibility is always Landlord responsibility and cannot be imposed of residential tenants.

The ACT Residential Tenancies Act explicitly apportions to the Lessor liability for infrastructure connection and provision including for gas, electricity water and telephone.

Similar provisions apply in Victorian provisions.

I discuss cost-recovery by Landlords and/or OCs under tenancy provisions elsewhere.

The collusive arrangements made that are apparently tacitly endorsed by energy policy-makers and regulators appear to have the effect of facilitating, through the use of third party contractors “*see-through tax advantages*” for Landlords that are not passed on to consumers; that cause ongoing detriment and erode enshrined rights under multiple provisions including tenancy rights; unfair contract terms under generic laws current and proposed; trade measurement practices and enshrined consumer protections therein – subject to the lifting of remaining utility exemptions as is the intent; common law rights including the rights of social and natural justice.

Reliance on the option of residential tenants to simply fit a individual boiler system or gas or electricity meter in order to “*opt-out*” of arrangements for central heating of water for all occupants in multi-tenanted dwellings as evidence of competitive choice is fundamentally flawed and is leading to widespread exploitation of the enshrined rights of individual consumers.

Even in the case of individual strata title owners, there are many matters of dispute, some before the open courts, based on current practices that form part of collusive arrangements between Landlords and/or OCs and energy providers including those fitting the description of either in-house or third-party external outsourced arrangements for data metering services.

I will not dwell here on interpretations of what constitute arms-length or non-arms length arrangements, but have cursorily discussed the structure of the Jemena Group and relationship to Singapore Power International.

In terms of repair it is always the Lessor's responsibility normally Landlord or Owners Corporation to maintain and replace infrastructure. It is unviable and inappropriate for a residential tenant to install such infrastructure, which in any case cannot be undertaken without the Lessor's consent, rarely given in terms of utility infrastructure

Refer to case studies cited by TUV and consistent findings by VCAT that tenants of premises not separately metered for gas cannot be charged for energy consumption. Water may only be charged in separately metered and only for actual consumption costs not supply or other costs, as upheld by most other state tenancy laws

Refer to provisions in ACT tenancy laws wherein amongst several other obligations the Lessor (Landlord or OC) must pay for

42 (c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;

42 (d) all services up to the time of measurement or reading at the beginning of the tenancy

43 (1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

In relation to alleged "choice" the erroneous perception that a residential tenant may "choose" to install physical infrastructure such as individual boiler system meter and associated equipment fails to recognize other laws, or practical considerations including affordability and the often transient nature of tenancy arrangements for which lease agreements are negotiated on a 12-month basis as a rule. To suggest that renting tenants can make their own arrangement is they do not like imprecise and legally unsustainable means of calculation is to ignore obligations under trade measurement and other provisions.

Jemena has alleged that NSW provisions are different in that individual occupants in multi-tenanted dwellings have choice in a competitive environment – in relation to the BHW provisions there is no such choice; and even if change of retailer were feasible the outcomes would be the same – the wrong instrument measures the wrong commodity, applying incorrect use of instrument, using the wrong prescribed unit and scale of measurement. The practices in place are inappropriate and legally unsustainable

In the case of the Jemena (JGN Gas Networks (NSW) 20010-2015 gas access proposal, JGN has suggested massive outlays for replacement of water meters that are entirely unnecessary for the calculation of gas provision and which do not form p-at of the gas distribution system

The ramifications for contract, trade measurement, generic and tenancy laws are huge, including unfair substantive terms of contract that would be voidable.

Similar arguments apply to all other providers of services, including metering data services using metrology practices and imposing contractual obligations on the right parties. The proper contractual party is the Landlord or OC, and the proper measurement instrument is the single gas or electricity meter that heats a communal boiler tank reticulating heated water supplies in water pipes to individual residential abodes in multi-tenanted dwellings.

Refer to impacts resulting from possible failure to consider comparative law and developments in multiple arenas, including the new national powers under national trade measurement provisions with full effect from 1 July 2010 (with some utility exemptions pending, and others being considered).

In the major case study cited, upon challenge to Victorian Civil and Administrative Tribunal (VCAT), all bills remitted to tenants and residents were found to contravene the Act and the amount paid under these unlawful bills were refunded

In that context, I now quote directly and dissect paragraph by paragraph here from s.46 and s48 respectively of the *Gas Industry Act 2001*,⁶ administered by the *Essential Services Commission Victoria* (VESC) and overseen by the Department of Primary Industries Victoria, making particular note that the provisions refer to the sale of gas, and must not be inconsistent with the *Gas Distribution Code* published from time to time by the Office of the Regulator General (now Essential Services Commission).

⁶ *Gas Industry Act 2001* found at [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/451636145440e6a2ca25705900078e48/\\$FILE/01-31a024.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/451636145440e6a2ca25705900078e48/$FILE/01-31a024.pdf)

TENANCY LAWS IN RELATION TO COST RECOVERY

On reviewing the website recently I stumbled on a number of regulatory cost allocation and other matters in several states that are also pertinent and would be affected by some of the considerations that I have raised.

These include impacts resulting from possible failure to consider comparative law and developments in multiple arenas, including the new national trade measurement provisions already in place, with full effect from 1 July 2010 (with some utility exemptions pending, and others being considered).

There are also impacts on several new provisions within the adopted Australian Consumer Law (1), with further additions expected after Senate consideration of the ACL Amendment Bill (2), which are expected to be incorporated into the ACL later this year, with the TPA being renamed Competition and Consumer Law (CC).

I discuss below on separate pages for each some of the considerations in States participating in the NECF

ACT

[ACT Tenancy Provisions under the ACT Residential Tenancies Act 1997⁷](#)

Lessor's costs

42 The lessor is responsible for the cost of the following:

- (a) rates and taxes relating to the premises;*
- (b) services for which the lessor agrees to be responsible;*
- (c) services for which there is not a separate metering device so that amounts consumed during the period of the tenancy cannot be accurately decided;*
- (d) all services up to the time of measurement or reading at the beginning of the tenancy;*
- (e) all services after reading or measurement at the end of the tenancy providing the tenant has not made any use of the service after the reading.*

43 (1) The lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

(2) The tenant is responsible for the connection of all services that will be supplied in the tenant's name.

44 The lessor must pay the annual supply charge associated with the supply of water or sewerage.

45 If the premises are a unit under the Unit Titles Act 2001, the lessor is responsible for all owners' corporation charges.

⁷ *Residential Tenancies Act 1997 (ACT)* A1997-84 Republication No. 324 effective 22 December 2009. Last amendment made by A2009-44
<http://www.legislation.act.gov.au/a/1997-84/current/pdf/1997-84.pdf>

Comment MK

These provisions make it very plain that supply charges for water and sewage are Lessor responsibility, and also that the Lessor must pay for any physical installation of services (eg water, electricity, gas, telephone line).

These issues are not clarified in other tenancy provisions, but it is a matter of common sense that no tenant should be liable for installation costs of this kind, or that competition for utilities be deemed to exist because a theoretical but inaccessible “choice” may exist to install such infrastructure in order to ensure direct consumption of energy used to heat water.

Hot water services are normally an integral part of the rental costs in multi-tenanted dwellings 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 it conditions precedent and subsequent in relation to meter readings is Lessor responsibility. This is contrary to the expectations placed in the proposed National Energy Retail Laws and Rules

(2) The lessor must provide the tenant with an opportunity to verify readings and measurements.

49 If the lessor does not arrange reading or measurement of a service connected in the name of the lessor by the day after the date of expiry of notice to vacate given in accordance with this tenancy agreement or the Residential Tenancies Act, the lessor is be responsible for payment of the unread or unmeasured service after the date of the last reading or measurement.

50 (1) If the tenant vacates the premises without giving notice before departure, the lessor must arrange a reading or measurement of services connected in the lessor's name within a reasonable time of the lessor becoming aware of the departure of the tenant.

(2) The tenant is responsible for payment of services to the date of that reading or measurement.

Repairs in unit title premises

58 If the premises are a unit under the Unit Titles Act 2001, and the tenant's use and enjoyment of the premises reasonably requires repairs to the common property, the lessor must take all steps necessary to require the owners corporation to make the repairs as quickly as possible.

Comment MK

These provisions make matters clear and are not as succinctly put within other tenancy provisions, though in Victoria the OC Act exists to cover common property infrastructure liability by the OC.

Hot water services where water is centrally heated and a single gas or electricity meter exists to provide the energy are under that category. The existence of hot water flow meters are irrelevant and unnecessary, and under new trade measurement provisions would not be appropriate instruments to use to make any form of calculation regarding alleged energy usage or consumption by an end-tenant receiving merely heated water in composite form reticulated in water pipes rather than at the outlet of a gas meter (or electricity meter) representing flow of energy.

The proposed National Energy Retail Rules and Laws also embrace the concept of direct flow of energy and disconnection under specified circumstances only of gas or electricity not water.

MK further comment:

The energy supplier distributor or third party data metering provider or meter reader does not own the water and may not on-sell it. Exceptions may apply to public authorities in the role of Landlord.

Energy suppliers or other parties may own the energy being used to heat a single boiler tank, but they do not transmit energy to end users of a composite water product – reticulated in water of varying temperature quality and consistency in water service pipes.

In some apartment blocks depending on location a 200 litre draw can be necessary before the water is even hot. Landlords have no incentive to lag pipes or maintain infrastructure. The debates about who is responsible for each part of the infrastructure are perennial.

Energy policy makers and energy providers should not be interfering in contractual relationships between Landlords and tenants or endeavour to strip residential tenants of their enshrined rights under tenancy, generic, contractual, common law or trade measurement instruments, current or proposed.

The Water Authority supplies the water to the Body Corporate who then apportions to each owner (not renting tenant) the cost of heating the water, unless a separate gas meter already exists (at the owners' expense) through which gas consumption can be directly measured.

In each of these circumstances the question of choice is but an artifact based on perpetuated misconceptions across the board by policy-makers and providers of energy alike.

It is absurd and unjust to expect a renting tenant to exercise any choice that involves the outlay of considerable funds for fixtures, fittings or meters that are essential for the proper measurement of utilities using the right instrument, for the right commodity, applying the right scale of measurement, and applying the generic contractual and common law rights in force.

I remind all policy-makers that they always are in the process of change. The existing arrangements if they imply choice that cannot in practice be exercised; or use of water meters to effectively pose as gas or electricity meters in attempts to guesstimate the alleged sale and supply of gas where no flow of gas to each residential abode can be demonstrated.

A supply point does not mean a street address – it means the point at which gas leaves the gas infrastructure and enters the outlet of a gas meter.

Poor understanding of these technicalities has resulted in distortion of interpretations of existing and future provisions and progressive erosion of existing rights.

As to suggest that no matter may be appealed in the open courts – this again represents another illustration of poor understanding of the powers of higher courts.

NEW SOUTH WALES

In **NSW** Landlords can only reclaim the costs of actual consumption of **excess water**, or alternatively where water meters exist, and where by consent (but not obligatory under the law), additional standard term clauses are included in a tenancy lease, may reclaim additional **actual water consumption costs only** not supply charges and other costs. The same applies in Victoria.

Electricity and gas charges need to be metered to show consumption.

The **NSW** tenancy regulations appear to omit specific mention of heated water provisions where no direct supply occurs, as do the ACT provisions, but it is clear that in terms of water – only the excess cost of water (without specifying hot or cold) needs to be paid; or if by non-mandatory consent additional water costs are included in a lease.

VICTORIA

In **Victoria** even if water meters exist, Landlords can only charge for water costs if energy-saving devices are fitted (s69); the cost of consumption of water only may be charged not any supply or other charges bundled or unbundled); Landlords are responsible for all capital and infrastructure costs, including common property. The Landlord may not recovery other utility costs for gas or electricity for example in the absence of separate meters for each utility.

In some States, including Victoria, residential tenancy laws do not permit a Landlord to charge for the heating component of water unless a separate meter is fitted for each form of utility – and the cost such infrastructure is expected to be borne by the Landlord as an intrinsic part of the facilities provided. In addition, the Landlord may not charge for water even when accurately calibrated satellite hot water flow meters exist except at the cold water rate.

Specifically under s53 of the Victorian *Residential Tenancies Act 1997*⁸ the following provisions apply:

Residential Tenancies Act 1997 - SECT 52

Tenant's liability for various utility charges

52. Tenant's liability for various utility charges

A tenant is liable for-

(a) all charges in respect of the supply or use of electricity, gas or oil in respect of the tenant's occupation of rented premises that are separately metered except-

(i) the installation costs and charges in respect of the initial connection of the service to the rented premises; and

(ii) the supply or hire of gas bottles;

(b) the cost of all water supplied to the rented premises during the tenant's occupancy if the cost is based solely on the amount of water supplied and the premises are separately metered;

(c) that part of the charge that is based on the amount of water supplied to the premises during the tenant's occupation if the cost of water supplied is only partly based on the amount of water supplied to the premises and the premises are separately metered;

(d) all sewerage disposal charges in respect of separately metered rented premises imposed during the tenant's occupation of the rented premises by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(e) all charges in respect of the use of bottled gas at the rented premises in respect of the tenant's occupation of the rented premises.

⁸ *Residential Tenancies Act 1997* Victoria

Landlord's liability for various utility charges

53. Landlord's liability for various utility charges

(1) A Landlord is liable for-

(a) the installation costs and charges in respect of the initial connection to rented premises of any electricity, water, gas, bottled gas or oil supply service;

(b) all charges in respect of the supply or use of electricity, gas (except bottled gas) or oil by the tenant at rented premises that are not separately metered;

(c) all charges arising from a water supply service to separately metered rented premises that are not based on the amount of water supplied to the premises;

(d) all costs and charges related to a water supply service to and water supplied to rented premises that are not separately metered;

(e) all sewerage disposal charges in respect of rented premises that are not separately metered imposed by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(f) all charges related to the supply of sewerage services or the supply or use of drainage services to or at the rented premises;

(g) all charges related to the supply or hire of gas bottles to the rented premises.

(2) A Landlord may agree to take over liability for any cost or charge for which the tenant is liable under section 52.

(3) An agreement under subsection (2) must be in writing and be signed by the Landlord.

In addition

Residential Tenancies Act 1997 - SECT 54 (Vic)

Landlord's liability for charges for supply to non-complying appliances

54. Landlord's liability for charges for supply to non-complying appliances

(1) A Landlord is liable to pay for the cost of water supplied to or used at the rented premises for as long as the Landlord is in breach of section 69 or of any law requiring the use of water efficient appliances for the premises.

(2) Subsection (1) applies despite anything to the contrary in section 52 of this Act and Part 13 of the Water Act 1989.

I raised the following issues on page 26 of my original April 2010 submission:

“If any party should be contractually obligated for any metering and data services it should be the developer or Owners Corporation (Body Corporation) who originally requested the gas or electricity metering installation.

Any arrangements as to ownership of water assets, including metering and associated equipment is an arrangement between provider and the controller of premises, normally once developer stage is passed, the Body Corporate, not the end user of heated water.

I am concerned that the AER MCE AEMC and AEMO may by implication be sanctioning services that are unrelated to the sale and supply of energy. Changes to generic and trade measurement laws are very clear.

The National Measurement Institute is the sole authority on metrology matters and upholds the principles of legal traceability of commodities and services. For the purposes of current and proposed generic and other laws, electricity and gas are commodities and therefore are covered by the full suite of protections.

The Jemena Gas Networks (NSW) Ltd Revised Access revised proposal is pending the AER's final decision by 28 May is but the tip of the iceberg and my concerns extend much further to cost allocation principles generally both for electricity and gas in certain areas; to the ACCC's independent role in competition and consumer protection matters.

As to consideration those receiving heated water as a composite product under such conditions to be "embedded" this is absurd since no flow of energy ever enters the abodes of those deemed to be receiving gas.

Gas and electricity are commodities for the purposes of generic laws and the full suite of protections applies. There are implications also for statutory and implied warranty terms; unfair contract terms embedded in proposed energy rules and laws; and the pending Rule Change proposal by the AEMC, which was not made part of a transparent process at the time when the NECF2 Exposure Drafts were put forward for consideration by stakeholders.

EnergyAdvice has also raised the issue of meaningful stakeholder consultation, and queried why the Draft Decision of the AER was published without a further public forum?

Though this is not a requirement, in view of the degree to which stakeholder endorsement is compromised, and also given the massive regulatory changes on foot in generic, trade measurement, national energy laws and so on, a hasty decision without further direct consultation may be against public interest. This case is a test case and not about a particular provider. The principles will apply across the board to all energy providers and impact on all stakeholders."

Residential Tenancies Act 1997 - SECT 69 (Victoria)

Landlord must ensure replacement water appliances have A rating

69. Landlord must ensure replacement water appliances have A rating

A Landlord must ensure that if an appliance, fitting or fixture provided by the Landlord that uses or supplies water at the rented premises needs to be replaced, the replacement has at least an A rating.

55. Reimbursement

(1) If a Landlord pays for anything for which the tenant is liable under section 52, the tenant must reimburse the Landlord within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(2) If a tenant pays for anything for which the Landlord is liable under section 53 or 54, the Landlord must reimburse the tenant within 28 days after receiving a written request for reimbursement attached to a copy of the account and the receipt or other evidence of payment.

(3) Subsection (1) does not apply if there is an agreement to the contrary under section 53.

Comment MK

The problems with this cost-recovery arrangement are discussed more fully in the deidentified case study that I submitted to various arenas, including the MCE SCO NECF1 (2008) NECF2 Package (2010); the Gas Connections Framework Draft Policy Paper (2009); the Treasury's Unconscionable Conduct Issues Paper (2009) and the Senate's Economics Committee Consumer Inquiry (ACL-TPA Amendment Bill2) ((2010); and previously the Productivity Commission's Consumer Policy Inquiry (2007-2008) (subdr242 Parts 1-5 and 8).

These include:

1. Inaccessibility to fair and just complaints and non-litigious dispute resolution processes. For example most industry-specific complaints schemes are expressly limited under their charters to deal with complaints relating to BHW arrangements; embedded or exempt selling regimes. In the case of EWOV (Vic) they have openly expressed conflicts of interests
2. Difficulties under VCAT or other Fair Trading jurisdictions in other States in dealing with third parties not party to the Landlord-tenant agreement – which is why it is so attractive for Landlords to use those third parties in collusive arrangements with energy providers, with or without tacit or explicit sanction from energy authorities.
3. Cost of filing fees on a quarterly basis or at least as often as bills are issued, these costs often outweighing the value of reimbursement in monetary and stress terms
4. Waiting time for 28 days before VCAT reimbursement claim can be met
5. Dealing with recalcitrant Landlords who refuse to comply with Orders – repeatedly as documented for instance by the Tenants' Union Victoria

6. The imposition of conditions precedent and subsequent especially with regard to access to meters that are not in the care custody and control of end-users of utilities. Alleged denial of access to such meters results in unwarranted disconnection of heated water in the case of the BHW arrangements
7. Consequences of alleged “breach” of energy contracts that do not under contract and common law or tenancy provisions exist in the first place between energy providers and end-users of centrally heated water
8. Possible implications for credit rating
9. The inability of certain client groups to effectively participate and follow-through in litigious proceedings, especially because of the stresses and delays involved; language barriers; or generally compromised ability
10. Unjust imposition of unfair substantive terms under contracts that are not reflected in parity with generic provisions existing and proposed
11. Unjust use of inappropriate trade measurement practices that erode best practice stands and breach the spirit and soon the letter of trade measurement laws upholding the principles of legal traceability of measurement and measurement standards that include using instruments for the right purposes, in the manner intended, measuring the right commodity with the right instrument; using the prescribed units and scales of measurement.

As soon as remaining utility exemptions are lifted, many of the current practices may carry strict liability penalties under trade measurement provisions
12. The current arrangements for BHW contractual imposition trade measurement and charging will leave providers of energy vulnerable as well as potential those who tacitly or explicitly sanction practices that breach the spirit and letter of other provisions and violate best practice

SOUTH AUSTRALIA

In **South Australia** mandated tenancy terms require that The Landlord bears all statutory rates, taxes and charges imposed in respect of the premises (Div 11, s73 Rates taxes and charges)

In relation to the “*bulk hot water arrangements*” in **Queensland** tenancy and fair trading provisions have been diluted to reflect the warranties and arrangements made by the Queensland Government at the time of sale and disaggregation of assets which has left residential tenants and other occupants in multi-tenanted dwellings extremely vulnerable and has created a monopoly situation, albeit that these tenants do not receive direct flow of gas to their apartments where water is centrally heated.

Please refer to the submission of Kevin McMahon to the NECF2 2nd Exposure Draft, now also included as submission 46 to the Senate’s TPA-ACL Bill2 enquiry, now completed and reported. Mr. McMahon was a direct victim of these policies albeit living in social housing, living in public housing in Queensland.

The SA provisions⁹ 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.

⁹ *Residential Tenancies Act 1995 (SA) version 1 February 2010 Accessed 27 May 2010*
<http://www.legislation.sa.gov.au/LZ/C/A/RESIDENTIAL%20TENANCIES%20ACT%201995/CURRENT/1995.63.UN.PDF>

Extract **South Australian** tenancy regulations¹⁰

8—Other amounts recoverable by the Landlord

Pursuant to section 53(2)(c) of the Act, a Landlord is also authorised to require or receive payments for the provision of electricity, gas or telephone services at the premises if the accounts for those items are in the name of the Landlord.

Note the SA tenancy provisions have not been updated for ten years since 2000

¹⁰ *Residential Tenancies (General) Regulations 1995* (SA) last update 28 February 2000, Accessed 27 May 2010

[http://www.legislation.sa.gov.au/LZ/C/R/RESIDENTIAL%20TENANCIES%20\(GENERAL\)%20REGULATIONS%201995/CURRENT/1995.210.UN.RTF](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 website¹¹

Since the FRC date in Queensland (1st July 2007) the price of natural gas has only increased by about 10%, but the price that Origin charge for BHW has increased to a level of 39% above the Victorian Conversion Factor, and the hot water meter reading fees have increased by 50%, over the last 3 financial years Origin has refused to converse with me, or give any reason why such price gouging is justified.

In Origin's case, even when the gas went down in price (the FRC date) - the price of BHW went up!

He has referred to 44% price gouge this by 44%. In relation to supply charges and hot water charges for BHW consumers in Queensland. (p4)

Mr. McMahon further states

LANDLORDS AND PROPERTY OWNERS

Bulk hot water meter reading fees on Origin invoices, show a fee to read and service that meter. On the 1st of July, prices increase and is applied to invoices as of that date. It is back-dated for 91 days (1 Qtr). It is not pro-rated for up to 91 days Other fees and charges on the bill (Gas, Hot Water, Supply Charges), are shown with both Pre and Post fees that center around the 1st of July.

Origin retrospectively apply this hot water meter reading fee.

BHW is not mentioned in government tenancy agreements in Queensland, for Landlords know that they cannot force a tenant to buy a service from someone else (Line Forcing TPA).

¹¹ Submissions (2010) to Senate Economics Standing Committee Consumer Law Inquiry (completed Trade Practices Act (Australian Consumer Law) Amendment Bill(2)
http://www.aph.gov.au/Senate/committee/economics_cte/tpa_consumer_law_10/submissions.htm
Published item copy of submission from Kevin McMahon Qld resident in public housing as made to the National Energy Customer Framework 2nd Exposure Draft (March 2010)

My Landlord (The Hon. Karen Struthers, MP) refuses to correspond with me also.

Housing Queensland does not allow a body corporate system for its tenants, for this usually relates to shared strata-titled property owners. Housing Queensland is exempt from most of the Residential Tenancies Act (Qld).

Over the last few years, the current state of affairs regarding Housing Queensland and QBuild, is to design properties for public housing and community housing where tenants have their own hot water systems, along with potable water, gas, electricity meters etc; with each individually metered. The Queensland Government is concerned about saving water in this time of climate change, and to help reduce carbon foot-prints. Energy and water saving restrictors are installed in tenants abodes.

Most of the BHW systems in Queensland are in older public housing flats and apartments, with the rest made up of nursing homes, caravan parks, converted old hotels and motels, boarding houses, and generally affect citizens on low incomes. Most tenants affected have a poor understanding of the energy sector at large.

Some tenancies may have gas BHW only, with an electric stove. Some may have BHW and a gas stove appliance also.

Tenants do not have the ability to turn down the hot water (say in hot weather) nor abate the cost of use, for they are charged by the litre, whether the water is tepid, warm or hot. These large shared boilers are running flat out, 24 hours a day, every day of the year and are a massive waste of energy. Stored hot water systems have poor insulation and have a lower energy rating, compared to "peizo spark - on demand" hot water units.

Stored hot water boilers have very basic insulation, and waste a lot of energy. Even the pilot light that is continually lit, is a waste of energy.

There are also health risks (known Legionnaire's Contamination) regarding low heat settings for Hot Water Systems."

Comment MK:

Note I have discussed Legionnaire's diseases associated with boiler tanks at great length in my 2007 submission to the National Energy Efficiency 2 Package (NFEE), citing Australian and overseas data in support

The BHW arrangements post health risks; are inefficient in terms of energy conservation (a 200 litre draw of water is not uncommon in certain apartment blocks before water is hot); leave exploitation open, may occasion loss of water through unattended pipe leakages or failure to lag; and do not encourage Landlords or OCs to face their liabilities for maintenance.

TASMANIA

The **Tasmanian** provisions regarding water and sewage are under special campaign efforts by the Tasmanian Tenants Union, and are seen as unfair and burdensome especially to low income tenants.

There are numerous gaps in the Tasmanian provisions

The *Residential Tenancies Act 1997* (Tas)¹² refers to a “*water consumption charge*” with increases expected. Consumption of water means that measured by a devise capable of measuring water volume. Heated water is not mentioned and neither is electricity or gas.

“water consumption charge” means an amount levied on an owner by a regulated entity, within the meaning of the Water and Sewerage Industry Act 2008, for water consumed by an occupant of residential premises that is calculated as a fee for each unit of water consumed.

Other States including Queensland and South Australia followed Victoria’s lead with the bulk hot water arrangements. In Queensland the tenancy and fair trading protections are weaker and there are enhanced concerns about the operation of non-governmental monopolies in the provision of gas used to centrally heat a communal water tank. The segments of the community most impacted in Queensland are those living in public housing, most of them vulnerable and/or disadvantaged.

Even when they receive no gas at all they are required to pay FRC fees.¹³

Meanwhile, the QCA’s November 2009 report omitted to identify the following:

- Precisely how much gas was being transported via pipelines to heat communal water tanks (many in public housing; others in owner/occupier dwellings; others possibly in the private rental market without owner occupation?)
- How much gas in total was being used to heat communal “*bulk hot water tanks*” in multi-tenanted dwellings

¹² Tasmanian Tenancy Regulations
http://www.austlii.edu.au/au/legis/tas/consol_act/rta1997201/s17.html

¹³ FRC means "Freedom of Retail Contestability" is a computerized system data build, so that reticulated natural gas selling, and trading, is assigned to customers and natural gas retailers, so that trading and selling of this gas can take place. In Qld It is imposed on natural gas customers accounts, and is about \$25 per year for the first 5 years after the FRC date : 1st June 2007. It accumulates over this first 5 years as a "pass through cost" of about \$20million and will be phased out in a couple of years. Vencorp is to build this system, and is also the referee on this market using the MIRN meter numbering system.

- How calculations regarding gas consumption (using hot water flow meters that measure water volume not gas or heat) were made regarding the alleged sale of gas to end-users of heated water, and on what basis under the provisions of contractual law, revised generic laws under the *TPA* (which by the end of 2010 must also be reflected in all jurisdictional Fair Trading Laws); and the *Sale of Goods Act 1896 (Qld)*¹⁴ or residential tenancy provisions; and what is likely to happen with the existing utility exemptions under National Trade Measurement provisions are lifted as is the intent., making the current practices directly invalid and illegal with regard to trade measurement.
- How such a contractual basis is deemed valid and will be consistent with the provisions of the Trade Practices (Australian Consumer Law) Act 2009, effective 1 January 2010, given that the substantive terms of the unilaterally imposed “*deemed contract*” with the energy supplier its servant/contractor and/or agent
- How the calculations used, which may be loosely based on the Victorian “BHW” policy provisions (based on what seem to be grossly flawed interpretations of s46 of the *GIA*)
- Whether and to what extent a profit base is used to “cross-subsidize” the price of Origin’s gas sales barriers to competition may be represented to 2nd tier retailers when the non-captured captured BHW market¹⁵ 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.

¹⁴ *Sale of Goods Act 1896 (Qld)* (reprinted and as in force as at 29 August 2007)

¹⁵ A misnomer since it is not water that is charged for but the heating component of a composite product where only a single gas (or electricity) meter exists which is used to heat a communal water tank from which water is reticulated in water pipes to the individual abodes of renting tenants either in private 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 changing their gas retailer." This last comment means transfer from AGL to Origin to compound the monopoly situation so that supply charges for the actual supply of gas for heating and cooking purposes is not duplicated on the basis of alleged supply of gas from Origin for the purposes of centrally heating a communal boiler tank, but not providing any direct flow of gas to the recipients of the heated water. See Kevin McMahon's submission to the NECF2 Package, also published on the Senate's website (TPA_ACL-Bill2).

Refer also to the Second Reading Speech by the then Treasurer The Hon Anna Bligh (now Qld Premier) and Member for South Brisbane) 'Energy Assets (Restructuring and Disposal) Bill' Hansard Wednesday 11 October 2006, especially penultimate paragraph page 1, and first paragraph p2 in which extraordinary guarantees seem to have been made regarding exemption from challenge. Perhaps Part 3 Statutory Orders of Review as contained in the Queensland Judicial Review Act 1991 need to be evoked – since one monopoly – the State Government sold energy assets (and impliedly packaged these with water assets) to another monopoly Origin in order that Orin could claim retail sale of energy to its guaranteed monopoly market where no sale or supply of energy through flow of energy is effected.

Refer also to comments made by the law firm instructed to act on behalf of Energex, though the vendor instructions were handled by the Government in what appeared to be complex arrangements

In my view the circumstances , warranties and guarantees so made deserve scrutiny, as also arrangements in other states during sale and disaggregation of energy assets. Such scrutiny may provide the key to understanding why these bizarre, scientifically and legally unsustainable provisions have been retained despite detriment and unworkability, as arrangements that appear to be fanning market dysfunction and consumer detriment.

There is a fair and just way of a fairer system of addressing the issues.

The Victorian *Residential Tenancies Act 1997* (RTA) prohibits charging for water, even when meters exist other than at the cold water rate, so the question of charging for heating is inappropriate.

Victorian *RTA* provisions disallow utility supply charges or charges for anything other than actual consumption charges where individual utility meters (gas electricity or water) do exist. This is a vast improvement on Old provisions.

Nonetheless loopholes allow third parties and energy suppliers not party to Landlord-tenant agreements to exploit the system with the apparently collusive involvement and active instruction of policy-makers and regulators.

Despite the existence of these arrangements and both implicit and explicit endorsement of discrepant contractual governance and billing and charging practices associated with the “*BHW arrangements*” none of the policy-makers or regulators seem to be willing to clarify within market structure assessments; competitive assessments or reports that such arrangements exist, must be taken into account, and must be covered by appropriate consumer protection arrangements.

Regardless of whether these matters are considered of a predominantly “economic-stream” interest, there are consumer protection issues that have been entirely neglected with jurisdictional and proposed national energy consumer protection frameworks in areas where it is mostly the most vulnerable of utility end-consumer, in a captured monopoly-type market with no chance of actively competing in the competitive market

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 article¹⁶ 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 "*owners could be paying for the excessive water consumption of their neighbour.*"

Wheeler says the GST anomaly is costing residents millions of dollars each year and argues that billing individuals rather than whole buildings for water would be fairer. This is not associated with hot water, but cost of water divided amongst owners.

¹⁶ see www.apimagazine.com.au "*Making every drop count: Article by Shane McNally.*

The principles for billing owners simply by calculating the number of apartments or units and evenly dividing the cost has been also used for heated water in endeavouring to apportion to each supply and other charges – where for settlement purposes by a single gas supply or energization point exists, one GST charge and one proper contractual party – the Owners’ Corporation, who have to meet divided costs in the manner agreed under their terms.

Forcing strata owners into bundled arrangements or contractual arrangements that would not be 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 similarly 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 Commission's Inquiry Into Australia's Consumer Policy Framework (subdr242parts 1-5 and Part 8, 2008) and other public consultation arenas.

Some possible solutions:

- Withdraw existing the BHW arrangements from energy provisions. Revisit departmental local authority Infrastructure and Planning arrangements that allow perpetuation of the BHW arrangements (see for example Qld Dept of Infrastructure and Planning sanctions Fact Sheet under Building Codes Queensland).
- Allocate responsibility to the appropriate contractual parties - OCs
- Make sure metering databases and service compliance is undertaken
- Apply appropriate trade measurement practices using the right instrument to measure the right commodity in the correct unit of measurement and scale.
- Ban communal hot water systems and install individual utility meters for gas electricity and water in all new buildings.
- Assist existing OCs and Landlords to upgrade and retrofit with individual meters and instantaneous hot water systems in each residential abode - meeting efficiency and health risk issues in one fell swoop and enabling proper application of metrology procedures that are transparent.

ANALYSIS OF s46 GAS INDUSTRY ACT 2001 and conflict with Residential Tenancies Act 1997 (Vic)¹⁷

I now analyze in detail the deemed provisions of the *Gas Industry Act 2001* under s46 to support my view that these provisions have been mistakenly applied to those receiving bulk hot water supplies from a single energization point on common property infrastructure.

46. Deemed contracts for supply and sale for relevant customers

(1) If a relevant customer commences to take supply of gas at premises from the relevant licensee without having entered into a supply and sale contract with that licensee, there is deemed, on the commencement of that supply,¹⁸ to be a contract between that licensee and that person for the supply and sale of gas—

¹⁷ This section is dedicated to the Victorian tenancy provision as it was originally intended to support arguments in the Main Deidentified Case Study as Appendix 1 which was also submitted as supporting data to numerous other arenas, including the Productivity Commissions, Consumer Policy Review (2007-2008 (subdr242parts 4 and 5) (see also parts 1-7 and Part 8); MCE arenas including NECF1 Consultation RIS (2008); MCE SCO Gas Connections Framework (2009); Network Policy Working Group (2009) and NECF2 2nd Exposure Draft (2010); Federal Treasury's Unconscionable Conduct Issues Paper; Senate Economics Committee's Review of Consumer Legislation (TPA-ACL-Bill2). That Bill is now passed and steps are in hand for implementation of the revised Trade Practices Act 1974, which will be renamed Consumer and Competition Policy Act – see conduct provisions In the light of nationalization of energy laws; the concept of direct flow of energy (regardless of changeover of ownership operation; trade measurement provisions subject to further changes and pending lifting of utility provisions and any further amendments) these issues need to be reioved in terms of conduct and interpretation. There is a risk of perpetuation of inappropriate interpretation of the deemed provisions under the NECF2 Package, with numerous ripple effects for conditions precedent and subsequent as repeatedly discussed by me and by numerous community organizations – apparently with no effect.

Sanction of practices and Interpretations that neither represent best practice, nor are compliant with further changes to the law will be seen as inappropriate policy and instruction to market participants to ignore their obligation to meet the requirements of all laws and best practice conduct, not just those iterated or impliedly endorsed within energy provisions.

By the end of 2010 all State generic laws will have to be updated to reflect the new generic laws Parity and equity in all State tenancy laws is warranted – without going backwards and stripping end-users of utilities of their already enshrined rights. Inconsistencies between State provisions is a serious reflection of the parity and equity issues highlighted that need urgent attention across the board, with Office of Fair Trading urged to proactively address these anomalies within their jurisdictions and also through collaborative discussion with other jurisdictions

¹⁸ The term commencement of supply means commencement of gas supply to the said premises. In the BHW arrangements supply of gas is not the premises for which supply is billed. No gas associated with the heating of communal water tanks enters the premises at all. It is water in heated form as a composite product that enters the premises in a water transmission pipe. The water is supplied by the water authority. The heat is supplied to the Landlord, or OC at the outlet of a single gas meter on common property used to hear the water. In the absence of separate gas meters the landlord/Owner is responsible for all consumption supply and non-energy costs.

(a) at the tariffs and on the terms and conditions determined and published by that licensee under section 42; and

(b) on the conditions decided and provided for by the Commission under sub-section (5).

MK Comment

To meet the provisions of this clause (1) the only qualification is *“relevant customer” must be taking supply of gas at the premises from the relevant licensee”*

“relevant customer” has the same meaning as in section 43 as referred under s46 of the GIA

An Order (Order in Council exists dated 29 October 2002. It merely refers to consumption threshold of gas as 10,000 GJ per annum, and is not restricted to natural persons. Some 1.6 Victorian uses or gas consumer that amount. All provisions including the *Energy Retail Code* (VERC) provide for interchangeability of terms, i.e. natural person may be taken for an entity; plural may mean singular and the like

MK Comment

For s46 (1) to apply in respect of

“taking supply of gas at the premises from the relevant licensee”¹⁹

it must be shown that gas is being taken via a physical gas connection. That single supply point/supply address is on common property infrastructure. For BHW energization points, all of these are regarded as single supply and billing points for VENCORP Distributor-Retailer settlement purposes. The Landlord or Owners' Corporation takes supply.

Gas means gas, transmitted in gas transmission pipes not composite water products, value added products reticulated in water pipes.

This is regardless of creative redefinition of the term meter, distribution; supply; supply point/supply address, the fact is that the deemed provisions cannot be applied with regard to taking of gas supply if the gas does not enter the premises reticulated in gas service or gas transmission pipes. Therefore the deemed provisions are being inappropriately applied to recipients of heated water

¹⁹ The *Gas Industry Act, Gas Code; Energy Retail Code* (save for the BHW provisions that are transferred to it from the existing BHW Guideline 20(1) and the essence of deliberative documents of 2004 and 2005 relating to contractual matters); proposed NECF, all expect “taking supply of gas” to mean receiving gas through a gas service pipe or transmission pipe facilitating the flow of gas. Water meters, associated equipment and water service pipes do not facilitate the flow of gas or deliver gas to individual apartments where the water is communally heated in a storage tank on common property infrastructure. Ownership of the water meters does not create a contract or constitute sale of gas to the end-user of heated water in these circumstances. The contract lies with the Landlord or Owners/Corporation either explicitly because of authorization to fit the metering installation or implicitly since the supply has continued at the same supply point/supply address on common property infrastructure

Distribute,²⁰ in relation to gas, means convey gas through distribution pipelines; Gas does not pass through water meters; neither does gas pass through water service pipes. If no distribution takes place, no supply takes place of gas.

Therefore no contractual relationship exists on the basis that heated water has reached an individual apartment in water service pipes, where it can be shown that the premises in question deemed to be receiving “supply of electricity is devoid of connection point’ supply/supply address; energization; electrical line delivering the “energy” alleged to have been supplied

²⁰ Definitions, *Gas Industry Act 2001* v36, No 31 of 2001, version incorporating amendments as at 25 July 2008

Notwithstanding that the VESC has authority under the *Gas Industry Act 2001* (GIA)²¹ and the *Electricity Industry Act 2001* (EIA)²² to determine under an Order to specify a class of persons by reference to all who may supply electricity or gas, period of use, place of supply; purpose of use; quantity of energy used (consumption threshold) any other specified factor relevant to the sale of electricity or gas, the central contention in this submission and echoed in Part 2B of this tri-part submission²³ is that energy suppliers do not sell or supply energy to end-users of composite heated water products in multi-tenanted dwellings where the energy is supplied to a single energization point on common property infrastructure owned and controlled by Landlords/Owners or Owners' Corporations (OC).

Further, notwithstanding also that the VESC has the power under current legislation to regulate tariffs for "*prescribed customers*" the contention in this submission is that recipients of heated water products communally heated in a water storage tank and reticulated in water pipes, in the absence of any energy connection point in the individual premises of those parties, or any evidence of transmission of energy to those apartments in gas service pipes or gas transmission pipes or electrical lines, there is no sale or supply energy involved to the end-users of that water as a composite product heated at the request of the Landlord/Owner through a single energization point on common property infrastructure and supplied via either gas transmission pipes or else electrical lines to a communal water storage tank.

²¹ *Gas Industry Act 2001* Version No. 036, No 31 of 2001. Version incorporating amendments as at 25 July 2008-09-27 Found at

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/\\$FILE/01-31a036.doc](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc)

²² *Electricity Industry Act 2000* Version No. 040 Act No. 68/2000 Version incorporating amendments as at 9 November 2006 found at

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/75C08FBF1CB61807CA257220001BA107/\\$FILE/00-68a040.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/75C08FBF1CB61807CA257220001BA107/$FILE/00-68a040.pdf)

²³ In direct response to the VESC Regulatory Review 2008; but also to the MCE SCO Table of recommendations Policy Paper, and in addition intended for other relevant authorities and entities, including the proposed national regulator AER, the ACCC, CAV, NMI

The *GIA* describes *customer* means a person to whom a gas company transmits, distributes or supplies gas or provides goods or services. Under s22 of the *GIA* it is an offence to distribute gas without a licence other than a gas retailer.

1. *transmission pipeline means—*

(a) *a pipeline for the conveyance of gas—*

(i) *in respect of which a person is, or is deemed to be, the licensee under the **Pipelines Act 2005**;²⁴ and*

(ii) *that has a maximum design pressure exceeding 1050kPa—*

*other than a gathering line within the meaning of the **Petroleum Act 1998**; or*

(b) *a pipeline that is declared under section 10 to be a transmission pipeline—*

2. *but does not include a pipeline declared under section 10 not to be a transmission pipeline*

3. Under the definitions of the *GIA*

4. *transmit* means convey gas through a transmission pipeline;

5. **MK Comment**

6. No gas is transmitted through a transmission pipeline to the individual abode of an end-user of heated water receiving such water supplies from a communal water storage tank situated on common property infrastructure and supplied with heat from a single energization point on the same common property infrastructure owned and controlled by a Landlord/Owner.

7. Therefore no supply or sale of gas takes place to that end-user. Therefore no deemed contract exists or can be said to exist, or the necessity to form a market contract. That contract is formed at the time that the infrastructure is in place and the Landlord/Owner accepts the installation at his request.

8. Under the definitions of the *GIA*, *gas distribution company* means a person who holds a licence to provide services by means of a distribution pipeline. No gas service or transmission pipe is involved in transporting heated water from a communal water tank to the individual abode or an end-user of heated water.

9. Water pipes transport such a composite water product, from which the heating component cannot be separately measured or transported. Therefore if no distribution pipe is used, no distribution takes place. Therefore no contact exists. The energy is supplied to the Landlord/Owner on common property infrastructure.

²⁴ *Pipelines Act 2005* found at http://www.austlii.edu.au/au/legis/vic/consol_act/pa2005117/s5.html

10. Under the *GIA* “*gas fitting includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas*”

No such gas fitting as described in connection with the consumption of gas is involved in delivering heated water to the abode of an end-user of heated water that is heated in a communal water tank serving multiple occupants in a multi-tenanted dwelling (BHW). Therefore no supply is taken; in particular no unauthorized gas is consumer or taken. No deemed contract exists or ought to exist.

In addition, under s48 the terms and conditions must not be inconsistent with the *Gas Distribution System Code* published by the Office of the Regulator- (Now Essential Services Commission).

Similarly, electricity does not pass through water meters either nor through water service pipes. If no distribution takes place through electric lines, no supply takes place. Therefore no contractual relationship exists on the basis that heated water has reached an individual apartment in water service pipes, where it can be shown that the premises in question deemed to be receiving “supply of electricity is devoid of connection point; supply/supply address; energization; electrical line delivering the “energy” alleged to have been supplied.

The BWH contractual arrangements are inconsistent with the *Gas Code* to the extent that all definitions for supply point, supply address, gas transmission, meter and the like are discrepant to those provisions, and also with other provisions current and proposed for the sale and supply of energy, which requires a physical connection, flow of gas or conduction of energy through gas pipes or electricity lines to the premises deemed to be receiving that energy. Water pipes are not substitutes for such equipment. Water meters are not substitutes for gas meters within the Law and within the remainder of all Codes.

These particular provisions and terms stand out as particularly discordant with the remainder of the energy provisions and definitions.

The introduction of a new meaning for meter “*as a device that measures and records consumption of bulk hot water consumed at the customer’s supply address*”

“*Delivery of electric bulk hot water*”

“*Delivery of gas bulk hot water*”

Supply address is the customer’s apartment or flat rather than the technical use of the term that is synonymous with supply point and distribution supply point as described within the *Gas Code* and within the legislation.

It is explicit and/or implicit in all energy provisions that supply of gas means taking supply at a connection point for gas, being part of the distribution system.

This means at a distribution supply point (Gas Code=VGDSC; Energy Code=VERC); with synonymous terms “*supply point*” (VGDSC; VERC); “*supply address*” “*connection*” (NECF Glossary, Policy Paper {GPP}); “*energization point*”²⁵ NECF GPP

(2) If a relevant customer—

(a) commences to take supply of gas at premises under a supply and sale contract with the relevant licensee; and (b) that customer cancels the supply and sale contract within the cooling-off period relating to the contract; and (c) that customer continues to take gas from that licensee without entering into a further supply and sale contract with that licensee—

there is deemed, on the cancellation of the supply and sale contract, to be a contract between that licensee and that customer for the supply and sale of gas—

(d) at the tariffs and on the terms and conditions determined and published by that licensee under section 42; and

(e) on the conditions decided and provided for by the Commission under sub-section (5).

²⁵ This term means the same as supply address, supply point, distribution supply point and connection point, but must refer to an existing gas or electricity connection, as defined in the NECF and associated Glossary Policy Paper

MK Comment

As already discussed under (1) above, no supply of gas takes place as defined under the *GIA* definitions of “customer;” “gas distribution company;” “transmission;” “transmission pipeline;”

This sub-clause of s46 of the *GIA* refers to agreement to take supply and then defaulting on the agreement by withdrawing before the cooling-off period and then continuing to accept supply.

Such a circumstance is inapplicable for those receiving heated water that is communally heated by a single energization point on common property infrastructure supplied under either implicit or explicit contract between landlord and supplier. Though the BHW provisions do not acknowledge this, this is what is happening.

Those receiving communally heated water do not get to choose the supplier for the energy used. The Landlord makes that choice at the time of forming a contract and seeking for the installation of the metering installation for energy. It is not the succession of tenants who agree to take supply and then default. They take no energy at all. They take heated water supplies covered under the enshrined mandated terms of residential tenancy leases, lawfully accepted under those terms and residential tenancy provisions.

Those receiving communally heated water in multi-tenanted dwellings are not part of the distribution service since there is

- 1. No the connection of the premises to the distribution network to allow the flow of energy between the network and the premises of end-users as occupants of flats and apartments)*
- 2. No physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energization' of the connection)*
- 3. No network can facilitate the flow of energy between the network and the premises through the connection; and services relating to the delivery of energy to the(alleged) customer's premises*

That being the case, no contract can exist or been seen to exist, or be required to be acknowledged or formalized by way of an explicit contract.

That being the case, it is improper to demand conditions precedent or subsequent to the obligation to supply in relation to an end-user or heated water products. The obligation to supply, and any reciprocal obligations precedent or subsequent belong to the Landlord/Owner where only a single energization or supply point exists to supply heat to a communal water tank used to supply water to multiple occupiers in a multi-tenanted dwelling.

As reported by Tenant's Union Victoria (TUV) in their submission to the VESC Small Scale Licencing Review (2006)

"...there have been a number of instances whereby residents of dwellings in embedded networks were charged for energy consumption where there is no separate metering. Upon challenge to Victorian Civil and Administrative Tribunal (VCAT), all bills remitted to tenants and residents were found to contravene the Act and the amount paid under these unlawful bills were refunded.

Whilst recognizing that those receiving hot water supplies are not receiving energy at all through any energy connection facilitating the flow of gas, there are similarities in the arguments present

The TUV advises that "The practice of charging tenants for the gas consumption in the absence of a separate meter prima facie contradicts sections 52 and 53 of the Residential Tenancies Act 1997"

"Whilst we have successfully challenged these charges on a number of occasions the Body Corporate concerned has continued to modify the practice of charging including constructing third party agreements purportedly directly with the tenant."

However, despite numerous orders providing refunds for tenants who have paid these exorbitant hot water charges, we believe the practice continues, and that bodies corporate are profiting from inappropriate and unlawful conduct.

MK Comment

Since this is deemed to be unlawful conduct, it would seem that the explicit provisions of the BHW arrangements are encouraging and facilitating such unlawful conduct under other schemes. The energy policy-makers and regulators are adamant they wish to retain these provisions, which appear to be philosophically driven and nothing to do with consumer protection, best practice or proper trade measurement practice

MK Comment

These examples are given here to show that impartial legal interpretation of what constitutes separate metering and can be charged, whether directly by landlords, or through collusive arrangements with utility or other providers

(3) A deemed contract under sub-section (2) is deemed to commence on the commencement of supply referred to in sub-section (2)(a).

Sub-section 3 above does not apply since (2) does not apply

(4) If a supply and sale contract referred to in subsection 2)(a) is—

*(a) a contact sales agreement within the meaning of the **Fair Trading Act 1999**, sections 65 to 67 of that Act do not apply on the cancellation of that contract;*

*(b) a non-contact sales agreement within the meaning of the **Fair Trading Act 1999**, sections 73 to 75 of that Act do not apply on the cancellation of that contract.*

Subsection (4) does not apply. No agreement takes place. The contract between supplier and landlord is already formed at the time that any given tenant takes up occupancy. A supply charge applies from the moment the infrastructure is in place and normally pre-dates occupancy by any tenant. No new tenant taking up occupancy is a new customer or new supply. There is no supply to the premises of the occupant receiving communally heated water supplies reticulated in water pipes.

(5) Without limiting the generality of section 28, the Commission may decide, and provide for in the licence of a licensee, conditions setting out—

(a) circumstances in which a licensee must continue to supply or sell gas to a customer to whom the licensee supplies or sells gas under a deemed contract under this section after that contract comes to an end in accordance with sub-section (7)(d) or (e); and

MK Comment

Though the circumstances of sale or supply may be determined such circumstances must relate to the supply at a physical gas or electricity connection, regardless of network arrangements or changeover. Reticulation of heated water transported in water pipes to individual apartments does not form part of the energy distribution service at all and the two lots of transmission are unconnected. The heat is merely used to heat a communal water tank. The water is supplied to the Landlord by the Water Authority. The energy is supplied to the Landlord to heat the water storage tank. Thereafter the terms of contract are as mandated in lease arrangements between Landlord and tenant.

(b) events on the happening of which a deemed contract under this section may come to an end.

MK Comment

The event that the supplier wishes to facilitate is capitulation into an explicit market contract for the “delivery of bulk gas water” or “delivery of bulk electric water. This is not technically feasible and cannot be delivered in equipment specific to energy, or calculated and apportioned in a legally traceable manner.

(6) A condition referred to in sub-section (5)(a) must provide for the tariff or tariffs and the terms and conditions for the continued supply or sale of gas to be determined by the licensee.

MK Comment

Notwithstanding that the Governor in Council may regulate tariffs for prescribed²⁶ customers, such a customer must be the subject of sale of gas. In the case of those receiving composite water products from a communal storage tank under the ownership and control of a Landlord/Owner of a multi-tenanted dwelling, no sale of gas to the end-user of heated water takes place. The same applies to electricity. It is the Landlord/Owner who takes supply of the energy supplied to the communal water tank.

Again, the central issue is not whether any sale or supply of gas or electricity takes place to end-users of heated water supplies communally heated and supplied in water transmission papers rather than gas transmission pipes or electrical lines. The issue is how it has come about in the first place that policy-makers, regulators, complaints handlers and retailers perceive a deemed contract for the sale and supply of gas or electricity of any description to exist with an end-user of composite water products.

The tariffs determined are derived costs using the measurement of water volume to determine deemed gas or electricity usage for the heating of a communal water tank. The costs are apportioned to individual tenants, and proportionate supply charges and non-energy costs calculated by dividing the total amount of gas or electricity supplied to a single energization point the Landlord, by the total number of residential premises at the multi-tenanted dwelling.

(6A) A person who is a relevant customer may be a party to a deemed contract under this section even if the person has previously been a party to a contract for the supply or sale of gas to different premises on different terms and conditions with the same licensee or another licensee.

²⁶ A prescribed customer means a person or a member of a class of persons to whom an order under section (5) (of the GIA) applies. See *GIA* found [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/\\$FILE/01-31a036.doc](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc)

(7) A deemed contract under this section comes to an end—

(a) if the contract is terminated; or

(b) if the customer enters into a new contract for the purchase of gas from the licensee in respect of the same premises, on the date of taking effect of that new contract; or

(c) if the customer transfers to become the customer of another licensee; or

(d) at the end of 120 days after the day on which the deemed contract commences; or

(e) on the happening of an event decided and provided for by the Commission under subsection (5)(b)—

whichever occurs first.

MK Comment

7 (a) – (d) are inapplicable for those receiving heated water supplies in water pipes. The Landlord is responsible for the energy supplied to heat the communal tank and has the implicit or explicit contract.

(8) Sub-section (1) does not apply where the relevant customer referred to in that sub-section commences to take the supply of gas by fraudulent or illegal means.

(9) Sub-section (2) does not apply where the relevant customer referred to in that sub-section takes the supply of gas by fraudulent or illegal means after the cancellation of the supply and sale contract referred to in sub-section (2)(a).

MK Comment

(8) and (9) inapplicable in relation to BHW recipients. No residential tenant receives heated water or energy fraudulently. The heating component of the water supplied is covered in the cost of rent under mandated lease provisions – residential tenancy laws are explicit about this and also the Landlord’s liability for all non-energy costs in these circumstances.

It is preposterous to hint at illegal or unauthorized supplies of energy in the circumstances. Residential tenants receiving heated water supplies are being threatened with disconnection of heated water if they do not form explicit contracts to replace what represents unilaterally and unjustly imposed deemed contractual status.

Indeed if there is any question of illegality it is that collusive arrangements between utility providers and/or other providers are in place, sanctioned by policy-makers and regulators alike to strip end-users of their enshrined rights and directly contravene s52 and s53 of the RTA. It cannot possibly be acceptable regulation for there to be this degree of conflict and debate, whether it involves on-selling of water products or alleged provision of energy to end-user premises in there complete absence of any supply point/supply address/energization or connection for gas or electricity.

(10) In this section—

"cooling-off period" means the period within which a relevant customer is entitled under a supply and sale contract or section 63, 67H

or 71 of the Fair Trading Act 1999 to cancel the contract;

"relevant customer" has the same meaning as in section 43;²⁷

"relevant licensee", in relation to premises, means the licensee last responsible for the supply and sale of gas to those premises;

"supply and sale contract" means a contract for the supply or sale of gas, whether oral or in writing, or partly oral and partly in writing.²⁸

(11) This section expires on 31 December 2008.²⁹

²⁷ An existing Order under s43 merely defines relevant customer as one who consumes no more than 10,000 GJ per annum. This applies to approx 1.6 million Victorians and is not a term restricted to natural persons. Consumption level must be related to the physical supply of gas (or electricity) facilitating flow of gas or conduction of energy to the premises in question in order for a contractual obligation to exist.

That obligation is with the Landlord/Owner to whose premises on common property infrastructure gas is transmitted to the outlet of a gas meter, and thence in a transmission pipe to a communal water tank for the heating of centrally heated water then distributed in water service pipes to individual apartments. The end-user of heated water is not a "final gas customer" but rather a recipient of heated water that is already paid for within the rent under mandated lease provisions in the absence of any connection point or proof of energy consumption. Charging formulae, the existence of or ownership of hot water flow meters that measure water volume and other considerations are irrelevant unless gas or electricity is supplied.

Residential tenants do not take illegal or unauthorized supply of gas or electricity in these circumstances, but rather fully authorized supply of heated water as part of their private contractual lease agreement with landlord based on mandated standard lease terms.

The provisions represent obvious regulatory overlap, besides using methodologies that cannot show legally traceable means of measurement and calculation.

²⁸ No such contract exists or ought to exist between retailer and recipient of heated water that is communally heated through energy supplied at the request of a Landlord/Owner at the time that a metering installation is ordered and in place. The Landlord/Owner has the contract

²⁹ The deemed provisions under the *GIA* were extended to 31 December 2008 under subordinate legislation, but the date is now reflected in the latest version of the *GIA* v34, No. 31 of 2001 found at http://www.austlii.edu.au/au/legis/vic/consol_act/gia2001167/s3.html

I cite excerpts from the submission by the 2006 Tenants Union of Victoria to the VESC Small Scale Licencing issues Paper which is cited in full under Small Scale Licencing

I note the following:

Those receiving water heated in communal water tanks are not embedded network customers. They receive no energy at all. Though managers and operators of buildings sharing walls with gas and/or electricity reticulated as part of the building infrastructure may manage the properties that they reside in and have a network other than that owned operated and managed by the original distributor and network system, they only receive energy for heating, cooking and lighting from the embedded network. For heated water, this is reticulated in water pipes. No energy papers through water pipes or the hot water flow meters posing as gas meters. Therefore the energy providers who try to pass off these customers as “embedded” requiring to pay for energy received are incorrectly applying the term. The two groups share some common ground in as far as it is difficult to calculate what energy they do use – but those receiving communally heated water should not have to pay at all for energy. The *Residential Tenancies Act 1997* (Victoria) covers them.

I reproduce this article and appreciate that community organizations have for several years fruitlessly been trying to call attention to inequities and exploitive loopholes that have left end-consumers of utilities disadvantaged; imposed with unwarranted utility bills, and have found their access to justice and to their enshrined rights under mandated provisions difficult to access.

The work done by these community organizations is appreciated. It is clear that lobbying activities were undertaken around the time that the *Winters v Buttigeig* case before VCAT attracted some public attention.

In this case, the Owners’ Corporation had clearly been directly involved in collusive practices by engaging an energy provider as a “*billing agent.*” That “*billing agent*” was identified as EnergyPlus (Australia) Pty Ltd.³⁰

³⁰ EnergyPlus (Australia) is still around. Apparently operates as a billing agent for certain body coporate entities. See for example what appears to be a sample bill issued to occupants at “Blue City Tower Apartments in La Trobe Street Melbourne. Huge bills for hot water and cold water consumption are being applied, with hot water service

“Case Study 2: Courtyard Apartments, St Kilda West (TUV Submission to VESC SSL 2006)

The units in this apartment complex are separately metered for cold water. Hot water is provided by a bulk unit, provided by a utility company, that provides gas to heat the water for each apartment. The units are not separately metered in regard to gas

The utility company remits a bill to the body corporate for the supply of gas to the whole apartment complex. The body corporate estimates the approximate amount of gas supplied to each apartment (inclusive of a small administrative fee) on the basis of hot water consumption, and then remits each occupier a bill for hot water.

The body corporate also charged tenants a \$100 “Hot Water Deposit” fee at the commencement of their tenancies, pursuant to one of the body corporate rules of the complex.

When the validity of the gas bills and the Hot Water Deposit fee were challenged by a tenant at VCAT, it was held that, pursuant to sections 52 and 53 of the Residential Tenancies Act”

- *Tenants were not liable to pay either to their landlords or the body corporate for the supply of gas (including an administrative fees in respective same), because the units were not separately metered for gas; and*

Tenants were not liable to pay the Hot Water Deposit fee, because this charge derived from the supply of gas to units that were not separately metered for gas. Furthermore, the fee could not be characterized as deriving from the supply of water to the units, and could therefore not be charged to tenants.

Case Study 3: Willow Lodge Caravan Park, Bangholme (TUV submission to VESC)

The owner of this caravan park installed water meters to all sites in July 2004, and commenced issuing bills to residents based on readings taken from these meters

Residents were not given any notice of this change in the provision of services. Prior to the installation of these meters, site rental charges were inclusive of utilities. Site rental costs were not reduced to reflect the new metering regime for water

A park resident refused to pay water bills remitted to him because he had not been notified by the owner of the change in his tenancy agreement wrought by the installation of the water meters. In July 2005, the park owner commenced proceedings at VCAT to recover the amount owing on the water bills. VCAT found that

The meters were not installed or approved by the relevant water utility company, as required by the Water Act 1989, s237A; and

- *The owner did not hold a licence pursuant to that Act and therefore was not permitted to levy water bills on residents*
- *Therefore, the sites are not separately metered for the purposes of remitting accounts to residents.*

We received advice from the relevant water supplier that they had no intention of approving the meters and it was not their role to do so

“Our concern is that as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities (TUV, 2006 to VESC SSL)”

Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act 1997 and other relevant utilities legislation (TUV, 2006 to VESC SSL)”

In relation to hot water pricing, in the same submission to VESC (2006 SSL) TUV raised concerns that

“...these case studies also raise the question of the meters used to measure residents’ consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained.

Again, consumers in embedded networks are not being afforded the same level of protection from unfair practices and exploitation as other utilities consumers, and this must be addressed to ensure parity among Victorian consumers

Under s3, Definitions of the *GIA*:

transmit means convey gas through a transmission pipeline;

Under s3, Definitions of the *GIA*:

gas transmission system means-

- (a) the primary transmission system; and*
- (b) any transmission pipeline or system of transmission pipelines that, under section 14(1) is an approved transmission connection; and*
- (c) any transmission pipeline or system of transmission pipelines that, under section 14(2), is an approved transmission adjunct*

No such transmission system is employed in distributing heated water to the premises of an end-user of heated water that is communally heated in a water storage tank on common property infrastructure heated by a single supply point/supply address on such property.

Under s3, Definitions of the *GIA*.

gas fitting includes meter pipeline burner fitting appliance and apparatus used in connection with the consumption of gas

The end-user's premises (individual apartment, flat) is not a supply address which is a technical term synonymous with supply/connection point for energy.

If disconnection of gas or heated water supplies is undertaken by a retailer, with or without tacit or explicit sanction by policy-makers and/or regulator(s) the matter is serious if this occurs where no deemed contract exist; no just cause can be shown for such an action; no energy is supplied by the retailer or distributor on the basis of all the arguments shown above, that is to say, , no supply of gas takes place as defined under the *GIA* definitions of "*customer;*" "*gas distribution company;*" "*transmission;*" "*transmission pipeline.*

APPENDIX 5

CASE STUDIES

**AS PRESENTED BY TENANTS UNION
VICTORIA (2006, August)**

(see also Appdx 6 further submission. 2006 and TUV 2007)

Contained in

**Comments to Essential Services
Commission Victoria**

**SMALL SCALE LICENCING
FRAMEWORK ISSUES PAPER (2006)**

By e-mail: smallscalelicensing@esc.vic.gov.au

31st August 2006

RE: SMALL SCALE LICENSING FRAMEWORK ISSUES PAPER¹

The Tenants Union of Victoria (TUV) thanks you for the opportunity to respond to the Essential Services Commission's Small Scale Licensing Framework Issues Paper.

Who we are

The Tenants Union of Victoria was established in 1975 as an advocacy organization and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. We represent the interests of tenants in law and policy making by lobbying government and businesses to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of rental housing and financial assistance provided to low-income households.

Embedded networks and the Residential Tenancies Act 1997

TUV is concerned that the existence of embedded networks creates confusion about the responsibility for payment for utilities for tenants and residents of rented accommodation within these networks.

In many instances, this confusion results in payment of utilities costs in excess of what would normally be required.

The Residential Tenancies Act 1997 (RTA) is the primary legislation governing residential tenancies, including caravan parks and rooming houses, in Victoria.

Sections 52 and 53 of the RTA apportion liability for utilities connection, service and consumption between landlords and tenants and residents of caravan parks and rooming houses: continued...

- *If a rental property is separately metered, the tenant pays for the connection of supply to the property and for consumption;*
- *Owners are liable for the installation and infrastructure costs of the initial connection of service to the property, and for the utilities consumed if the property is not separately metered.*

However, there have been a number of instances whereby residents of dwellings in embedded networks were charged for energy consumption where there is no separate metering. Upon challenge to Victorian Civil and Administrative Tribunal (VCAT), all

¹ Subject to appropriate citation TUV had previously agreed for its public submissions to be cited in this manner. These direct citations are therefore submitted in good faith to remind the MCE and other interested parties of the sound arguments presented in this valuable outline to exempt regime framework and related issues impacted on those who receive no energy at all but yet are inappropriately imposed with contractual obligation for energy that is not supplied through direct flow of energy. Therefore the arguments concerning alleged sale and supply of energy are flawed and technically and legally unsustainable.

bills remitted to tenants and residents were found to contravene the Act and the amount paid under these unlawful bills were refunded.

However, despite the clarity of the Act on point of liability for utilities charges, and these VCAT orders, we believe that these practices are still occurring.

The following case studies illustrate the dissonance between the provisions of the Residential Tenancies Act 1997 and billing practices adopted by some bodies corporate or owners/managers of dwellings in embedded networks. In particular, the potential for profiteering from tenants and residents in the provision of utilities need to be urgently addressed.

Case Study 1: Condor Apartments and Arkley Towers, Docklands

The units in Condor Apartments and Arkley Towers at Docklands are all separately metered for water. However, hot water is supplied to each residence through a central boiler utilizing gas. Each residence is not separately metered in regard to consumption of this gas.

Since 2002, residents have been receiving accounts for water consumption, including charges for the provision of hot water. The cold water rate is \$1.53/kl but the hot water rate is \$10.00/kl.

The supply of water to each residence is controlled by the Body Corporate, who employ a billing agent to render accounts to occupants.

In some instances, tenants in the respective blocks have been asked to sign separate supply agreements with the Body Corporate or the billing agent.

The practice of charging tenants for the gas consumption in the absence of a separate meter prima facie contradicts sections 52 and 53 of the Residential Tenancies Act 1997.

Whilst we have successfully challenged these charges on a number of occasions the Body Corporate concerned has continued to modify the practice of charging including constructing third party agreements purportedly directly with the tenant.

However, despite numerous orders providing refunds for tenants who have paid these exorbitant hot water charges, we believe the practice continues, and that bodies corporate are profiting from inappropriate and unlawful conduct.

Case Study 2: Courtyard Apartments, St Kilda West

The units in this apartment complex are separately metered for cold water. Hot water is provided by a bulk unit, provided by a utility company, that provides gas to heat the water for each apartment. The units are not separately metered in regard to gas.

● *page 2 of 7*

The utility company remits a bill to the body corporate for the supply of gas to the whole apartment complex. The body corporate estimates the approximate amount of gas supplied to each apartment (inclusive of a small administrative fee) on the basis of hot water consumption, and then remits each occupier a bill for hot water.

The body corporate also charged tenants a \$100 “Hot Water Deposit” fee at the commencement of their tenancies, pursuant to one of the body corporate rules of the complex.

When the validity of the gas bills and the Hot Water Deposit fee were challenged by a tenant at VCAT, it was held that, pursuant to sections 52 and 53 of the Residential Tenancies Act:

- Tenants were not liable to pay either to their landlords or the body corporate for the supply of gas (including an administrative fee in respect of the same), because the units were not separately metered for gas; and*
- Tenants were not liable to pay the Hot Water Deposit fee, because this charge derived from the supply of gas to units that were not separately metered for gas. Furthermore, the fee could not be characterized as deriving from the supply of water to the units, and could therefore not be charged to tenants.*

Case Study 3: Willow Lodge Caravan Park, Bangholme

The owner of this caravan park installed water meters to all sites in July 2004, and commenced issuing bills to residents based on readings taken from these meters.

Residents were not given any notice of this change in the provision of services. Prior to the installation of these meters, site rental charges were inclusive of utilities. Site rental costs were not reduced to reflect the new metering regime for water.

A park resident refused to pay water bills remitted to him because he had not been notified by the owner of the change in his tenancy agreement wrought by the installation of the water meters. In July 2005, the park owner commenced proceedings at VCAT to recover the amount owing on the water bills. VCAT found that:

The meters were not installed or approved by the relevant water utility company, as required by the Water Act 1989, s237A; and

The owner did not hold a licence pursuant to that Act and therefore was not permitted to levy water bills on residents

Therefore, the sites are not separately metered for the purposes of remitting accounts to residents.

We received advice from the relevant water supplier that they had no intention of approving the meters and it was not their role to do so.

Despite this VCAT order, the park owner continued to issue water bills to residents. Bills issued post the date of the VCAT order indicated that payment would be required when the water supplier had approved the meters. However, we were advised by the water supplier that they had no obligation or intention of approving the water meters within the caravan park network.

It appears that this has caused some residents to commence or continue to pay the invalid bills, in fear that they will accrue a greater financial liability due at a later date. Some residents also entered into direct debit arrangements with the park owner to cover these water bills.

In addition, we were concerned that the caravan park owner who had been frustrated from applying the water charges had threatened to increase rents to compensate for this problem. As many of the residents are owners of moveable dwellings that are expensive to relocate it would be difficult for them to resist or respond to such an increase.

This case study provides a number of prima facie breaches of the Residential Tenancies Act 1997:

Section 159 provides that if a caravan park owner ceases to provide services to a resident, the rent must be reduced to reflect this. Water is included in the definition of 'services' for the purpose of this section; and

Section 501(c) of the Residential Tenancies Act makes it an offence to make false representations to a person in regard to the provision of the Act, terms included or to be included in a tenancy agreement, or any matter affecting a person's rights or duties under the Act or a tenancy agreement.

Our concern is that as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities.

Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act 1997 and other relevant utilities legislation.

Hot water pricing and the regulation of metering in embedded networks²

The previous case studies also demonstrate that there is insufficient regulation protecting consumers in embedded networks from profiteering in regard to the sale of hot water. In the Docklands and Courtyard Apartments cases, the consumer protection provisions of the Gas Industry Act did not apply because hot water, not gas, was being sold. However, because the price at which hot water can be sold in embedded networks is not regulated, on-sellers are able to set their own process and residents may be charged at higher rates than consumers of the same products who do not reside in embedded networks. This is manifestly unfair, and effectively creates two classes of consumer, one of whom is afforded appropriate legislative protections from exploitative pricing by providers, and one who is not.

Furthermore, these case studies also raise the question of the meters used to measure residents' consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained. Again, consumers in embedded networks are not being afforded the same

Furthermore, these case studies also raise the question of the meters used to measure residents' consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained. Again, consumers in embedded networks are not being afforded the same level of protection from unfair practices and exploitation as other utilities consumers, and this must be addressed to ensure parity among Victorian consumers.

² **Comment MK:** I note that the TUV implies that those receiving heated water supplies from a communal water tank in multi-tenanted dwellings are “embedded consumers” The term strictly speaking applies to those receiving direct supply of energy through an electricity network. There is no such thing as a gas network technically, an issue raised by industry participants in direct submissions to the MCER on other matters. The Victorian Orders in Council were exclusive to electricity. If it is the MCE’s intention to group recipients of “bulk hot water” under the exempt selling regime this should be made very plain. If not pricing and monitoring controls should be in place, notwithstanding that in contract law and under the revised proposed alternations to generic laws impacting on substantiate unfair contracts, the current arrangements will not be compatible with other consumer protections, with proposed national energy laws relating to direct “flow of energy” regardless of “network” operation changeover or ownership

For the sake of convenience, and given that most funded community organizations seem to deal with the “*bulk hot water issue*” as synonymous with “*embedded: electricity networks.*” I have included many of my comments about this issue under the Exempt Selling Section in addition to discussion elsewhere under discussion of the tripartite contractual governance model and discussion of components of the Objective.

Comments on specific issues raised by the Paper

1. Are the current terms, conditions and limitations contained within the OIC sufficient for the regulation of small-scale electricity distribution and/or retailing?

Currently, the OIC does not require small-scale on-sellers to inform customers about the utilities concessions scheme, such as the Non-Mains Winter Energy Concession and the Non-Mains Utility Relief Grant. TUV believes that redrafting the OIC to oblige these on-sellers to provide information about the availability of concessions would rectify this oversight, and enable more vulnerable low-income households residing within embedded networks to access concessions.

We are also concerned that there is no effective compliance and enforcement regime supporting the OIC, and that regulation is driven by complaints rather than by active monitoring of the sector. This is not optimal practice in regard to consumer protection, and needs to be addressed to ensure that all customers enjoy the same level of protection, regardless of whether they reside in an exempt network.

2. What is the value of the current customer review and dispute resolution mechanisms provided under the OIC?

The OIC provides that if a dispute arises, distributors and/or on-sellers are required to inform the customer of their right to have the matter adjudicated by VCAT.

While the ability to access an independent dispute resolution process is important, there are a number of shortcomings with the VCAT process. Fees apply (though these can be waived if the applicant demonstrates financial hardship) and the process is not especially expeditious.

Furthermore, in the absence of enabling legislation, we are concerned that VCAT has no effective jurisdiction to hear and these matters. The Issues Paper (and presumably the Essential Services Commission and the Department of Infrastructure) accepts that VCAT is empowered to adjudicate dispute between consumers and small-scale operators and/or on-sellers. Disputes in which the TUV has represented applicants were heard in VCAT's Residential Tenancies List or Civil Claims List, as the Tribunal has express jurisdiction over matters pertaining to the Residential Tenancies Act 1997 or the Fair Trading Act 1999. However, VCAT's jurisdiction to adjudicate disputes between small-scale operators and/or on-sellers and consumers in embedded networks has not been made explicit in legislation of the OIC, and we contend that express provision should be made empowering VCAT to hear these matters to effect an accessible and straightforward dispute resolution.

It is also important to note the reticence of low-income households in marginal tenures (such as caravan and residential parks) to access dispute resolution procedures, because they perceive that making complaints will result in their eviction.

Customers whose housing choices are constrained by poverty are much more likely to be living in substandard conditions, and their fear of potential homelessness makes them more likely to tolerate exploitative conduct on the part of service providers. Consequently, they are less likely to be aware of and to exercise their legal rights. The

availability of the VCAT process alone in these circumstances does little to protect vulnerable households from unfair and exploitative conduct on the part of small-scale distributors and/or on-sellers.

● *page 5 of 7*

Furthermore, as noted in the Issues Paper at p. 34, there is no regulatory oversight ensuring that the provision of the OIC requiring distributors and on-sellers to inform customers of the VCAT dispute resolution mechanism is being complied with. Without appropriate supervision of distributor and on-seller behaviour, this provision will not provide customers with adequate protection equivalent to that enjoyed by customers who do not reside in embedded networks. This is manifestly unfair, and should be addressed as a matter of urgency.

3. Should customers in small-scale arrangements have access to EWOV? How could this be facilitated? What are the advantages and disadvantages of providing access, including the likely impact on small-scale operators?

TUV contends that all consumers should have access to EWOV, to ensure customer parity and fairness. Consumers qua consumers should all enjoy the same level of governmental and legal protection, regardless of whether they reside in an embedded network.

Furthermore, EWOV's processes have the advantages of being free and non-adversarial.

However, permitting customers in small-scale arrangements access to EWOV would likely involve amending EWOV's Constitution and Charter to include a specific membership category for small-scale distributors and on-sellers. TUV recommends that further work be undertaken to determine the optimal means of effecting access to EWOV for customers in small-scale arrangements.

4. What is the extent to which customers within an embedded network can and do access alternative retailers, what barriers to competitive retail access may exist for customers within an embedded network and how these barriers may be addressed?

Currently, the OIC provides, where metered electricity is sold in an embedded network, the on-seller must inform business customers of their right to purchase electricity from the licensed retailer of their choice. However, this right is not extended to residential customers.

TUV contends that this anomaly should be rectified immediately to ensure that all consumers have the same rights.

In the embedded networks with which we have experience, there is no possibility of alternative supply for an individual consumer and the embedded network supplier is effectively in a monopoly position.

In many embedded networks such as those operated by bodies corporate in high-density housing, alternative supply options would require changing the utility infrastructure.

• page 6 of 7

5. What are the advantages and disadvantages of introducing a registration system for small-scale operators? How could such a system be established and who is the most appropriate enforcement agency is?

TUV supports the development of a registration and/or licensing system for small-scale operators, as this would make it easier to monitor and enforce compliance with regulatory requirements. Without such a system it is difficult to determine the number of operators, the extent of their activities and the number of customers affected.

Our most pressing concern is that the licensing system should provide both clarity and equity of consumer outcomes in both mainstream and embedded networks.

Given it's statutory obligation to protect the interests of Victorian consumers, including low income and vulnerable consumers, with regard to the price, quality and reliability of essential services, we suggest that the Essential Services Commission (ESC) would be the most appropriate enforcement agency.

Please do not hesitate to contact me at the Tenants Union of Victoria on (03) 9411 1410 or 0409 092 949 if you wish to discuss any matters raised in this submission further.

Yours sincerely,

Research & Policy Worker

Tenants Union of Victoria

• page 7 of 7

APPENDIX 6

REPRODUCED SUBMISSION

**AS PRESENTED BY TENANTS'
UNION VICTORIA (2006, September)
Further Comments**

to

Essential Services Commission Victoria

**SMALL SCALE LICENCING
FRAMEWORK DRAFT DECISION
(2006)**

By e-mail: smallscalelicensing@esc.vic.gov.au

Friday, 29th September 2006

“RE: FURTHER COMMENTS ON THE SMALL SCALE LICENSING FRAMEWORK ISSUES PAPER

Thank you for the opportunity to make further comments on the Small Scale Licensing Framework Issues Paper in light of the matters raised at the Essential Services' Commission's (ESC) Forum of 15th September 2006.

This response represents the views of a number of consumer and community advocates including:

- Consumer Utilities Advocacy Centre (CUAC)*
- Consumer Law Centre Victoria (CLCV)*
- Kildonan Family Services*
- Alternative Technology Association*
- Tenants Union of Victoria (TUV)*

This response was enabled by a grant provided by CUAC for the small scale licensing review.

In summary our concerns and comments are as follows:

1. Registration

We agree that an extension of the current licensing model to embedded networks is impractical, given the diversity of these arrangements. However, because of that diversity we are reluctant to endorse fully the ESC's proposed registration model at this point in time, as we believe there is a dearth of information about the precise number of embedded networks currently operating, and the number and types of consumers affected by these networks.

A detailed list and description of current embedded networks should be collected, maintained and made accessible to the general public.

continued...

Given the breadth of housing types and tenures that are affected by embedded networks, we question whether the ESC model is appropriate for the variety of potential networks. We generally endorse the proposed obligation to provide information about pricing arrangements, concession entitlements, and dispute resolution avenues.

Those requirements should however be viewed as the minimum possible standard. When talking about domestic consumers in large developments (for example, in new housing estates or large high-density developments such as in Docklands) network managers should be required to comply with consumer protections in the Energy Retail Code. The ESC should therefore consider some form of threshold that would specify the level of obligation on network owners.

The registration model must be appropriately tailored to the needs of the types of consumers within an embedded network and, where appropriate in larger networks, consumers should be afforded the same protections available to all other residential customers.

It is also unclear from the ESC's proposed model how the anomalies for bulk hot water will be covered. As was clear from the case studies outlined in the TUV's previous submission, there are cases where domestic consumers have been overcharged.

We are also concerned that the consequences of non-compliance with registration requirements have not been properly explored. For example, would supplying without registration be an offence. Also, what would be the status of consumers in a non- or de-registered network? Does the ROLR take effect in these circumstances? If so, what if the network is not compliant in distribution terms?

Further work is therefore required to articulate the compliance and enforcement regimes effecting registration and consequential changes that might be required for network inheritance.

2. Retail choice

We agree that in some circumstances -- it is appropriate to place some limits on consumers' free retail choice. For example, to facilitate community development of embedded generation initiatives or to allow a consumer to sign a long-term contract). However, it is essential that consumers be able to exit the network should participation in the network prove materially disadvantageous.

Opting out of the network will necessitate the purchase of a separate meter. However, this may prevent low-income consumers and tenants from exiting a network. Requiring distribution businesses or retailers to amortize the cost of the meter could assist consumers who own their own properties, but would be unlikely to be of any benefit to tenants.

All consumers, regardless of their financial circumstances and/or housing tenure, deserve the same level of protection, and further work must be undertaken to ensure that low-income consumers and tenants enjoy the freedom to opt out of the network should continued participation be materially disadvantageous.

Furthermore, it is anomalous that networks are required to inform business consumers of their right of choice, but there is no such mandate in regard to residential consumers.

This anomaly should be rectified as soon as possible.

- Page 2 of 5

3. Incidental Supply

The ESC is seeking input on how to regulate networks that serve a mixture of transient and permanent consumers. We agree that there is no value in remitting bills for consumption for users of hotel and similar accommodation, university colleges and dormitories, and patients in hospitals.

However we strongly oppose any registration model that would exclude permanent residents, and contend that the registration scheme should apply where an embedded network is providing energy or water to a residential consumer's principal place of residence. The ESC has proposed that the definition of permanent resident rest on a criterion of 6 months residency. As an alternative we propose that 'principal place of residence' is a more effective criterion.

Furthermore, we also agree with the ESC's view (as stated in the public forum) that the definition should not revolve around the provision of separate bills, as this may act as a perverse incentive for network owners where there are permanent residents (such as caravan parks, rooming houses and apartment complexes) to cease remitting separate bills. Separate bills provide consumers with an accessible means of monitoring their own consumption, assisting them to make more informed choices about the amount of energy they consume. Consequently, separate bills have potentially beneficial impacts for both individual consumers and the environment.

The registration scheme should apply where an embedded network supplies utilities to a residential consumer's principal place of residence. The onus of proof that customers are transient and not permanent should rest with the network.

4. Price

Currently, the Order-in-Council (OIC) states that consumers in exempt networks cannot be charged more than the standing offer, but that protection is neither uniform nor effective. For consumers of bulk hot water, for example, there is no effective protection around price of either gas or water.

The OIC also does not effectively define the components of 'price'. Any new definition should include all ancillary charges (e.g. meter reading, late payment fees etc), as we are aware of cases where consumers are being charged for such services at a price that does not reflect the cost of services.

Given the diversity of embedded networks, we would also strongly recommend that the ESC implement an effective monitoring and compliance regime to oversee pricing arrangements.

Price caps should be instituted for embedded networks that ensure access and affordability for all Victorian consumers. The price caps should be rigorously monitored by the ESC.

The standing offer also sunsets at the end of 2007, raising the issue of how to benchmark a standard price after that date. Given the monopoly enjoyed by providers in embedded networks, independent price regulation and monitoring are essential to protect consumers from profiteering and other poor practices. We suggest that a benchmark maximum based on an average price would be the most appropriate method.

● Page 3 of 5

The ESC should develop a longer-term strategy to develop a system of price regulation that ensures that energy remains affordable for consumers within embedded networks.

• **5. Dispute resolution**

We agree that capacity to access an independent dispute resolution process is essential, but contend that there are a number of shortcomings with the Victorian Civil and Administrative Tribunal (VCAT) process. Fees apply (though these can be waived if the applicant demonstrates financial hardship) and the process is not especially expeditious. Furthermore, in the absence of enabling legislation, we are concerned that VCAT may not have effective jurisdiction to hear and determine these matters.

The Issues Paper accepts that VCAT is empowered to adjudicate dispute between consumers and small-scale operators and/or on-sellers. Disputes in which the TUV has represented applicants were heard in VCAT's Residential Tenancies List or Civil Claims List, as the Tribunal has express jurisdiction over matters pertaining to the Residential Tenancies Act 1997 or the Fair Trading Act 1999. However, VCAT's jurisdiction to adjudicate disputes between small-scale operators and/or on-sellers and consumers in embedded networks has not been made explicit in legislation or the OIC, and we contend that express provision should be made empowering VCAT to hear these matters to effect an accessible and straightforward dispute resolution.

It is also important to note the reticence of low-income households in marginal tenures (such as caravan and residential parks) to access dispute resolution procedures, because they perceive that making complaints will result in their eviction. Customers whose housing choices are constrained by poverty are much more likely to be living in substandard conditions, and their fear of potential homelessness makes them more likely to tolerate exploitative conduct on the part of service providers. Consequently, they are less likely to be aware of and to exercise their legal rights. The availability of the VCAT process alone in these circumstances does little to protect vulnerable households from unfair and exploitative conduct on the part of small-scale distributors and/or on-sellers.

All consumers should enjoy the same level of government and legal protection, regardless of whether they reside in an embedded network. The Electricity and Water Ombudsman's (EWOV) dispute resolution processes have the advantages of being free and non-adversarial.

We believe all consumers should have access to EWOV, to ensure customer parity and fairness.

We note permitting customers in small-scale arrangements access to EWOV would likely involve amending EWOV's Constitution and Charter to include a specific membership category for small-scale distributors and on-sellers. We would also wish to ensure that the addition of embedded networks does not threaten the viability of EWOV's existing scheme, which offers real protection for Victorian consumers.

We recommend that further work be undertaken to determine the optimal means of effecting access to EWOV for customers in small-scale arrangements. • Page 4 of 5

6. Retailer of Last Resort (ROLR)

We are concerned about how consumers would be protected in the following scenarios:

- Failure of an embedded network owner;
- Failure of a network manager;
- Failure of the retailer.

How consumers would be protected in the instance of any these failure scenarios is not clear.

Further work clarifying how services are to be maintained for consumers in the event of any of these failure scenarios must be undertaken.

7. Alignment with other legislative obligations

Finally, we are conscious that there are a range of obligations through other legislative instruments that affect the owners and managers of caravan parks, retirement villages and tenancies. As such, Consumer Affairs Victoria (CAV), which administers the Fair Trading Act, Residential Tenancies Act, and Retirement Villages Act, should be actively engaged in the development of a regulatory model, including to ensure that the networks are appropriately defined.

In that process, the ESC and CAV should maintain vigilance on the range of utilities provided by some of these networks (gas and water, for example), to see whether the registration model should be expanded to capture other essential services.

The registration model and accompanying obligations on network owners and operators must be effectively and appropriately aligned with other legislative and regulatory instruments.

If you require any further information about any of the matters raised in this submission, please do not hesitate to connect Rebecca Harrison, Research & Policy Worker at TUV on (03) 9411 1410.

Yours sincerely,

(name omitted)

Research & Policy Worker Tenants Union of Victoria • Page 5 of 5

APPENDIX 7

REPRODUCED SUBMISSION

**AS PRESENTED BY TENANTS UNION
VICTORIA (2007, September)**

to

Essential Services Commission Victoria

**SMALL SCALE LICENCING
FRAMEWORK DRAFT DECISION
(2007)**

Tenants Union Victoria (2007) Submission by Tenant's Union Victoria to VESC 2006 Small Scale Licencing Issues Paper¹”

The Tenants Union of Victoria welcomes the opportunity to comment on the Small Scale Licencing Framework Draft Recommendations.

We endorse the submission made by the Consumer Utilities Advocacy Centre (CUAC) but would like to make some additional comments.

Who we are

The Tenants Union of Victoria was established in 1975 as an advocacy organization and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. We represent the interests of tenants in law and policy making by lobbying government and businesses to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of rental housing and financial assistance provided to low-income households.

The registration system – caravan parks and rooming houses

The Essential Services Commission (ESC) Draft Recommendations indicate that it does not intend that the registration system cover entities such as caravan parks and rooming houses, which distribute and supply electricity as an integral part of another service and do not charge for it separately. The ESC believes that providers of caravan park and rooming house accommodation are not actively involved in the distribution and reselling of energy to their residents and therefore should not be subject to energy-specific customer protection regulation (see 2.3.1, p.16).

However, the decision to exclude caravan parks and rooming houses from the registration system is based on a misapprehension of this sector of the housing market. Many caravan parks and most rooming houses do not provide temporary, holiday or crisis accommodation – they are the long term or permanent homes for around 25,000 Victorian households. Specifically, they are the only housing option available to very low-income, complex needs and/or unemployed or retiree households. As a group, caravan park and rooming house residents are very vulnerable – their limited incomes and health or other issues mean that they have effectively no choices in the housing market and are at high risk of homelessness. Consequently, they have a particular need for effective consumer protection frameworks to defend them from potentially exploitative practices.

In particular, it should be noted that crisis accommodation and rooming houses are not comparable entities. Crisis accommodation is a temporary source of housing for people

¹ Tenants Union Victoria (2007) Submission by Tenant's Union Victoria to VESC 2006 Small Scale Licencing Issues Paper
http://www.tuv.org.au/pdf/submissions/Small_Scale_Licencing_Review_ESC_082006.pdf

in need that is funded by the government, while rooming houses are generally operated by private or non-government providers offering long-term or permanent homes.

In the case of caravan parks, most are 'mixed use' in that they provide holiday or temporary accommodation as well as homes for permanent residents. As a matter of equity among consumers, caravan park residents should all enjoy the same level of protection regardless of the population of the park in which they live. Therefore, all caravan parks where there are any permanent residents should be subject to the registration system, not just those where the majority of residents are permanent.

The Tenants Union of Victoria recommends that that registration system be extended to capture caravan parks and rooming houses to ensure that residents are appropriately protected. The stated reason for their exclusion is based on the assumption that these complexes provide temporary accommodation to a transient population. This is clearly not the case, as caravan parks and rooming houses provide long-term or permanent housing to a class of especially vulnerable Victorians in need of particular protection.

We hope that this submission clarifies the issue for the ESC. If you wish to discuss any of the matter raised in this submission further, please contact Rebecca Harrison, Research & Policy Worker, on (03) 9411 1410

Yours sincerely,

Research & Policy Worker Tenants Union of Victoria

Comment MK

It is clear from the above that the intent was to exempt from licencing small scale operators providing electricity in embedded networks.

Elsewhere it was clearly specified that the intent was to exempt only those networks where that electricity was provided on an 'incidental' basis, such as transitory accommodation, motels, rooming houses, caravan parks; nursing homes; student accommodation associated with education institutions

The TUV pointed out that some permanent residents live in rooming houses, and caravan parks. For as long as any residents were permanent proper protections should apply.

"...there is no regulatory oversight ensuring that the provision of the OIC requiring distributors and on sellers to inform customers of the VCAT dispute resolution mechanism is being complied with. Without appropriate supervision of distributor and on-seller behaviour, this provision will not provide customers with adequate protection equivalent to that enjoyed by customers who do not reside in embedded networks. This is manifestly unfair, and should be addressed as a matter of urgency

APPENDIX 8

REPRODUCED SUBMISSION

Extract only: Energy issues – tenancy matter Residential Parks Act 1998

NEW SOUTH WALES GOVERNMENT OFFICE OF FAIR TRADING (2008)¹

SUBMISSION TO PRODUCTIVITY COMMISSION'S REIVEW OF AUSTRALIA'S CONSUMER POLICY FRAMEWORK

¹ http://www.pc.gov.au/_data/assets/pdf_file/0008/89207/subdr251.pdf

Appendix 7

Case Study

New South Wales Government Office of Fair Trading (2008) Submission to Productivity Commission's Review of Australia's Consumer Policy Framework Draft Report

http://www.pc.gov.au/__data/assets/pdf_file/0008/89207/subdr251.pdf

Extract only: Energy issues – tenancy matter Residential Parks Act 1998

“Attachment B – Litigation Case Studies

Case studies where only the Fair Trading Act could provide an effective enforcement outcome:

1. The owner of a caravan park engaged in conduct that was in breach of his obligations under the Residential Parks Act 1998. His tenants took action in the Consumer, Trader and Tenancy Tribunal and the Office of Fair Trading prosecuted him for offences under the Act.

The owner continued the misconduct. The only option was to seek an injunction under section 66 of the Fair Trading Act and orders that the owner comply with the Residential Parks Act.”

APPENDIX 9

REPRODUCED

ELECTRICITY INDUSTRY ACT 2000

EXEMPTION ORDER (2002)

UNDER SECTION 17

MINISTERIAL ORDER IN COUNCIL

VICTORIA

Appendix 9

<http://www.esc.vic.gov.au/NR/rdonlyres/695EF0E8-FBEB-4B42-879F-B233058DFAF0/0/PublicforumSmallScaleLicensing20060914.pdf>

<http://www.esc.vic.gov.au/NR/rdonlyres/9EC969C8-B301-4BD9-8E62-4A8042085616/0/MinisterLetterMarch06.pdf>

<http://www.esc.vic.gov.au/NR/rdonlyres/E0479D36-BC99-4563-9D1B-58D064BCBE13/0/GeneralOrderMay02.pdf>

ELECTRICITY INDUSTRY ACT 2000 EXEMPTION ORDER UNDER SECTION 17 ORDER IN COUNCIL

The Governor in Council acting under section 17 of the **Electricity Industry Act 2000** (the "Act") hereby makes the following Order:

1. Date of effect

This Order comes into effect on 1 May 2002.

2. Exemptions

A person identified in Column 1 of the Schedule, or falling within a class of persons identified in Column 1 of the Schedule, is exempt from the requirement to obtain a licence under section 16 of the Act in respect of each activity identified opposite that person's name, or the class of persons in which that person is included, in Column 2 of the Schedule, subject in each case to the terms, conditions and limitations (if any) specified in Column 2 of the Schedule.

3. Revocation of Existing Orders

The General Exemption Order is revoked on 1 May 2002. It is the intention of this Order not to affect the revocations made by the General Exemption Order.

4. Definitions

In this Order, including the Schedule, the following terms have the following meanings unless the contrary intention appears:

“approved meter” means any device that is of a type that the holder of a licence under the Act is permitted by law to use to measure consumption of electricity for the type of person to whom electricity is being transmitted, distributed, supplied or sold;

"Distribution Code" means the Electricity Distribution Code from time to time approved by the Essential Services Commission;

“Electricity Customer Metering Code” means the Electricity Customer Metering Code from time to time approved by the Essential Services Commission;

“ETSA Utilities” means ETSA Utilities Pty Ltd (ACN 082 711 895) and any person who in accordance with the laws of South Australia succeeds to the entitlements of ETSA Utilities;

“General Exemption Order” means the Order made under section 160 of the Electricity Industry Act 1993 and published in the Government Gazette on 27 June 1996 and varied

by an Order made on 19 December 2000 and published in Government Gazette G51 on 21 December 2000;

"generation" includes co-generation;

"Hume Power Station Agreement" means the agreement for the construction, operation and maintenance of the Hume power station and associated works between the State Electricity Commission of Victoria and the Electricity Commission of New South Wales dated 25 July 1957;

"intermediary distribution or supply", in relation to a supply of electricity to a customer, means the conveyance of electricity through facilities of a person other than a distribution company after the electricity leaves a supply facility owned or operated by a distribution company and before being supplied to the customer in premises of a kind which, as at the date of this Order, it is customary for electricity to be so supplied;

"kVa" means 1,000 volt amps;

"large business customer" means a person to whom peak demand of not less than 500 kVa, or consumption of not less than 160MWh per annum, is distributed, supplied or sold for commercial or industrial purposes;

"licensed electricity distributor" means the holder of a licence to distribute or supply electricity under the Act;

"licensed retailer" means the holder of a licence to sell electricity under the Act otherwise than through the wholesale electricity market;

"long term resident " has the same meaning as **"resident"** in the Residential Tenancies Act 1997 and the Retirement Villages Act 1986, but does not include a person who was a resident of a retirement village but who has left the retirement village or who has died, or their legal personal representative;

"metered intermediary sale of electricity" means the sale of electricity by a customer of a licensed retailer to a short term resident, long term resident, small business customer or large business customer where consumption by each such person is measured by an approved meter;

"Minister" means the Minister responsible for the Electricity Industry Act 2000;

"MW" means megawatts;

"MWh" means megawatt hours;

"National Electricity Code" has the meaning given to "Code" in the National Electricity (Victoria) Law as defined in the National Electricity (Victoria) Act 1997;

"related body corporate" has the same meaning as in the Corporations Act;

"Pricing Rule" means the price or prices determined by reference to clause 7 of this Order;

"Retail Code" means the Electricity Retail Code from time to time approved by the Essential Services Commission;

"short term resident" means any person, other than a person who is a long term resident, who resides in a premises used for residential purposes only (such as a retirement village, a rooming house or a site in a caravan park) whether or not on a temporary or intermittent basis;

“small business customer” means a person to whom peak demand of less than 500kVa, and consumption of less than 160MWh per annum, is distributed, supplied or sold for commercial or industrial purposes;

"Snowy Mountains Hydro-electric Agreement " means the agreement for the construction, operation and maintenance of the Snowy Mountains Hydroelectric Scheme between the Commonwealth of Australia, the State of New South Wales and the State of Victoria dated 18 September 1957;

“Special Power Payment rebate” means the payments made by licensed retailers to certain customers, in accordance with the scheme implemented by the Minister and administered by VENC Corp to reduce the electricity bills payable by those customers;

“System Code” means the Electricity System Code from time to time approved by the Essential Services Commission;

“VENC Corp” means the Victorian Energy Networks Corporation subsisting under section 158 of the Gas Industry Act 2001.

5. Certification by Commission

The Essential Services Commission may, on application by any person whose interests are affected, issue a certificate stating that, in the opinion of the Essential Services Commission, a particular activity does or does not constitute:

- (a) the intermediary distribution or supply of electricity; or
- (b) the metered intermediary sale of electricity,

and, if it does so, that activity does or does not, as applicable, constitute the intermediary distribution or supply of electricity or the metered intermediary sale of electricity, as the case may be, for the purposes of this Order.

6. Condition for all circumstances

It is a condition of each exemption granted under this Order that the person to whom the exemption applies must provide (whether or not through an agent), to the Minister or the Essential Services Commission, any information requested by the Minister or the Essential Services Commission, respectively, that either may require for the reasonable administration of this Order.

7. Pricing Rule

The price, or range of prices, at which electricity (and services related to the provision of electricity) may be distributed, supplied and sold to a short term resident, long term resident or small business customer pursuant to an exemption granted under this Order must:

- (a) not be more than the tariff that would apply to the customer if the customer purchased the electricity and related services pursuant to an offer made in accordance with the requirements of section 35 of the Act ; and
- (b) allow for the Special Power Payment rebate to which the customer would be entitled if the customer purchased electricity from a licensed retailer, in accordance with any guidelines that may be issued by the Essential Services Commission.

8. Safety

A person to whom an exemption under this Order applies is not, by reason of this Order, exempt from any provisions of the Electricity Safety Act 1998 or the Regulations or any other instruments made under that Act.

Dated 2002

Responsible Minister:

Candy Broad

Minister for Energy and Resources

Clerk of the Executive Council

SCHEDULE

PART A – GENERIC SITUATIONS

Column 1

Column 2

1. GENERATION

Exempt Persons

Exemption

Any person

The generation of electricity for supply or sale where the total output by that person (whether or not with another person), using a generator or generators connected to the transmission network or distribution network at a common point, is less than 30MW.

Conditions

This exemption is subject to the conditions that:

(a) the total exported output of the relevant electricity generator or group of generators must be supplied or sold to a licensed retailer; and (b) the exempt person must observe all applicable provisions of the Distribution Code.

Limitations

This exemption does not apply to the generation of electricity for supply or sale if the relevant electricity generator or group of generators is required by the National Electricity Code to be centrally dispatched.

Examples of such networks include caravan parks and office buildings.

Exempt Persons

Exemption

Any person The intermediary distribution or supply of electricity to a short term resident, long term resident, small business customer or large business customer within the limits of the premises owned or occupied by the person engaging in that activity.

Conditions

This exemption is subject to the condition that the exempt person must observe all applicable provisions of the Distribution Code as if that person was a licensed electricity distributor.

This exemption is subject to the additional condition that in the event of a dispute concerning the distribution or supply of electricity to a short term resident, long term resident or small business customer, and in the absence of any determination of the Victorian Civil and Administrative Tribunal, that the exempt person must:

- (a) make reasonable endeavours to resolve the dispute;
- (b) advise the person to whom electricity is distributed or supplied, of his or her right to apply to have a matter heard by the Victorian Civil and Administrative Tribunal; and
- (c) continue to distribute or supply electricity to that person.

Limitations

This exemption does not apply to the intermediary distribution or supply of electricity in respect of any premises where:

- (a) in relation to any existing premises, the supply arrangements are restructured; and
- (b) in relation to any new premises, the supply arrangements are structured, in such a way as may have the effect of denying:
- (c) a person any rights they may have if the supply arrangements were not so structured or restructured; or
- (d) a licensed retailer the ability to sell electricity to a customer with an approved meter.

The Essential Services Commission may, on application of any person whose interests are affected, issue a certificate stating that in the opinion of the Essential Services Commission the structuring or restructuring of supply arrangements may have an effect specified in the preceding paragraph and, if it does so, then the arrangements have that effect for the purposes of this Order.

SALE OF METERED ELECTRICITY IN EMBEDDED NETWORKS

Exempt Persons

Exemption

Any person

The metered intermediary sale of electricity within the limits of the premises owned or occupied by the person engaging in that activity.

Conditions

This exemption is subject to the conditions that:

- (a) the exempt person must observe all applicable provisions of the Retail Code as if that person was a licensed retailer;
- (b) in the case of the sale of electricity to a short term resident, long term resident or small business customer, the exempt person must observe all applicable provisions of any Pricing Rule;
- (c) in the case of the sale of electricity to a large business customer or a small business customer, the exempt person must, when it commences selling electricity to the customer, inform the customer in writing that it may have the right to elect to purchase electricity from a licensed retailer of its choice; and
- (d) the exempt person must not, by reason only that the exempt person has changed its licensed retailer, cease to sell electricity to any relevant short term resident, long term resident, small business customer or large business customer unless that customer has elected to purchase electricity from a licensed retailer.

This exemption is subject to the additional condition that in the event of a dispute concerning the sale of electricity to a short term resident, long term resident or small business customer, and in the absence of any determination of the Victorian Civil and Administrative Tribunal, the exempt person must:

- (e) make reasonable endeavours to resolve the dispute, and
- (f) advise the person to whom electricity is sold, of his or her right to apply to have a matter heard by the Victorian Civil and Administrative Tribunal.

4. SALE OF ELECTRICITY BETWEEN RELATED COMPANIES

Exempt Persons

Exemption

Any person

The sale of electricity by the exempt person to a related body corporate of the exempt person.

5. SUBDIVISION OF LAND

Exempt Persons

Exemption

Any person

The distribution, supply and sale of electricity outside premises owned or occupied by the person engaging in the activity to a large business customer with an approved meter as the direct consequence of a subdivision of a property.

Conditions

This exemption is subject to the conditions that the exempt person:

- (a) must not engage in the exempt activities other than incidentally to its core business function, which function must not be related to the distribution, supply or sale of electricity;
- (b) must cause an easement to be recorded on the titles of all affected properties in accordance with the Transfer of Land Act before the distribution, supply or sale of electricity occurs;
- (c) must cause the distribution, supply or sale arrangements to be noted on any statements provided under section 32 of the Sale of Land Act relating to all affected properties;
- (d) must observe all applicable provisions of the Distribution Code as if the person was a licensed electricity distributor;
- (e) must not take any action which prevents the large business customer from purchasing electricity from a licensed retailer of its choice;
- (f) must not take any action which prevents a licensed retailer from selling electricity to the large business customer;
- (g) unless otherwise agreed, must provide, at the request of any person who occupied the subdivided property at the time of subdivision, a separate point of supply (as defined in the Electricity Safety Act) from the licensed distribution company at no cost to that person if such a separate point of supply does not already exist; and
- (h) accepts full liability for any claims, losses, damages or costs incurred by any materially affected person as a direct result of any breach by the exempt person of any of these conditions.

Limitations

This exemption ceases to apply where there is any restructuring of the distribution or supply arrangements other than like-for-like replacement in the course of maintenance, or the replacement of an approved meter with another approved meter.

PART B – SPECIFIC SITUATIONS

Exempt Persons

Exemption

1. Country Energy The distribution, supply and sale of electricity in the areas of Bonang, Tebbutt, Dedick, Goongerah, Delegate River, Bendoc, Lower Bendoc, Jingellic, Bongilla Island and Tocumwal.

Conditions

This exemption is subject to the conditions that Country Energy:

- (a) must distribute, supply and sell electricity to persons in these areas on the same terms and conditions of any licence it holds that enables it to distribute, supply and sell electricity to customers in New South Wales;
- (b) agrees, that the Energy and Water Ombudsman of New South Wales has jurisdiction to hear and determine disputes in accordance with its functions;
- (c) must not take any action that would affect the ability of a customer to purchase electricity from an electricity retailer licensed in New South Wales to sell electricity to a customer in these areas; and
- (d) must not take any action that would affect the ability of an electricity retailer licensed in New South Wales to sell electricity to a customer in these areas.

2. ETSA Utilities The distribution, supply and sale of electricity by ETSA Utilities to another licensed electricity distributor or licensed retailer in Victoria, and existing customers of ETSA Utilities in Victoria as at the date of this Order, subject to the conditions that ETSA Utilities:

(a) distributes, supplies and sells electricity to persons in these areas on the same terms and conditions of any licence it holds that enables it to distribute, supply and sell electricity to customers in South Australia; and

(b) provides customers in Victoria with access to the same dispute resolution process it provides to comparable customers in South Australia.

3. Federal Airports Corporation

The distribution, supply and sale of electricity at Melbourne International Airport, Tullamarine.

This exemption is subject to the conditions that Federal Airports Corporation must:

(a) observe the Pricing Rule;

(b) observe all applicable provisions of the Distribution Code, the Electricity Customer Metering Code and the Retail Code;

(c) not take any action which prevents a customer from purchasing electricity from a licensed retailer of the customer's choice; and (d) not take any action which prevents a licensed retailer from selling electricity to a customer.

Melbourne Exhibition Centre The distribution, supply and sale of electricity within the exhibition centre owned and operated by Melbourne Exhibition Centre.

Conditions

This exemption is subject to the conditions that:

(a) Melbourne Exhibition Centre must observe the Pricing Rule;

(b) Melbourne Exhibition Centre must observe all applicable provisions of the Distribution Code;

(c) any dispute relating to the distribution, supply or sale of electricity between Melbourne Exhibition Centre and a person to whom it distributes, supplies or sells electricity must, except where both parties otherwise agree, be resolved in accordance with any dispute resolution process that has been agreed between them; and

(d) Melbourne Exhibition Centre supplies electricity to its exhibitors at cost and does not seek to make a profit on the re-sale of electricity.

076 279) ("HRL")

The distribution, supply and sale of electricity within the limits of the premises owned or occupied as at the date of this Order by HRL or one of its related bodies corporate at Tramway Road, Morwell.

Conditions

This exemption is subject to the conditions that HRL observes:

(a) all applicable provisions of the Distribution Code; and

(b) the Pricing Rule.

6. Loy Yang B Power Station Pty Limited (ACN 052 530 551)

Mission Energy Australia Ltd (ACN 055 563 785) as managing partner of the Latrobe Power Partnership The generation of electricity by the Loy Yang B power station for supply or sale to the State Electricity Commission of Victoria.

Mission Energy Management Australia Pty Ltd (ACN 055 563 696) as the operator of the Loy Yang B power station and any other person appointed in its place as operator of the Loy Yang

B power station by Loy Yang B Power Station Pty Ltd and Mission Energy Australia Ltd as managing partner of the Latrobe Power Partnership

Electricity Trust of South Australia ("ETSA") and any person who in accordance with the laws of South Australia succeeds to the entitlements of ETSA

The generation of electricity for supply or sale pursuant to any remaining entitlements under the former Interconnection Operating Agreement dated 14 July 1986.

8. Electricity Commission of New South Wales ("ECNSW") and any person who in accordance with the laws of New South Wales succeeds to the entitlements of ECNSW under the Snowy Mountains Hydro-electric

Agreement or the Hume Power Station Agreement

The generation of electricity for supply or sale to any licensed distributor or licensed retailer in Victoria pursuant to the Snowy Mountains Hydro-electric Agreement or the Hume Power Station Agreement.

9. Department of Natural Resources and Environment

The generation of electricity for supply or sale, the transmission, distribution, supply or sale of electricity, in each case within Wilson's Promontory National Park in the manner and to the extent such activities are engaged in as at the date of this Order.

Conditions

This exemption is subject to the conditions that the Department observes:

- (a) all applicable provisions of the Distribution Code; and
- (b) the Pricing Rule.

Alpine Resorts Commission

The generation of electricity for supply or sale, the transmission, distribution, supply or sale of electricity, in each case in the areas of Lake Mountain and Mount Baw Baw in the manner and to the extent that such activities are engaged in as at the date of this Order.

Conditions

This exemption is subject to the conditions that the Alpine Resorts Commission observes:

- (a) all applicable provisions of the Distribution Code; and
- (b) Pricing Rule.

11. Lions Village Licola Incorporated

The generation of electricity for supply or sale, the transmission, distribution, supply or sale of electricity, in each case in respect of Licola Village in the manner and to the extent that such activities are engaged in as at the date of this Order.

Conditions

This exemption is subject to the condition that Lions Village Licola Incorporated observes:

- (a) all applicable provisions of the Distribution Code; and
- (b) Pricing Rule.

Appendix 10

COMPARATIVE ANALYSIS OF SELECTED ENERGY PROVISIONS

and

TRADE MEASUREMENT PROVISIONS

FOCUS ON TRIPARTITE GOVERNANCE MODEL

Document incomplete work in progress
Prepared by Madeleine Kingston

current and proposed, and of some trade measurement interpretations, demonstrating continuing conflict and overlap within and outside energy provisions; with other statutory regulatory schemes and with common law contractual provisions

Appendix 10

ANALYSIS OF INCONSISTENCIES IN DEFINITIONS BETWEEN BUL HOT WATER ARRANGEMENTS AND ALL OTHER ENERGY –SPECIFIC DEFINITIONS

SELECTED FURTHER PERTINENT DEFINITIONS DOCUMENT IN PREPARATION

Note: last minute changes to prepared documentation similar to that submitted to the GCF Draft Policy Paper in September and the Commonwealth Treasury was changed upon discover of even further revisions to the Energy Retail Code in February 2010, effective date April 2010 – with retained and more extended discrepancies and inconsistencies within and outside energy laws and also to common law provisions. Though every effort has been made to incorporate comments and changes, this document remains a work in progress but is submitted as is in good faith.

I also attach extracts from the Interpretation section of the Energy Retail Code (v7) for direct comparison – a task that by now should have been achieved given the advanced stage of the NECF2 Package

Extracts:

ENERGY RETAIL CODE¹

Version 7

~~October 2009~~

February 2010 applicable April 2010

The BWH definitions and provisions are inconsistent with all other existing energy provisions, about metering, supply points and ancillary supply points (taken as one under existing legislation), supply address (with the same meaning as supply point); energization point; billing points)

Under the *Gas (Residual Provisions) Act 1994* (GRPC) provides that any gas connection point in existence prior to 1 July 1997 considered as a single supply billing point remains so. Note the bulk gas meter measures gas volume not heating; the hot water flow meters measure water volume only not heat or gas. Under residential tenancies provisions the Landlord is responsible for any utility not separately metered (other than bottled gas). The term meter implies use of an instrument designed for the purpose

¹ http://www.esc.vic.gov.au/NR/rdonlyres/132FD501-0774-467E-A8EF-800354BDA755/0/RIEnergyRetailCodeOctober2009_trackedchanges_20090814C0920410.pdf

Customer/Relevant Customer/Business/Domestic/Prescribed/Deemed Customer

These terms are used variously and discrepantly within numbers of provisions and are interpreted at will especially in relation to the proper contractual party for communal utility infrastructure under the control of “Controller of Premises” (see NMA definitions) normally the Owners’ Corporation

A customer may be an Owners’ Corporation. In the case of the Energy Retail Code and most other Interpretations plural may mean singular, reference to natural person may mean a body corporate (Owners’ Corporation)

A **relevant** customer is defined under the *Gas Industry Act 2001*, which is one with the Gas Industries Residual Provisions Act 1994 simply as one who consumes no more than 10,000 GJ of gas per annum, which applies to some 1.6 million Victorians. A renting tenant in a multi-tenanted dwelling is not the relevant contractual party despite the provisions in Codes and Guidelines relied up

A residential customer is one who is an end-consumer of any utility. Such a customer does not consumer, or purchase gas or electricity from any party in the absence of flow of energy to the premises deemed to be receiving it under contract law and the terms of current and proposed generic laws (see revised implied and statutory warranties provisions) and most Sale of Goods Acts

Where only a single gas meter exists on common property infrastructure as a single connection or energization point used to heat a communal water tank centrally heating water reticulated in water pipes to multiple end-users (whether residential tenants or individual owners) the proper contractual party for the sale and supply of energy is the Owners’ Corporation not individual renting tenants or owners. However, if owners, arrangements exist for the Owners’ Corporation to apportion utility costs in the manner dictated by Owners’ Corporation Rules and consistent with the Owners’ Corporation Act 2006.

For market settlement purposes only a single charge and a single supply point is deemed to exist. This is consistent with the *Gas Residual Provisions Act 1994* provisions and the Gas Distribution Code

Deemed Contract/Deemed Contract Arrangements/Customer Contract (terms implying the same)² – see s46 of the *GIA* and analysis on Apdx 1, 201-218

Revised Energy Retail Code, v 7 February 2010 effective April 2010 provisions allow a “deemed customer” relationship to last no more than two billing cycles.

² See analysis of s46 of the *GIA*. Taking supply means from a physical connection where energy is received. Taking supply of heated water does not meet that description. Therefore the deemed provisions under s46 do not apply to end-users of heated water products reticulated in water pipes rather than gas transmission pipes or electrical lines

The effect of this is that if deemed status is imposed on the wrong contractual parties such as occurs within the “*bulk hot water policy arrangements*” a move-in customer as a residential tenant refusing to accept unjust and unwarranted deemed contractual status for the sale and supply of energy that simply does not occur to his or her residential premises on the basis of provision of communally heated water reticulated in service pipes, repeated threats of disconnection can occur, culminating in disconnection of heated water supplies, though the clamping of hot water flow meters, despite every definition within existing and proposed energy laws that defines disconnection (ERC, NECF2, de-energization or decommissioning (Gas Code) for gas as follows:

disconnect means:

(a) for electricity, the disconnection of contact between the electrical systems of two persons preventing the supply of electricity between those systems; and

(b) for gas, the separation of a ***natural gas installation*** from a distribution system to prevent the flow of gas.

At the same time, those adopting the “BHW policies” and the NECF2 Package fails to acknowledge that disconnection processes applying unjustly and improperly the term disconnection to extend to severance or suspension of heated water supplies that are communally heated and reticulated in water service pipes to individual residential premises (abodes) in multi-tenanted dwellings.

The refusal of the MCE in finalization the NECF2 Package to address the issues of discrepancies within and outside energy laws and in particular deal appropriately and fairly with these arrangements is cause for concern and will be instrumental in continuing to contribute to perceptions of poor energy-specific protection; poor commitment to the concepts of harmonization, consistency, adoption of best practice and respect for the provisions of other regulatory schemes, including national measurement provisions and the concepts of legal traceability in the sale and supply of goods and services that can be measured; and adherence to the fundamentals of the common law especially with regard to contract.

The disconnection practices, unjustly imposed contractual status on the wrong parties also have implications unjust perceived damage to credit rating and a number of provisions precedent and subsequent including expectation of provision of access to meters (usually water meters) that are behind locked doors in the care custody and control of landlords

In addition, by deemed contractual status imposition on the wrong parties, the path is opened up for exploitive conduct as has been extensively discussed in case studies and in particular the extended Deidentified Case Study again lodged with this submission, but already published on the MCE arena, Productivity Commission site and Commonwealth Treasury site

In these respects – and beyond, the single market object is not met

customer retail contract means a contract between a small customer and a retailer of a kind referred to in section 202 for the provision of customer retail services for particular premises;

See all comments above. For more detailed discussion please see my various submissions to the ESC (Vic) 2008); Productivity Commission (2008) and (2009) MCE NECF1 Consultation RIS; MCE Gas Connections Framework (2009); Treasury's Unconscionable Conduct Issues Paper

The term "*customer*" needs to be distinguished from the term "*consumer*" or end-user or any utility (be it gas or electricity). This point was raised by a market participant delegate on Day 2 of the NECF2 Public Workshop Forum in Melbourne

In multi-tenanted dwellings, it is the Owners' Corporation who is provided with either a basic or negotiated connection service, not a succession of renting tenants. The contractual responsibility of a gas installation or service is always OC responsibility. Please refer Owners' Corporation Act 2006 (Vic). These provisions may vary from jurisdiction to jurisdiction.³

If the supply of gas through a dedicated gas meter

The term "*premises*" needs further clarification. A clear distinction needs to be made between "*premises*" which can donate chook-house, boiler room; underground facilities (under care custody and control of the Controller of Premises, normally a Landlord and/or Owners Corporation (Body Corporate)⁴

The Gas Supply Act 1996 defines premises as follows

premises includes any building or part of a building, any structure or part of a structure, any land (whether built on or not) and any river, lake or other waters.

The *National Measurement Act 1960* amended to 1 July 2009⁵ Act No. 64 of 1960 refers to these definitions:

"controller" , in relation to *premises*, a part of *premises* or a *vehicle*, means the person apparently in control of the *premises*, the part of the *premises* or the *vehicle*.

"premises" means:

(a) an area of land or any other place, whether or not it is enclosed or built on; or

(b) a building or other structure

connection means a physical link between a distribution pipeline and a customer's premises to allow the flow of natural gas."

Supply Remit/

Retailer Supply Remit

Classes of Premises/Businesses Premises/Residential Premises

³ Note there is a court proceeding on foot currently with an estimated total liability over the full term of the alleged contracts with regard to the legality of the contract for "provision of hot water services

⁴ Note Owners Corporation provisions vary between jurisdictions. Refer to Victorian Owners Corporation Act and the sorts of facilities and services that do come under their control – all common property infrastructure, including hot water services, public lighting, car-parks, gardens, etc.

⁵ National Measurement Act 1960 amended to 1 July 2009, Act No. 60 of 1960, taking into account amendments up to Act No. 137 of 2008

http://www.austlii.edu.au/au/legis/cth/consol_act/nma1960222/notes.html

Classes of Consumers

Leaving definition and re-definition of these “classes” will continue to give rise to the confusion and distortion identified above – as has been the case through numerous Orders in Council which have often had the effect of attempting to entirely re-define the laws that may have originally attempted to take care to achieve consistency, parity, equity and fairness.

Supply Address

This term is discrepantly used within the revised Energy Retail Code to imply a residential abode. It has the meaning within the Gas Industry Act and Gas Industry Code as synonymous with supply point (or connection/energization) point. This has implications for move-in-customers and alleged deemed carry over customers

Supply Point

This term is synonymous with supply address though the latter is entirely incorrectly used within the ERC to imply a residential abode (premises) This has ripple effects on other contractual matters and on conditions precedent and subsequent, including move-in and carry-over customer issues, provision of identification on the basis of deemed contractual status; provision of access to meters (normally hot water flow meters) in the care custody and control of Owners’ Corporations in the case of multi-tenanted dwellings whether publicly or privately owned and managed.

Since supply points and ancillary points are taken as one no need for mention of the latter, though for embedded networks the parent/child concept has been introduced) Since supply points and ancillary points are taken as one no need for mention of the latter, though for embedded networks the parent/child concept has been introduced)

Energization/Connection Point Supply point

As previously discussed there is no flow of energy effected to the residential premises of residential tenants or individual owners supplied with heated water in service pipes where the heating of the water has been achieved through a single supply point/supply address (technical terms); connection point;; energization point. For settlement purposes that single master gas meter or electricity meter referred to under the ERC “bulk hot water policy provisions” is a single connection or energization point. Yet massive supply and other charges, bundled or unbundled are being imposed on end-users of communally heated water deemed individually to be contractually liable under those provisions

Distribution supply points

See comments above

Supply Address⁶/Supply Point

The terms supply point and ancillary supply point are synonymous under the legislation and the *Victorian Gas Distribution System Code*. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points

⁶

Supply⁷

All of these are intended to imply for gas, gas supply points and take into account the metering and metering installation concepts and definitions that apply to gas. The same applies in principle to electricity

Supply Address/Supply Point/Connection Point/Energization Point

The end-user's premises (individual apartment, flat) is not a supply address which is a technical term synonymous with supply/connection point for energy

Distribution Supply Point/Supply

Since supply points and ancillary points are taken as one no need for mention of the latter, though for embedded networks the parent/child concept has been introduced)

For embedded networks the parent/child concept has been introduced)

Energization/Supply point/supply address

Distribution supply points/

Supply Address

The terms supply point and ancillary supply point are synonymous terms under the legislation and the *Victorian GDSC*. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points. See *GRPA, taken as one with the GIA*

Supply/Sale and Supply of Gas/Sale and Supply of Electricity

MK Comment

All of these are intended to imply for gas, gas supply points and take into account the metering and metering installation concepts and definitions that apply to gas. The same applies in principle to electricity.

Erroneously used within some jurisdictional definitions to imply costs for delivery of heated water in water service pipes, which is not the responsibility of energy retailers. They sell and supply gas or electricity under licence. If they supply metering services such as maintenance of hot water flow meters, this is a service offered to Landlords and/or Owners' Corporation entities, not individual end-users of heated water. The ESC has introduced a new definition of meter for BHW which means "a device that records consumption of hot water."

No aspect of current or proposed legislation intends meter to be defined in this way or for sale and supply of gas to mean "*delivery of bulk hot water services.*" This service is provided directly to the business customer, the Owners' Corporation or Landlord, not the end-user of a composite water product.

Energy suppliers are encouraged to form collusive arrangements with landlords by offering third party "maintenance and management of hot water flow meters" used in conjunction with boiler systems (hot water installation) Installation in this sense has

nothing to do with a gas or electricity metering installation, but rather a boiler system with associated water service pipes that carry heated water of varying quality and temperature to individual residential premises in multi-tenanted dwellings

Gas supply is through the *“physical connection that is directly activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energization' of the connection)”*¹⁸⁸

Gas supply is through facilitation of the flow of gas (or electricity) between the network and the premises through the connection; and services relating to the delivery of energy to the (alleged)

- connection to customer’s premises, using a gas fitting that “includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas”

Connection Point/Supply Point/Energization Point

Connection (VGDSVC9)/Connect (VERC)/Connection Point

The joining of a gas installation to a distribution supply point to allow the flow of gas

(a) for electricity, the making and maintaining of contact between the electrical systems of two persons allowing the supply of electricity between those systems;

and

(b) for gas, the joining of a natural gas installation to a distribution system supply point to allow the flow of gas.

See all comments under disconnection

No such connection takes place for those receiving heated water centrally heated in a communal boiler tank belonging to a Landlord, and where a single energization point exists responsible for heating the Landlord’s boiler tank. Heated water is reticulated in water pipes to each residential tenant’s apartment or flat.

It would seem quite clear cut, yet the BHW policy arrangements contained within the same code develop a new lexicon exclusive to the bulk hot water arrangements in defining meters, implicitly endorsing disconnection or suspension of water; considering poor credit rating with “water bills” to be relevant to credit history, security deposit, over due bill history, and other conditions precedent and subsequent which will have ongoing implications and which the MCE in its Package has declined to appropriately address.

The collective attitude is one of overlooking the glaring discrepancies, the inconsistency and direct overlap and conflict with other statutory regulatory schemes and within the common law, and especially regarding contract and legal traceability of goods and services

The connection of a single mast gas or electricity meter is undertaken at the time of building erection at the request and under contract to the Developer or Owners Corporation. The same normally applies for hot water floor meters or cold water flow meters relied upon under the BHW arrangements as suitable instruments through which to measure and by conversion factor algorithm estimated deemed gas or electricity usage by end-users of heated water supplies

Since no flow of energy is effected to the individual residential premises of end-users of communally heated water, no contract can possibly exist under existing, proposed generic laws, sale of goods acts (save in Qld which changed Fair Trading and Sale of Goods Acts just prior to the sale of energy assets, presumably to make way for arrangements and any warranties made regarding the “BHW provisions; refer also to Queensland’s Infrastructure and Planning provisions discussed elsewhere)

Connection/Energization

See all comments above variously under supply point/supply address/ energization point; customer, residential customer; residential premises; business premises

Connect in the Victorian *ERC* and proposed *NECF* means

*for electricity the making and maintaining of contact between electrical systems for two persons allowing the supply of electricity between those systems; and
for gas, the joining of a natural gas installation to a distribution system supply point to allow the flow of gas”*

See Energy Retail Code, v 7 (revision Feb2010) Barring the 1.1 Introduction: Purpose, Authority and Commencement date the explanations for the algorithm formula (how the calculation is actually made); interpretation – how to interpret the Guideline; Appendices 1 and 2 outlining the algorithm conversion factor formula after calculating water volume usage allegedly “*individually monitored*” for each tenant in a multi-tenanted bloc of flats and apartments) (without the necessity for site-specific reading);

Connection/Energization

Energy Supply DPI/VESC’s Energy Retail Code alternative definition

“delivery of gas bulk hot water” or “delivery of electric bulk hot water”

Massive charges including hidden and bundled unspecified charges incorporating alleged heating component of communally heated water as a composite water product; recovery of some water supply charges; all other charges unspecified that aids a retailer and/or Landlord OC recover costs not properly the contractual responsibility of end-users of heated water products in the absence of any separate energy meter or energy connection/energization point into the residential premises of the

Creative distortion of the meaning of “*metering*” “*separate metering*” by policy-makers, regulators, complaints handlers and energy suppliers does not dilute the strength of existing legislation under other schemes. The definition to be transferred from the BHW Guideline 20(1) to the Victorian ERC is a distortion of the meaning of meter in all other provisions, and therefore impact on every aspect of perceived deemed contracts, conditions precedent and subsequent and consequences for end-consumers of utilities.

Instead a mere reference to the DPI will be included. The DPI has taken over policy responsibility for the conversion factor formulae and tariffs; whilst the ESC retains responsibility for what is included on the bills under 2.3 of the Guideline, to be transferred to 4.2 of the VERC.

Disconnect (VERC)

(a) for electricity, the disconnection of contact between the electrical systems of two persons preventing the supply of electricity between those systems; and

*(b) for gas, the separation of a natural gas installation from a distribution system to prevent the flow of gas.*⁸

It is implicit that disconnection of hot water services is not part of the concept, definition, permissible action or provision when hot water supplies are provided by the Landlord to residential tenants, using a water storage tank that is first heated by energy supplied to him as Landlord by implicit or explicit contract to a single energization point on common property infrastructure. It is the Landlord who is supplied the energy. For VENCORP purposes, consistent with the existing legislation, the single energization point represents a single supply point, single billing point. Therefore all supply and bundled charges, and all charges for the sale of energy belong to the Landlord

Under residential tenancy laws, unless a separate energization point exists for residential tenants for the supply of any component of energy, the landlord is the responsible contractual party. Therefore the energy legislation needs to explicitly reflect and acknowledge this.

Disconnection/Decommissioning/Disconnection-Reconnection

As mentioned the term supply point is synonymous with supply address and implies an energized or new connection in relation to gas (or electricity). For gas these terms are together defined within the existing legislation as synonymous with ancillary supply point. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points. Refer to Gas (Residual Provisions) Act 1994 which is one with the *Gas Industry Act 2001* (GIA).

From the time of that the Essential Services Commission undertook deliberation, structuring, adoption and implementation of the existing BHW Charging Provisions, (2004 and 2005) with implementation on 1 March 2006 of the Guideline 20(1) now to be repealed and for the most part transferred to the *Energy Retail Code* Clauses 3.3 and 4.2 respectively, supply points, supply address, relevant customer and meters have been defined in such a way as to be entirely inconsistent with all other existing and proposed provisions.

The ESC was originally responsible for development of the algorithm conversion factor formulae in use (soon to be repealed and replaced with similar provisions following negotiation of regulated price).

On 1 January 2008 the DPI took over the responsibility for the formula and tariff to be used, presumably with the regulated tariff to be negotiated with retailers. It is unclear how off-peak rates will apply or where the revised formula details currently contained in Appendices 1 and 2 will reside and whether these will be transparently available online on the DPI, ESC and/or retailers' websites.

Ready accessibility to such information is crucial to providing informed consent, at least on websites, though not all stakeholders are internet literate, or would know where to look unless a specific web link is provided on bills.

If disconnection of gas or heated water supplies is undertaken by a retailer, with or without tacit or explicit sanction by policy-makers and/or regulator(s) the matter is serious if this occurs where no deemed contract exist; no just cause can be shown for such an action; no energy is supplied by the retailer or distributor on the basis of all the arguments shown above, that is to say, , no supply of gas takes place as defined under the *GIA* definitions of “*customer*,” “*gas distribution company*,” “*transmission*,” “*transmission pipeline*.”

Gas Service Pipes/Gas Transmission Pipes

For gas these are intended to be gas service pipes or gas transmission pipes not water pipes service pipes, disconnection and decommissioning; and other such definitions are described within VENCORP rules and how these sit with the interpretation placed on deemed provisions and application of BHW arrangements to end-users of heated water from which the heating component cannot be separated or measured through legally traceable means.

Consistent with existing legislation, for VENCORP purposes all BHW gas energization points are considered for Distributor-Retailer purposes to be single supply points and single billing points

Electrical Service Lines

a *supply address* as a medical exemption *supply address* if a *customer* requests registration and provides a current medical certificate certifying that a person residing at the *supply address* has a medical condition which requires continued supply of gas; or

(d) a *customer*, unless otherwise requested by that *customer*:

- after 2 pm (for a *domestic customer*) or 3 pm (for a *business customer*) on a weekday; or
- on a Friday, on a weekend, on a *public holiday* or on the day before a *public holiday*.

Comment: What happens if medical advice is that continuity of heated water supplies is warranted on medical grounds, but that reliance is placed by distributors and retailers and their servants/contractors and/or agents to suspend those heated water supplies on the basis of wrongly imposed contractual status for the alleged sale and supply of energy.

Which disconnection procedures , checks and balances will apply?

Which complaints mechanism may be relied upon?

Who will decide whether this comes under water provisions, energy provisions, generic provisions, common law provisions?

Energy-specific ombudsman who are industry-run are forbidden to deal with the bizarre bulk hot water arrangements, contractual disputes, over-charging, under-charging, improper disconnection practices, conditions precedent and subsequent and the host of issues for which customers who receive direct flow of energy to their residential premises are covered.

Refusal by the MCE to deal with these matters within the NECF2 Package implies disregard for proper protection of all Australians who should be able to implicitly rely on fundamental protections for security, safety and reliability of supply in addition to price parameters.

Deemed Contract/Deemed Contract Arrangements/Customer Contract (terms implying the same)⁹ – see s46 of the *GIA* and analysis on (attachment XXX)

See analysis of s46 of the *GIA*. Taking supply means from a physical connection where energy is received. Taking supply of heated water does not meet that described. Therefore the deemed provisions under s46 do not apply to end-users of heated water products reticulated in water pipes rather than gas transmission pipes or electrical lines

Supply Remit/Retailer Supply Remit

Classes of Premises

Allowing continuing changes to definitions such as under OIC's gives rise to the same sorts of discrepancies within and outside energy laws at jurisdictional and state level, with other statutory regulatory schemes and within the common law.

Classes of Consumers

Allowing continuing changes to definitions such as under OIC's gives rise to the same sorts of discrepancies within and outside energy laws at jurisdictional and state level, with other statutory regulatory schemes and within the common law

Electrical Service Lines

Disconnection/Decommissioning/Disconnection-Reconnection

Gas fitting (Gas Industry Act) *“includes meter pipeline burner fitting appliance and apparatus used in connection with the consumption of gas*

Gas Service Pipes/Gas Transmission Pipes

For gas these are intended to be gas service pipes or gas transmission pipes not water pipes service pipes, disconnection and decommissioning; and other such definitions are described within VENCORP rules and how these sit with the interpretation placed on deemed provisions and application of *BHW* arrangements to end-users of heated water from which the heating component cannot be separated or measured through legally traceable means.

Consistent with existing legislation, for VENCORP purposes all *BHW* gas energization points are considered for Distributor-Retailer purposes to be single supply points and single billing points

Continuing problem – contractual issues and legal traceability of goods and services allegedly supplied to end-users of heated water within energy laws

The proper contractual party is the Owners' Corporation in these circumstances, not end-users of the heated water

⁹

Meter/Double Custody Changeover Point normally at outlet of meter

Meter - DPI/ESC's ERC alternative definition:

No meters as defined in the legislation reside in individual apartments receiving bulk hot water. There is no distribution supply point for gas associated with the provision of heated water to tenants

Allowing continuing changes to definitions such as under OIC's gives rise to the same sorts of discrepancies within and outside energy laws at jurisdictional and state level, with other statutory regulatory schemes and within the common law

meter in respect of a *customer* means:

(a) for electricity, the device which measures and records the consumption of electrical energy consumed at the *customer's supply address*;

(b) for gas, an instrument that measures the quantity of gas passing through it and includes associated equipment attached to the instrument to filter, control or regulate the flow of gas and;

(c) for *electricity bulk hot water* or *gas bulk hot water*, the device which measures and records the consumption of bulk hot water consumed at the *customer's supply address*.

Comment: A supply address is a technical term meaning the same as supply point/connection point/energization point. It does not have the meaning in legislation as given above and commonly used by the ERC in its documents. This is also reflected within the NECF2 package though the discrepancy has been pointed out many times over.

Defining a meter in this manner, discrepantly with all other existing and proposed energy laws, and in conflict with the principles of legally traceability of goods and services in trade measurement will continue to make for distortions, inequities, unwarranted imposition of contractual status for the alleged sale and supply of energy. In the case of the heated water provided under the BHW arrangements, no flow of energy to the premises deemed to be receiving it is achieved.

Appendix 2

Bulk Hot Water Charging

Gas Bulk Hot Water Pricing Formulae

A. *Gas bulk hot water rate* (cents per litre) = CF (MJ per litre)

* *gas bulk hot water tariff* (cents per MJ)

Where *customers* are charged by their *retailer* for *energy* in delivering *gas bulk hot water*:

CF = the *gas bulk hot water conversion factor* = 0.49724 MJ per litre

gas bulk hot water tariff = the *standing offer* tariff applicable to the *gas bulk hot water* unit (gas tariff 10/11)

Where *customers* are charged for *energy* in delivering *gas bulk hot water* pursuant to a *market contract*:

CF = the *gas bulk hot water conversion factor* = 0.49724 MJ per litre

gas bulk hot water tariff = the market tariff applicable to the *bulk hot water* unit B.
Retailer provided *gas bulk hot water* per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant *gas bulk hot water* unit divided by the number of *customers* supplied by the relevant *gas bulk hot water* unit.

Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.

C. *Customer gas bulk hot water* charge (cents) = the *customer's* metered consumption of hot water (litres)

* *gas bulk hot water* price (cents per litre)

+ *customer's* supply charge (cents)

<http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf>

Electric Bulk Hot Water Billing Formulae

A. Where *customers* are charged for *energy* in delivering *electric bulk hot water* either by their *retailer* under a *standing offer* contract or pursuant to a *market contract* the:

Customer electricity bulk hot water charge (cents) = the *customer's* metered consumption of hot water (kilolitres)

* electricity tariff rate(s) applicable to the *customer* for the applicable *electric bulk hot water* unit (cents per kWh)

* CF (kWh per kilolitre)

Where:

CF = *electric bulk hot water conversion factor* used by *retailers* to bill *electric bulk hot water* customers. The *electric bulk hot water conversion factor* will have a maximum value of 89 kWh per kilolitre. Where *customers* are currently billed using a lower *electric bulk hot water conversion factor*, or a lower *electric bulk hot water conversion factor* for the site is assessed, *retailers* must bill *customers* using the lower *electric bulk hot water conversion factor*.

The *customer's* electricity tariff must be an off-peak tariff if supplied from an off-peak *electric bulk hot water* unit.

Comment:

Option 2—Fixed conversion factor

Selected for Victoria without site specific meter readings – all usage is deemed – calculated from water volume using a hot water flow meter whilst at the same time including heating values, pressure factors and other alleged gas data usage apportioned to

individuals receiving no flow of gas or electricity to their premises. What they receive is a composite water product from which the gas volume or heat cannot possibly be calculated.

The option fixes the conversion factor at the previous historic level of 0.49724 MJ per litre. To provide for such an approach, the fixed conversion factor would need to be included in the GTO (or current equivalent).

In Queensland the market is operated like a water market but energy sale and supply alleged. Bills is cents per litre applying a gas rate and massive supply and FRC charges also included to each individual

Though in theory the Owners Corporations in public housing are meant to receive the bills and fairly apportion along with a composite service charge for a range of services, use of communal laundry facilities, etc, in practice the original “agreement” is believed to be obsolete and energy bills and directly sent to end-users in public housing receiving communally heated water.

In South Australia it is more common for site specific reading to take place, also based on water volume calculate to determine how the prescribed “gas rate” should be applied.

Metrology Procedure: Part A (National Electricity Market) is the procedure as published by the Australian Energy Market Operator in accordance with clause 7.14.1(a) of the ***National Electricity Rules***.

Metrology Procedure: Part B (National Electricity Market) is the procedure as published by the Australian Energy Market Operator in accordance with clause 7.14.1(a) of the ***National Electricity Rules***.

National Electricity Rules means the Rules made under the National Electricity (Victoria) Law applicable in Victoria as a result of the operation of section 6 of the ***National Electricity (Victoria) Act 2005***.

National Gas Rules means the Rules made under the ***National Gas Law*** as contained in a Schedule to the ***National Gas (South Australia) Act 2008***.

As mentioned in the footnotes, the term supply point is synonymous with supply address and implies an energized or new connection in relation to gas (or electricity). For gas these terms are together defined within the existing legislation as synonymous with ancillary supply point. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points.

The NGL refers to an end-user of gas as follows: “***end user means a person who acquires natural gas or proposes to acquire natural gas for consumption purposes.***”

It is preposterous to suggest illegal consumption of supply; commencement of taking supply or any other such term when no flow of energy can be shown to occur regardless of change of ownership or operation of network in the case of electricity (no networks exist for gas and therefore cannot be strictly termed embedded

This is discussed elsewhere in the context of contract law; generic laws current and proposed including unfair contract and implied and statutory warranty provisions; Owners’ Corporation laws; residential tenancy provisions.

Extracts Dictionary Gas Supply Act 1996 (NSW) last updated 23 March 2010

Historical notes

An Act to amend the [Gas Supply Act 1996](#) to make further provision, and to clarify the regulatory framework, in relation to gasfitting work, autogas work, gas installations, autogas installations and gas appliances.

1 Name of Act

This Act is the [Gas Supply Amendment Act 2010](#).

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Omit the definitions of *gas appliance*, *gas installation* and *gasfitting work*.

Insert in alphabetical order:

basic metering equipment means a gas meter and any equipment prescribed by the regulations for the purposes of this definition when used in conjunction with gas meters.

(*same as existing Act*)

consumer service means any pipe or system of pipes used to convey or control gas, and any associated fittings and equipment, that are connected to a gas network upstream of the gas supply point, but does not include any part of a gas network.

(*same as existing Act*)

MK Comment

This is distinct from data management, meter reading (of water meters) and billing services provided through collusive arrangements between Developers and/or OC entities, and/or Landlords and energy suppliers, endeavouring to strip end users of enshrined rights.

What is clear is that Jemena (JGN), as part of its current Revised Gas Access Proposal in NSW is seeking to upgrade water meters at enormous expense, claiming that they are part of the gas distribution infrastructure – which is scientifically impossible. The basis for such a claim needs to be transparently explained.

Vigilance requires that the NSW Department of Industry and Investment directly checks with each supplier of energy and each distributor or data metering service exactly what practices are in place regarding imposition of contractual status for alleged sale and supply of energy (or heated water) and direct billing of end-user recipients of heated water reticulated in water pipes after being centrally heated.

gas appliance means any gas burning or gas using appliance that is manufactured, adapted or designed for connection to a gas installation, whether by means of a gas outlet socket or otherwise, and includes any liquefied petroleum gas dispenser, catalytic burner or vaporiser, but does not include an internal combustion engine that is installed in, or forms part of, a vehicle, vessel or machine.

gas container includes a gas cylinder, a gas cartridge, a pressure vessel and a gas tank.

gas installation means:

- (a) any pipe or system of pipes used to convey or control gas, and any associated fittings and equipment, that are downstream of the gas supply point, but does not include anything beyond the gas installation end point, and
- (b) any flue that is downstream of the gas supply point, but does not include an autogas installation.

gas installation end point means:

- (a) in the case of a gas installation to which gas is supplied from a gas network—the gas outlet socket, or
- (b) in any other case—the control valve or other connection point of a gas appliance or of another gas container.

gas network means a distribution pipeline or a distribution system.

gas supply point means:

- (a) in the case of a gas installation to which gas is supplied from a gas network—the outlet of the gas meter at which the gas is supplied, or
- (b) in any other case—the control valve or other connection point of a gas container.

gasfitting work means any work involved in:

- (a) the installation, alteration, extension or repair of a gas installation, or
- (b) the installation, alteration, extension, removal or repair of a flue, or
- (c) the connection of a gas installation to, or the disconnection of a gas installation from, a gas supply point, or
- (d) the connection of a gas appliance to, or the disconnection of a gas appliance from, a gas installation (otherwise than where the point of connection is a gas outlet socket), or
- (e) the connection of a gas container, gas regulator or gas appliance to, or the disconnection of a gas container, gas regulator or gas appliance from, a gas installation (otherwise than where it is designed to be readily detachable from the installation whether by the use of a tool, mechanical force or otherwise).

Gas Supply Act 1996 (NSW)

Updated 23 March 2010

Last accessed 28 May 2010

http://www.austlii.edu.au/au/legis/nsw/num_act/gsa1996n38175/

Dictionary

(Section 4)

access agreement means an access agreement referred to in section 22 (4).

Access Code means the Access Code referred to in section 31 (1).

access determination means an access determination referred to in section 23 (5).

access order means an access order referred to in section 21 (2).

access undertaking means an access undertaking referred to in section 20 (1).

associated system user means an associated system user referred to in section 24 (1).

authorisation means a reticulator's authorisation or a supplier's authorisation.

authorised reticulator means a person who holds a reticulator's authorisation.

authorised supplier means a person who holds a supplier's authorisation.

council means the council of a local government area.

declared distribution system means a declared distribution system referred to in section 19 (1).

Department means the Department of Energy.

Director-General means the Director-General of the Department.

distribution district means the district to which a network operator is restricted under the conditions of an authorisation or licence.

distribution system means the gas pipes and associated equipment that are used to convey and control the conveyance of gas to the premises of customers, but does not include:

(a) any pipeline in respect of which a licence is in force under the *Pipelines Act 1967* (other than a pipeline that the regulations declare to be, or to form part of, a distribution system), or

Page 58

(b) any gas installation, or

(c) any gas pipe or associated equipment that is wholly situated on land owned by the person who owns or controls the gas pipe or equipment, or

(d) any gas pipe or associated equipment that the regulations declare not to be, or not to form part of, a distribution system.

distributor means a person who supplies gas (other than natural gas) to other persons by means of a distribution system.

distributor's licence means a licence referred to in section 35.

exercise a function includes perform a duty.

function includes a power, authority or duty.

gas means:

(a) natural gas, or

(b) liquefied petroleum gas, or

(c) any other substance that the regulations declare to be a gas for the purposes of this Act.

gas appliance means any gas burning appliance that is manufactured, adapted or designed for connection to a gas installation, whether by means of a gas outlet socket or otherwise.

gas installation means the gas pipes and associated equipment that are used to convey and control the conveyance of gas within premises to which gas is supplied, whether from a distribution system or otherwise, but does not include anything connected to and extending or situated beyond a gas outlet socket.

gas pricing order means a gas pricing order referred to in section 27 (1).

gas works means any gas pipes or associated equipment that form part of a distribution system.

gasfitting work means any work involved in:

(a) the installation, alteration, extension or repair of a gas installation, or

Page 59

(b) the connection of a gas installation to, or the disconnection of a gas installation from, a distribution system, or

(c) the connection of a gas appliance to, or the disconnection of a gas appliance from, a gas installation (otherwise than where the point of connection is a gas outlet socket).

inspector means a government inspector or gas industry inspector appointed under section 77 (1) or (2).

licence means a distributor's licence.

licensed distributor means a person who holds a distributor's licence.

liquefied petroleum gas means a liquid or gaseous substance containing a mixture of hydrocarbons, basically consisting of butane or butene or propane or propene, or any mixture of them.

natural gas means a naturally occurring mixture of hydrocarbon and non-hydrocarbon gases, the principal constituent of which is methane.

network operator means a reticulator or a distributor.

premises includes any building or part of a building, any structure or part of a structure, any land (whether built on or not) and any river, lake or other waters.

reticulator means a person who owns or controls a distribution system for natural gas.

reticulator's authorisation means an authorisation referred to in section 6 (a).

roads authority has the same meaning as it has in the *Roads Act 1993*.

supplier means a person who supplies natural gas to other persons, whether end user customers or other suppliers.

supplier's authorisation means an authorisation referred to in section 6 (b).

system user means a person whom the regulations declare to be a system user or who belongs to a class of persons so declared.

Page 60

tariff customer means a person whom the regulations declare to be a tariff customer or who belongs to a class of persons so declared.

Tribunal means the Independent Pricing and Regulatory Tribunal established under the *Independent Pricing and Regulatory Tribunal Act 1992*.

[Minister's second reading speech made in—

Legislative Assembly on 5 June 1996

Legislative Council on 19 June 1996]

Page 61

<http://www.legislation.nsw.gov.au/xref/inforce/?xref=Type%3Dact%20AND%20Year%3D2009%20AND%20no%3D31&nohits=y>

Energy Infrastructure Amendment Act

Currency of version

Current version for 9 June 2009 to date (accessed 28 May 2010 at 15:52).

Legislation on this site is usually updated within 3 working days after a change to the legislation.

Energy Legislation Amendment (Infrastructure Protection) Act 2009 No 31

Current version for 9 June 2009 to date (accessed 28 May 2010 at 15:53)

Commencement

This Act commences on a day or days to be appointed by proclamation.

Excerpt Gas Supply Act 1997 SA

<http://www.legislation.sa.gov.au/LZ/C/A/GAS%20ACT%201997/CURRENT/1997.24.UN.RTF>

4—Interpretation

(1) In this Act, unless the contrary intention appears—

annual gas consumption level means a level of consumption of gas determined in accordance with the regulations (and the regulations may, for that purpose, make provision for the estimation or agreement of the level in specified circumstances);

authorised officer means a person appointed under Part 6 as an authorised officer;

Commission means the Essential Services Commission established under the *Essential Services Commission Act 2002*;

condition includes a limitation or restriction;

contravention includes a failure to comply;

council means a council within the meaning of the *Local Government Act 1999*;

customer means a person who has a supply of gas available from a distribution system for consumption by that person, and includes—

- (a) the occupier for the time being of a place to which gas is supplied by a distribution system; and
- (b) where the context requires, a person seeking a supply of gas from a distribution system; and
- (c) a person of a class declared by regulation to be customers;

disconnect a gas supply includes a procedure to interrupt or discontinue the gas supply to a customer;

distribution system means the whole or a part of a system of pipes and equipment for use for, or in connection with, the distribution and supply of gas to persons for consumption, but does not include—

- (a) a transmission pipeline (other than a pipeline declared by the regulations to be, or form part of, a distribution system); or
- (b) a system of pipes and equipment—
 - (i) installed in a place for the conveyance and use of gas from a pressurised vessel situated in the place; and
 - (ii) not extending to, or connected to pipes in, some other place in separate occupation; or

- (c) pipes or equipment declared by the regulations not to be, or form part of, a distribution system;

gas means a fuel consisting of hydrocarbons or predominantly of hydrocarbons that is in a gaseous or vapour form when it is at the pressure and temperature of its normal pipeline transportation and utilisation conditions, but does not include anything declared by regulation not to be gas;

gas appliance means an appliance that uses gas as a fuel, but does not include anything declared by regulation not to be a gas appliance;

gas entity means a person licensed under Part 3, and includes (where the context requires) a person who has been licensed under that Part whose licence has been suspended or cancelled or has expired;

gas infrastructure means any part of a distribution system owned or operated by a gas entity;

gas installation means fixed pipes and any fixed gas appliances, and associated equipment (including flues), installed in a place for the conveyance, control, measurement or use of gas that is, is to be, or has been, supplied (whether by a distribution system or pressurised vessel) for consumption in the place, but does not include gas infrastructure;

gas officer means a person appointed under Part 4 as a gas officer;

gas supply industry means the operation of a distribution system, the retailing of gas and any other operation for which a licence is required under Part 3;

land includes—

- (a) an estate or interest in land (including an easement); or
- (b) a right or power over or in respect of land;

National Gas Procedures (South Australia) means the National Gas Procedures under the *National Gas Law* that apply in, or in relation to, South Australia, as in force from time to time;

occupier of land or a place means a person who has, or is entitled to, possession or control of the land or place;

operations includes activities;

retailing of gas means the sale and supply of gas to a person for consumption (and not for resale) where the gas is to be conveyed (whether or not by the seller) to the person by a distribution system, but does not include an activity declared by regulation not to be retailing of gas;

small customer means a customer classified by regulation as a small customer;

Technical Regulator means the person holding the office of Technical Regulator under Part 2;

transmission pipeline means a transmission pipeline within the meaning of the *Petroleum Act 2000*.

Excerpt Gas Supply Act 1997 SA

<http://www.legislation.sa.gov.au/LZ/C/A/GAS%20ACT%201997/CURRENT/1997.24.UN.RTF>

33—Price regulation by determination of Commission

- (1) The Commission may make a determination under the *Essential Services Commission Act 2002* regulating prices, conditions relating to prices and price-fixing factors for—
 - (a) the sale and supply of gas to small customers or customers of a prescribed class;
 - (d) the sale and supply of gas by a gas entity to customers of another gas entity in accordance with a condition of the entity's licence imposed under Division 3B;
 - (e) other goods and services in the gas supply industry specified by the Minister by notice in the Gazette.

MK Comment

The “other goods and services” refer to those within the gas supply industry. The wording was never intended to include water industry price regulation or water infrastructure

The deemed provisions for sale and supply of gas have become distorted within the “bulk hot water arrangements”

51—Entry to disconnect supply

If a gas officer has proper authority to disconnect a gas supply to a place, the gas officer may, at any reasonable time, enter and remain in the place to disconnect the gas supply to the place.

MK Comment

The authority under specified conditions is for disconnection of gas not water.

Providers of energy to single gas meters heating central boiler tanks do not supply gas and do not disconnect gas.

Yet the existence of water meters is used to dangle the threat of disconnection of heated water supplies because of creating the illusion that a contract exists for sale and supply of energy where in fact none is supplied in these circumstances in multi-tenanted dwellings where no separate gas meter exists for the purposes of heating water

Gas Regulations1997

under the Gas Act 1997

Expiry Program Information

Date of expiry: 1.9.2010 (original date of expiry, 1.9.2008, postponed under Subordinate Legislation Act 1978).

**GAS DISTRIBUTION CODE (SA
8 March 2004
(As last varied on 6 July 2006)**

<http://www.escosa.sa.gov.au/library/060629-GasDistributionCode.pdf>

9. DEFINITIONS AND INTERPRETATION

9.1 Definitions

In this industry code:

“**Access Arrangement**” means the arrangement for third party access to a **distribution pipeline** filed by the **distributor** pursuant to the **Access Code**, and which has been approved by the relevant regulator;

“**Access Code**” means the *National Third Party Access Code for Natural Gas Pipeline Systems* in force pursuant to the *Gas Pipelines Access (South Australia) Act 1997*;

“**Act**” means the *Gas Act 1997*;

“**applicable regulatory instruments**” means any Act or regulatory instrument made under an Act, or a regulatory instrument issued by the **Commission**, which applies to a **distributor** or a **retailer**;

“**best endeavours**” means to act in good faith and use all reasonable efforts, skill and resources;

“**business day**” means a day on which banks are open for general banking business in Adelaide, other than a Saturday or Sunday;

“**Commission**” means the Essential Services Commission established under the *Essential Services Commission Act 2002*;

“**connection**” means the joining of a **gas installation** to a **delivery point** to allow the flow of **gas**;

“**customer**” has the meaning given to that term in the **Act**, namely a person who has a supply of **gas** available from a system for consumption by that person, and includes:

(a) the occupier for the time being of a place to which **gas** is supplied by a **distribution system**; and

(b) where the context requires, a person seeking a supply of **gas** from a **distribution system**; and

(c) a person of a class declared by regulation to be customers;

“**delivery point**” means a point on a **distribution system** at which **gas** is withdrawn from the **distribution system** for delivery to a **customer** and which is normally located at:

28 of 36

(a) the inlet of a *gas installation* of a *customer*; or

(b) the outlet of a meter;

“*distribution pipeline*” has the meaning given to that term in the *Gas Pipelines Access (South Australia) Act 1997*;

<http://www.escosa.sa.gov.au/library/040227-EnergyRetailCode.pdf>

“*connection point*” means:

(a) In the case of a *small electricity customer*, the agreed point of *supply* between the *small electricity customer’s* electrical

installation and the distribution network; and

(b) In the case of a *small gas customer*, the agreed point of *supply* between the *small gas customer’s* gas installation and the

distribution system.

“*customer*” means a *customer* as defined in the *Electricity Act* or the *Gas Act*, as the context requires, who buys or proposes to buy *energy* from a *retailer*;

SCHEDULE 1: DEFINITIONS

“*acceptable identification*” in relation to:

(a) A *residential customer*, includes one or more of the following:

(i) a driver’s licence, a current passport or other form of photographic identification;

(ii) a Pensioner Concession Card or other entitlement card issued by the State or Commonwealth Government;

(iii) a birth certificate.

(b) A *business customer* which is a sole trader or partnership, includes one or more of the forms of identification for a *residential customer* for each of the individuals that conduct the business.

(c) A *business customer* which is a body corporate, includes the body corporate’s Australian Company Number or Australian Business

Number.

“*ADI*” means an authorised deposit taking institution within the meaning of the *Banking Act 1959 (Cth)* as defined in section 4 of the *Acts Interpretation Act 1915 (SA)*;

“*Adelaide central*” means the area shaded red on the attached plan;

“*annual energy consumption level*” has the same meaning:

(a) in the case of an electricity *customer*, as is given to that term in the *Electricity Act*;

(b) in the case of a gas *customer*, as is given to that term in the *Gas Act*.

“*applicable regulatory instruments*” means any Act or regulatory instrument made under an Act, or any industry code, guideline or other regulatory instrument issued by the *Commission*, which applies to a *retailer*;

“*assigned metering identifier*” means either or both of a *NMI* and a *MIRN*;

“*best endeavours*” means to act in good faith and use all reasonable efforts, skill and resources;

“*billing cycle*” means the regular recurrent period for which a *small customer* receives a bill from a *retailer*;

“*business customer*” means a *small customer* who is not a *residential customer*;

“*business day*” means a day on which banks are open for general banking business in Adelaide, other than a Saturday, or a Sunday;

“*Commission*” means the *Essential Services Commission* established under the *Essential Services Commission Act 2002*;

“*connection point*” means:

(a) In the case of a *small electricity customer*, the agreed point of *supply* between the *small electricity customer’s* electrical installation and the distribution network; and

(b) In the case of a *small gas customer*, the agreed point of *supply* between the *small gas customer’s* gas installation and the distribution system.

“*customer*” means a *customer* as defined in the *Electricity Act* or the *Gas Act*, as the context requires, who buys or proposes to buy *energy* from a *retailer*;

“*Customer Charter*” means the charter prepared by the *retailer* under clause 2;

“*customer sale contract*” means a *standing contract*, a *market contract* or a *default contract*;

“*date of receipt*” means, in relation to the receipt by a *customer* of a notice (including a *disconnection warning*) given by a *retailer*:

(a) in the case where the *retailer* hands the notice to the *customer*, the date the *retailer* does so;

(b) in the case where the *retailer* sends a notice by facsimile or by e-mail before 5pm on a *business day*, on that *business day*, otherwise on the next *business day*;

(c) in the case where the *retailer* leaves the notice at the *customer’s supply address*, the date the *retailer* does so;

(d) in the case where the *retailer* gives the notice by post or, registered mail or lettergram, a date 2 *business days* after the date the *retailer* sent the notice.

“**default contract**” means the *customer sale contract* between a *retailer* and a *default customer* arising in accordance with the regulations under the *Electricity Act* or the *Gas Act*, as the context requires;

“**default customer**” means, in relation to a *connection point*, a person who is deemed pursuant to the regulations under the *Electricity Act* or the *Gas Act*, as the context requires, to have a *default contract* with a *retailer* in relation to that *connection*

“**disclosure statement**” means the written disclosure statement provided to a *small customer* by a *retailer* in accordance with a *retailer’s* obligations under the *Energy Marketing Code* made by the *Commission* under section 28 of the *Essential Services Commission Act 2002*;

“**disconnection warning**” means a notice in writing issued in accordance with clause 9;

“**distributor**” means a holder of a licence to operate a distribution network under Part 3 of the *Electricity Act* and a holder of a licence to operate a distribution system under Part 3 of the *Gas Act*;

“**dual fuel contract**” means a single *customer sale contract* for the sale of electricity and for the sale and supply of gas by a *retailer* to a *customer*;

“**Electricity Act**” means the *Electricity Act 1996*;

“**energy**” means either or both of gas or electricity;

“**explicit informed consent**” has the same meaning as is given to that term in the *Energy Customer Transfer and Consent Code* made by the *Commission* under section 28 of the *Essential Services Commission Act 2002*;

“**fixed-term market contract**” means a *market contract* which has start and finish dates set expressly under the terms and conditions of that *market contract*;

“**force majeure event**” means an event outside the control of a *retailer* or a *small customer*;

“**Gas Act**” means the *Gas Act 1997*;

“**Industry Ombudsman**” means the ombudsman appointed under the scheme approved by the *Commission* in accordance with the *retailer’s* licence;

“**in-situ termination**” means a termination of a *customer sale contract* where the *small customer* is not vacating his or her *supply address*;

“**last resort event**” means an event which triggers the operation of the retailer of last resort scheme approved by the *Commission*;

“**market contract**” means a *customer sale contract* between a *retailer* and a *small customer* which complies with Part A of this *Energy Retail Code*, other than a *standing contract* or a *default contract*;

“**metering data**” has the meaning given that term:

(a) in the case of electricity, in the *National Electricity Code*; and

(b) in the case of gas, in the *Retail Market Rules*.

“**metropolitan area**” means the areas shaded green on the attached plans, excluding the *Adelaide central* and *remote areas*;

“**Metrology Procedure**” means the South Australian Electricity Supply Industry *Metrology Procedure* published under the *National Electricity Code*;

“**MIRN**” means a Meter Installation Registration Number assigned to a metering installation at a gas *customer’s supply address*;

“**NEMMCO**” means the National Electricity Market Management Company Limited can 072 010 327, the company which operates and administers the wholesale electricity market in accordance with the *National Electricity Code*;

“**NMI**” means a National Metering Identifier assigned to a metering installation at an electricity *customer’s supply address*;

“**prescribed customer**” has the meaning given to that term in regulation 8AB of the *Gas Regulations 1997*;

“**quarterly**” means the period of days represented by 365 days divided by 4;

“**remote area**” means all areas in which *customers* are supplied through a 19kV SWER line, irrespective of their location;

“**residential customer**” means a *small customer* who acquires *energy* for domestic use;

“**responsible person**” has the same meaning as is given to that term in the *National Electricity Code* and clause 1.3.3 of the *Electricity Metering Code* made by the *Commission* under section 28 of the *Essential Services Commission Act 2002*;

“**retailer**” means a person licensed under the *Electricity Act* to sell electricity and a person licensed under the *Gas Act* to sell and supply gas;

“**rural area**” means all areas in South Australia other than *Adelaide central*, *metropolitan areas* and *remote areas*;

“**security deposit**” means an amount of money or other arrangement acceptable to the *retailer* as a security against a *customer* defaulting on a bill;

“**small customer**” means either or both of *small electricity customer* and *small gas customer*;

“**small electricity customer**” has the same meaning as is given to the term “*small customer*” in the *Electricity Act*;

“**small gas customer**” has the same meaning as is given to the term “*small customer*” in the *Gas Act*;

“**standing contract**” means:

(a) in relation to a *small customer*, a *customer sale contract* published by a *retailer* in the form set out in Part B or Part C of this *Energy*

Retail Code in accordance with the *retailer's standing offer obligation* under the *Electricity Act* or the *Gas Act*, as the context requires; and

(b) in relation to a *prescribed customer*, a *customer sale contract* published by a *retailer* in accordance with the *retailer's standing offer obligation* under the *Gas Act* and clause 1.2 of this *Energy*

Retail Code.

“standing offer obligation” means the obligation imposed on a *retailer* under the *Electricity Act* or the *Gas Act* to agree to sell electricity or to sell and supply gas to a *small customer* or a *prescribed customer* in accordance with the *retailer's standing contract* terms and conditions when requested to do so by that *small customer* or *prescribed customer*;

“supply” means the physical delivery of electricity or gas;

“supply address” means:

(a) the address for which a *small customer* purchases gas or electricity

from a *retailer* where there is only one gas or electricity *connection point* at that address;
or

(b) where there is more than one *supply point* at the address, each gas or electricity *connection point* through which the *small customer* purchases gas or electricity from the same *retailer*.

ERC/01

Made by the Essential Services Commission on 27 February 2004.

Note V2 2006 was temporary unavailable – re-check

SA Government Gazette, 4 March 2004. Date of operation: 8 March 2004.

ORIGIN ENERGY RETAIL LTD
Proposed Price Path for Standing Contract Prices for Supply & Sale of
Natural Gas: 2005/06 to
2007/08
SOUTH AUSTRALIA
Public Submission

<http://www.originenergy.com.au/1312/Queensland-Bulk-Hot-Water>

see

9 Throughout this submission, consistent with the definitions under the Act, recipients of bulk hot water services are not counted as standing contract customers and the gas associated with providing those services is not counted in the volume of gas supplied to standing contract customers.

http://www.ocv.org.au/pdfs/API_Article_Sept07.pdf

Making every drop count

The anomalies of strata water billing that exist throughout Australia need addressing, according to the experts. **Shane McNally**

“This article reports that the Institute of Strata Title Management general manager Bruce Wheeler believes the current situation in NSW is unfair and the government has no right to the GST.

He is calling for an across-the-board move towards individual water meters as a fair means of billing and also as a water saving measure.”

He is reported as saying:

‘Individual water meters will benefit individuals owners and tenants and they will pay only for the water each residence uses.’

see

http://www.escosa.sa.gov.au/library/100512-OriginTariffApplication_2010-2011-Public.pdf

SA Gas Standing Contract Retailer Tariffs For 1 July 2010 to 30 June 2011 Public Version

11 May

APPENDIX 11

REPRODUCED EXTRACTS

REVISED ENERGY RETAIL CODE (VICTORIA)¹

Version 7

February 2010

(effective Date April 2010)

¹ Energy Retail Code Version 7 February 2010 commencement date April 2010
<http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf>

<http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf>

ENERGY RETAIL CODE

Purpose

This Code specifies the terms and conditions required in a contract for the supply or sale of energy.

The code applies to:

1. all domestic consumers
2. for electricity purposes, small business consumers who consume less than 40MWh of electricity per year and
3. for gas purposes, small business consumers who consume less than 1000GJ of gas per year¹.

Relevant legislation

The terms and conditions specified by this Code are determined by the *Commission* for the purposes of section 36 of the *Electricity Act* and of section 43 of the *Gas Act*:

- to any *market contract* made before or after 1 January 2009;
- to any *energy contract* arising from the acceptance of a *standing offer*; and
- to any deemed contract;

As contemplated by section 36(1)(b) of the *Electricity Act* and by section 43(1)(b) of the *Gas Act*, all of the terms and conditions determined by the *Commission* and set out in Parts 1 to 9 (inclusive) of this Code are provided for in *retailers'* electricity and gas retail licences.

Commencement

The February 2010 amendments to the Code takes effect from 1 April 2010.

¹ As defined by the s 36 of the *Electricity Industry Act 2000* and s 43 of the *Gas Industry Act 2001*.

PART 9 DEFINITIONS AND INTERPRETATION

34. DEFINITIONS

In this Code, including the preamble, unless the context otherwise requires:

acceptable identification in relation to:

(a) a ***domestic customer***, includes one or more of the following: a driver's licence, a current passport or other form of photographic identification, a Pensioner Concession Card or other current entitlement card issued by the Commonwealth or a birth certificate;

(b) a ***business customer*** which is a sole trader or partnership, includes one or more of the forms of identification for a ***domestic customer*** for each of the individuals that conduct the business; and

(c) a ***business customer*** which is a company, includes the company's Australian Company Number or Australian Business Number.

additional retail charge means a charge relating to the sale of ***energy*** by a ***retailer*** to a ***customer*** other than a charge based on the ***tariff*** applicable to the ***customer*** and which must be calculated in accordance with clause 30 of this Code. To avoid doubt:

(a) any network charge relating to the supply, but not sale, of ***energy*** to a ***customer's supply address*** is not an ***additional retail charge*** (whether or not the network charge is bundled in the ***retailer's tariff***);

(b) without limiting paragraph (a), any charge the ***retailer*** may impose as a direct pass through of a distribution tariff, excluded service charge for electricity, ancillary reference tariff for gas or other charge imposed on the ***retailer*** by a ***distributor*** for ***connection*** to, or use of, the ***distributor's*** distribution system is not an ***additional retail charge***; and

(c) any amount payable by a ***customer*** to a ***retailer*** for the ***customer's*** breach of their ***energy contract***, whether under an ***agreed damages term*** or otherwise, is not an ***additional retail charge***.

agreed damages term means a term or condition of an ***energy contract*** under which a ***customer*** and a ***retailer*** have agreed the amount, or a basis for determining the amount, that will be payable by the ***customer*** to the ***retailer*** for the ***customer's*** breach of their ***energy contract***.

amount outstanding, in respect of an ***energy*** or water bill issued to a ***domestic customer***, means:

(a) unless paragraph (b) applies, any amount which is not paid by the due date specified on the bill; or

(b) if the ***domestic customer*** and the relevant service provider enter into an agreement or arrangement for the ***domestic customer*** to pay the amount or an instalment on a later date, any amount or installment which is not paid by that later date in accordance with the agreement or arrangement.

applicable regulatory instruments may include (but is not necessarily limited to) one or more of the following:

(a) for electricity:

- the *National Electricity Rules*;
- the *Metrology Procedure: Part A (National Electricity Market)*;
- the *Metrology Procedure: Part B (National Electricity Market)*;
- the *Electricity Customer Transfer Code*; and
- the *Electricity Customer Metering Code*; and

(b) for gas:

- the *Gas Distribution System Code*;
- the *Retail Rules*; and
- the *National Gas Rules*;

or any other regulatory instrument which substitutes, amends or supplements any of the above.

assigned meter identifier means:

(a) for electricity, the National Meter Identifier assigned to the *customer's* metering installation; and

(b) for gas, the Meter Installation Reference Number assigned to the *customer's* metering installation.

assignment includes dispose of, declare a trust over or otherwise create an interest in rights under an *energy contract*.

bank bill rate in respect of the interest a *retailer* must pay to a *customer* on the amount of a *refundable advance*, means a daily published rate no less than the pre-tax rate of return the *retailer* would earn over the period the *retailer* retains that amount if it were invested in bank bills that have a tenor equal to 90 days.

best endeavours in relation to a person, means the person must act in good faith and do what is reasonably necessary in the circumstances.

billing cycle means the regular recurrent period in which a *customer* receives a bill from a *retailer*.

business customer means a *customer* who is not a *domestic customer*.

business day means a day other than a Saturday or Sunday or a *public holiday*.

checksum means:

(a) for electricity, the National Meter Identifier checksum; and

(b) for gas, the Meter Installation Reference Number checksum.

Commission means the Essential Services Commission under the *Essential Services Commission Act 2001*.

concession means a concession, rebate or grant including, without limitation, those known as or relating to:

- (a) Winter Energy Concession;
- (b) Life Support Machines;
- (c) Group Homes;
- (d) Multiple Sclerosis or Associated Conditions;
- (e) Service to Property Charge Supply Concession;
- (f) Property Transfer Fee Waiver; and
- (g) Utility Relief Grant Scheme.

connect means:

- (a) for electricity, the making and maintaining of contact between the electrical systems of two persons allowing the supply of electricity between those systems; and
- (b) for gas, the joining of a **natural gas installation** to a distribution system **supply point** to allow the flow of gas.

cooling-off period in respect of an **energy contract** means any period within which the **customer** has a right to cancel the **energy contract** under clause 3.4 of the Code of

Conduct for Marketing Retail Energy in Victoria issued by the Commission in January 2009 or the Fair Trading Act 1999 (Vic).

customer means a person other than:

- (a) for electricity, a **retailer**; and
- (b) for gas, a participant or market participant as defined in the **National Gas Rules**, who buys or proposes to buy energy from a **retailer**.

date of receipt in relation to a notice given by a **retailer** means:

- (a) if the **retailer** hands the notice to the **customer**, the date the **retailer** does so;
- (b) if the **retailer** leaves the notice at the **customer's supply address**, the date the **retailer** does so; or
- (c) if the **retailer** gives the notice by post, a date two **business days** after the date the **retailer** posts the notice.

deemed in respect of an **energy contract** means an **energy contract** deemed to apply between a **customer** and a **retailer** under the **Electricity Act** or the **Gas Act** and **deemed contract** has a corresponding meaning.

deemed customer means a person who is **deemed** to have an **energy contract**.

disconnect means:

- (a) for electricity, the disconnection of contact between the electrical systems of two persons preventing the supply of electricity between those systems; and

(b) for gas, the separation of a *natural gas installation* from a distribution system to prevent the flow of gas.

distributor means a person who holds, or in the case of electricity only is exempt from holding, a distribution licence under the *Electricity Act* or the *Gas Act*.

domestic customer means a *customer* who purchases *energy* principally for personal, household or domestic use at the relevant *supply address*.

dual fuel contract means an *energy contract* for the sale of electricity and for the sale of gas by a *retailer* to a *customer*, or two *energy contracts* between the same *customer* and the same *retailer*, one an *electricity contract* and one a *gas contract*, under which

billing cycles for electricity and gas are synchronised. The *dual fuel contract* may also oblige the *retailer* to *connect* the *customer's supply address* or to otherwise procure the supply of electricity or of gas or of both electricity and gas.

electric bulk hot water means water centrally heated by electricity and delivered to a number of *customer supply addresses* where the *customer's* consumption of hot water is measured with a *meter* and where an *energy bill* is issued by a *retailer*.

electric bulk hot water conversion factor means the *conversion factor* used by *retailers* to bill *electric bulk hot water customers*. The *electric bulk hot water conversion factor* will have a maximum value of 89kWh per kilolitre. Where *customers* are currently billed using a lower *electric bulk hot water conversion factor*, or a lower *electric bulk hot water conversion factor* for the site is assessed, *retailers* must bill *customers* using the lower *electric bulk hot water conversion factor*.

Electricity Act means the *Electricity Industry Act 2000*.

electricity contract means a contract for the sale of electricity by a *retailer* to a *customer*. The *electricity contract* may also oblige the *retailer* to *connect* the *customer's supply address* or to otherwise procure the supply of electricity.

Electricity Customer Metering Code means the industry code of that name certified by the *Commission*.

Electricity Customer Transfer Code means the industry code of that name certified by the *Commission*.

energy means electricity or gas or both electricity and gas.

energy contract means an *electricity contract* or a *gas contract* and may include a *dual fuel contract*.

evergreen contract means an *energy contract*, other than a *fixed term contract*, which includes a *maturity date*.

explicit informed consent means consent given:

(a) by the *customer* directly to the *retailer* or the *retailer's marketing representative*:

(i) in writing or by electronic communication signed by the *customer*; or

(ii) except for the purposes of clause 5.1 and 10.1 of this Code, orally;

(b) only after the **retailer** or the **retailer's marketing representative** has clearly, fully and adequately disclosed in plain English all matters relevant to the consent of the **customer**, including each specific purpose and use of the consent; and

(c) by a person competent to do so.

fixed term contract means an **energy contract** the term of which continues for a fixed, certain or definite period including, in the case of a **deemed contract**, any fixed, certain or definite period under or contemplated by the **Electricity Act** or the **Gas Act**.

force majeure breach means a breach by a **retailer** or a **customer** of their **energy contract** which, but for clause 18, the **retailer** or the **customer** would commit arising only through a **force majeure event**.

force majeure event means an event outside the reasonable control of a **retailer** or a **customer**.

franchise customer in relation to the period ending on:

(a) for electricity, 31 December 2000; and

(b) for gas, 31 August 2001, means a franchise customer within the meaning of:

(a) for electricity, the **Electricity Industry Act** 1993 immediately before 1 January 2001; and

(b) for gas, the **Gas Industry Act** 1994 immediately before 1 September 2001.

FRC date means the date on which there ceases to be in effect an Order made under section 35 of the **Gas Act** (i.e., the date from which all **customers** will be able to choose their gas **retailer**).

Gas Act means the **Gas Industry Act** 2001.

gas bulk hot water means water centrally heated by gas and delivered to a number of **customer supply addresses** where the **customer's** consumption of hot water is measured with a **meter** and where an **energy bill** is issued by a **retailer**.

gas bulk hot water rate means the gas price in cents per litre that is used by a **retailer** to charge **customers** for **energy** in delivering **gas bulk hot water**.

gas contract means a contract for the sale of gas by a **retailer** to a **customer**. The **gas contract** may also oblige the **retailer** to **connect** the **customer's supply address** or to otherwise procure the supply of gas.

Gas Distribution System Code means the code of that name certified by the **Commission**.

gazetted tariff at any time means a **tariff** determined by a **retailer** and published by the **retailer** in the Government Gazette and at that time effective under:

(a) for electricity, section 35 of the **Electricity Act**; and

(b) for gas, section 42 of the **Gas Act**.

A **gazetted tariff** corresponds with a **tariff** applicable to a **customer** under an **energy contract** if it is the **tariff** that a **retailer** would be required to offer to the **customer** if the

customer at that time made a request for a **standing offer** in respect of the relevant **supply address**.

gazetted term or condition at any time means a term or condition determined by a **retailer** and approved by the **Commission** and published by the **retailer** in the Government Gazette and at that time effective under:

(a) for electricity, section 35 of the **Electricity Act**.

(b) for gas, section 42 of the **Gas Act**.

guideline means a guideline published by the **Commission**.

late payment fee means an amount payable by a **customer** to a **retailer** in connection with the **customer** having breached the **customer's** obligation to pay an amount due on or before the pay by date on the **retailer's** initial bill.

last resort event in respect of a **retailer** means when:

(a) the **retailer's** retail licence is suspended or revoked; or

(b) the right of the **retailer** to acquire:

- for electricity, electricity from the wholesale electricity market; and
- for gas, gas from a wholesale gas market or a producer, is suspended or terminated, whichever first occurs.

local retailer has the same meaning :

(a) for electricity, as made under Order-in-Council S315 dated 25.11.08 in accordance with section 35 of the **Electricity Act**; and

(b) for gas, as made under Order-in-Council S315 dated 25.11.08 in accordance with section 42 of the **Gas Act**.

market contract means an **energy contract** between a **customer** and a **retailer** which is not a **deemed contract** nor an **energy contract** arising from the acceptance of a **standing offer**.

marketing representative includes an employee, agent, representative, contractor or person acting on behalf of a **retailer**, who is engaged in marketing and or selling the **retailer's energy contracts**.

maturity date in respect of an **energy contract** means a date included in the **energy contract** on which a fixed, certain or definite period ends:

(a) before which, if the **customer** terminates the **energy contract**, the **retailer** may have a right to impose an early termination fee; and

(b) after which, if the **customer** terminates the **energy contract**, the **retailer** has no right to impose an early termination fee.

meter in respect of a **customer** means:

(a) for electricity, the device which measures and records the consumption of electrical energy consumed at the **customer's supply address**;

(b) for gas, an instrument that measures the quantity of gas passing through it and includes associated equipment attached to the instrument to filter, control or regulate the flow of gas and;

(c) for *electricity bulk hot water* or *gas bulk hot water*, the device which measures and records the consumption of bulk hot water consumed at the *customer's supply address*.

Metrology Procedure: Part A (National Electricity Market) is the procedure as published by the Australian Energy Market Operator in accordance with clause 7.14.1(a) of the *National Electricity Rules*.

Metrology Procedure: Part B (National Electricity Market) is the procedure as published by the Australian Energy Market Operator in accordance with clause 7.14.1(a) of the *National Electricity Rules*.

National Electricity Rules means the Rules made under the National Electricity (Victoria) Law applicable in Victoria as a result of the operation of section 6 of the *National Electricity (Victoria) Act 2005*.

National Gas Rules means the Rules made under the *National Gas Law* as contained in a Schedule to the *National Gas (South Australia) Act 2008*.

natural gas installation means any gas equipment located at a *customer's supply address* downstream of the *supply point* that is not part of a distribution system.

public holiday means a public holiday appointed under the *Public Holidays Act 1993*.

reasonable assurance in relation to a *customer's* willingness to pay means a fair and reasonable expectation, based on all the circumstances leading to, and which are anticipated to follow, the assurance that the *customer* will pay.

reconnect means to connect following a disconnection.

refundable advance means an amount of money or other arrangement acceptable to a

retailer as security against a *customer* defaulting on a final bill.

relevant customer means a person, or a member of a class of persons, to whom an

Order under:

(a) for electricity, section 36 of the *Electricity Act*; and

(b) for gas, section 43 of the *Gas Act*, applies.

relevant default in relation to a *domestic customer*, occurs where:

(a) within the previous five years, the *domestic customer* has failed to pay a bill under an *energy* contract with the *retailer* or any former or other *retailer* or in respect of the *customer's* water consumption, where:

- the ***amount outstanding*** is greater than or equal to \$120;
- the payment is at least 60 days overdue; and
- the ***retailer***, the former or other *retailer* or water provider has taken steps to recover the whole or any part of the ***amount outstanding***;

(b) within the past five years, a court has issued judgment against the *domestic customer* in relation to a debt; or

(c) the *domestic customer* has been declared bankrupt and the bankruptcy order has not been discharged.

responsible in respect of a *retailer* and a *supply address* means the *retailer* is responsible for the *energy* supplied at the *supply address* for the purposes of settlement of a relevant wholesale *energy* market under *applicable regulatory instruments*.

retailer means a person who holds a retail licence under the *Electricity Act* or under the *Gas Act*.

Retail Rules means the *Retail Market Procedures (Victoria)* issued by the Australian Energy Market Operator and authorised under the *National Gas Law* and the *National Gas Rules*.

second tier electricity customer means, in respect of the relevant *supply address*, the *customer* who purchases electricity otherwise than directly and in its entirety from the *retailer* that is the *local retailer* in respect of that *supply address*.

standing offer means an offer made by a *retailer* as contemplated by:

(a) for electricity, section 35 of the *Electricity Act*; and

(b) for gas, section 42 of the *Gas Act*.

supply address includes:

(a) for electricity, the relevant market connection point (as defined in the *National Electricity Rules*) in respect of that supply address; and

(b) for gas, the point where gas leaves the distribution system before being supplied to a *customer*, whether or not it passes through facilities owned or operated by another person after that point and before being so supplied.

supply point means the point where gas or electricity leaves the distribution system before being supplied to the customer, whether or not it passes through facilities owned or operated by another person after that point and before being so supplied.

tariff means a price for the supply or sale of *energy*.

transfer in respect of a *customer* and two *retailers*, means that *responsibility* for the relevant *supply address* of the *customer* has transferred from one of the *retailers* to the other.

writing includes any mode of representing or reproducing words, figures, drawings or symbols in visible form.

35. INTERPRETATION

35.1 Connection, disconnection and reconnection

A *retailer* is not in a position to *connect*, *disconnect* or *reconnect* the electrical system or *natural gas installation* at a *customer's supply address* to a *distributor's* distribution

system. In this Code unless the context otherwise requires, a reference in a term or condition to a **retailer**:

(a) having a right or not having a right to **disconnect** a **customer** is to be construed as a reference to the **retailer** having a right or not having a right to procure the

distributor to **disconnect**; or

(b) being obliged to **connect**, **disconnect** or **reconnect** a **customer** is to be construed as a reference to the **retailer** being obliged to use its **best endeavours** to procure the **distributor** to **connect**, **disconnect** or **reconnect**, the electrical system or **natural gas installation** at the **customer's supply address** to the **distributor's** distribution system.

35.2 General

In this Code including the preamble, unless the context otherwise requires:

(a) headings and footnotes are for convenience or information only and do not affect the interpretation of this Code or of any term or condition set out in this Code;

(b) words importing the singular include the plural and vice versa;

(c) an expression importing a natural person includes any company, partnership, trust, joint venture, association, corporation or other body corporate and any governmental agency and vice versa;

(d) a reference to a clause or appendix is to a clause or appendix of this Code;

(e) a reference to any statute includes all statutes varying, consolidating, re-enacting, extending or replacing them and a reference to a statute includes all regulations, proclamations, ordinances, by-laws and determinations issued under that statute;

(f) a reference to a document or a provision of a document includes an amendment or supplement to, or replacement of or novation of, that document or that provision of that document;

(g) a reference to a person includes that person's executors, administrators, successors, substitutes (including, without limitation, persons taking by novation) and permitted assigns;

(h) other parts of speech and grammatical forms of a word or phrase defined in this Code have a corresponding meaning;

(i) a period of time:

- which dates from a given day or the day of an act or event is to be calculated exclusive of that day; or
- which commences on a given day or the day of an act or event is to be calculated inclusive of that day;

(j) a reference to:

- time is a reference to Standard Time within the meaning of the *Summer Time Act 1972* and not Summer Time within the meaning of that Act;

- a day is a reference to a period commencing immediately after midnight and ending the following midnight; and
- a month is a reference to a calendar month; and

(k) an event which is required under any term or condition set out in this Code to occur on or by a stipulated day which is not a *business day* may occur on or by the next *business day*.

Appendix 1

Variation by Agreement

A list of the terms and conditions set out in this Code which are marked with an asterisk (*),

are allowed to be varied by agreement between customers and retailers in the formation of market contracts. These terms and conditions are:

- Clause 3.1(a) and (b)
- Clause 4.2(m).
- Clause 4.4(a).
- Clause 5.3.
- Clause 5.4(a).
- Clause 7.1(b).
- Clause 7.2(a).
- Clause 7.3.
- Clause 24.1(b).

<http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf>

Appendix 2

Bulk Hot Water Charging

Gas Bulk Hot Water Pricing Formulae

A. *Gas bulk hot water rate* (cents per litre) = CF (MJ per litre)

* *gas bulk hot water tariff* (cents per MJ)

Where *customers* are charged by their *retailer* for *energy* in delivering *gas bulk hot water*:

CF = the *gas bulk hot water conversion factor* = 0.49724 MJ per litre

gas bulk hot water tariff = the *standing offer* tariff applicable to the *gas bulk hot water* unit (gas tariff 10/11)

Where *customers* are charged for *energy* in delivering *gas bulk hot water* pursuant to a *market contract*:

CF = the *gas bulk hot water conversion factor* = 0.49724 MJ per litre

gas bulk hot water tariff = the market tariff applicable to the *bulk hot water* unit B.
Retailer provided *gas bulk hot water* per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant *gas bulk hot water* unit divided by the number of *customers* supplied by the relevant *gas bulk hot water* unit.

Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.

C. *Customer gas bulk hot water* charge (cents) = the *customer's* metered consumption of hot water (litres)

* *gas bulk hot water* price (cents per litre)

+ *customer's* supply charge (cents)

<http://www.esc.vic.gov.au/NR/rdonlyres/1C4BEA8F-B31D-49F2-89F0-3E2D70172A1B/0/EnergyRetailCodeFebruary2010with1April2010dateofeffect20100201.pdf>

Electric Bulk Hot Water Billing Formulae

A. Where *customers* are charged for *energy* in delivering *electric bulk hot water* either by their *retailer* under a *standing offer* contract or pursuant to a *market contract* the:

Customer electricity bulk hot water charge (cents) = the *customer's* metered consumption of hot water (kilolitres)

* electricity tariff rate(s) applicable to the *customer* for the applicable *electric bulk hot water* unit (cents per kWh)

* CF (kWh per kilolitre)

Where:

CF = *electric bulk hot water conversion factor* used by *retailers* to bill *electric bulk hot water* customers. The *electric bulk hot water conversion factor* will have a maximum value of 89 kWh per kilolitre. Where *customers* are currently billed using a lower *electric bulk hot water conversion factor*, or a lower *electric bulk hot water conversion factor* for the site is assessed, *retailers* must bill *customers* using the lower *electric bulk hot water conversion factor*.

The *customer's* electricity tariff must be an off-peak tariff if supplied from an off-peak *electric bulk hot water* unit.

PERTINENT EXTRACTS² –

National Measurement Act 1960

Act Compilation (current) - C2009C00273

Number 64 of 1960

² See also Appendices 11 and 12 to follow NMI info and regs

PERTINENT EXTRACTS – National Measurement Act 1960

Act Compilation (current) - C2009C00273 Number 64 of 1960

<http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/696988C40661A93ACA2575E60006C499?Open>

INTERPRETATION

Part I—Preliminary

1 Short title [*see* Note 1]

This Act may be cited as the *National Measurement Act 1960*.

3 Interpretation

business premises means premises or a part of premises:

- (a) used for the importation, packing, storage or sale of articles or utilities sold, or to be sold, by measurement; or
- (b) on which a measuring instrument is used for trade; or
- (c) used for activities incidental to the uses mentioned in paragraph (a) or (b);

but does not include premises or a part of premises occupied as a residence or for residential accommodation.

business vehicle means a vehicle:

- (a) used for the transportation of articles or utilities sold, or to be sold, by measurement (whether packed in advance ready for sale or otherwise); or
- (b) on which a measuring instrument is used for trade; or
- (c) used for the measurement of articles or utilities sold, or to be sold, by measurement; or
- (d) used for activities incidental to the uses mentioned in paragraph (a), (b) or (c).

premises means:

controller, in relation to premises, a part of premises or a vehicle, means the person apparently in control of the premises, the part of the premises or the vehicle.

component, in relation to a thing (in this definition called the **basic thing**) by means of which a measurement of a physical quantity may be made, includes another thing (whether or not forming part of the basic thing) where:

- (a) the basic thing is so designed or constructed as to include, or have associated with it, the other thing; and
- (b) the other thing is designed or intended to do any or all of the following:
 - (i) carrying out a conversion of the result of a measurement made by the basic thing;
 - (ii) calculating a number, tax or price by reference to the result of a measurement made by the basic thing;
 - (iii) correcting the result of a measurement made by the basic thing;
 - (iv) providing or repeating information consisting of or relating to any or all of the following:
 - (A) the result of a measurement made by the basic thing;
 - (B) a conversion of the result of a measurement made by the basic thing;
 - (C) a calculation of a number, tax or price calculated by reference to the result of a measurement made by the basic thing;
 - (v) controlling the measurement process carried out by the basic thing.

controller, in relation to premises, a part of premises or a vehicle, means the person apparently in control of the premises, the part of the premises or the vehicle.

- (a) an area of land or any other place, whether or not it is enclosed or built on; or
- (b) a building or other structure.

measurement means a determination of number or physical quantity, other than for descriptive purposes only.

measuring instrument means:

- (a) a thing by means of which a measurement of a physical quantity may be made; or
- (b) a component of such a thing.

measuring instrument gives an inaccurate measurement has the meaning given in subsection (6).

recognized-value standard of measurement means a standard of measurement that the Chief Metrologist has, under section 8A, determined shall be a recognized-value standard of measurement.

reference standard of measurement means a standard of measurement (other than an Australian primary standard of measurement, an Australian secondary standard of measurement, a recognized-value standard of measurement or a State primary standard of measurement) that has been verified in accordance with the regulations and for which the period for which a certificate of verification is given under the regulations has not expired.

residential premises means premises, or a part of premises, that is occupied as a residence or for residential accommodation.

sell includes barter or exchange.

4 Objects and application of Act

- (1) The objects of this Act are:
 - (a) to establish a national system of units and standards of measurement of physical quantities; and
 - (b) to provide for the uniform use of those uniform units and standards of measurement throughout Australia; and
 - (c) to co-ordinate the operation of the national system of measurement; and
 - (d) to bring about the use of the metric system of measurement in Australia as the sole system of measurement of physical quantities; and
 - (e) to provide for a national system of trade measurement;and this Act shall be construed accordingly.

Any measurement that allows for water volume calculations or some other bizarre equivalent, to be part of the equation that calculates energy consumption is fundamentally flawed. These provisions do not uphold public interest, best practice standards or the spirit and intent of existing provisions. The provisions are as good as relying on an oil funnel to measure the weight of a bag of apples. Energy retailers are licenced to sell gas and electricity not water products or heated water. Even if they were so licenced, there are the issues of generic and common law provisions.

Appendix 12

NATIONAL MEASUREMENT INSTITUTE

GENERAL INFORMATION AND ROLE

ABOUT NATIONAL MEASUREMENT

<http://www.measurement.gov.au/Pages/About.aspx>

Last updated 20 May 2010 last accessed 27 May 2010

NMI is the peak Australian measurement body responsible for biological, chemical, legal and physical measurement.

Our vision and purpose is to deliver capability for measurement in Australia that is world class, increases national economic efficiency, enhances export trade prospects, empowers sound environmental regulation, and enables effective social and health policies.

Our goals are to maintain Australia's measurement standards, provide national leadership in measurement science, lead global collaboration, improve and develop our services, grow research and development capability, and implement the national trade measurement system.

Functions

NMI is responsible for Australia's units and standards of measurement and for realising those units of measurement through the development and maintenance of standards of measurement, reference materials and reference techniques. It represents Australia in the peak international measurement forums including BIPM and OIML.

Meeting the measurement needs of government, industry and scientific organisations for calibration, measurement, analysis and training are key functions of NMI. The services section of this website provides more information.

NMI is an important element of Australia's standards and conformance infrastructure and provides advice on measurement to the other members, the National Association of Testing Authorities, Standards Australia and the Joint Accreditation System of Australia and New Zealand.

NMI works with state and territory trade measurement

<http://www.measurement.gov.au/TradeMeasurement/Documents/Guide%20to%20the%20New%20National%20Trade%20Measurement%20Regulations.pdf>

GUIDE TO THE NEW TRADE MEASUREMENT REGULATIONS

November 2009

Excerpt from National Measurement Guidelines (verbatim)

On 1 July 2010 a new national system of trade measurement will commence under the administration and regulatory oversight of the National Measurement Institute (NMI) a division of the Australian Government's Department of Innovation, Industry, Science and Research.

Trade measurement is an important element of economic infrastructure. It has the critical role of ensuring that all transactions whose value is determined by a measurement are correct. An estimated four hundred billion dollars a year in trade transactions rely on measurement.

Consumers and businesses alike rightly expect that goods that are sold on the basis of such measures as length, weight and volume, are accurately and faithfully represented. Suppliers of measuring instruments expect clear and comprehensive regulatory requirements. Governments and the economy as a whole require a trade measurement system that establishes and maintains a national and international reputation for equitable trading.

NMI is Australia's peak measurement organisation, responsible for maintaining Australia's primary standards of measurement and for providing the legal and technical framework for the dissemination of measurement standards. We represent the only 'one-stop shop' for all disciplines of measurement in Australia – analytical, biological, chemical, physical and legal. We provide measurement expertise, calibration services, chemical and biological analyses and pattern approval testing.

NMI takes its new responsibility of trade measurement very seriously. We are keen to support industry and consumers alike by ensuring timely communication of legislative and regulatory obligations for businesses and rights for consumers.

This Guide provides a concise summary of the new national regulatory framework.

Dr Laurie Besley

CEO and Chief Metrologist

WHEN WILL THE REGULATIONS COMENCE?

Under the *National Measurement Act 1960 (Cth)*, provisions that pertain to utility meters commenced on 1 July 2009. The *National Trade Measurement Regulations 2009 (Cth)* commenced on 11 September 2009. However, the enforcement provisions of the Act do not commence until 2010 and therefore some provisions, in both the Act and the Regulations, relating to other trade measuring instruments and packaging do not come into effect until the transition day, 1 July 2010.

Appendix 13

NATIONAL MEASUREMENT INSTITUTE

EXCERPTS

EXPLANATORY MEMORANDUM

NATIONAL MEASUREMENT AMENDMENT BILL 2008¹

¹ National Measurement Amendment Bill 2008 – approved *National Measurement Amendment Act 2009* http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword amends the *National Measurement Act 1960* (Cth) to introduce a national system of trade measurement. The National Measurement Institute is now the sole authority for authority for trade measurement. *On 1 July 2010 a new national system of trade measurement will commence under the administration and regulatory oversight of the National Measurement Institute (NMI) a division of the Australian Government's Department of Innovation, Industry, Science and Research*

GENERAL NOTES²

OFFENCE PROVISIONS IN THE BILL

The offence provisions in the Bill will apply to a wide range of entities, from small businesses to large multinational concerns, in a wide variety of circumstances. This makes it desirable to have a range of enforcement options appropriate to the different circumstances to which the Bill might apply. Consequently, the Bill provides for: different categories of offences in relation to particular conduct; for a range of responses, depending on the circumstances of a particular suspected offence; and for three tiers of penalties. The Bill does this in the following ways:

- a number of provisions in the Bill create offences requiring a fault element and corresponding strict liability offences;
- as an alternative to prosecution, the Bill enables trade measurement inspectors to issue infringement notices to suspected offenders; and
- the Bill provides for three tiers of penalties, with the highest penalties being imposed for fault element offences, lower penalties for strict liability offences, and the lowest penalties are payable under infringement notices.

Where appropriate, the offence provisions in the Bill also extend geographical jurisdiction for offences committed outside Australia.

These issues are discussed in further detail immediately below, and in relation to specific provisions later in this Explanatory Memorandum.

Offences requiring a fault element

A number of provisions in proposed Parts IV, V, VI and VII create offences requiring a fault element.

Section 3.1(1) of the Criminal Code (which is contained in a Schedule to the *Criminal Code Act 1995*) explains that an offence ordinarily consists of physical elements and fault elements. A person will be guilty of an offence requiring a fault element if it can be proved that the relevant physical elements for that offence exist, and one of the fault elements for each physical element is also proved.

The physical elements for offences requiring a fault element contained in the Bill are set out in the proposed provisions creating those offences. The fault elements are set out in Division 5 of Part 2.2 of the Criminal Code.

The offences requiring a fault element that are proposed to be created by the Bill have been designed to be consistent with the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the Attorney-General's Department, and in particular Parts 4.3 and 4.4 of that Guide.

² Extracts National Measurement Act Amendment Bill 2009 Explanatory Memorandum

Strict liability offences

A number of provisions in proposed Parts IV, V, VI, VII, IX, X and XI create strict liability offences.

Section 6.1 of the Criminal Code explains what is meant by 'strict liability'. A person will be guilty of a strict liability offence if it can be proved that the person committed a certain prohibited act. For example, a person will breach proposed subsection 18GA(2) if that person uses a measuring instrument for trade and that instrument is not verified. The person's state of mind is not relevant to their guilt. For example, it does not matter whether the person did not intend to breach subsection 18GA(2): the person will be guilty if it can be proved they committed the prohibited act.

The proposed strict liability offences created in the Bill are consistent with the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. In particular:

- none of the strict liability offences is punishable by imprisonment;
- the maximum penalty for committing one of the strict liability offences is a fine of up to 40 penalty units for an individual; and
- as explained below in relation to relevant provisions, strict liability has been imposed to enhance the effectiveness of particular provisions of the Act, by deterring people from committing offences, and to encourage people to be vigilant so as to ensure they do not breach the Act.

Reports 17/2000 and 6/2002 by the Senate Standing Committee for the Scrutiny of Bills were also considered in relation to the strict liability provisions of the Bill.

Extended geographical jurisdiction

Where appropriate, some offences have been extended in geographical reach, by applying extended geographical jurisdiction - category B (as provided for in section 15.2 of the *Criminal Code*). In these cases, a person will commit an offence if a requirement for standard geographical jurisdiction is satisfied, or the conduct constituting the offence occurs outside Australia and the person who commits it is an Australian citizen, resident or body corporate at the time of the alleged offence, subject to any applicable defences.

POWERS OF TRADE MEASUREMENT INSPECTORS

Proposed Part IX is concerned with trade measurement inspectors, who are responsible for monitoring compliance with the Act. Part 3 of Part IX confers powers on inspectors, for the purposes of the Act, to enter and search business or residential premises, to inspect business vehicles, to seize certain things, to require answers to certain questions, and to require certain documents to be produced.

These powers are conferred on inspectors to enable them to effectively monitor compliance and enforce the Act. The principles set out in Chapters 8 and 9 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* were

carefully considered when creating these powers. In particular, the following things were taken into account.

- There was extensive consultation with the Attorney-General's Department and the Australian Federal Police regarding the proposed provisions.
- It was decided that, given the large number of inspections involved, it would not be practicable to require warrants for the exercise of monitoring powers by inspectors in all cases.
- The powers replicate long-established equivalent powers in existing state and territory corresponding laws. These powers are familiar to, and accepted by, traders.
- If these powers were not available, it would not be possible to effectively administer the Act. In particular, it would be difficult to monitor compliance.
- The powers will only be exercisable by inspectors who are properly selected, qualified and trained to do so.
- In the case of residential premises, inspectors may be refused entry.

NATIONAL MEASUREMENT ACT 1960

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_pdf/319962.pdf;fileType=application%2Fpdf

Extracts from 2nd reading speech last accessed 27 May 2010

Strict liability offences

A number of provisions in proposed Parts IV, V, VI, VII, IX, X and XI create strict liability offences.

Section 6.1 of the Criminal Code explains what is meant by 'strict liability'. A person will be guilty of a strict liability offence if it can be proved that the person committed a certain prohibited act. For example, a person will breach proposed subsection 18GA(2) if that person uses a measuring instrument for trade and that instrument is not verified. The person's state of mind is not relevant to their guilt. For example, it does not matter whether the person did not intend to breach subsection 18GA(2): the person will be guilty if it can be proved they committed the prohibited act. The proposed strict liability offences created in the Bill are consistent with the principles set out in *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. In particular:

- none of the strict liability offences is punishable by imprisonment;
- the maximum penalty for committing one of the strict liability offences is a fine of up to 40 penalty units for an individual; and
- as explained below in relation to relevant provisions, strict liability has been imposed to enhance the effectiveness of particular provisions of the Act, by deterring people from committing offences, and to encourage people to be vigilant so as to ensure they do not breach the Act.

Reports 17/2000 and 6/2002 by the Senate Standing Committee for the Scrutiny of Bills were also considered in relation to the strict liability provisions of the Bill.

Extended geographical jurisdiction

Where appropriate, some offences have been extended in geographical reach, by applying extended geographical jurisdiction - category B (as provided for in section 15.2 of the *Criminal Code*). In these cases, a person will commit an offence if a requirement for standard geographical jurisdiction is satisfied, or the conduct constituting the offence occurs outside Australia and the person who commits it is an Australian citizen, resident or body corporate at the time of the alleged offence, subject to any applicable defences.

NATIONAL MEASUREMENT ACT 1960

See also regulations

http://www.austlii.edu.au/au/legis/cth/consol_act/nma1960222/s4.html

NATIONAL MEASUREMENT ACT 1960 - SECT 4

Objects and application of Act

(1) The objects of [this Act](#) are:

(a) to establish a national system of units and standards of [measurement](#) of physical quantities; and

(b) to provide for the uniform use of those uniform units and standards of [measurement](#) throughout [Australia](#); and

(c) to co-ordinate the operation of the national system of [measurement](#); and

(d) to bring about the use of the [metric system of measurement](#) in [Australia](#) as the sole system of [measurement](#) of physical quantities; and

(e) to provide for a national system of trade [measurement](#);

and [this Act](#) shall be construed accordingly.

(1A) Subsections(2) and (3) do not apply in respect of the application of [this Act](#) and regulations to [utility meters](#) used for trade.

Note: [Section 4A](#) deals with the application of the Act in respect of [utility meters](#) used for trade

(2) This Act and the regulations do not apply to the exclusion of any law of a State or Territory except in so far as that law is inconsistent with an express provision of [this Act](#) or of the regulations.

NATIONAL MEASUREMENT ACT 1960 - SECT 3

Interpretation

Selected extracts

"business premises" means [premises](#) or a part of [premises](#):

- (a) used for the importation, packing, storage or sale of [articles](#) or utilities sold, or to be sold, by [measurement](#); or
- (b) on which a [measuring instrument](#) is used for trade; or
- (c) used for activities incidental to the uses mentioned in paragraph (a) or (b);

but does not include [premises](#) or a part of [premises](#) occupied as a residence or for residential accommodation.

"business vehicle" means a [vehicle](#):

- (a) used for the transportation of [articles](#) or utilities sold, or to be sold, by [measurement](#) (whether [packed in advance ready for sale](#) or otherwise); or
- (b) on which a [measuring instrument](#) is used for trade; or
- (c) used for the [measurement](#) of [articles](#) or utilities sold, or to be sold, by [measurement](#); or
- (d) used for activities incidental to the uses mentioned in paragraph (a), (b) or (c).

"controller" , in relation to [premises](#), a part of [premises](#) or a [vehicle](#), means the person apparently in control of the [premises](#), the part of the [premises](#) or the [vehicle](#). *"use for trade"* : a person uses a [measuring instrument](#) for trade if:

- (a) the person is actually or apparently in control of the [measuring instrument](#); and
- (b) the person uses it, or makes it available for another person to use, for either or both of the following purposes:
 - (i) determining the consideration in respect of a transaction;
 - (ii) determining the amount of a tax.

"interest in land" includes an interest by way of stratum title (by whatever name known), an interest by way of strata title (by whatever name known) and a time-sharing [interest in land](#) (by whatever name known).

"premises" means:

- (a) an area of land or any other place, whether or not it is enclosed or built on; or
- (b) a building or other structure

"unit of measurement" includes any word or expression that is used in conjunction with numerical values in order to describe the magnitudes of physical quantities.

"use for trade" : a person uses a [measuring instrument](#) for trade if:

- (a) the person is actually or apparently in control of the [measuring instrument](#); and
- (b) the person uses it, or makes it available for another person to use, for either or both of the following purposes:
 - (i) determining the consideration in respect of a transaction;
 - (ii) determining the amount of a tax.

"utility" means gas, electricity or water.

"utility meter" means a [measuring instrument](#) that is:

- (a) a gas meter; or
- (b) an electricity meter; or
- (c) a water meter;

but does not include a meter that is included in a class of meters exempted from the operation of Part IV by the regulations.

Note: Most of the definitions dealing with [utility meters](#) are in section 18H.

As mentioned in the Explanatory Memorandum that accompanied the Bill leading to the finalization of the *National Measurement (Amendment) Act 2009*, it is the intent of the NMI to lift remaining exemptions for utilities. Some exemptions have already been lifted.

Forecasts for costs, including CAPEX AND OPEX COSTS and changes to other regulations should bear this in mind and not authorize unreasonable and unnecessary costs in the face of provisions for unreliable methods of calculation

Water meters and gas meters or electricity meters may be accurate.

But if the wrong instrument is used to calculate actual or estimated consumption of the wrong commodity, and contractual obligation, conditions precedent and subsequent and other considerations, including matters relating to price or tax - such practices adopted whether or not tacitly or explicitly sanctioned by codes guidelines or other provisions in other regulatory jurisdictions may be seen to be contradicting these provisions, as well as containing substantive unfair terms that would qualify for avoidance under revised unfair contract provisions contained with proposed generic laws – when the new TPA takes full effect and is renamed Competition and Consumer Law 2010, with an effective proposed date of 1 January 2011.

These matters will affect cost allocations and other determinations such as gas or electricity access determinations and related rule changes initiated by the AEMC or considered by the AEMC.

PART V--GENERAL PROVISIONS ON USING MEASUREMENT IN TRADE

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

NATIONAL MEASUREMENT ACT 1960 - SECT 18H

Overview

Overview of Part

- (1) This Part regulates the use of [measurement](#) in trade generally.
- (2) This Part deals with:
 - (a) [articles](#) that must be sold by [measurement](#) (sections 18HB and 18HC); and
 - (b) the units of [measurement](#) that must be used for certain transactions (section 18HD); and
 - (c) the scale intervals of [measuring instruments](#) used for certain [articles](#) (section 18HE); and
 - (d) unreliable methods of [measurement](#) (section 18HF); and
 - (e) the use of certain [measuring instruments](#) (section 18HG); and
 - (f) [measuring instruments](#) and methods of [measurement](#) used in monitoring compliance with [this Act](#) (section 18HH).
- (3) All trade [measurement](#) is to be a net [measurement](#) (section 18HI).

Explanatory Memorandum

Last accessed 27 May 2010

Part V—General provisions on using measurement in trade

Section 18H Overview

1. This section highlights the key elements of new Part V of the Act.

EXPLANTORY MEMORANDUM

LAST ACCESSED 27 May 2010

Section 18HD Transactions based on measurement to be in prescribed units of measurement

2. Proposed subsection 18HD(1) contains an offence provision that relates to the units of measurement that must be used for certain transactions. Under subsection 18HD(1), a person commits an offence if:
 - the person sells an article (whether packed in advance ready for sale or otherwise) or a utility for a price determined by reference to measurement of the article; and
 - a unit of measurement is prescribed by the regulations for that article or utility, or articles or utilities of that class, for the purposes of this paragraph 18HD(1)(b); and
 - the price is not a price determined by reference to a measurement of the article or utility in that unit of measurement.
3. The offence is punishable by a penalty of 40 penalty units (currently \$4,400).
4. It is important for the proper operation of the Act that the regulations may prescribe a unit of measure for a particular article or utility, or class of articles or utilities, so that these units may be prescribed comprehensively and precisely, and so that they may be relatively readily amended to reflect changes in industry practice and the creation of new types of articles.
5. Proposed subsection 18HD(2) provides that the offence in proposed subsection 18HD(1) is an offence of strict liability. The subsection contains a note referring to section 6.1 of the *Criminal Code*, which explains the concept of strict liability.
6. The penalty imposed by subsection 18HD(1) is designed to encourage people to be vigilant in ensuring that they comply with the subsection's requirements and to deter them from engaging in the prohibited behaviour.
7. Proposed subsection 18HD(3) provides that section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code* applies to offences against proposed subsection 18HD(1). This is because these offences could be committed outside Australia in circumstances where it may be appropriate and practicable to take action against the person who committed the offence. Proposed subsection 18HD(3) is designed to be consistent with the principles discussed in par 4.8 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

NATIONAL MEASUREMENT ACT 1960 - SECT 18HE

Measuring instruments used in transactions to have prescribed scale intervals

(1) A person commits an offence if:

(a) the person sells an article (whether packed in advance ready for sale or otherwise) or a utility for a price determined by reference to measurement of the article; and

(b) the regulations prescribe scale intervals for measuring instruments used in the measurement of the article or utility, or articles or utilities of that class; and

(c) the price is not a price determined by reference to a measurement of the article or utility using a measuring instrument of those scale intervals.

Penalty: 40 penalty units.

(2) Subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code* .

(3) Section 15.2 (extended geographical jurisdiction--category B) of the *Criminal Code* applies to an offence against subsection (1).

Explanatory Memorandum last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HE Measuring instruments used in transactions to have prescribed scale intervals

8. Proposed subsection 18HE(1) contains an offence provision that relates to the scale intervals of measuring instruments used for certain articles. Under subsection 18HD(1), a person commits an offence if:
 - the person sells an article (whether packed in advance ready for sale or otherwise) or a utility for a price determined by reference to measurement of the article; and
 - the regulations prescribed scale intervals for measuring instruments used in the measurement of the article or utility, or articles or utilities of that class; and
 - the price is not a price determined by reference to a measurement of the article or utility using a measuring instrument of those scale intervals.
9. The offence is punishable by a penalty of 40 penalty units (currently \$4,400).

10. Proposed subsection 18HE(2) provides that the offence in proposed subsection 18HE(1) is an offence of strict liability. The subsection contains a note referring to section 6.1 of the *Criminal Code*, which explains the concept of strict liability.
11. The penalty imposed by subsection 18HE(1) is designed to encourage people to be vigilant in ensuring that they comply with the subsection's requirements and to deter them from engaging in the prohibited behaviour.
12. Proposed subsection 18HE(3) provides that section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code* applies to offences against proposed subsections 18H(1), (2), (3) and (4). This is because these offences could be committed outside Australia in circumstances where it may be appropriate and practicable to take action against the person who committed the offence. Proposed subsection 18HE(3) is designed to be consistent with the principles discussed in par 4.8 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

NATIONAL MEASUREMENT ACT 1960 - SECT 18HF

Unreliable methods of measurement

- (1) The regulations may prescribe unreliable methods of [measurement](#) of an [article](#) or [utility](#) or a class of [articles](#) or utilities.
- (2) If the regulations make provision under subsection (1):
- (a) the unreliable method of [measurement](#) must not be used in working out the amount of any tax (however described) payable by reference to [measurement](#) of the [article](#) or [utility](#) or an [article](#) or [utility](#) of that class; and
- (b) no contract, dealing or other transaction is to be made or entered into that requires the unreliable method of [measurement](#) to be used in measuring the [article](#) or [utility](#) or an [article](#) or [utility](#) of that class for the purpose of determining the consideration under that contract, dealing or transaction; and
- (c) to the extent that a contract is entered into requiring the unreliable method to be used for that purpose, the contract is null and void.

"measuring instrument gives an inaccurate measurement" has the meaning given in subsection (6).

Explanatory Memorandum last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HF Unreliable methods of measurement

13. Proposed section 18HF deals with unreliable methods of measurement. Subsection (1) of this proposed provision provides that the regulations enabled by the *National Measurement Act 1960* may prescribe unreliable methods of measurement of an article or utility or a class of articles or utilities.
14. Proposed subsection 18HF(2) provides that if the regulations make provision under proposed subsection 18HF(1):
- the unreliable method of measurement must not be used in working out the amount of any tax (however described) payable by reference to measurement of the article or utility or an article or utility of that class; and
 - no contract, dealing or other transaction is to be made or entered into that requires the unreliable method of measurement to be used in measuring the article or utility or an article or utility of that class for the purpose of determining the consideration under that contract, dealing or transaction; and

- to the extent that a contract is entered into requiring the unreliable method to be used for that purpose, the contract is null and void.
15. It is important that regulations may be made prescribing precisely unreliable methods of measurement so that this information is readily available and can be relatively readily amended to accommodate changing business practices and practical circumstances.
16. **EXAMPLE:** When firewood is sold by volume, and is not stacked with as few gaps as practicable, a measurement method based on the size of the stack would be unreliable. Also, weighing a vehicle on a weighbridge using the 'end and end' method is not as reliable a method of measurement as direct weighing of the vehicle.

NATIONAL MEASUREMENT ACT 1960 - SECT 18HG

Limiting use of certain measuring instruments

Offence requiring fault element

(1) A person commits an offence if:

(a) a [measuring instrument](#) is of a class that, by regulation, must only be used for prescribed purposes; and

(b) the person uses the [measuring instrument](#) for trade for another purpose.

Penalty: 100 penalty units.

Strict liability offence

(2) A person commits an offence if:

(a) a [measuring instrument](#) is of a class that, by regulation, must only be used for prescribed purposes; and

(b) the person uses the [measuring instrument](#) for trade for another purpose.

Penalty: 20 penalty units.

(3) Subsection (2) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code* .

Explanatory Memorandum extract: last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HG Limiting use of certain measuring instruments

17. Proposed subsection 18HG(1) contains an offence provision that relates to the use of certain measuring instruments. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HG(1), a person commits an offence if:
 - a measuring instrument is of a class that, by regulation, must only be used for prescribed purposes; and
 - the person uses the measuring instrument for trade for another purpose.
18. The offence is punishable by a penalty of 100 penalty units (currently \$11,000).
19. It is important for the proper operation of section 18HG that the regulations may prescribe purposes for which only certain classes of measuring instruments may be used. This is so that the circumstances in which certain measuring instruments may be used for certain purposes in the course of trade can be comprehensively and precisely prescribed, and that these prescribed purposes may be relatively readily amended to reflect changes in technology and business practices. Par 4.2 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* was considered when framing this provision.
20. Proposed subsection 18HG(1) is designed to strongly deter people from engaging in the prohibited behaviour.
21. Proposed subsection 18HG(2) contains an offence provision that also relates to the use of certain measuring instruments. Under subsection 18HG(2), a person commits an offence if:
 - a measuring instrument is of a class that, by regulation, must only be used for prescribed purposes; and
 - the person uses the measuring instrument for trade for another purpose.
22. The offence is punishable by a penalty of 20 penalty units (currently \$2,200).
23. Proposed subsection 18HG(3) provides that the offence in proposed subsection 18HG(2) is an offence of strict liability. This provision contains a note referring to section 6.1 of the *Criminal Code*, which explains the concept of strict liability.
24. Offences under subsection 18HG(2) will attract a lesser penalty than the corresponding offence requiring a fault element. This provision is designed to encourage people to be vigilant in ensuring that they do not engage in the prohibited behaviour and to deter people from engaging in that behaviour.

NATIONAL MEASUREMENT ACT 1960 - SECT 18HH

Measuring instruments and methods of measurement used in monitoring compliance with the Act

(1) The regulations may prescribe:

(a) measuring instruments, or classes of measuring instruments, to be used by trade measurement inspectors in the measurement of an article or utility, or a class of articles or utilities, for the purpose of monitoring compliance with this Act; and

(b) the methods of measurement of an article or utility, or a class of articles or utilities, to be used by trade measurement inspectors in monitoring compliance with this Act.

(2) All courts, judges and persons acting judicially must presume that:

(a) a measuring instrument or a class of measuring instruments prescribed for an article or utility, or a class of articles or utilities, will, if used correctly, produce an accurate measurement of the article or utility, or articles or utilities of that class; and

(b) the use of the method of measurement prescribed for an article or utility, or a class of articles or utilities, will produce an accurate measurement of the article or utility, or articles or utilities of that class.

Explanatory Memorandum last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HH Measuring instruments and methods of measurement used in monitoring compliance with the Act

25. Proposed section 18HH deals with measuring instruments and methods of measurement used in monitoring compliance with the *National Measurement Act*. Subsection (1) of this proposed provision provides that the regulations enabled by the *National Measurement Act* may prescribe:

- measuring instruments, or classes of measuring instruments, to be used by trade measurement inspectors in the measurement of an article and utility or a class of articles or utilities for the purpose of monitoring compliance with this Act; and
- the methods of measurement of an article or utility or an article or utilities of a class, to be used by trade measurement inspectors in monitoring compliance with this Act.

19 of 27

26. It is important regulations may be made for these purposes, so that there is a clear public document setting out these important matters, and that the regulations prescribing these matters may be relatively readily amended to accommodate changes in technology and business practices. This will help ensure that inspectors discharge their duties in accordance with the best of current standards and practices.
27. Proposed section 18HH(2) provides for presumptions that must be made by all courts, judges and persons acting judicially:
 - a measuring instrument or a class of measuring instrument prescribed for an article or utility in relation to which it is prescribed, will, if used correctly, produce an accurate measurement of the article or utility; and
 - the use of the method of measurement prescribed for an article or utility, in relation to which the method is prescribed will produce an accurate measurement.
28. This provision is designed to facilitate administration of the Act, by avoid unnecessary collateral proceedings in relation to the Act. For example, this provision would avoid the need to establish in a number of different proceedings that a measuring instrument will, if used properly, will give an accurate result.

Explanatory Memorandum Last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HI Articles sold by measurement to be sold by net measurement

29. Proposed subsection 18HI(1) contains an offence provision relating to sellers and trade measurement being a net measurement. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HI(1), a person commits an offence if:
 - the person sells an article (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
 - the price is not determined by reference to the net measurement of the article when sold or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.
30. The offence is punishable by a penalty of 100 penalty units (currently \$11,000).
31. This provision is designed to strongly deter people from engaging in the prohibited behaviour.
32. Proposed subsection 18HI(2) contains an offence provision relating to sellers and trade measurement being a net measurement. Under subsection 18HI(2), a person commits an offence if:
 - the person sells an article (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
 - the price is not determined by reference to the net measurement of the article when sold or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.
33. The offence is punishable by a penalty of 20 penalty units (currently \$2,200).
34. Proposed subsection 18HI(3) contains an offence provision relating to possession, offer or exposure for sale and trade measurement being a net measurement. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HI(3), a person commits an offence if:
 - the person possesses an article for sale, or offers or exposes it for sale, at a particular time (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
 - the price is not determined by reference to the net measurement of the article at that time, or if an alternative time is prescribed in relation to the article, or articles of that class, at an alternative time.

21 of 27

35. The offence is punishable by a penalty of 100 penalty units (currently \$11,000).
36. This provision is designed to strongly deter people from engaging in the prohibited behaviour.
37. Proposed subsection 18HI(4) contains an offence provision relating to possession, offer or exposure for sale and trade measurement being a net measurement. Under subsection 18HI(4), a person commits an offence if:
 - the person possesses an article for sale, or offers or exposes it for sale, at a particular time (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
 - the price is not determined by reference to the net measurement of the article at that time or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.
38. The offence is punishable by a penalty of 20 penalty units (currently \$2,200).
39. Proposed subsection 18HI(5) provides that the offences in proposed subsections 18HI(2) and (4) are offences of strict liability. This provision contains a note referring to section 6.1 of the *Criminal Code*, which explains the concept of strict liability.
40. Offences under subsections 18HI(2) and (4) will attract a lesser penalty than the corresponding offence requiring a fault element. These provisions are designed to encourage people to be vigilant in ensuring that they do not engage in the prohibited behaviour and to deter people from engaging in that behaviour.
41. Proposed subsection 18HI(6) provides that section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code* applies to offences against proposed subsections 18HI(1), (2), (3) and (4). This is because these offences could be committed outside Australia in circumstances where it may be appropriate and practicable to take action against the person who committed the offence. Proposed subsection 18HI(6) is designed to be consistent with the principles discussed in par 4.8 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Explanatory Memorandum

Last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18HI Articles sold by measurement to be sold by net measurement

42. Proposed subsection 18HI(1) contains an offence provision relating to sellers and trade measurement being a net measurement. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HI(1), a person commits an offence if:
- the person sells an article (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
 - the price is not determined by reference to the net measurement of the article when sold or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.
43. The offence is punishable by a penalty of 100 penalty units (currently \$11,000).
44. This provision is designed to strongly deter people from engaging in the prohibited behaviour.
45. Proposed subsection 18HI(2) contains an offence provision relating to sellers and trade measurement being a net measurement. Under subsection 18HI(2), a person commits an offence if:
- the person sells an article (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
 - the price is not determined by reference to the net measurement of the article when sold or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.
46. The offence is punishable by a penalty of 20 penalty units (currently \$2,200).
47. Proposed subsection 18HI(3) contains an offence provision relating to possession, offer or exposure for sale and trade measurement being a net measurement. This offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under subsection 18HI(3), a person commits an offence if:
- the person possesses an article for sale, or offers or exposes it for sale, at a particular time (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and

23 of 27

- the price is not determined by reference to the net measurement of the article at that time, or if an alternative time is prescribed in relation to the article, or articles of that class, at an alternative time.
48. The offence is punishable by a penalty of 100 penalty units (currently \$11,000).
49. This provision is designed to strongly deter people from engaging in the prohibited behaviour.
50. Proposed subsection 18HI(4) contains an offence provision relating to possession, offer or exposure for sale and trade measurement being a net measurement. Under subsection 18HI(4), a person commits an offence if:
- the person possesses an article for sale, or offers or exposes it for sale, at a particular time (whether packed in advance ready for sale or otherwise) for a price determined by reference to measurement of the article; and
 - the price is not determined by reference to the net measurement of the article at that time or, if an alternative time is prescribed in relation to the article, or articles of that class, at that alternative time.
51. The offence is punishable by a penalty of 20 penalty units (currently \$2,200).
52. Proposed subsection 18HI(5) provides that the offences in proposed subsections 18HI(2) and (4) are offences of strict liability. This provision contains a note referring to section 6.1 of the *Criminal Code*, which explains the concept of strict liability.
53. Offences under subsections 18HI(2) and (4) will attract a lesser penalty than the corresponding offence requiring a fault element. These provisions are designed to encourage people to be vigilant in ensuring that they do not engage in the prohibited behaviour and to deter people from engaging in that behaviour.
54. Proposed subsection 18HI(6) provides that section 15.2 (extended geographical jurisdiction—category B) of the *Criminal Code* applies to offences against proposed subsections 18HI(1), (2), (3) and (4). This is because these offences could be committed outside Australia in circumstances where it may be appropriate and practicable to take action against the person who committed the offence. Proposed subsection 18HI(6) is designed to be consistent with the principles discussed in par 4.8 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

NATIONAL MEASUREMENT ACT 1960 - SECT 18KA

Measurement must be open to scrutiny if purchaser present

Offence requiring fault element

(1) A person commits an offence if:

(a) the person [sells](#) an [article](#) for a price determined by reference to [measurement](#) of the [article](#); and

(b) the [article](#) is not [packed in advance ready for sale](#); and

(c) the purchaser is present at the point of sale; and

(d) the [measurement](#) is made in either of the following circumstances:

(i) the measuring process is not readily visible to the purchaser;

(ii) any reading or information displayed by the [measuring instrument](#) is not readily visible to the purchaser.

Penalty: 200 penalty units.

Strict liability offence

(2) A person commits an offence if:

(a) the person [sells](#) an [article](#) for a price determined by reference to [measurement](#) of the [article](#); and

(b) the [article](#) is not [packed in advance ready for sale](#); and

(c) the purchaser is present at the point of sale; and

(d) the [measurement](#) is made in either of the following circumstances:

(i) the measuring process is not readily visible to the purchaser;

(ii) any reading or information displayed by the [measuring instrument](#) is not readily visible to the purchaser.

Penalty: 40 penalty units.

(3) Subsection (2) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code* .

Explanatory memorandum last accessed 27 May 2010

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r3088_ems_766cf68e-6f94-4a28-9171-871398eb9682/upload_word/319962.doc;fileType=application%2Fmsword

Section 18KA Measurement must be open to scrutiny if purchaser present

55. Proposed subsection 18KA(1) provides for an offence in relation to a person who sells an unpackaged article, where the price of the article is determined by measurement of the article, and the customer is present at the point of sale. The offence requires a fault element to be proven with respect to its physical elements (which must also be proven). Under proposed subsection 18KA(1), a person commits an offence if:
- the person sells an article for a price determined by reference to measurement of the article; and
 - the article is not packed in advance ready for sale; and
 - the purchaser is present at the point of sale; and
 - the measurement is made in either of the following circumstances:
 - the measuring process is not readily visible to the purchaser;
 - any reading or information displayed by the measuring instrument is not readily visible to the purchaser.
56. The offence is punishable by a penalty of 200 penalty units (currently \$22,000).
57. This provision is designed to strongly deter people from engaging in the prohibited behaviour, and to ensure that customers are given complete information as to the measurement and price of relevant articles.
58. Proposed subsection 18KA(2) provides for an offence in relation to a person who sells an unpackaged article, where the price of the article is determined by measurement of the article, and the customer is present at the point of sale. Under proposed subsection 18KA(2), a person commits an offence if:
- the person sells an article for a price determined by reference to measurement of the article; and
 - the article is not packed in advance ready for sale; and

- the purchaser is present at the point of sale; and
 - the measurement is made in either of the following circumstances:
 - the measuring process is not readily visible to the purchaser;
 - any reading or information displayed by the measuring instrument is not readily visible to the purchaser.
59. The offence is punishable by a penalty of 40 penalty units (currently \$4,400).
60. Proposed subsection 18KA(3) provides that the offence in proposed subsection 18KA(2) is an offence of strict liability. This provision contains a note referring to section 6.1 of the *Criminal Code*, which explains the concept of strict liability.
61. Offences under subsection 18KA(2) will attract a lesser penalty than the corresponding offence requiring a fault element. This provision is designed to encourage businesses to be vigilant in ensuring that they do not engage in the prohibited behaviour, to deter people from engaging in that behaviour, and to ensure that customers are given complete information as to the correct measurement and price of relevant articles.

Appendix 12

COPY OF FURTHER COMMENT

AEMC ERC0092 DRAFT DECISION METERING DATA SERVICE PROVISION

3 JULY 2010-08-04

MADELEINE KINGSTON

3 July 2010

Telephone 9017-3127

[email: mkin2711@bigpond.net.au](mailto:mk2711@bigpond.net.au)

Mr. Rory Campbell and Mark Tutaan
Senior Adviser and Project Leader
Australian Energy Commission
Canberra, ACT

by [email: submissions@aemc.gov.au](mailto:submissions@aemc.gov.au)

Dear Mr. Campbell and Mr. Tutaan

Further Comment to Draft Determination ERC0092 Metering Data Service Provision and Clarification of Metrology Procedures¹

I refer to my formal submission sent by email dated 1 July now acknowledged to the AEMC ERC0092 Draft Determination, and submissions to the AER – which appeared to have no impact on their determination in the Jemena Gas Network (NSW) Gas Determination, which is almost bound to be appealed before the Australian Competition Tribunal – in yet another turnaround of decisions impacting on the taxpayers' pockets.

Similar concerns relate to the ACT matter brought to the ACT in Merits Review to be determined on 26 July. I attended the Directions Hearing last week. The perception by Jemena Ltd its servants contractors and/or subsidiary companies, including JGN and ActewAGL Distribution, either directly expressed or through its asset management company Jemena Asset Management (JAM), and by the AER that the matters do not impact on NSW and the ACT is misguided. Similar concerns apply to other states and other distributors.

The Decision by the AER of 11 and 28 June respectively is misguided in the sanctioning of unnecessary CAPEX and OPEX costs associated with water meter upgrades as alleged legitimate “*additional services*” under energy laws, to be incurred by one of two major distributors with all the power – including over policy-makers, rule makers, and politicians, in a monopoly-like market will ultimately be regretted and criticized as much as the ill-fated and ill-considered Victorian smart meter roll out. The MCE is completely dominated by Victorian influences and ill-considered decisions.

I have referred to the Victorian Auditor-General's scathing comments about complete lack of governance leadership and demonstrable economic and technical case. The same issues stand to impact on ill-considered proposals, sanctioned by the AER for the unnecessary upgrade of water meters, conveniently listed as “*additional services*” or “*ancillary services*” in attempts to squeeze non-system, non-distribution excluded services into energy laws.

This I believe is beyond the jurisdiction of energy policy makers, rule makers and regulators under energy laws.

I have sighted what Kevin McMahon has sent to the AEMC. I could not agree more.

Though living in different States, our experiences of the exploitive market are very similar. Many stakeholders from Queensland and other States have contacted me regarding the public concerns that I have expressed. I have reflected back those concerns, with little real expectation of being heeded. When has the consumer voice ever been regarded with anything but disdain. It is not wonder that every one is so very disillusioned.

Nonetheless I urge the AEMC to carefully consider and discuss the consumer submissions received in the ERC0092 Matter and to submissions by consumers to other related arenas.

It is my view that the AMEC, MCE, AER and others "pandering" to those who undoubtedly dominate the market, as Mr. McMahon puts it, may well be laying itself open to legal action eventually, even if statutory provisions don't support this.

The potential also exists, despite all attempts to preclude parties from taking matters before the open courts for market participants to expose themselves to class action litigation - this is

bound to happen eventually. The failure of all policy-makers and regulators to consider comparative law is not merely regrettable, but, forgive me for saying, possibly grossly misguided and bordering on risk-taking.

Perhaps the AEMC, who gets to appoint the Chairperson of the AER is not quite aware of what is happening at the level of regulatory determinations under constant challenge by those with market power.

I am aware of more than one legal matter on foot in the open courts challenging the precepts that have been adopted in the lucrative serviced hot water data metering provider monopoly and exploitive market. The enshrined rights of those covered under contract and the common law cannot be stripped from them by mere statutory provisions. The worm will turn ultimately and will bring in its wake expensive and unnecessary litigation.

Though my formal submissions deals with many of these issues, I cannot resist reinforcement at this stage before the AEMC publishes its Final Determination.

Consumers won't forever tolerate abuse of market power and misguided policies.

I can only begin to suggest that a Pandora's box of issues that appear to have been so incompletely considered in the formulation of state and national laws, with such minimal consideration of the impact of comparative law.

For example, no single State or Commonwealth statutory provision will affect other rights or remedies.

Specifically, for example such a provision **WILL NOT** at the end of the day, even in the name of "*competition policy*;" or the alleged "*the best long term interests of consumers*" or any other such guise, under any circumstances; howsoever engrossed, structured, intimated or otherwise conveyed within such provisions, or for that matter terms of commercial agreement between one party or another, including between government authorities and other entities:¹

- a) **affect or limit a civil right or remedy** apart from such an Act, whether at common law or otherwise
- b) **exonerate from liability including under the common law** such recourses, including through, compliance with any given legislative Act or ancillary provision including, Code or Guideline or reference thereto within statutory provisions; generic, state or territory; industry-specific or otherwise; and irrespective of discrepancies; misinterpretations (for example deemed sale and supply of gas or electricity as commodities attractive the full suite of protections under multiple

¹ One example is the Energy Assets (Restructuring and Disposal) Act 2006 (Qld)
See Queensland Legislative Assembly, Hansard pp 53; 61, 62, 64 (resumed); 164, 167-178 (First and second readings reintroduction, (then) Qld Treasury and Minister for Infrastructure) pp231, 559. 11, 12, 31 October 2006
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_11_WE_EKLY.pdf
http://www.parliament.qld.gov.au/view/legislativeAssembly/hansard/documents/2006.pdf/2006_10_12_WE_EKLY.pdf
<http://www.legislation.qld.gov.au/LEGISLTN/ACTS/2006/06AC042.pdf>

provisions) or any other energy form; or any other commodity or service to a customer (incorporated or otherwise)

- c) **hamper, restrict or remove civil or other rights or obligations under other statutory other provisions**, notwithstanding any misguided transparent or hidden warranties or guarantees (for example any warranties or guarantees entered into during the disaggregation of infrastructure or other assets)
- d) **over-ride recourse to seeking justice under enshrined rights** within the written or unwritten laws, including under the common law
- e) imply or create **limitations as to culpability and/or liability** by the mere existence of perceived exoneration under one enactment or ancillary provision (or for that matter terms of any commercial agreement, whether or not between government authorities); including but not limited to for example; commercial agreements formed between government organizations during the disaggregation and sale of infrastructure assets;² specific legal provisions under state, local government or federal laws; or generic laws; will in any way limit a court's powers under the *Penalties and Sentences Act (2) Without limiting subsection (1), compliance with this Act does not necessarily show that a civil obligation that exists apart from this Act has been satisfied or has not been breached.*

I now refer to provisions currently operational in State jurisdictions. These issues are further discussed and analyzed in the appendices already submitted with my main submission of 1 July and under various headings including Contractual arrangements, and tenancy provisions

If not too late I have no objection to the publication of this brief comment as an additional submission, but at any rate I hope the AEMC and others will take into account in any decision making current and future

Madeline Kingston

Regards

Madeline Kingston

Private Stakeholder

² See for example the extraordinary and perhaps misguided arrangements, guarantees, warranties and assurances provided to purchasers within the energy industry of energy (and impliedly other assets and/or client bases

APPENDIX 15

SOME EVALUATIVE PRINCIPLES

SOME BURNING EVALUATION PRINCIPLES CONVERTING THEORY INTO PRACTICE¹

The following principles may assist with general evaluative and record-keeping best practice principles – for all policy, regulatory and other entities working in the public policy arena

Recommendations: General evaluative principles

1. What was the evaluand *{Funnell and Lenne 1989}* at several levels, mega, macro and micro, since different stakeholders will have different concerns at each of these levels *{Owen (1999:27)}*.
2. In choosing design and methods, were any cautions used against replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}*.
3. What external threats were identified and considered before the data gathering exercise was undertaken?
4. What comparisons were used?
5. What were the boundaries and objectives?
6. Was an evaluability assessment undertaken to more precisely determine the objectives of the intervention, the different possible ways in which the item could be evaluated and the cost and benefits of different evaluation designs²
7. What were the implied or explicit criteria used to judge the value of the intervention?
8. Which evaluation design was employed was employed, since a decision on this issue would impact on the data-gathering measures?

¹ How many of these principles were adopted in the various evaluative processes undertaken by those guiding or undertaking major or minor policy reform in various State, Commonwealth or advisory arenas

² Wholly (1977) *“Evaluability assessment”* in L Rutman (ed.) *Evaluation Research Methods: A Basic Guide*, Beverly Hills, CA: Sage
Wholey JK (1983), *Evaluation and Effective Public Management*, Boston: Little, Brown c/f Ovretveit *Evaluating Health Interventions*. Open University Press. McGraw-Hill (reprinted 2005), Ch 2 p 41

9. Was the evaluative design in this case case-control, formative, summative, a combination of process (formative) and summative; cost-utility or audit? Will assessment of the data gathered be contracted out to an informed researcher or research team with recent professional development updates and grasp of the extraordinary complexities in the evaluative process?³
10. How was the needs assessment conceptualized?
11. Was the program design clarifiable?
12. How was the formative evaluation undertaken?
13. What are or were the Program Implementation process evaluation parameters?
14. What measures will be in place for evaluating the “settled program” (or policy change proposed)?
15. How were short term impacts by conceptualized and identified for the proposed changes?
16. What definitive outcomes are sought and how will these outcomes be determined by follow-up?
17. Was/will there be time to activate the evaluation’s theory of action by conceptualizing the causal linkages?⁴ Whilst not ideal, if no theory of action was formulated, perhaps it is not too late to partially form a theory of action plan.
18. Was there be room or time in the data-gathering exercise to probe deeper into the answers provided by the people whose lives will be affected by any decision the Government may make to deregulate within the energy industry? The skilled questioner knows how to enter another’s experience?⁵
19. As Eyler (1979) said *What are figures worth if they do no good to men’s bodies or souls?*⁶
20. What was be done do assess the intended impacts of the studies undertaken.
21. Before the data-gathering exercise was undertaken, and considering the time constraints were these factors considered: feasibility, predictive value; simulations; front-end; evaluability assessment?
22. What processes will be undertaken to ensure added-value components to the evaluation?

³ Patton, M. Q. (2002) *Qualitative Research & Evaluation Method* Sage Publications

⁴ Patton, M. E. *The Program’s Theory of Action* in *Utilization Focussed Evaluation*, Sage, Thousand Oaks, 1997, pp 215-238

⁵ From Halcom’s *Epistemological Parables* c/f ibid *Qualitative Research and Evaluation Methods*, Ch 7 *Qualitative Interviewing*

⁶ c/f Ovretveit (1997) *“Evaluating Health Interventions”*. Open University Press. McGraw-Hill (reprinted 2005), Ch 1

23. How will the agencies/entities utilize case study example in augmenting the

existing relatively generic study undertaken addressing standard demographics over a large sample without sub-segmentation of more vulnerable groups (such as residential tenants or regional consumers) with more in-depth evaluation?

24. How carefully will the agencies/entities in their parallel Review/Inquiry review in tandem program documentation, especially where there is overlap; or examine complaints and incident databases; form a linkage unit for common issues.
25. To what extent have the following evaluative process been undertaken⁷ by both bodies, and all Commonwealth and State bodies including the MCE and COAG Teams, policy advisers and policy-makers regulators:
 - Strongly conceptualized parameters
 - Descriptive
 - Comparative
 - Constructively skeptical
 - Positioned from the bottom up
 - Collaborative
- Does all of the government, quasi-government, regulators and others a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?⁸
- How will the success of the policy changes ultimately effected be monitored and reevaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?
- What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?
- Generic protections such as those afforded by trade practices and fair trading provisions are currently insufficient and not quite as accessible as is often purported.
- Within an industry that represents an essential service and where large numbers of vulnerable and disadvantaged consumers (not just on financial grounds) are under-represented how will the Government ensure that the rights of specific stakeholder groups are not further compromised?

⁷ Centre for Health Program Evaluation, Melbourne University

⁸ Funnell S, Program Logic (1997): *“An Adaptable Tool for Designing and Evaluating Programs”* in Evaluation News and Comment, V6(1), pp 5-17

.How accessible will Rule Changing be?

- How will the success of the policy changes ultimately effected by monitored and re-evaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?
- In choosing design and methods, what will be done about replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}*.
- What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?
- How accessible will Rule Changing be?
- Perhaps the agencies and entities would consider seeking specialist evaluation input with further evaluation of data when making major regulatory reform decisions
- Does Government have a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?”⁹

Evaluation is a sophisticated and scientific professional challenge. It is not just a trade, though compromises often make it so. Professional evaluators are humble people. They make no pretenses. Regardless of reputation or status, they are never too humble to ask for collaborative input and peer opinion and suggestion. Evaluation is a continuing process and does not start and end with data gathering. They recognize the challenges of best practice data gathering and evaluation and do not pretend to have all the answers.

For instance, check out the University of Alabama’s EVALUTALK facility. American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]. This group is the cutting edge of evaluative practice. The rest of the world respects the results this group achieves.

One such evaluator could be Bob Williams a highly respected NZ evaluator with an international reputation and particular expertise in public policy evaluation. He is a frequent visitor to Australia, and is a fairly well known figure in Australasian evaluation, through evaluations, his work within the Australasian Evaluation Society (AES) (which merged with Evaluation News and Comment under Bob Williams’ supervision) and his contributors to the two Internet discussions groups Evalutalk and Govteval. He has vas experience of Governmental evaluations.

On the online Evaluator’s Forum, EVALUTALK, Bob Williams responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen

————— Funnell, S, (1997) “*Program Logic: An Adaptable Tool for Designing and Evaluating Programs*” in Evaluation news and Comment, V6(1), pp 5-17

as craftspeople with a pride in their work and the outcomes of their findings long after the consultative process is over.

Williams' specialty is evaluation, strategy development, facilitating large-group processes and systemic organizational change projects. He has his own website under his name. Reviews books for Journal Management Learning, writes for Australasian Evaluation Society's Journal. He wrote the entries on "systems" "systems thinking" "quality" and planning Encyclopaedia of Evaluation {Sage 2008) and co-written with Patricia Rogers in "Handbook of Evaluation" {Sage 2006}.

There is a great deal of valuable consultative evaluation advice out there for the asking. Lay policymakers are not normally trained in this area.

Bob Williams, has commented as follows on EVALUTALK:

"The Ministry of Education here in New Zealand has been doing something very interesting for the past four or five years. The policymakers along with teachers university researchers and others have been developing a series of "best evidence syntheses". The concept of "best evidence" is fairly comprehensive with a set of agreed criteria for what constitutes "best" and "evidence". As each synthesis is developed it is opened up for discussion with practitioners and academics - and placed on the Ministry of Education's website. I was involved in some of the early discussions (as a facilitator rather than evaluator) and was impressed by both the method and the content of the syntheses. What I found most impressive was that the policymakers were brave include evidence that challenged some of the assumptions that have dominated education policymaking in the past few decades (e. g. the extent to which socio-economic status effects student performance)."

"The 2006 edition of the World Education Yearbook describes the BES Programme "as the most comprehensive approach to evidence" and goes on to say: "What is distinctive about the New Zealand approach is its willingness to consider all forms of research evidence regardless of methodological paradigms and ideological rectitude and its concern in finding...effective appropriate e and locally powerful examples of 'what works.'"

Bob Williams suggests that before data gathering is undertaken the underlying assumptions must be made, followed by identification of the environment and environmental factors that will affect the way in which the intervention and its underlying assumptions will interact and thus behave.

A recent dialogue between evaluators on that Discussion List produced a useful list of criteria that would cover the processes that should ideally be undertaken.

6 of 18

Senate Standing Committee on Economics
Inquiry Trade Practices (Australian Consumer Law) Amendment Bill 2010

Madeleine Kingston
Individual Stakeholder
Open Submission April 2010 With appendices
Some General Evaluative Principles

Though the inputs came from a number of Discussion List members, I cite below how Bob Williams¹⁰ a respected New Zealand evaluator with an international reputation summarized as follows inputs from various evaluators participating on the Discussion List **ii**.

Position the evaluation – that is, locate the evaluation effectively in its context, in the broader systems.

MK Comment:

This is impossible to achieve without a comprehensive informed SWOT analysis that goes well beyond background reading of other components of the internal energy market –a highly specialized exercise, especially in an immature market. Prior to undertaking the survey mentioned to ascertain market awareness, what steps were taken to mount a strengths and weakness analysis (SWOT).

If undertaken, where can the results be located? This type of exercise is normally undertaken prior to the gathering of data so that the survey data is meaningful, is robust to address a range of relevant factors; and not simply narrowly focused on data-gathering that may yield compromised results if the goals and parameters that could have been initially identified in a SWOT analysis were not clearly identified and addressed in the study design.

1. *Clarify the purpose and possibilities, etc (design phase – why do it)*
2. *Plan the evaluation (design phase) (what do we want to know)*
3. *Data Gathering (how will we find out what we want to know)*
4. *Making meaning from the data (e.g. analysis; synthesis; interpretation (how can we get people to be interested in the evaluation processes/results*
5. *Using the results (shaping practice) (what would we like to see happen as a result of the evaluation and what methods promote that?)*

Stanley Capella on the University of Alabama Online Evaluation Discussion Group EVALUTALK has whether evaluators should push for program decisions based on evaluation, or is this an advocate's role.

Bob Williams a New Zealand Evaluator on the same discussion group has responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen as craftspeople with a pride in their work and the outcomes of their findings.

As suggested by *Ovretveit*¹²

¹⁰ <http://www.eval.org>

¹¹ Bob Williams, Discussion List Member Evalutalk

¹² Ovretveit (1997) *Evaluating Health Interventions*. Open University Press. McGraw-Hill (reprinted 2005), Ch 6

“Design is always balancing trade-off.” “Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives.” These parameters cannot be decided “without some consideration of possible designs and the answers they could give” (since) planning is an interaction between the possible design and the questions and purposes.”

“Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention.”

“Randomized experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable comparisons. There is not a staggering number of opportunities for its use¹³

“Politicians often do not examine in detail the cost and consequences of proposed new policies, or of current policies.”¹⁴

In discussing better informed political decisions *Ovretveit* noted, for example, the lack of prospective evaluation or of even small scale testing of internal market reforms in Sweden, Finland and the UK. Whilst he did not infer that all new policies should be evaluated or that the results of an evaluation should be the only basis on which politicians decide whether to start, expand or discontinue health policies, just that politicians could sometimes save public money or put it to better use if they made more use of evaluation and of the *“evaluation attitude.”*¹³

*Ovretveit*¹⁶ embraces six evaluation design types: descriptive (type 1); audit (type 2) outcome (type 3); comparative (type 4); randomized controlled experimental (type 5) and intervention to a service (type 6) Each of these six broad designs can and have been successfully used in a variety of interventions targeted at examining policies and organizational interventions, depending on which of the four evaluation perspectives have been selected: quasi-experimental; economic; developmental or managerial.¹⁷

In recent years there has been increasing pressure on all scientists to communicate their work more widely and in more accessible ways. For evaluators, communication is not just a

¹³ Webb et al 1966 c/f *Ovretveit Evaluating Health Interventions, “Evaluation Purpose Theory and Perspectives”* Ch 2, p31

¹⁴ Ibid, *Ovretveit* Ch 2, p 27

¹⁵ Ibid, Ch 2, p27

¹⁶ Ibid *Ovretveit* , Ch 3 *Evaluating Health Interventions Six Designs*

¹⁷ Ibid *Ovretveit’s* Ch 3 *Model Evaluating Health Interventions*, p73

question of improving the public image of evaluation, but an integral part of their role and one of the phases of an evaluation. It is one of the things they are paid to do. Here we consider evaluators' responsibility for communicating their findings and the different ways in which they can do so.

The following is an abstract from Edmund Chatto's 1995 Research Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme.¹⁸ The paper:

".....addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained.

The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations. This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development."

Daniel L Shufflebaum's Program Evaluations Metaevaluation Checklist is worth looking at.¹⁹

Michael Scriven's Key Evaluation Checklist is a useful resource²⁰. Scriven's Checklist poses some challenging questions that are touched on here in good spirit:

- *Can you use control or comparison groups to determine causation of supposed effects/outcomes?*
- *If there is to be a control group, can you randomly allocate subjects to it? How will you control differential attrition, cross-group contamination, and other threats to internal validity.*
- *If you can't control these, what's the decision-rule for aborting the study? Can you single or double-blind the study.*
- *If a sample is to be used, how will it be selected; and if stratified, how*

▪ Chattoe, E. (1995) *"Can Sociologists and Economists Communicate?"* Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Department of Sociology, University of Surrey, Guildford, GU2 5XH (plus an impressive array of reference on Consumer Behaviour)

▪ Shufflebeam, D. L. (1999) *"Program Evaluations Metaevaluation Checklist"*, based on The Program Evaluation Standards (University of Michigan)

▪ Michael Scriven's *Key Evaluation Checklist* <www.evaluation.wmich.edu>

stratified?

- *If none of these apply, how will you determine causation (the effects of the evaluand)*
- *If judges are to be involved, what reliability and bias controls will you need (for credibility as well as validity)?*
- *How will you search for side effects and side impacts, an essential element in almost all evaluations*
- *Identify, as soon as possible, other investigative procedures for which you'll need expertise, time, and staff in this evaluation, plus reporting techniques and their justification*
- *Is a literature review warranted to brush up on these techniques?*

Texts such as *Schiffman and Kaunk's Consumer Behaviour*²¹ may provide some useful insights during the evaluative process.

As previously mentioned, The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols of Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

"Logic models can be described as frameworks for thinking about (including evaluating a program in terms of its impact

*Stakeholders processes inputs etc. Typically these run from inputs through activities/processes to outputs/products outcomes/results and impact including beneficiaries"*²²

In response to Fred Nichols comments, Sharon Stone on the same EVALUTALK, comments on the assumptions that include program theory and external conditions (meaning factors not included that could affect positively or negatively the hypothesized chain of outputs, outcomes.

Stone²³ poses two questions:

²¹ Schiffman, Leon G and Kanuk, Leslie Lazar Consumer Behaviour. (1994) Prentice-Hall International Editions

²² Fred Nichols, Senior Consultant, Distance Consulting on EVALUTALK, American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]; on behalf of; nickols@att.net

²³ Sharon Stone, Evaluator, on EVALUTALK, University of Alabama September 2007

“Are these just “logical chains” – or are these cause the effect”

Either way – are things really that simple – or do we need to pay more attention to those ‘external’ factors” – and how they are identified as external

Patton (1980)²⁴ has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.

Patton claims:

“One reason why evaluation can be confusing is that there are so many types of evaluation. Case- control, formative, summative, process, impact, outcome, cost-utility, audit evaluations.”

Funnell (1996) has some views on Australian practices in performance measurement. Her 1996 article in the Evaluation Journal of Australasia²⁶ provides broad-brush review of the state of evaluation for management in the public service.

Funnell provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as *‘managerial accountability.’* p452).

As well **Funnell** explores the impact of cutbacks on the conduct of evaluations, the levels of evaluation expertise available and on evaluation independence and rigor. Her arguments on the impact of market-based policies imply there could be both benefits and dangers.

Hawe and Degeling (1990)²⁷ have some ideas of survey methods and questionnaire design. These authors describe random, systematic, convenience and snowballing sampling and look at questionnaire layout and presentation; the need for piloting and some simpler basic description analysis of quantitative and qualitative data. For more sophisticated analysis such as may be warranted before any decision is made by the Government to deregulate in the energy industry may warrant the employment of a highly trained researcher, recently trained.

²⁴ ~~Patton (1980)~~ *“Qualitative Evaluation Methods”*, London Sage, c/f Evaluation Purpose and Theory in Evaluating Health Interventions

²⁵ See Patton, M. Q. (1997) *Utilisation Focused Evaluation*. The new Century text 3rd edn.

²⁶ Funnell S (1996): *“Reflections on Australian practices in performance measurement”*, 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

²⁷ Hawe, P., Degeling D., & Hall, J (1990) *Evaluating Health Promotion*. Ch 7 Survey Methods and Questionnaire Design, Sydney, McLennan & Petty

These authors examine a) the types of items; (b) questionnaire layout and presentation; (c) the need for piloting (this is often overlooked by evaluators undertaking small-scale evaluations; d) maximizing response rates.

Note their comments on the analysis of quantitative and qualitative data. These comments describe simple, basic descriptive analysis. For more sophisticated analysis evaluators should employ a trained researcher.

*Funnell (1997)*²⁸ has discussed program logic as a tool for designing and evaluating programs. This is simply a theory about the causal linkages amongst the various components of a program, its resources and activities, its outputs, its short-term impacts and long-term outcomes. It is a testable theory, and must be made explicit as a first step to testing its validity.

The process by which this is achieved is program analysis. This is a job for an expert in evaluation where major government policy is being reexamined.

As *Funnell*²⁹ points out, the many models of program theory

.... “date back to the 1970s and include amongst others Bennett’s hierarchy of evidence for program evaluation within the context of agricultural extension programs and evaluability assessment techniques developed by Wholey and others.”

A typical program logic matrix may include a grid that includes ultimate and intermediate outcomes, and immediate impacts, with success criteria being measurable and specific in accordance with the SMART principles.

One theme in the responses (TO EVALUTALK) as summarized by Johnny Morrell, is that

“..... logic models can be seen as constructions that can be used to test key elements of a program’s functioning.”³⁰

Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms.

²⁸ Funnell S (1997) “Program Logic: An adaptable tool for designing and Evaluating Programs” in *Evaluation News and Comment* v.6(1) 1997 pp 5-17. Sue Funnell is Director of Performance Improvement Pty Ltd and chair of the AES Awards Committee.

²⁹ Ibid Funnell Program Logic, p5

³⁰ American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU] as summarised by Johnny Morrell, PhD, Senior Policy Analyst, Member American Evaluation Association EVALUTALK Discussion Group

To me, this gets at the notion that while there is a useful distinction between “design” and “logic model”, the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.

From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference. But the distinction is not clean.

Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms. To me, this gets at the notion that while there is a useful distinction between “design” and “logic model”, the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.

From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference.

But the distinction is not any given logic model is never anything more than a work in progress that has to be updated on a regular basis. With this approach, logic models (and the evaluation plans they drive), can be updated as the consequences of program action evolve.³¹

The major point in this category is that “design” means a lot more than a logic for looking at data. According to this view, “design” includes procedures for gathering data, schedules for doing evaluation tasks, and so on

Johnny Morrell calls this:

“an evaluation plan and reserve the term ‘design’ for the logical structure of knowing if observations have meaning.”³²

There is a consensus amongst EVALUTALK members that:

“the use of logic models (may be seen as) a consensus building tool. The notion is that logic models come from collaborative cross- functional input from various evaluator and stakeholder groups. Thus, the act of building a logic

³¹ Johnny Morrell on EVALUTALK, American Evaluation Association

³² Ibid Johnny Morrell

model works toward common vision and agreed upon expectations.”

Swedish evaluator *John Ovretreit (1987, reprinted 2005)*³³ has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.

Rossi's evaluation theory³⁴ is about whether the intentions of the program were effected by delivery to the targeted recipients.

This task is typically undertaken by independent evaluators and can be a stand-alone evaluation if the only questions addressed focus on operational implementation, service delivery and other matters. This form of evaluation is often carried out in conjunction with an impact evaluation to determine what services the program provides to complement findings about what impact those services have.

One example of a combined process and summation evaluation is shown in the study reported by *Waller, A. E et al (1993)*³⁵

In that study, the summative component was inbuilt into the original program design. The findings were inclusive and relatively useless primarily because of flaws in conceptual assumptions made. However there were lessons to be learned in designing other similar studies, so the pilot study was not entirely wasted.

Rossi examines outputs and outcomes as distinct components of an evaluative program, with the former referring to products or services delivered to program participants (which can be substituted for end-consumers) and with outcomes relating to the results of those program activities (or policy changes).

Program monitoring can be integrated into a program's routine information collection and reporting, when it is referred to as MIS, or management information system. In such a system data relating to program process and service utilization is obtained, compiled and periodically summarized for review.

The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols of Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

*Patton (1980)*³⁶ has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.

³³ Ovretreit (1997) *Evaluating Health Interventions*. Open University Press. McGraw-Hill (reprinted 2005)

³⁴ Rossi, P., Freeman and Lipsey, M. (1995) *Monitoring Program Process and performance: Evaluation: A Systematic Approach* (6th edition) Sage, pp 191-232

³⁵ Waller, A. E, Clarke, J. A., Langley, J. D. (1993). An Evaluation of a Program to Reduce Home Hot Water Temperatures. *Australian Journal of Public Health* (17(2), 116-23.

Patton claims:

“One reason why evaluation can be confusing is that there are so many types of evaluation. Case control, formative, summative, process, impact, outcome, cost-utility, audit evaluations.”

Funnell (1996) has some views on Australian practices in performance measurement. His 1996 article in the *Evaluation Journal of Australasia*³⁸ provides broad-brush review of the state of evaluation for management in the public service.

Funnell provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as ‘managerial accountability p452’.

Swedish evaluator *John Ovretreit (1987, reprinted 2005)*³⁹ has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.

As suggested by *Ovretreit*⁴⁰

“Design is always balancing trade-off.” “Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives.” These parameters cannot be decided “without some consideration of possible designs and the answers they could give” (since) planning is an interaction between the possible design and the questions and purposes.”

“Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention.”

“Randomised experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable

³⁵ Patton (1980) *Evaluation Purpose and Theory*

³⁷ See Patton, M. Q. (1997) *“Utilisation Focused Evaluation.”* The New Century Text 3rd edn.

³⁸ Funnell S (1996): *Reflections on Australian practices in performance measurement”, 1980-1995.* *Evaluation Journal of Australasia* 8(1), 36-48

³⁹ Ovretreit (1997) *Evaluating Health Interventions.* Open University Press. McGraw-Hill (reprinted 2005)

⁴⁰ Ibid Ovretreit (1997) (reprinted 2005), Ch 6

comparisons. There is not a staggering number of opportunities for its use⁴¹

Of quality assurance *Davey and Dissinger* said

“Quality assurance (QA) and evaluation are complementary functions which collect data for the purpose of decision-making. At the process level, quality assurance provides both a system of management and also a framework for consistent service delivery with supporting administrative procedure. When implemented appropriately QA methods provide rapid feedback on services and client satisfaction, and a means to continuously upgrade organizational performance.

Despite client feedback being part of QA, it lacks the depth provided by evaluation in determining individual client outcomes from a person centered plan for service delivery.⁴²

- Webb et al 1966 c/f Ovretveit *Evaluating Health Interventions, Evaluation Purpose Theory and perspectives* Ch 2, p31
- Davey, R. V. and Dissinger, M (1999) *“Quality Assurance and Evaluation: essential complementary roles in the performance monitoring of human service organisations.”* Paper presented at Australasian Evaluation Society Conference, Melbourne 1999, p 534-550

Bill Fear^{43/44} recently wrote to EVALUTALK, the American Evaluation Association Discussion Group on the topic of self-efficacy. His insights are topical so I quote them below:

Why do policy makers make such bad policy most of the time? Why is good policy so badly implemented most of the time? Why don't policy makers listen to honest evaluations and act on the findings? And so on.

Could we actually bring about meaningful changes by giving people the tools to think things through and act accordingly? Does empowerment actually mean anything? (Well, yes, but it seems to lack substance as a term in its own right.)

Does anybody ask these questions? Or is everybody just concerned with the latest methodology which will always be historic not least because it can only be applied to the past (there is an argument there).

I digress. The point is, to my mind at least, the importance of self-efficacy in the field of evaluation has been overlooked at our expense.

MK Comment:

See my posts on Gov2 re evaluation and its role in public policy

Evaluation and analysis factors impacting on market failure. Interpretations that switching conduct is predictive of real outcomes in an unstable market are yet to be substantiated. Much discussion on the Productivity Commission site and in responses to AEMC and other consultative processes has focused on behavioural economics and the value of superficial evaluation of switching conduct. I will not repeat those arguments here, save to say that the data relied upon does not appear to robustly embrace these principles.

- Bill Fear Online contribution to EVALUTALK, the American Evaluation Association Discussion Group April 2008
- ~~Bill Fear, BA (Education)~~ MSc (Social Science Research Methods), PhD (Cognitive Psychology). Member UK Evaluation Society. He sits on the UKES council, and the American Evaluation Association. He has excellent research and evaluation experience, as well as solid grounding in PRINCE project management. He has attended top level training programs in the US with both Michael Scriven and Michael Patton. Recent experience include working for the Office for National Statistics where he led a large index rebasing project, and helped set up the development of both a banking and insurance index for the corporate sector. He is currently running the Investing in Change project (a Wales Funders Forum project). This project is using an evaluation framework to explore funding of the voluntary sector from a funders perspective. A recent achievement in this includes building a partnership with the Directory of Social Change to deliver a Funding Guide for Wales. He presents workshops on the emerging findings of this project to a wide range of policy makers. He is frequently asked to comment on evaluation methodology and proposals

17 of 18

Senate Standing Committee on Economics
Inquiry Trade Practices (Australian Consumer Law) Amendment Bill 2010

Madeleine Kingston
Individual Stakeholder
Open Submission April 2010 With appendices
Some General Evaluative Principles

Finally for those interested I pass on the invitation extended by Patricia Rogers and Jane Davidson of the American Evaluation Association Discussion Group EVALUTALK who will join respected evaluator Michael Scriven in a guest blogging week during the week beginning 19 April 2010 (this week)

<http://GenuineEvaluation.com>.

discussion, see <http://genuineevaluation.com/michael-scriven-to-be-our-celebrity-guest-blogger-next-week/>

Daily email updates:

<http://feedburner.google.com/fb/a/mailverify?uri=GenuineEvaluation&loc=en> USRSS feed:
<http://genuineevaluation.com/feed/>

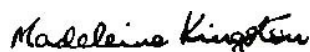
Michael Scriven is Associate Director Evaluation Centre, Western Michigan University. He is author of Evaluation Thesaurus⁴⁵ and many other books and resources. Western Michigan University Kalamazoo, Michigan (BA and MA, Melbourne University)

Prof Patricia Rogers is a Research Program Leader at RMIT Melbourne with a primary focus of government, social and public policy

Dr. Jane Davidson returned to Aotearoa New Zealand in 2004 from the United States, where she served as Associate Director of the internationally recognized Evaluation Center at Western Michigan University. There, she launched and directed the world's first fully interdisciplinary Ph.D. in evaluation. <http://evaluation.wmich.edu/idpe/>

She is author of Evaluation Methodology Basics: The Nuts and Bolts of Sound Evaluation (2004, Sage Publications).

Prepared and collated by (UPDATED 22 April 2010)



Madeleine Kingston

⁴⁵ ——— Evaluation Thesaurus 4th Edn Sage Publications California 1991