TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) BILL (NO. 2)
SENATE ECONOMICS COMMITTEE ENQUIRY

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OPEN SUBMISSION[1]

APRIL 2010

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[1] Intended also for the Federal Treasury and the National Measurement Institute to supplement previous communications

19 April 2010

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Chair
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Dear Senator Hurley

Trade Practices Amendment (Australian Consumer Law) Bill (No. 2)

On 18 March the Standing Committee on Economics was asked to undertake an inquiry and report on the Trade Practices Amendment (Consumer Law)(Bill (No. 2) 2010, representing *"the second step in introducing a single national consumer law"*. The areas covered include but are not limited to consumer protection against misleading or unconscionable conduct, unfair contracts and practices, consumer guarantees, unsolicited selling, information standards and product safety. This limited submission endeavours to respond to selected aspects only of that Inquiry. Time constrains prevent a more thorough examination of the issues raised.

I discuss selected components of the Explanatory Memorandum, Second Reading Speeches and of the content of the Bill with a comparative law approach and particular emphasis on energy provisions as they relate to the policy assurance that there will be a single consumer law that encompasses electricity and gas as goods (commodities) that are afforded the full suite of protections. Please refer to my disclaimers and statements of good faith in proffering critical comment

I invite enquiry from any source and would be happy to discuss further any matter that will help clarify or expand on the issues examined.

Though a private citizen without organizational affiliation, I also ask that my email and telephone contact details be retained to facilitate enquiries from those seeking further information. I seek effective citizen engagement, would be available for further discussion and happy to clarify any matter upon request.

I appreciate the opportunity to participate in this inquiry.

Sincerely

Madeleine Kingston

Madeleine Kingston, Individual Stakeholder

ANNOTATED CONTENTS

SUBMISSION TO SENATE STANDING ECONOMCS FCOMMITTEE

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[2]/[9] and add that

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

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

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

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

Madeleine Kingston

Madeleine Kingston

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[2] [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

GLOSSARY

Abbreviation	Definition
ACCC	Australian Consumer and Competition Commission
AER	Australian Energy Regulator
AEMO	Australian Energy Market Operator
ACL	Australian Consumer Law
ACL Bill or Bill	Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010
Applied ACL	Applied Australian Consumer Law
ASIC Act	*Australian Securities and Investments Commission Act 2001* (Cth)
BWH	Bulk hot water jurisdictional arrangements in three states, Victoria, New South Wales and Queensland. Contains discrepancies with other jurisdictional provisions; definitional and interpretational conflict within energy and other provisions Includes derived costing based on readings of water meters effectively posing as gas meters wherein (in Victoria) a meter are described as *"a device that measures the consumption of bulk hot water"* *See annotated glossary and submission to National Energy Consumer Framework NECF2 Package February 2010*
CALV (Vic)	Consumer Action Legal Centre (Vic) an incorporated not-for-profit body wholly funded by Consumer Affairs Victoria (CAV) undertaking mostly policy advocacy, with limited legal advice or representation in certain matters being provided to vulnerable and/or disadvantaged.
CALV (Cwth)	Commonwealth Assembly of Legislative Counsel of which Eamonn Moran[3] is current President. The Commonwealth Association of Legislative Counsel publishes a Journal called The Loophole, from which I have included pertinent citations relating to legislative drafting
CC Act	*Competition and Consumer Act 2010*

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

CPF	Productivity Commission's Review of Australia's Consumer Policy Framework 2008
CPRS	Carbon Pollution Reduction Scheme (CPRS).[4]
CRA	CRA International Pty Ltd
Corporations Act	*Corporations Act 2001* (Cth)
Corporations law	The ASIC Act and the *Corporations Act 2001* (Cth)
COAG	Council of Australian Governments
CPF	Productivity Commission's Review of Australia's Consumer Policy Framework 2008
CPRS	Carbon Pollution Reduction Scheme (CPRS).[5]
CRA	CRA International Pty Ltd
CUAC	Consumer Utilities Advocacy Centre, a not-for-profit incorporated body with limited guarantee but without share portfolio wholly funded by regulator Consumer Affairs Victoria who has substantial say in appointment of staff, many of whom have started off at EWOV, mainly funded by industry, but also receiving CAV funding. The funding and charter of this body effectively restricts the policy advocacy work undertaken by this body to focus on the needs of small consumers of utilities facing vulnerability or hardship. It does not deal directly with individuals but participates in the policy debate in advocating for reform measures predominantly focused on a specific client group as mentioned.
DHS	Department of Human Services, (incorporating the former Dept of Housing). This body acts as Landlord/OC for public housing
DPI	Department of Primary Industries Victoria The DPI has statutory responsibilities under *GIA* and *EIA* and overall consumer protection and service quality

[4] Major Energy Users (2009). "*The effectiveness of current gas and electricity emergency arrangements.*" Discussion Paper prepared by Energy Security Working Group

[5] Major Energy Users (2009). "*The effectiveness of current gas and electricity emergency arrangements.*" Discussion Paper prepared by Energy Security Working Group

EAG	Energy Action Group (President John Dick) A 33-year old unfunded not for profit incorporated association representing the interests of residential energy consumers. EAG has had over 16 years experience with regulatory processes and determinations in the gas and electricity markets. Andrea Sharam was previously President EAG[6]
EIO	Energy Industry Ombudsman SA
ESC	Essential Services Commission Victoria, set up under the Essential Services Commission Act 2001.(ESC Act) The ESC is required under s15 of the ESC Act 2001 to avoid regulatory overlap and conflict with other schemes[7] Administers the Electricity Industry Act 2001 (EIA) Administers Gas Industry Act 2001 (GIA) Formulated and administered the "bulk hot water arrangements" the policy provisions and derived costing formulae responsibilities transferred to the Department of Primary Industries (DPI) Victoria in mid-2008 Similar BHW provisions are in existence in NSW and Queensland but not in other states
ESC RRI	Essential Services Commission (Victoria) (2008) Review of Regulatory Instruments. See also (Further) Amendments to ERC (Vic) intended effective date 1 October 2009[8]

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

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

[7] See Madeleine Kingston (2008) Response to NECF Consultation RIS Part 3 Detailed Discussion of operational parameters, oversight of Energy and Water Ombudsman under the terms of EWOV's constitution and charter *http://www.ret.gov.au/Documents/mce/_documents/Madeleine_Kingston_part3200812081207l8.pdf* . Indexed submission with executive summary

[8] See especially responses of TRUenergy and Origin Energy regarding BHW arrangements in relation to credit rating in their respective summarized responses to the ESC Final Decision Review of Regulatory Instruments, both suggesting that there were remaining ambiguities regarding whether the use of the term (unpaid) water bills was intended to capture BHW and whether it was appropriate to include reference to water bills at all given that the ERC relates to energy provision. ESC confirmed that historically water bills may be included within assessment of energy credit rating, but also that BHW was not intended to be captured. Nevertheless such further clarification has not been included in the

ERC	Energy Retail Code (Victoria) The BHW provisions under the BHW Guideline 20(1) authored originally in 2004 by the ESC were transferred to the Victorian Energy Retail Code wherein crucial energy terms and interpretations contained in all other energy provisions, including the GIA and the Gas Industry Distribution Code (GIDC) (Victoria) appear to have creatively redefined allowing for apparent distortion of such fundamental terms as meter, disconnection sale and supply of gas or electricity
EIOWA	Energy Industry Ombudsman (Western Australia) Ltd[9] See Constitution http://www.ombudsman.wa.gov.au/energy/doc/EIO_Constitution_Nov_08.pdf Receives investigates and facilitates resolution of complaints regarding supply of gas or electricity (but not water) within the limits of constitution only but has limited binding power[10] **"Distribution Customers"** means – (a) for the purposes of calculating Customer Numbers under clause 20.5(a), Gas Customers receiving gas, or entitled to receive gas, at an outlet point on a gas distribution system[11] owned or operated by a Member holding a licence of a type referred to in paragraph (b) of the definition of Licence; and (b) for the purposes of calculating Customer Numbers under clause 20.5(b), Electricity Customers receiving electricity, or entitled to receive electricity, at a point of connection on an electricity distribution system owned or operated by a Member holding a licence of a type referred to in paragraph (d) or (e) of the definition of Licence. **"Retail Customers"** means: (a) for the purposes of calculating Customer Numbers under clause 20.5(a), Gas Customers buying gas from a Member holding a licence of a type referred to in paragraph (a) of the definition of Licence and having an arrangement to transport gas through the gas distribution network to its customers; and (b) for the purposes of calculating Customer Numbers under clause 20.5(b), Electricity Customers buying electricity from a Member holding a licence of a type referred to in paragraph (c) or (e) of the definition of Licence and having an arrangement to transport electricity through an electricity distribution system to its customers

suggested pending Amendments to the Victorian ERC. At the very least confusion in the minds of all stakeholders should be supported with direct reference within the amended Victorian ERC, to be effective from 1 October 2009. It is regrettable that the wrongful disconnection procedures have been removed and that better clarity was never obtained as to disconnection of heated water supplies s opposed to gas or electricity within these provisions and the BHW provisions. The *GIA* and *GDSC* refers to disconnection or decommissioning of gas quite specifically as being the discontinuance of gas supply or suspension of the flow of gas. Disconnection of heated water supplies as a composite product hardly fits this definition.

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

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

	In relation to BHW matters, EWOV is entirely powerless to achieve fair and equitable outcomes for consumers, sometimes suggestion s55 RTA options as a pragmatic cost-recovery solution. There is much more to the issue that cost recovery, which can be negated by the mere cost of failing fees and other costs in stress and time for utility costs that should in the first place be the responsibility of Landlords and/or OCs.
	RTA options are less than satisfactory and even when brought to the civil list did not result in best outcomes or deal with contractual issues with third parties or the policies and conduct that cause detriment. Current VCAT outcomes show heavy weighting in favour of landlords. Those receiving BHW are not embedded consumers though this is often misunderstood by numerous parties. I now refer to the disturbing report by EAG[12] dated 2004 following FOI investigation of complaints handling (attached as appendix). That report examined the attitude of the ESC, the total lack of triangulation in reviews of its own reporting performance and the perceived gaps in EWOV's performance and reporting. I quote directly below from the full report also for immediate reference as a public domain document
Federal Court	Federal Court of Australia
First ACL Bill	Trade Practices Amendment (Australian Consumer Law) Bill 2009 The Bill has been passed through Parliament and became effective on 14 April 2010
FT Act or FT Acts	State and Territory Fair Trading Legislation, including *Fair Trading Act 1987* (New South Wales), *Fair Trading Act 1999* (Victoria), *Fair Trading Act 1989* (Queensland), *Fair Trading Act 1987* and *Consumer Transactions Act 1972* (South Australia), *Fair Trading Act 1987* and *Consumer Affairs Act 1971* (Western Australia), *Fair Trading Act 1990* (Tasmania), *Fair Trading Act 1987* and *Fair Trading (Consumer Affairs) Act 1973* (Australian Capital Territory) and *Consumer Affairs and Fair Trading Act 1990* (Northern Territory).
FTA	Fair Trading Act 1999
GDSP	*"gas distribution supply point"*
GIA	*Gas Industries Act 2001* which is taken as one with the *Gas Industry (Residual Provisions) Act 1994*.
GIRPA	*Gas Industry (Residual Provisions) Act 1994* (Victoria)
GCF	Gas Connections Framework for the Connection of Retail Customers to Natural Gas Distribution Networks – a component of the NECF

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

IGA	*Intergovernmental Agreement for the Australian Consumer Law* signed on 2 July 2009 by COAG
LI Act	*Legislative Instruments Act 2003* (Cth)
MCCA	Ministerial Council on Consumer Affairs A body responsible for energy policy and legislation for which the Commonwealth Department of Energy Tourism and Resources (RET) offers a Secretariat service. This body comprising representatives from State and Territory Ministers and a single Federal Minister,
MCE	Ministerial Council on Energy[13]
MEU	Major Energy Users
MIRN	Meter Identifying Registration Number
NECF1	National Energy Consumer Framework 2 (First Exposure Draft
NECF2	National Energy Customer Framework 2 (Second Exposure Draft Note the Gas Connections Framework now forms part of the NECF The differences between gas and electricity markets has now been adequately reflected within the NECF2 package, as noted by industry participants and other stakeholders. For example there is no such thing as an embedded gas network, yet the provisions continue to explicitly include gas under this heading Further, where heated water supplies are provided after a single gas or electricity meter fires a centrally heated water tank supplying water to individual occupants with heated water in water pipes, neither group of recipients is "embedded" This term is being creatively and inappropriately used, with implications for determination of the proper contractual party, their rights, the threat of disconnection of the wrong party; using the wrong trade measurement instrument and the wrong scale of measurement. See revised National Measurement regulations, subject to intended lifting of the utility exemptions and the concept of legal traceability It would seem that these provisions have been created without due regard to recognition of the National Measurement Institute sole legal authority on metrology matters relating to measurement.
NERC	National Energy Retail Code (proposed)
NERL	National Energy Retail Law
NGL	National Gas Law`
NGR	National Gas Rules

[13]

NMA	*National Measurement Act 1960* and all corollary provisions including the *National Measurement Amendment (Utility) Act 2009*, effective dated 1 July 2009 See NMA, Part V Using Measuring Instruments for Trade *http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/AC996739A0F25545CA2575E60019C6E7/$file/NatMeas60_WD02.doc* see National Amendment (Utility Meters Act) 1999 No. 9 Commencement Date 31 March 2009 *http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/3A68EBC53AC7A50CCA25742500057102/$file/009-99.doc* *see* National Measurement Regulations 1999 1999 No. 100 *http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmr19991999n110358.html* See National Measurement Regulations 1999 1999 No. 110 Explanatory Statement Statutory Rules 1999 No. 110 National Measurement Act 1960 found at *http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmar20091n151o2009521.html*
NMI	National Measurement Institute *"The National Measurement Act 1960* (NMA) provides the legislative basis for Australia's National Measurement System. See also the *National Measurement (Amendment) Utility) Act 1999)* effective date *The aim of the Act (NMA) is to ensure that measurements are what they purport to be and to give legal sanction to the national standards of measurement.* *The NMI or its agents provide legal metrological traceability to the national standards of measurements through the issue of certificates issued under regulation 13 of the National Measurement Regulations 1999.* *The NMI, a division within the Department of industry, Tourism and Resources, is responsible for Australia's national infrastructure in physical, chemical, biological and legal measurements. Under the NMA, NMI is responsible for coordinating Australia's national measurement system, and for establishing, maintaining and realizing Australia's units and standards of measurement, thereby allowing Australian industry to operate competitively in a global environment*[14] The Hawkless Report (2006) on Utility Metering Regulations recognizes that "A national approach to the regulation of energy distribution and retail has been the subject of review. Any attempts to implement national energy regimes for consumer protection and distribution price regulation will risk being ineffective if they fail to address metering
NMAUA	National Measurement Regulations 1999 No 110 Explanatory Statement commencement date 1 July 2009, found at (Minister for Industry Science and Tourism) *http://www.austlii.edu.au/au/legis/cth/num_reg_es/nmar20091n151o2009521.html*

[14] Taken from Hawkless Report (commissioned for CAV) (2006) Utility Metering Regs under the NMA

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

INTRODUCTION

I make this submission in the capacity of an individual stakeholder and consumer of utilities in Victoria.

I am concerned about issues of discrepancies within Australian provisions that will continue to lead to market confusion and uncertainty and detriment to consumers.

A significant gap is lack of explicit mention of which law over-rides the other in the case of dispute. There are many confusing sections and clauses that will compound debate and uncertainty over these issues. In every enactment there should be cross-referencing to others where there may be overlap or disagreement. The context of these concerns will become clearer soon, but a good example is where a sole authority of metrology, in this case the National Measurement Institute finds that its provisions are over-ridden by energy policies and regulations or entirely ignored, leading to much confusion and expensive complaints handling or litigation.

This is a matter that needs correction as a matter of urgency.

At any rate there was an agreement 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.

I refer to comparative law studies undertaken by Associate Professor Luke Nottage, University of New South Wales in terms of the extent to which world's best practice may not have been adopted with the proposed generic laws, but do not attempt to deal with comparative law issues beyond examining by way of detailed example how anomalies and discrepancies between jurisdictions; apparent failure to undertake at least adequate inter-body collaboration in the design of new policies and regulations.

Public expectation should be a powerful modifier when major changes are contemplated to outdated laws. It is pleasing that attempts are being made to bring laws up to fate within generic provisions. Yet there are gaps that will continue to create significant problems. Some believe that the competition and consumer components of the new generic laws should be split. One of these is Julie Clarke, an academic lawyer at Deakin University, whose findings I cite elsewhere.

Many have expressed disappointment over gaps in adequately catering for small businesses. Others have focused on the difficulties faced by franchises. I have not deal with this issue save to more generally express disappointment that small business protection has become so diluted after earlier promises that things would be different. Professor Stephen Corones and many others are addressed this matter is considerable detail and I have includes some citations.

Are public expectations of a consumer-driven society misplaced? Were management and marketing philosophers wrong? What can we expect in the 21st century?

My unfunded self-funded and self-directed de facto position in attempting to raise issues that are not the central focus of formally funded agencies, most of these organizations more focused on hardship marketing and disconnection matters where there is direct supply if energy through flow of energy, whether or not embedded, has resulted from compromised faith the general and specific commitment of policy-makers and regulators to upholding enshrined consumer rights and ensuring a confident marketplace.

One of my concerns is the requirement under Schedule 4 requiring enforcement of industry codes. This is a good plan if one could be sure that those codes were consistent with the provisions of the generic laws. Where those codes fail on several cou8nts, there is a double disadvantage and no reasonable recourse except through the open courts to seek interpretation of what constitutes an unfair provision or inappropriate contractual imposition, leaving aside the unconscionable conduct provisions.

Existing redress options are grossly inadequate, and the scope of industry-specific Ombudsman schemes, especially those that are privately run and most funded by indsutry7. This too is discussed yet again – in much the same way as I have repeated discussed in my submissions to the Productivity Commission's Review of Australia's Consumer Policy (2008) see subdr242part4) (one of six submissions made by me to that arena; and in numerous submissions mostly to energy arenas, state and federal.

I refer to Prof Luke Nottage's views about the inadequacies of appropriate consumer redress options. By the way, industry-specific complaints schemes are certainly not "alternative dispute resolution schemes (ADRF). The do not fulfill the criteria; offer no mediation; and if a complainant does not accept the recommendation, there is no choice but to walk away or seek redress through the courts. Binding decisions are rare – in the case of EWOV they have made no such decisions in 14 years, and such decisions as have been made prior to that were mostly related to power surge matters. A binding decision is only possible if the market participant agrees, so has limited weight and can only be entered into over a very limited range of circumstances.

Industry-specific complaints handles face such enormous restrictions to their jurisdiction that for the vast majority of issues that are not related to attempts to prolong disconnection because of inability to pay bills, or cases of clear-cut misleading marketing or billing errors, no redress options are available at all.

The reticence of regulators generally to deal with complex matters such as the case study cited in detail, and others also included in my submission to the NECF2 arena

These bodies are most closely associated with statutory authorities, despite incorporation and appear to take an administrative approach. It is unclear whether they are operating under administrative law, contract law or common law but in any case their powers are so very limited as to render their value highly compromised. They re not trained in nor do they offer mediation.

Laws and provisions can be the best in the world. But if redress options are well nigh impossible to access, they may as well not exist at all. Such laws can be likened to unused tools rusting in a cupboard.

In technical matters, there are concerns that policy-makers and regulators are less then optimally informed in order to avoid obvious errors when considering policies. There appear to be few mechanisms through which policies can be evaluated. For example the AEMC has undertaken over 100 Rule Changes which appear to remain unmonitored as to their efficacy or consumer impacts. Other decisions are being made, apparently in a vacuum without considering the long-range impacts. Much is covered by alleged "long-term interests of consumers"

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

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

Or are we in such a position that the dog is wagging the tail, privatization of monopoly-type assets like essential services couples with premature deregulation of prices; novel licence exemption provisions and powers; protracted Orders in Council rubber-stamped by Ministers either in touch or out of touch with community expectation; the detrimental impacts of risk-shifting to consumers or the concept that all components of the marketplace need to be confident and catered for in order to achieve a well-functioning market.

OVERVIEW OF ACL MATTERS

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

Chapter 5

Unfair contract terms

Comment on context of amendments

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

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

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

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

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

The ACL is a generic law applying to all sectors of the economy.[15]

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."

[15] Note there are further explanations about financial products and services as covered by Corporations Agreement 2002

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

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

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

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

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

See

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

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.[16]

[16] A direct Queensland victim of the existing *"bulk hot water provisions"* living in public housing apparently under energy laws – also discusses many other issues including competition matters

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

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

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

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

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

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

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

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

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.

Regulatory Reform

COAG 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.

GAPS IN PROTECTION FOR BUSINESSES AND CONSUMERS

Focus on unfair provisions

In the case of consumers, by way of illustration relying on energy this matter is discussed in the context of how discrepant interpretation, inclusion of unfair substantive provisions with model of standard contracts within proposed energy law and rules; reliance on and direction to abide by flawed policies enshrined within codes and guidelines; lack of clarity.

I cite directly from and support the recently published views of Associate Professor Frank Zumbo,[17] to whom I have previously written in connection with concerns about consumer law provisions and energy provisions in particular.

"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.

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[17] Zumbo Prof Frank Australian consumer law reforms fall short" Business Dynamics, 18 March 2010 Assoc Prof Frank Zumbo University of New South Wales. See Prof Zumbo's submission to the Senate Committee in 2009 in relation to the First ACL Bill Review.

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.

I echo Professor Zumbo's disappointment and that of many businesses, individuals and representatives of the legal fraternity over these issues.

I also refer to Professor Frank Zumbo's 15-page submission to the Senate Select Committee in 2009, wherein he discussed the case for coverage of businesses.

He iterated his views on the need for:

"An effective legal framework for dealing with unfair contract terms: the compelling case for fining-tuning the unfair contract proposals and re-instating business-to-business contracts involving small businesses"

Professor Zumbo had put these considerations forward as an essential feature of world's best competition and consumer law. He has discussed the extent to which the Australian Consumer Law Bill 2009, which received Royal Assent on 15 April 2010 has failed to meet world's best practice in relation to unfair practices

He referred to the following impediments and unnecessary omission

- Minister Emerson's reversal of the previous Minister's and Federal Cabinet's endorsement of the need to include small businesses
- Placing undue emphasis on questions of detriment and transparency
- Failure to provide safe harbours as mechanisms for ensuring additional business certainty

In discussing each of these matters individually Assoc Prof Frank Zumbo refers to the Minister Bowen media release less some ten months ago, on 5 June 2009 regarding the COAG agreement regarding unfair contract law and the commitment of the Australian to ensuring that consumers and business would access protection through unfair contracts,

Australian lawyer Julie Clark[18] had noted as far back as 2 July 2009 that the sudden and unexplained threshold of $2 *"above which the laws would not apply."*

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[18] Julie Clarke is an Australian lawyer (since 2001) as a PhD Candidate Qld University of Technology: topic The International Regulation of Transnational Mergers. She has a BA (Politics Major), Deakin 1997; LLB (Hons) Deakin (1998). She has one a number of distinctive awards.
See her various blogs concerning this matter
http://austcontractlaw.wordpress.com/category/unfair-terms/

In addition the new law will apply only to consumer contracts defined as contracts for (a) a supply of goods or (b) a sale or grant of an interest inland; to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use of consumption

There are many businesses who may have contracts above the $2m mark, but nevertheless are small businesses.

Unless I have missed something, in the 669 page Explanatory Bill that changes the above situation, I believe that the nature of consumption is more the issue than the purpose. That is to say, if a business is using goods such as electricity, gas (or water), these goods are "normally used for personal domestic or household use), and therefore should be given full protection for both consumers and businesses.

In his published paper Anthony Gray[19] says

The definition of consumer contract is found in cl 2(3) of the schedule to mean a contract for the supply of goods or services, or sale or grant of an interest in land to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.4

A term of a consumer contract is unfair if (a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and (b) it is not reasonably necessary5 to protect the legitimate interests of the party that would be advantaged by the term. The court can take account of all matters, but is required by the Bill to take into account the extent to which the term would cause, or there is a substantial likelihood it would cause, detriment to a party if it were relied on, the extent to which the term is transparent,6 and the contract as a whole.7

Anthony Gray's footnotes to this section

Footnote 4 This definition is somewhat similar to the existing definition of 'consumer' in s 4B of the Trade Practices Act 1974 (Cth), but differs in that s 4B applies where either the transaction is below a certain dollar amount (no equivalent in the proposed new provision), or where the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption, or consisted of a commercial road vehicle.

Last accessed 18 April 2010
Especially Unfair terms … narrower than planned 2 July 2009 and my recent response of 6 April 2010
Filed under unfair contracts
See Julie Clarke's links Anthony Gray, *Unfair Contracts and the Consumer Law Bill* **c.f** *JULIE CLARK'S BLOG UPDATED 2010New articles on Australian Consumer Law*
QUT Law and Justice Journal has released its latest issue dedicated to consumer law reforms
See also Julie Clarke *Time to split up the Trade Practices Act 9 April 2010*

[19] Gray, Anthony (2010) *Unfair Contracts and the Consumer Law Bill* **.f** *JULIE CLARK'S BLOG UPDATED 2010New articles on Australian Consumer Law*
http://www.law.qut.edu.au/files/3.Unfair_Contracts_and_the_Consumer_Law_Bill_GRAY_Publish.pdf
Last accessed 18 April 2010

The proposed new Australian Consumer Law Bill definition refers to the purpose of the actual purpose of this acquisition, not whether such acquisitions are usually for a private purpose, and no reference is made to commercial road vehicles. However, the Bill does not apply to contracts of marine salvage or towage, chartering of a ship, or a contract for the carriage of goods by ship (see cl 8). In respect of the definition of 'consumer' in the legislation of various states, there is a divergence of approaches: S Corones and S Christensen, Comparison of Generic Consumer Protection Legislation (2007) 40-6. Corones and Christensen also observe that, in varying degrees, provisions of State fair trading legislation can apply to contracts where a corporation is the purchaser, including occasions where the acquisition is for business purposes (54-5), and to cases where individuals acquire services for business purposes (58-9)."

Julie Clarke observed in the same article as follows:

"The law is now NARROWER than the existing unfair terms law in Victoria; Victoria restricts the unfair terms prohibitions to consumer contracts, defined in a similar manner to that described above BUT it applies to ALL consumer contracts, not just standard form contracts."

I too am concerned the unfair consumer contracts are intended to apply solely standard form contracts. I will further discuss standard form contracts in relation to substantive unfair terms included in the mandated proposed standard or deemed contracts proposed under the National Energy Retail Laws and Rules under a tripartite governance model that includes distributors, retailers and end-consumers.

Subtle changes in terminology have resulted in confusion as to the differences between *"customers" and end-consumers"* in relation to sale and supply of energy. This is further clarified at great length in various my submissions including to the Treasury's Unconscionable Conduct Issues Paper (2009) and more recently to the National Energy Consumer Framework (NECF2) Package.

I have also raised new concerns in correspondence with various agencies, since it is my contention that in certain circumstances the billing metering and data services provided are to Body Corporate entities not to end-users of centrally heated water reticulated in water pipes living in multi-tenanted dwellings. This has implications also for the interpretation of generic laws in relation to sale and supply of utilities to businesses.

As things stand, consideration is to be given to franchises under the Franchising Code of Conduct, and the issue of unconscionable conduct. In relation to unconscionable conduct, the agreed aments are to be introduced later in 2010. It is noted on [43 of the Explanatory Memorandum that the amendments to implement the Government's response to the Expert Panel's recommendations are not including in the ACL Bill.

It is therefore not possible to see the precise impacts on consumers or businesses at this stage, though it of some comfort to know that

A statement of interpretative principles will be included into the provisions

And that 51AB and 51AC will be redrafted to either harmonize or unity them.

There is much room for enhanced protection for businesses and consumers in relation to unconscionable conduct, especially in relation to essential services like gas electricity and water.

It is mystery why water has not been identified as good (commodity). This should be rectified.

The Unsolicited Provisions (see p83 of EM2) have particular relevance to the matters raised under discussion of specific energy issues (gas and electricity deemed to be supplied, whereas no such thing occurs,, instead the end-recipient receives a heated water product and is coerced into a deemed contract, followed two billing cycles later into a either a standard contract or a market contract for the alleged sale and supply of gas or electricity.

Where billing and metering services are provided as apparently sanctioned by both sate and federal provisions, these are provided to a Body Corporate entity as a business, not the end-consumer of a communally heated water product. Ownership of water infrastructure does not create a contractual relationship with an end-user of a heated water product that is centrally heated in a communal water tank in multi-tenanted dwellings. A single gas or electricity meter exists on the common property of the Controller of Premises (see revised Trade Measurement provisions and within Schedule 1 of the operational ACL (Part 1) in such circumstances, which for billing purposes is a single settlement.

Under the ACL(1), Chapter 1, 2 Definitions, p23 Premises means:

(a) an area of land or ay7 other place (whether or not it is enclosed or built on); or

(b) (b) a building or other structure; or

(c) A vehicle, vessel or aircraft; or

(d) (d) part of any such premises

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.[20]

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[20] 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

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.

I note the ACCC's interpretation of current provisions regarding private actions.[21]

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.

As an individual stakeholder, I wish to add my disappointment to those of numerous community organizations, legal academics, businesses as consumers, and others about outcomes with both the generic laws and energy-specific regulation current and proposed.

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

[21] ACCC website Legislation Overview of Trade Practices Act (when part 2 provisions are incorporated, the act is to be re-0named Competition and Consumer Ac

INCONSISTENCY

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

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

My focus in discussing this issue is limited to energy in relation to

(a) unjustly imposed deemed standard contracts, as they are unjustly imposed on the wrong parties because of flawed state and federal regulations both implicitly and explicitly endorsing inappropriate provisions that have the effect of stripping consumers of their enshrined rights under proposed energy laws as well as numerous other provisions

(b) Unjust and inappropriate trade measurement practices both explicitly and implicitly endorsed by state and federal provisions as they impact on consumers under both Codes and Guidelines, and within national wholesale gas and electricity laws, as well as within the proposed National Energy Retail Laws and Rules (National Energy Consumer Framework2) (NECF2), from which the consumer focus seems to have already disappeared before scheduled rubber-stamping in the Australian Parliament in Spring 2010

Though discussed in a different context (relating to structural health reform), Treasurer Wayne Swann in his interview ON 18 April 2010 with Laurie Oaks [22] 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;

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[22] Treasurer Wayne Swann Today Program Interview with Laurie Oaks 18 April 2010 *http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=transcripts/2010/028.htm&pageID=004&min=wms&Year=&DocType*

Though it may seem that the issues I have raised are peculiar to energy, I remain concerned that original promises that there would be a single national law as referred to in Dr. Steven Kennedy's address of 27 November 2009 have become progressively eroded through failure of other jurisdictions to take account of the fundamentals of comparative law when designing new energy rules and laws and current proposed Rule Changes.

I do not believe that the Intergovernmental Agreement for the ACL signed on 2 July by COAG has been heeded or embraced during the formation and engrossment of the proposed Energy Laws and Rules.

In their online article A Brave New World - Senate endorses unfair terms regulation, commercial law firm Mallesons, Stephens and Jacques[23] 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 …. With the view of persuading various industries."

How regulators will approach the national unfair terms regime is a great unknown. Prima facie, the unfairness of a term is a matter between the consumer and the supplier, not the regulator and the supplier. However, other regulators (such as Consumer Affairs Victoria) have in the past taken a targeted approach to unfairness with consultation in various industries (such as telecommunications and fitness), with the view to persuading suppliers to change their contract terms. Whether the ACCC and ASIC will follow suit is unknown."

This thus leaves consumers forced into the open courts if a regulator does not lead appropriate action over unfair terms.

The existing and proposed energy laws and rules, and the potential within them for ongoing dilution of the consumer protections which the single national generic laws are endeavouring to address through on demand Rules Changes, initiated by the AEMO, AEMC, or MCE, or responsible Energy Minister, State of Federal through for example Orders in Cpu8ncil is a matter that needs particular attention.

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[23] A Brave New World – Senate endorses unfair terms regulation Mallesons, Stephens and Jacques. (an international commercial law firm) 17 March 2010 accessed online http://www.mallesons.com/publications/2010/Mar/10276861W.htm

I start by examining the issue of inconsistency by comparing selected energy provisions with those within the existing and proposed generic laws, ACL Part 1 which received Royal Assent on 15 April and is now operational, and Part 2 which is the subject of the Second Bill. The two will then be combined to rename the TPA Competition and Consumer Act 2010.

There 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)[24]

[24]

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 Owners' Corporation, used its market power in a monopoly situation to disconnect heated water supplies on the false allegation that the recipient of that commodity was obligated to form a contractual contract for sale and supply of gas.

The victim of unacceptable practices resided in a multi-tenanted block of privately rented apartments wherein a single gas meter on common property (business premises of a Body Corporate) was used to fire a communal stationary boiler tank supplying heated water of varying temperature not normally "fit for purpose" in water pipes.

Though the supplier, a licenced energy retailer claimed ownership of the water infrastructure, meaning the water meters, no gas was supplied through flow of energy to the abode claimed to be receiving it. Mere ownership of the water infrastructure did not in common law create a contractual relationship for sale and supply of gas (or electricity). Persistent harassment even after being informed of the alleged consumer's vulnerabilities, coercive threat, misleading and deceptive conduct, are amongst the several allegations made.

Ultimately, with the full sanction of the industry-specific complaints scheme, the incorporated regulator and the energy policy maker, the tenant's heated water supplies were suspended through claiming of water meters, whilst the allegation was that energy was being supplied and whilst provisions for either decommissioning or disconnection applied only to energy if this was warranted. Yet no energy had ever been received. The methods used to calculate deemed usage of gas are those that are sanctioned by existing jurisdictional provisions.

Existing protections against unacceptable conduct, including unconscionable conduct will continue to occur unchecked if provisions within other jurisdictions are not brought into line with the spirit and intent of proposed generic laws.

Please refer to my submission to the Commonwealth Treasury Unconscionable Conduct Issues Paper (2009)

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

http://www.treasury.gov.au/documents/1614/PDF/Kingston_Madeline.pdf

Other pertinent submission include

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

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

NECF 1 Consultation RIS

http://www.ret.gov.au/Documents/mce/_documents/Madeleine_Kingston_part320081208120718.pdf

Gas Connections Framework Draft Policy Paper (2009)

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

NECF2

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

www.ret.gov.au/Documents/mce/emr/rpwg/necf2-submissions.html

http://www.ret.gov.au/Documents/mce/_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/Madeliene%20Kingston.pdf

ESC Review of Regulatory Instruments

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

also

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

www.pc.gov.au/projects/inquiry/consumer/.../subdr242part4

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

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.

SOME COMPARATIVE LAW CONSIDERATONS

In his Introduction to the latest Queensland University of Technology Law and Justice Journal Professor Stephen Corones[25] commented on the Productivity Commission's 2008 Report that represented the catalyst for reforms intended to address empowerment of consumers to "meet current and future challenges."

He also discussed the PC's brief to report on

'any barriers to, and ways to improve, the harmonisation and coordination of consumer policy and its development and administration across jurisdictions in Australia, including ways to institutional arrangements and to avoid duplications of effort'.4

The PC commissioned a report to ascertain the nature and extent of any differences between the existing Commonwealth, State and Territory legislation governing consumer protection.5

Professor Corones refers also to his joint report with Sharon Christensen in 2007 prepared for the PC that identified many small variations, even in regard to the definition of 'consumer'

His views that we are "moving towards greater complexity and disharmony" rather than uniformity and simplicity"

The same observations were made by Prof Corones in his paper in the same volume of QUT's Justice and Law Journal *"Consumer guarantees in Australia: putting an end to the blame game.*[26]*"* which I discuss elsewhere briefly under discussion of statutory and implied warranties. In that paper he 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."

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25 Corones, Professor Stephen (2009) Introduction Queensland University of Technology (QUT) Law and Justice Journal Vol 9 No. 2 (c.f. C Julie Clarke Time to split up the Trade Practices Act 9 April 2010 <http://austcontractlaw.wordpress.com> at 18 April 2009

26 Vol 9 No. 2 (QUTLJJ) *http://eprints.qut.edu.au/)*

Assoc Professor Luke Nottage,[27] also in the same Journal, examined comparative law in terms of world best practice examining existing and proposed generic provisions in the context of emerging global standards. In a separate paper in the same Journal, Luke Nottage[28] also examines certain gaps in redress options for alternative dispute resolution, a term that is erroneously used in the context of most industry-specific complaints schemes and the remarkable uncertainties that surround their application with confusion as to whether they fit into administrative or arbitration law or contract law.[29]

In my own way, with a more limited agenda I have repeatedly examined in the context of my public submissions the perceived flaws especially within the energy arena that will continue to create confusion and uncertainty whilst the goals of achieving a single national consumer law applied in multiple jurisdictions fades into the distance even before the ink rubber stamp and ink have connected.

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27 Nottage, Prof Luke (2009) Contemporary and Comparative Constructive Criticism (QUT) Law and Justice Journal Vol 9 No. 2
http://www.law.qut.edu.au/files/1.Consumer_Law_Reform_in_Australia_NOTTAGE_Publish.pdf

28 Associate Professor, Sydney Law School; Program Director (Comparative and Global Law), Sydney Centre for International Law; Co-Director, Australian Network for Japanese Law.

29 Nottage, Luke (2009) The New Consumer Law – What About Consumer ADR
See also Assoc. Prof Nottage's submission to the Productivity Commission's Review of Australia's Consumer Policy Framework (sub112) which I extensively cited from in my own submission to the same arena (subdrpart3), as one of five component submissions

COMPARISON OF NATIONAL GENERIC LAW OBJECTIVE UNDER THE TRADE PRACTICES (AUSTRALIAN CONSUMER LAW) 2010

WITH NATIONAL ENERGY OBJECTIVE

Ii place my concerns in context, it is necessary for me to examine aspects of the proposed National Energy Retail Laws and Rules (NERL and NERR), expected to be rubber-stamped through the South Australian Parliament in Spring 2010.

It remains my contention that those provisions are inconsistent within themselves, with certain other energy provisions including jurisdictional Codes and Metrology procedures; with revised National Measurement provisions current and proposed; and importantly with aspects of the current and proposed national consumer protection provisions, the second Part of which is the subject of Bill No. 2 before the Senate as the Trade Practices (Australian Consumer Law) Bill No. 2, 2010, which is expected to be in place later in 2010, and will then, together with Part 1 already in place, be renamed from Trade Practices Act 1974 to the Competition and Consumer Law 2010 (CC).

These matters have already been aired in response to the Second Exposure Draft of the NECF2 Package, following public meetings which incompletely addressed stakeholder concerns.

The disappointment and concern of all 41 stakeholders responding to the National Energy Law and Rules encapsulated in the NECF2 Package are accessible on the website of the Department of Energy and Resources (DRET) which provides a Secretariat Service to the Ministerial Council on Energy.

The consumer focus and slant appear to have disappeared from the NECF2 Package, despite the perhaps understandable perceptions of those from industry, who would like to see even more light-handed approaches; focus on *"economic efficiency"* alone in the alleged *"long-term protection of consumers"*

Although different groups of stakeholders have expressed conflicting perspectives about the perceived inadequacies of the proposed national energy laws there is unity on these issues:

a) perceived significant shortcomings in meeting a single national consumer protection objective (taking account also of proposed generic laws still under discussion

b) identification of a wide range of inconsistencies, duplication, lack of clarity and lack of workable detail in a large number of crucial aspects of the law.

Please see

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

and other submissions from individual parties and from funded consumer organizations.

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

From a consumer perspective, as expressed by both funded consumer organizations and by individual citizens, the entire slant and focus of both the stated objective and the content of the national retail energy laws and rules (NERL and NERR) reflects preoccupation with process rather than a *"wellbeing framework"* as espoused by the Australian Treasury (p. 3 Dr. Steven Kennedy's speech 27 Nov 2009).

The national consumer policy objective of the ACL is *"to improve consumer well-being, empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly."*

By contrast the proposed national retail energy provisions have included a diluted version of a consumer protection regime for retail energy by focusing on economic efficiency for the alleged long-term protection of consumers, an unsubstantiated claim that appears to be regularly used to justify continuing dilution of consumer protection wherein the wellbeing of consumers is insufficiently considered, if at all.

The ACL philosophy embraces a commitment to protection for the Australian people at large and is not focused merely on certain segments of the community deemed to be in *"most need."*

The proposed National Energy Law and Rules appear to fail to embrace the concept of a market in which *"both consumers and suppliers trade fairly,"* or the concept of wellbeing empowerment and protection for all Australians, as is reflected in operational detail and in apparently deliberate omission of certain provisions adopted at state jurisdictional level and at risk of being perpetuated within national energy laws.

There are many other ways in which the proposed energy-specific laws fail to align with generic policy objectives including in relation to standard term and deemed contracts, statutory consumer guarantees, and proper protection under proposed exempt authority regimes.

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

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

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

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

However, Dr. Kennedy observed that

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

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

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.

TRADE PRACTICES (ACL) PROVISIONS

The Trade Practices Amendment (Australian Consumer Law) Bill (No. 1) 2010, Act No 44[30] contains the following objectives:

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"

By contrast, the Object of the National Energy Retail Law and Rules (NERL and NERR) as encapsulated in the Second Exposure Draft of the NECF2 Package immediately dilutes the consumer focus by using the following phrasing:

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30 Trade Practices (Australian Consumer Law) Amendment Bill 2010 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation%2Fbillhome%2Fr4154%22

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")

PERCEIVED FAILURE OF THE FRAMEWORK TO UPHOLD THE NATIONAL ENERGY RETAIL OBJECTIVE – SOME GENERAL COMMENTS

I do not intend to deal with the entire range of issues where the fundamental objective appears to fail, but rather will continue to address issues already extensively aired with the MCE orally and in writing to no avail, and notwithstanding the unambiguous message obtained from those involved in the formation or endorsement the NECF2 package that the issues of particular concern to me impacting detrimentally on several groups of consumers left entirely unprotected under this framework would not be addressed (if ever).

However, it was somewhat reluctantly conceded during the February NECF2 Workshops that the matters may have merit, whilst the position was maintained that they would not be addressed. Undeterred by that stance, and regardless of whether the MCE sees fit to reconsider its position, my views are once more provided in direct response to the NECF2 package at 2nd Exposure Draft stage and whilst the right of stakeholders to transparently participate in the public policy debate exists.

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) (see bibliography)

"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-function CSO model that will meet the needs of all consumers who have a right not only to participate in contribution towards competition, but also to guaranteed protection and redress options. These rights should not be excluded from availability to all Australians, no matter what the nature is of their minority statu8s in numbers or for other reasons.

Yet this package altogether excludes from both effective participation in fostering competition and from affordable and accessible redress options including through the jurisdictional complaints schemes known as Ombudsmen, in some cases with such limitations on their charters and jurisdictions, and with so many self-confesed conflicts of interest as to be of no value at all to certain groups of end-consumers of utilities. The exclusive focus on hardship (in the case of electricity representing 5% f the NEM) without focusing on other sectors of the community, including medium to large businesses means that the NECF2 Package fails on numerous counts in meting national consumer objectives and objectives under industry-specific laws.

In addition, the failure to properly consider the implications of comparative law, and provisions under other schemes and within the common law has created more not less confusion and potential for conflict, expensive complaints and redress and ultimately possible class actions in the open courts. Tow of these are already in progress in connection with the bizarre and inappropriate "bulk hot water policies" which three jurisdictions have been allowed to retain, apparently with so little understanding of or regard for the fundamentals of contractual laws, trade measurement best practice and a host of other provisions. Failure in this Package to ensure protection for all consumers of utilities, including those in temporary residence may be interpreted as irresponsible.

Likewise the small scale licencing or exempt regime is fraught with gaps that will create residual markets and exclusions from proper protection that the NECF2 Package has failed to address.

I deal with a selection of these issues in this submission though not in the depth deserved. As mentioned failure to comment on some aspects of these issues or to omit mention altogether of other matters does not represent endorsement, but merely time constraint.

I have reminded the MCE SCO Retail Policy Working Group {RWPG} that the Australian Consumer Law in the words of Dr. Stephen Kennedy (2009) 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 than extensive consultation has not been undertaken, whilst reserving comment on the quality of that consultation, which many believe to have represented no more than tokenism.

RIS processes have failed to give reasons for not addressing certain concerns, and in other cases last minute inclusion of major changes (such as occurred between the NECF1 and NECF2 packages) has meant that neither industry nor consumers were consulted early enough of given a proper opportunity to study and respond to the hundreds of pages of proposed regulation, to say nothing of all the submissions, policy documents and commissioned reports that needed also to be taken into account.

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,

EXCLUSION WITHIN THE FRAMEWORK OF WHOLE SEGMENTS OF THE AUSTRALIAN POPULATION FROM PROTECTION, INCLUDING COMPLAINTS AND REDRESS

I believe that many provisions, including those left under jurisdictional control else or dismissed as being of an entirely economic focus rather than relating to components of both economic and non-economic considerations (for example, BHW arrangements; embedded consumers and small scale licencing (the latter two applying to electricity only). The issue of regulatory overlap with other schemes has been ignored; as have the proposed protections under generic laws, including substantive unfair terms within both standard and market contracts; and unconscionable conduct considerations which are the subject of ongoing evaluation by the Treasury following receipt of expert panel advice.

I was unable to effectively engage with the Panel in NECF2 Workshop consultations on 3 and 4 February in Melbourne or through extensive written submissions to MCE arenas, the contents of which appear to have been altogether ignored.

I was unable to the NECF2 Workshop Panel, or through protracted written dialogue with the RPWG as to how the current deficient Framework will operate, be monitored and evaluated, and how the needs of residential tenants in particular will be met where these needs are entirely neglected for those on deemed contracts especially for the bizarre BHW policy arrangements will be catered for despite the proposed implementation of a revised tripartite governance model that has entirely failed to account for certain groups of end consumers of utilities.

It concerned me that the Workshop process appeared to have been pre-empted particularly in respect to appropriate discussion with Panel members in abortive attempts to seek answers as to how the current deficient framework will operate, be monitored and evaluated with particular emphasis on whole groups of end—consumers of utilities altogether left out of coverage within the Framework.

Further I have evidence to hand that includes correspondence from Minister(s) that will confirm a pre-empted stance prior to completion of the consultative dialogue in relation to the NECF2 Package Second Exposure Draft to the effect that the Commonwealth Government is not considering national regulation of “bulk hot water provisions”

I have assumed that the CoAG agreement on this issue may be an influencing factor.[31] I believe that such an agreement should be re-visited and that Federal intervention is warranted for a number of reasons. There are no further constitutional impediments to such intervention.

My past efforts and those of others to engage in effective dialogue with this Federal Minister, and other members of the MCE on this issue have been abortive, as the BHW arrangements impact on a segment of the population in three jurisdictions who appear to have no proper protection under current energy provisions, and whose needs have from the outset been neglected even before proposals to adopt national energy laws.

In my view, the failure of the MCE to appropriately clarify this matter could be viewed as direct or tacit instruction to licenced and unlicenced energy providers to breach best practice, the intent and spirit of existing and proposed laws, and even direct breach of provisions, including those under the common law.

There is blatant evidence of market failure in certain areas including what is ridiculously referred to as "bulk hot water provision" within energy laws (mainly gas); embedded and exempt frameworks (electricity), with those ill-considered provisions, again based on Victoria's perception of best practice about to be elevated from OIC provisions to the Law. Note the original OIC provisions were intended only to capture transitory provision of electricity to iterant parties, not to create a whole new opportunity for ongoing for innovative distortion of the most fundamental precepts of contract law; or to breach existing tenancy laws, Owners' Corporations provisions (both discrepantly operating)' trade measurement precepts and intended provisions.

There are certain current legal matters on foot in the open courts with regard to alleged exploitive conduct by "providers" of alleged energy services under distortions of the tacitly endorsed "bulk hot water provisions

Now the AER is to be held responsible for piecemeal consideration of an "exempt selling framework" which presumably includes those considered to be "embedded consumers."

Please note that the term embedded consumer" does not and should not ever apply to provision of gas, principally because of safety reasons, as recognized in MCE discussions prior to publication of the 2nd Exposure Draft.

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[31] 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.
Citied from Adams, D (2001) ibid

In the full knowledge that the "bulk hot water policy arrangements" exist within three jurisdictions and continue to exploit enshrined and proposed consumer rights, the MCRE has also chosen to overlook the absence altogether of consumer complaints options and redress for the class of consumers impacted, more particular as choice in provider of utilities is unavailable to this captured group.

Both for the "bulk hot water" recipients unjustly deemed to be receiving energy and therefore unfairly subjected to all conditions precedent and subsequent; as well as to unjust implied claims of *"fraudulent and illegal consumption of energy"* (see for example most components of Part 2 Division 9 and mirrored more detailed provisions under the NERR); and for those under small scale licencing regimes or exempt selling regimes; industry-specific ombudsmen are prohibited from dealing with complaints.

Policy maker and regulators at jurisdictional level who implemented the BHW provisions have been shown to refuse to intervene in preventing disconnection not of energy but of heated water products (allegedly on the basis of a deemed energy contract), even when unconscionable conduct considerations, supported by irrefutable medical evidence.

I note that the Treasury has sought expert panel input on the issue of unconscionable conduct. Without pre-empting that advice, the Treasury has observed as follows

"The Committee noted a growing trend in legislation to insert notes and examples to assist both the courts and the parties understand the effect of the provisions.""[32] 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.

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[32] ibid, page 37.

Of all the issues raised in this submission this one of lack of parity and equity is to my way of thinking the most significant because it illustrates that even when major regulatory changes are undertaken, the needs of all Australians are not catered for appropriately.

This a 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

LACK OF CLARITY

(energy in relation to generic and trade measurement laws)

(selected areas only chosen as focus and examples)

Comment MK

I do not intend to deal with the entire range of issues where the fundamental objective appears to fail, but rather will continue to address issues already extensively aired with the MCE orally and in writing to no avail, and notwithstanding the unambiguous message obtained from those involved in the formation or endorsement the NECF2 package that the issues of particular concern to me impacting detrimentally on several groups of consumers left entirely unprotected under this framework would not be addressed (if ever).

However, it was somewhat reluctantly conceded during the recent workshops that the matters may have merit, whilst the position was maintained that they would not be addressed. Undeterred by that stance, and regardless of whether the MCE sees fit to reconsider its position, my views are once more provided in direct response to the NECF2 package at 2nd Exposure Draft stage and whilst the right of stakeholders to transparently participate in the public policy debate exists.

Part 1 Division 3 National energy retail objective and policy principles

113 National energy retail objective (cf NEL s7; NGL s23)

(1) The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.

(2) The national energy retail objective should not be taken to prevent or restrict the development and application of consumer protections for hardship customers and other small customers, including the development, approval and application of customer hardship policies.

There appear to be numerous clarity gaps in the NECF2 Package especially in relation to consumer protections for those who seem altogether to have been left out of the provisions – as a consequence of an apparently deliberate decision by the MCE RPWG and its advisers to sanction by default practices that appear to contrive not only to strip certain categories of end-users of utilities of their enshrined rights under multiple provisions, and to defy best practice trade measurement, but also adopt practices that are scientifically, technically and legally unsustainable and fail to recognize the trap of regulatory overlap and failure to consider comparative law.

In discussing how certain issues may be addressed *"to protect and enhance the wellbeing of consumers now and into the future,"* the Final Report dated October 2009 of the Commonwealth Consumer Advisory Committee observed that:[33]

"Clarity and awareness of the law, combined with clear and effective methods for redress, are fundamental attributes in the law, and have been identified as being imperative in addressing the issues faced by consumers, retailers and manufacturers. Information about the type of warranties and remedies available to consumers when they experience product failure is crucial in promoting wellbeing and empowering consumers in today's environment. This report considers how these issues can be addressed to protect and enhance the wellbeing of consumers now and into the future. "

This report acknowledged that the current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law (Findings 5.1).

The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions

The failure to distinguish within NECF drafting proposals between customers and individual residential customers as end-consumers (of energy) creates immediately problems. This causes particular problems in multi-tenanted dwellings whether privately managed by Owners' C

Owners' Corporations are frequently customers but never end-consumers. Either Developers of Owners' Corporations are the entities that normally arrange for connection, any augmentation and seek ongoing sale and supply of energy to supply of either gas or electricity to heat communal boiler tanks that reticulate heated water, often of variable and inconsistent quality to end-users in multi-tenanted dwellings or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

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[33] Commonwealth Consumer Affairs Advisory Council (CCAC) (2009) Consumer rights: reforming statutory implied conditions and warranties. Commonwealth Treasury Final Report. October *http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf*

Though the concept of *"flow of energy"* is recognized within the NECF2 Package, it could be reasonably claimed that a perceived "ostrich-like approach" in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect.

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009 Productivity Commission (2008 and 2009); and Federal Treasury (2009). So far convenient strategies to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

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:[34]

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The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions, Australian consumers of utilities face short-changing in expectations of proper consumer protection.

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[34] 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 de-energizaton, 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.

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It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

It is my contention that the fundamental issue seems to be systemic failure to meet the Single Market Objectives of the each following"

1. The NECF Package detailing the proposed Energy Law Regulations and Rules outlined in Part 1 Div 3
2. National Gas (South Australia) Act 2008, Part 2, National Gas objective and principles, and Division 1, 23
3. National Electricity (South Australia) act 1996 - schedule 7—national electricity objective

There appear to be numerous clarity gaps in the NECF2 Package, some of which are discussed below especially in relation to consumer protections for those who seem altogether to have been left out of the provisions – as a consequence of a deliberate decision by the MCE RPWG and its advisers to sanction by default practices that appear to contrive not only to strip end-users of utilities of their enshrined rights under multiple provisions, and to defy best practice trade measurement, but also adopt practices that are legally unsustainable and fail to recognize the trap of regulatory overlap and failure to consider comparative law.

In discussing how certain issues may be addressed *"to protect and enhance the wellbeing of consumers now and into the future,"* the Final Report dated October 2009 of the Commonwealth Consumer Advisory Committee observed that:[35]

"Clarity and awareness of the law, combined with clear and effective methods for redress, are fundamental attributes in the law, and have been identified as being imperative in addressing the issues faced by consumers, retailers and manufacturers. Information about the type of warranties and remedies available to consumers when they experience product failure is crucial in promoting wellbeing and empowering consumers in today's environment. This report considers how these issues can be addressed to protect and enhance the wellbeing of consumers now and into the future."

This report acknowledged that the current range and lack of uniformity of Australian laws on implied conditions and warranties leads to confusion and uncertainty for consumers about their rights. It also leads to confusion and unnecessary costs for businesses in complying with the law (Findings 5.1).

The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions

The failure to distinguish within NECF drafting proposals between customers and end-consumers (of energy) or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

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[35] Commonwealth Consumer Affairs Advisory Council (CCAC) (2009) Consumer rights: reforming statutory implied conditions and warranties. Commonwealth Treasury Final Report. October *http://www.treasury.gov.au/documents/1682/RTF/Report_CCAAC_091029.rtf*

Though the concept of *"flow of energy"* is recognized within the NECF2 Package, it could be reasonably claimed that a perceived "ostrich-like approach" in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect.

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009 Productivity Commission (2008 and 2009); and Federal Treasury (2009). So far convenient strategies to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

PARTICIPATION OF CONSUMERS IN FOSTERING EFFECTIVE COMPETITON

In again refer to inconsistency between the single national energy objective in the context of Dr. Steven Kennedy's (2009) address

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

Many community organizations and individuals including me have referred to exploitive practices in the provision of utilities becoming even more prevalent in numerous settings, with prices being charged for unregulated "embedded" water networks and for *"heated water pricing"* than those not considered to be *"embedded"*

Retail choice and informed consent are central issues impacting on an end-consumer's ability to participate effectively in the marketplace. I deal first with choice

Retail choice:

On the issue of choice, discussion in the context of fungible commodities can be brief. The Foundation for Effective Market Governance in their submission to the Productivity Commission[36] somewhat cynically has suggested that they may be:

"…hint of untested ideology in the Commission's statement that effective market competition is the most important safeguard for consumers (Vol 1 p2)

The FEAMG submission subdr121 discusses consumer choices and cost benefit analyses, but draws the line with water and electricity – since there are fungible commodities who ever has a company name on the bill. The FEAMGC Submission refers to *"skilled intermediaries"* and discusses the possibility that the government may be that skilled intermediary to provide water and electricity at reasonable prices.

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.

[36] Foundation for Effective Markets and Governance (FEAMG) (2008) Response to Productivity Commission's Draft Report (Jan),ssubdr121p11.

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 Victoria[37], though there are some circumstances where some *limits on consumer's free retail choice* may be considered reasonable *(such as to facilitate community development of embedded generation initiatives or to allow a consumer to sign a long-term contract),* there is consensus that *it is essential that consumers are able to exit the network should participation in the network prove materially disadvantageous"*

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

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

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

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

There is no question that participation in choice and competition is 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 Owners' Corporations 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.[38]

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)*[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.

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[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 $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.

[39] 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, 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 market[40] is captured by an encumbent retailer who apparently purchased in its entirety the "BHW customer base" in 2007, based not on the number of single gas master meters existed in multi-tenanted dwellings (which for Distributor-Retailer settlement purposes represent a single supply point, there being no subsidiary gas points in the individual abodes of those unjustly imposed with contractual status in terms of sale and supply of gas.
- On what basis massive supply, commodity, service and FRC charges are imposed on end users of gas so supplied for the heating of a communal water tank, when the services and associated costs property belong to the Owners' Corporation

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

  Under Victorian *RTA* provisions utility supply charges or charges for anything other than actual consumption charges where individual utility meters (gas electricity or water) do exist, is also prohibited under RTA provisions. This is a vast improvement on Qld provisions. Nonetheless loopholes allow third parties and energy suppliers not party to landlord-tenant agreements to exploit the system with the apparently collusive involvement and active instruction of policy-makers and regulators.

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

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[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 of public housing.

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

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 withstand heat well.

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 as provided to individual residential tenants 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

(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."

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 Paper[41]; 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 Owners Corporations 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.

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

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

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

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

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

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

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

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

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

Whist speaking of competition and perceptions of its effectiveness in two jurisdictions, with the third – ACT targeted on schedule, whilst the following observations may not seem relevant to the legal architecture of the proposed drafts, I resurrect some of the issues that I had raised in my two-part submissions to the AEMC's Review of the Effectiveness of Competition in Victoria and subsequent reference in submissions to the MCE and other arenas concerning the submissions and responses received from The Hon Patrick Conlon, MP and member of the MCE, who will be the responsible Minister for the instrument now in hand – the National Energy and Retail Laws and Rules.

The reason for making passing mention of this is that the philosophical climate of deregulation and light-handedness has developed in tandem with what has been seen as flawed assessment of the energy markets as to competitiveness. This is more so in relation to gas. There is general market unrest. Complaints figures are rising and these are the tip of the iceberg given the relatively small proportion of the population as a whole who actually complain.

A framework, for example of licence exemption, poor monitoring generally, and especially of the 100+ Rule Changes that have been undertaken by the AEMC which have not been subjected to retrospective regulatory impact; the long-standing failure to consider regulation in the context of the internal energy market and rapid changes and a climate of general regulatory uncertainty in the face of so many changes; are all issues that impact on consumer well-being and ability to participate in the competitive.

For the sectors discussed throughout this submission – their choices are non-existent. Though numbers may be relatively small, these considerations illustrate beyond any doubt the impacts of policy and regulation in developing residual markets; marginalized groups and those left without protection altogether perhaps because it is seen as all too burdensome to address the issues that have remained in the too-hard-basket for so long.

Consumer and regulatory policy generally that is formulated in vacuum conditions with a focus on process rather than in the context of the internal energy market, blatant evidence of market failure in many areas and poor understanding of the differences between the electricity and gas markets may be destined for repeated re-evaluation as to the effectiveness of those policies.

So for the sake of an historical glance back to the time that the AEMC prepared itself for what appeared to be pre-determined decisions to find for competitiveness, and remembering the distortions that appear to have been made of data on the basis of poor understanding of behaviour economics; and on reliance on the poorest possible data availability, as freely admitted in CRA's Price and Profit Margin Report (discussed at some length in my 2007 AEMC submissions – I repeat the following, remembering that two more RoLR events have occurred, and the market has become very tough for second-tier retailers. Assessment of the retail market, and regulatory focus on retail outside the context of volatile wholesale conditions appears to be a short-sighted approach.

Gas and electricity retailers are not normally licenced to sell water, water products or value-added products and are bound by the legislated definitions of the term meter, meaning an instrument through which gas (or electricity) passes to filter, control and measure the flow of gas (or electricity) through that meter and is associated metering installation.

Following total price deregulation, there is no safety net available, and even without any choice at all of energy provider, suppliers will continue to exploit the interpretation of the energy-specific law regarding meters and products and services fit the purpose sold.

There will be no incentive to pass on any to end-consumers any savings in monopoly markets, leaving aside all of the contractual considerations.

Leaving aside bulk hot water providing and the energy used in that supply, those who are unattractive customers will simply not be offered products that are attractive and reasonably priced.

It is enough of a worry that remote reading of meters is more costly than manual reading, according to tariffs published for 2008 (see for instance Origin Energy's explicitly phrased tariff provisions).

In discussing the application of behavioural economics to its rationale for consumer protection, FEAMG made the following observations, which are just as relevant to the AEMC. I quote directly:

Extract from FEAMC Submission to Productivity Commission, p9

"2.5. Producer exploitation of consumer biases

"The (PC) Commission was obliged to consider empirical evidence in its terms of reference to:

"the need for consumer policy to be based on evidence from the operation of consumer product markets, including the behaviour of market participants"

The Report has a section on behavioral economics, but it tends to be dismissive of any policy prescriptions based on behavioral findings. The Commission's reasoning is that most findings of behavioral economics are based on laboratory studies rather than field observations.

(By contrast, conventional economics is based on an axiomatic faith, but that has never given economists a great deal of trouble.) And it suggests that we tend to overcome our behavioral biases over time and when significant amounts are involved in our transactions.

Therefore apart from reference to considering behavioral responses to disclosure (Vol 1 p. 47) the document is light on behavioral policy responses.

This is in spite of evidence of poor decision-making as a result of behavioral biases. The report notes that many consumers are unaware of the implied warranty provisions of the TPA, and therefore buy unnecessary protection cover. Behaviorally such over-insurance may result not from ignorance but, rather, from behavioral biases (vividness, hypersensitivity to loss). In the Report's section on behavioral economics and public policy there is reference to irrational over-insurance (Vol 2 p. 313), the influence of "shrouded attributes" (Vol 2 p. 313), suboptimal risk appraisal (Vol 2 p. 355).

It reports on four biases (overconfidence, endowment effect, choice overload and present bias) that may have "particular policy interest" (Vol 2 p. 320), but does not develop these. (In the process it overlooks the massive policy interventions of mandated superannuation and heavily subsidized private health insurance, which clearly have a behavioral origin.)

Debates on empirical sciences are always subject to their own confirmation bias. Apart from the pure academic theoretician (perhaps an extinct species), advocates are prone to fall victim to confirmatory biases. It would be surprising if the Commission staff provide an exception to this rule.[42] [4]

The behavioral issue missing in this report is the extent to which regulators should intervene in the practices of marketers, particularly advertisers. There is an acceptance that "bait" advertising should be proscribed, but there are many other advertising practices designed to lead consumers away from welfare-improving decisions, such as:

frames around anchor points – "normally $200, now just $179".[43] [5]

- *exploitation of utility curves – the cashback offer is attractive because it is seen as a "gift". "$1000 with $100 cashback" is much more attractive than "$900".*
- *exploitation of the present bias – teaser offers, "nothing to pay for 6 months".*
- *vividness – use of fearful images in selling insurance.*

It may be difficult for the Commission to make categorical recommendations on marketing practices which exploit consumer biases. That is a major topic in its own right. But it warrants mention, and inclusion in the Commission's work program."

There are no such offers with provision for the energy component bulk hot water, either to the proper contractual party, the Owners' Corporation, or the renting tenants, for the most part of low income given the quality of accommodation that normally has bulk hot water services in the first place, unjustly imposed with contractual status.

Provision of energy to those in embedded situations, 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

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42 [4] We note the Commission does not include the confirmation bias in their section on behavioral economics *(citation 4 from FEAMG submission122) c/f FEAMGC Submission to Productivity Commission p9*

43 [5] A retail manager explained to us that most "Manchester" (sheets, towels etc) sales are made in post-Christmas and end of financial year promotions. Full price sales are the exception. Have we ever seen an advertisement for bed sheets "normally $60, now $139"?

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 your and your landlord.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

All of this does seem rather bizarre application of contract law and proper trade measurement.

Other Competition, issues and impacts on consumers – a retrospective glance

As previously observed, The National Consumer Roundtable on Energy (NCRE)[44] had suggested that more confidence on the national regulators, AEMC and AER before they would feel comfortable about supporting the national framework would need to be justified. Their concerns about confidence in the proposed rule-makers are shared by many.

I cite directly from the South Australian Government's submission dated 5 November 2007 to the AEMC's Second Draft Report[45]:

"I do not propose to comment on issues and findings that are specific to Victoria. Rather this submission concentrates on those matters pertinent to the overall approach that may set a precedent for future reviews, noting that the AEMC is due to undertake a similar review for South Australia in 2008[46]

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44 National Consumer Roundtable on Energy (2008) (NCRE) Response to PC's Draft Report, p7

45 Submission by South Australian Government to AEMC's Second Draft Report 5 November 2007. found at *http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/submissions/014Minister%20for%20Energy,%20the%20Hon%20Patrick%20Conlon%20MP.pdf*

46 This has already commenced. The same conclusions are likely to be drawn, despite the evidence or lack of it to support such conclusions. Confidence in the AEMC's ability or willingness to undertake robust and objective enquiry is shown to be eroded on the basis of the various submissions made

"Whilst the AEMC has provided a detailed report there would appear to be some gaps in the analysis, and areas where the evidence does not unambiguously support the conclusions reached. The AEMC has the important task of determining whether a market has achieved effective competition, which is a step above gathering evidence that a market is developing well.

In its April 2007 Statement of Approach, the AEMC advised that it would examine market concentration indices and noted the availability of a number of economic tools for assessing the likely impact the number of firms and their market shares has on the competitive nature of a market. I would therefore have expected analysis along the lines of the top four-firm concentration ratio analysis, which would be performed by the Australian Competition and Consumer Commission (ACCC) in its market assessment for purposes of merger applications. I can see no evidence in the First Draft Report of such analysis having been performed

The AEMC has concluded that the gas retail market is effectively competitive though less so than electricity. The AEMC's conclusion that the gas retail market is competitive also relies in part on evidence of retailers in the electricity market pursuing opportunities to secure gas customers in conjunction with marketing electricity, given the limited availability of gas only offers.

This raises the general question as to what degree a market is sufficiently effectively competitive to enable consideration of the removal of price controls.

It is the State Government's view that more evidence would need to be presented as part of future reports to support a conclusion that rivalry between retailers was sufficiently strong, along the following lines:

The level of, and changes in, the number of market shares (both customer numbers and energy volumes) of each electricity and gas retailer since the introduction of full retail contestability.

The level of, and changes in, the market concentration of the electricity and gas retail markets since the introduction of full retail contestability;

Standing-offer and market-contract retail energy prices since the introduction of full retail contestability;

The nature of, and changes in, differentiated and innovative products and services being offered in the electricity and gas retail markets.

This additional evidence would draw out the extent that new entrant retailers were competing amongst themselves rather than just against the regulated standing contract of the incumbent retailer.

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questioning the decision made both to find retail competition successful in Victoria, and secondly to recommend removal of the only remaining price control (not price gap) in the form of the safety net default option. This is not merely a blunt tool for addressing hardship, but has many applications in ensuring customer choice and participation in the market and in contributing to some balance

It is also important that customers have an understanding of the retail offers available and are engaged in the process. The evidence in the AEMC's First Draft Report could be seen to indicate that customers generally appear only to respond to direct advances from retailers and accept the information provided to them by the retailer.

Whilst the South Australian Government looks forward to effectively competitive energy markets occurring around Australia, it is important that the evidence be unambiguous that such markets exist, rather than providing further evidence that markets are continuing to develop"

Signed The Hon Patrick Conlon, MP, Minister for Energy 5 November 2007

These concerns were reflected in numerous other submissions to the AEMC, including that of St Vincent de Paul Society.[47]

One of the most significant direct contributions to questioning the AEMC's conclusions was that from Victoria Electricity both to the AEMC Issues Paper and to the AEMC's Second Draft Report (9 November 2007[48]) and First Final Report 1 February 2008

"Victoria Electricity along with other 'second tier" and new entrant retailers strongly contends threat the new rule requiring the procurement of physical gas for injection at Longford is a major barrier to entry and growth. Continuing with this new rule will only support incumbency domination and risk the collapse of new entrant competition (Response to AEMC First Final report 1 feb2008 p2)

We do not intend providing details of the reasoning in this submission, having discussed this previously in earlier submissions. However, we are available to revisit the core issue if required. Suffice to say that little has changed since those earlier submissions, except that, in order to protect itself, Victoria Electricity (and possibly others) has already had to take steps that will have the effect of reducing our ability to co9mpete for Victorian energy customers" (Response to AEMC First Final report 1 Feb2008 p2)

AEMC has been misinformed

Victoria Electricity is disturbed that the AEMC "understands that steps are being taken to address" the "amendments to the rules governing the operation of the wholesale gas market which… have unintended consequences for the future competitiveness of gas retailing in Victoria."

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47 Victoria Electricity (Infratil Ltd) (2008) and (2007) Response to Australian Energy Market Review of Effectiveness of Competition in the Gas and Electricity Retail Markets in Victoria, Second Draft Report (November 2007)' and to First Final Report (1 February 2008)

48 Victoria Electricity (Infratil Ltd) (2007) Response to AEMCs Review of the Effectiveness of Competition of Gas and Electricity Markets in Victoria (9 November)
Found at
http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/submissions/021Victoria%20Electricity.PDF

"This is simply not the case. A great many parties, including the AEMC, have expressed concern about the serious threat to retail competition. However, no arm of the Victorian Government with the authority to remedy the situation ahs commenced changes to market rules regarding injection dependency of AMDQ."

(Response to AEMC First Final report 1 Feb2008 p2)

If the AEMC has made errors of this magnitude in verifying impressions before relying on them, what other errors have been made of omission or commission?

In fact, it can be demonstrated that a huge range of relevant internal market factors have either not been examined at all or insufficiently examined and considered before drawing the conclusion about alleged effectiveness of competition (in Victoria), repeated like a mantra from one report to another, regardless of stakeholder challenge or objection and in the face of blatant evidence that the conclusions would benefit from reconsideration

The Victoria Electricity submission to the AEMC First Final Report goes on in more detail on page 6 to discuss the review of VoLL Gas – a report that had been finalized by MMA for consideration, and a general "Top End Review" – always on the CRA agenda for commissioning, bit not considered by Victoria Electricity to be sufficient to deal with longer term exercise with uncertain outcomes and in any case not likely to be completed before Winter 2008.

"As a result, new entrants and second tier retailers face extensive risks going into this year. "The most important item remains unaddressed – an interim solution that will allow smaller retailers to compete for customers over 2008 and the following 2-3 years."

"There is disagreement between market participants – it is hardly surprising that dominant retails that have benefited from a market rule change would disagree with smaller competitors who are severely disadvantaged b it. If VENCopr is waiting for consensus, it will never be in a position to act…." "VenCorp management has decided to take a position that favours those dominant retailers."[49]

In its earlier submission to the AEMC Second Draft Report during November 2007, Victoria Electricity (VE) (Infratil) had made the following observations about competition and about residential customer outcomes from current conditions and the implications of the AEMC's conclusions, considered by many to be seriously flawed, but relied upon by the Productivity Commission.

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[49] This is a general concern in the community – that the tail has for some time been wagging the dog and that the Tier 1 retailers have government advisers, the government; and the direction of regulatory control, in their power – this enhancing further market dominance factors. This cannot be good for the overall economy, for the implications for anti-competitive outcomes and for consumers generally, who according to Louise Sylvan, deputy Chair, ACCC in her recent submission (DR253) to the Productivity Commission belies that consumers not only benefit from competition but actually drive it. The detrimental impacts on consumers are innumerable and will not be resolved by cursory tweaking of existing provisions or over-reliance on compromised complaints redress

"No prudent new entrant retailer will be able to grow in the Victorian gas market for many years to come if injection dependency of AMDQ is allowed to remain in place. For those not yet active, that means not entering. For those already in the market and able to hedge their current customer base, expansion is simply not worth the risk. As Victoria is a dual fuel market, this also means a major reduction of retail competition in electricity."

Since that time two further RoLR events have occurred. All end-consumers are required to pay for the cost of those events. I have recommended that at least those facing hardship be spared the cost-smearing exercises undertaken on this and other regards

The picture for residential customers is not appealing. They face reduced competition at the retail level and higher underlying wholesale gas prices. The money for the windfall gains to some has to come from somewhere, and that will inevitably be from residential customers, the customers with the least ability to respond to the very strong price "signals". To date, this problem has remained relatively low profile. However, losses sustained through the winter of 2007 are unlikely to remain below the radar in coming months. AGL has recently announced a profit downgrade and attributed that in part to wholesale gas issues. Simply Energy has recently decided to pass cost increases on to residential customers.

As far back as April 2002, PIAC had made same salient points about consumer protection and energy costs in their public submission to the Independent Pricing and Regulatory Tribunal (IPRT), NSW as quoted below[50]

1. Competition and consumer protection

PIAC repeatedly has expressed the view that those consumers who are not likely to receive direct benefits from full retail competition (FRC) should not be expected to bear the costs of its implementation. As the Tribunal will be aware, this concern has been focused particularly on low-income and disadvantaged households in NSW.

From this position we see the assessment of the claims made concerning the appropriate level of retail margin within the current determination of the regulated or 'standard' electricity tariff as focusing on two main sets of issues. The first is the viability of second tier retailers seeking to undercut the standard retailers and the regulated tariff. The second is the legitimate costs incurred by the incumbents who supply energy at the regulated maximum price.

During the public consultations prior to the current determination a number of prospective second tier retailers proposed that the regulated tariff contain, in addition to an allowance for a standard retail margin, a 'retail headroom' or premium. This was conceived with the purpose of driving significant numbers of households to churn away from the incumbent suppliers.

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[50] 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

Interestingly, demands for similar headroom have been aired more recently in Victoria in response to decisions by the State Government to hold increases in domestic tariffs below the levels sought by retailers.[51][1] *Assertions by some Victorian market participants of the need for significant increases in retail prices have coincided with predictions that the industry is on the verge of a period of consolidation.*

One senior industry executive has been quoted as stating that a reduction in the number of competing retailers, perhaps by half, is 'inevitable'[52][2]

Yet, a number of submissions made to the Tribunal's mid-term review have based the proposals for the inclusion of greater headroom on the view that competition rather than regulation can be relied upon to provide the most effective protection for consumers.

Not surprisingly, the second tier retailers such as TXU and AGL again appear to be leading the argument. The doctrinaire Institute of Public Affairs also has commented on the development of retail competition being dependent on a larger retail margin within the regulated tariff.

Unfortunately, the IPA has made a rather confused attempt to illustrate their point, arguing that a higher retail margin is necessary for the growth of competition while asserting that very tight profit margins are inherent to effective competition.

However, PIAC finds it astonishing that this argument has been taken up even by the publicly owned, standard retailer[533]*s in disregard for both current NSW Government policy and one of the key purposes of the Electricity Supply Act 1995.*

For example, Integral Energy has quoted the view of the supposed architect of competition reform in the UK utilities industries, Professor Stephen Littlechild, that facilitating competition is so much more important than the prices paid by consumers that:

"it may be more appropriate to set the initial price controls at a level that encourages new entrants into the market rather than at the estimated efficient cost level."[54][4]

The United Kingdom's national electricity markets regulator, Ofgem, has only recently decided to adopt the approach advocated by Professor Littlechild, announcing last February that it will remove the remaining direct controls over retail prices in that market. Yet, it is difficult to see why NSW should embrace a similar approach at what is a comparatively much earlier stage in the development of the local market. To date the vast

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51 Thomson, J. *'High-voltage hardship'* in *Business Review Weekly* 28 February 2002 c/f PIAC (2004) Submission to IAPRT (2004) citation 1

52 Clegg, B. 'Energy shake-up on $1.5bn sale' in *The Australian Financial Review* 5 February 2002, c/f PIAC (2004) Submission to IPART (2004) citation 2

53 Australian Inland Energy and Water is the notable exception, having concentrated instead on their distinct cost base. Thomson, J. 'High-voltage hardship' in *Business Review Weekly* 28 February 2002 c/f PIAC Submission to IPART (2004), citation 3

54 Integral Energy, Submission to Mid Term Review : Regulated Retail Prices for Electricity to 2004, March 2002,p5 c/f PIAC (2004) Submission to IPART (2004) citation 2

bulk of NSW households have seen little in their new market other than demands for higher prices and uncertainty over the strength of competition.

It also needs to be understood that Ofgem has not embraced an open market entirely. Importantly, the regulator has announced that it will continue to investigate retail prices offered to low-income consumers and the relationship between these and the cost-to-serve[55][5]*. Further, in order to continue to address 'fuel poverty' in the United Kingdom Ofgem have determined that retailers must target such households for a minimum of 50% of their spending on the mandated 'Energy Efficiency Commitment'.*

Another view of the proposals from the incumbents is that they are less interested in facilitating customer churn than maximising their revenue from those households remaining in a quasi-monopoly relationship with their respective standard retailers. The standard retailers accept that the majority of residential customers are not commercially attractive to their second tier competitors. Yet they appear unwilling to acknowledge that this is the reason for the introduction of a regulated standard supply tariff after significant efforts by organisations such as PIAC. It seems that what consumers regard as price exploitation is viewed by some businesses as a legitimate commercial strategy.

EnergyAustralia, for example, has proposed a double whammy of price increases aimed at achieving the current profit target and yet further rises to meet a revised target. PIAC can only wonder at the difficulties of explaining to the community the need for EnergyAustralia to raise its profit performance by some 400%.

A number of submissions have cited the level of customer transfers between retailers in NSW as if this alone demonstrates a link between the original determination and the extent of retail competition. In at least one case the data on churn rates has been misrepresented in order to support the assertion that retail competition is failing under the current regulated tariff

The issue of cherry picking and its impact on the customer base of the incumbent retailers has been raised by EnergyAustralia. The claim is that the loss of wealthier, higher-volume customers from standard supply contracts needs to be addressed by increasing the revenue earned form the remaining low-income households. However, it is the understanding of PIAC that the significant activity in the new retail energy markets is not the movement of consumers to the second tier retailers but the attempts by the incumbents to secure the more commercially attractive of their existing customer base with their own long-term, market-based retail contracts. In other words, it is EnergyAustralia and the other incumbent retailers who are responsible for the bulk of the cherry picking in the NSW market.

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55 Office of Gas and Electricity markets (UK), Review of domestic gas and electricity competition and supply price regulation : Conclusions and final proposals, February 2002, pp.60-61

Even with the knowledge of this internal cherry picking, Integral Energy has asserted that it is the current standard retail tariff which will restrict the churning of customers to second tier retailers to perhaps only 20% of the total customer base.[56][6] *In truth, such a level of activity would compare favourably with international experience.*

However, PIAC long has held the view that this may be a generous estimate of the extent to which NSW households will embrace the concept of 'retailer of choice'. This arises from the structure of the local market and the realities of introducing competition to a commodity such as electricity. It was largely for these reasons that PIAC pursued the issue of a regulated tariff prior to the commencement of FRC.

PIAC has for over three years been expressing its concerns for the weakness of electricity retail competition and drawing attention to the problems of the majority of residential consumers being excluded from the new market. It is extremely galling to find now that these same weaknesses and flaws in FRC are being seized upon in an attempt to force low-income households to pay more for what is an essential service.

The activity of the incumbent retailers in churning the wealthier of their existing customers will result in their existing customer base being divided into two classes – on the one hand the more commercially desirable group who are targeted to receive the benefits of FRC in product innovation and, perhaps, lower prices; and on the other hand the bulk of their existing standard customers who are expected to pay higher prices for electricity in order to fund the benefits enjoyed by the wealthy few.

There appears to be wide support from retailers for the standard tariff to reflect the prices being charged in other jurisdictions. Particular reference has been made to the higher retail margin allowed by the Essential Services Commission (formerly the Office of the Regulator-General) for the Victorian retailers. Once again, this argument ignores the realities of the residential consumer market NSW. In particular, it fails to recognise that the incumbent NSW retailers remain far more profitable than their privately-owned counterparts in Victoria. More importantly, it ignores the fact that Victoria does not provide for the existence of 'standard' retailers who are guaranteed a greater than 80% share of the small volume market segment.

The industry needs to understand that the standard retail supply options for small volume users exist to protect poor and vulnerable consumers. Most importantly, the publicly owned retailers need to accept that they have been given this role not by the regulator but by the NSW Parliament. Rather than trying to divide their customers into winners and losers the standard retailers should note the responsibility given to them under the State Owned Corporations Act 1987 to balance their apparent commercial instincts with a measure of social responsibility."[57][7]

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56 Integral Energy submission, p.9 c/f PIAC Submission to IPART (2004) citation 6, p

57 *State Owned Corporations Act 1989 s.20E c/f* PIAC (2004) Submission to Independent Pricing and Regulatory Tribunal (IPRT), NSW, Mid Term Review of Regulated Retail Tariffs, citation 7

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:[58]

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.

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[58] 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 AER's apparent lack of rigour in revenue determinations and poor performance before the Australian competition Tribunal has cost NSW consumers at least $ 2.4B one could say that the Advocacy Panel's failure to effectively resource consumers has placed the AER in the position of being a de facto consumer.

I make some general observations before turning to specifics.

In the case of the consultation process the failure of the Advocacy Panel to actually enhance/help consumer energy market consultation processes.

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

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

There is a deficient complaints redress scheme, especially for those collectively known as *"embedded consumers of utilities"* though strictly speaking this really only applies to electricity. If plans are made to extend the term to gas there are safety, technical and other considerations that need to be considered.

It is of real concern that no matter what may be done in the future to address charter and constitution issues that restrict the handling of certain types of complaints about utilities by industry-specific complaints schemes known as Ombudsmen. In the case of EWOV, this body's perceived conflicts of interest in handling such classes of complaints and consumers – so that those termed *"embedded"* or receiving *"bulk hot water"* under jurisdictional policies remain without any form of complaints redress.

For the purposes of this submission, in order to reflect back the views of numerous consumer organizations that do use the term inclusively, I will allow a technical error in using the word to apply to other utilities,

There is a "*deficient metering protection"* framework with regard to access to quality, servicing and the like. There are confusions over which authority has proper control over these issues – with regard to all metrology issues the sole authority of the National Measurement Institute should be recognized and reflected also in cross-referencing when regulations are formulated. There is not even mention of the NMA regulations that will apply to energy providers when remaining utility exemptions are made, or to the numerous changes that have been made to provisions to date. Therefore the smart metering provisions; the embedded consumer considerations the BHW provisions and other hot spot areas of inadequate protection need to be considered in this context also.

The failure to distinguish within NECF drafting proposals between customers and end-consumers (of energy) or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

Though the concept of "flow of energy" is recognized within the NECF2 Package, it could be reasonably claimed that a perceived "ostrich-like approach" in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect

I have discussed these matters in extraordinary detail in various public submissions to the ESC (2008); MCE (2008 and 2009 Productivity Commission (2008 and 2009); and Federal Treasury (2009). So far convenient strategies to sweep the matters under the carpet and continue to allow gross regulatory failure in certain areas as well as conflict and inconsistency seems to have characterized the approach taken by the MCE.

It concerns me greatly as an individual consumer that multiple groups of consumers, are altogether excluded from coverage within the NECF2 Package, including access to any complaints or redress options.

The BHW provision are confusing, illogical, scientifically, technically and legally unsustainable and conflict with all other schemes and with the common law and within energy provisions both state and federal.

There are safety and technical considerations, health risks associated with boiler tanks being used in such a way by using non-instantaneous, changes to temperature control, off peak adjustments, Legionnaire's disease and other health risks. I have discussed these issues in my submission to the National Energy Efficiency Consultation (NFEE2) in 2007.

There are also safety and technical risks associated with embedded gas and electricity provision and licence exemptions.

Concerns have been raised by industry responding to the MCE Technical and Safety Draft Plan-Consultation RIS (2009) [59] and the PC's Regulatory Burden Research Report (2009) (Social and Infrastructure).[60]

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[59] Refer to selected annotated bibliography as Attachment XX, submissions from Envestra and others to the MCE Technical and Safety Draft Plan and Consultation RIS (PriceWaterHouse) 2009

Many of these concerns are unaddressed and have impacts on operational aspects of the NECF2 Package.

Consumers have constitutional rights that cannot be eroded in principle regardless of any alternations to provisions within regulatory schemes. The common law provisions must prevail and do not disappear but can be made inaccessible in practical terms because of cost, stress factors, adequate representation and the like.

The measures adopted have actually added financial burdens to end-consumers, especially those disadvantaged and living in sub-standard accommodation, so the absurd justification provided that they were adopted to "prevent end-consumer price shock" is challengeable - and so perhaps are the motives of all regulators who promoted these provisions, refused to re-consider them and conveniently ignored their existence in the formulation of new so-called national energy provisions (NECF2 package).

Discrepant interpretations of the application of existing provisions subject to lifting of the restrictions will lead to market confusion, expensive complaints handling; absence of proper complaints and accessible redress and snow-balling effects too numerous to contemplate.

Social and natural justice provisions within the common law stand behind the end-user's position, supporting the case that the proper contractual party is not the end-user but rather the Owners' Corporation. This is reflected also in the language used in the ESC's Determinations (in conflict with the actual provisions adopted) and in the licence agreements with the host retailers providing monopoly services to Owners Corporation 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 owners Corporation (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.

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[60] Refer to Productivity Commission (2009) Review of Regulatory Burden Social and Infrastructure. Research Report

Within current jurisdictional provisions for BHW it is heated water that is disconnected through the clamping of hot water flow meters, penalizing en-users of heated water for failing to establish an explicit contractual relationship , causing considerable detriment to end-consumers who in good faith take on a residential tenancy fully expecting the residential tenancy laws and the trade measurement laws, as well as unfair contract and implied warranty legislation to protect them against inappropriate imposition of deemed energy contract status and unjustifiable disconnection of water supplies

The submission by the Griffith University Centre for Credit and Consumer Law and the collective response attached to their brief covering letter to the same arena, MCE Retail Policy Working Group can be views online.[61]

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 2007[62] can be viewed also online[63] 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.

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[61] 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*

[62] 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_Distributio_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

[63] Tenants Union Victoria (TUV), (2007) Submission to MCE Retail Policy Working Group Composite Paper National Framework for Distribution and Regulation. July 2007 found at *http://www.mce.gov.au/assets/documents/mceinternet/TenantsUnionVictoria20070718145702%2Epdf*

I refer to that submission made by the Tenants Union Victoria[64] to the as follows:

The Tenants Union supports the attached Composite Table Paper prepared on behalf of community sector organizations. In addition the Tenants Union wishes to highlight the following comments in relation to the Consultation Paper:

1. *The Tenants Union submits that landlords, as property owners, should be primarily responsible for the obligations relating to access to the meter, access to the property and meeting equipment specifications imposed by distribution and retail regulation. The MCE should recognize that tenants, whilst occupiers of a property, may not have the legal right to interfere with the premises, in order to comply with regulatory obligations that are the responsibility of the property owner.*

At minimum, the Tenants Union urges that the condition relating to failure to provide access to the premises should refer to "unreasonable failure to provide access to the meter".

However, the Tenants Union submits that the approach to these issues adopted in the Consultation paper is flawed. It is submitted that the current approach of the Victorian regulator is legally preferable and fairer to energy customers.

The Tenants Union submits that the proposed increase in the period allowed for backbilling (at least in Victoria and Tasmania) is unacceptable, particularly for Centrelink recipients, and that the MCE should adopt best practice within state jurisdictions in regard to this issue. We believe that a retailer should only recover amounts undercharged during the previous 6 months. We note that best practice is 6 months (Tasmania) and it is the timeframe recommended by the Utility Regulators' Forum.

The Tenants Union submits that the proposed increase in the period allowed for backbilling (at least in Victoria and Tasmania) is unacceptable, particularly for Centrelink recipients, and that the MCE should adopt best practice within state jurisdictions in regard to this issue. We believe that a retailer should only recover amounts undercharged during the previous 6 months. We note that best practice is 6 months (Tasmania) and it is the timeframe recommended by the Utility Regulators' Forum.

The Victorian regulator reduced the period for backbilling to 9 months in response to the Jindarra and other similar submissions.

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[64] The Tenants Union of Victoria was established in 1975 as an advocacy organization and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. The TUV represents the interests of tenants in law and policy making by lobbying government and businesses to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of rental housing and financial assistance provided to low-income households. (source preamble to TUV (2007) submission to Consultation Paper by MCE RPWG

The Tenants Union is concerned that an increase in large energy debts arising as a result of longer periods of backbilling will increase the housing stress on low income tenants.

Centrepay has not been included in the suite of options as a required payment method. We submit that Centrepay should be a payment option available to Centrelink recipients, but that they should not be required to utilise Centrepay.

The rental sector context

The Tenants Union is concerned that policy makers have a tendency to examine a market in isolation rather than recognize that each market is a part of a series of interconnected markets where decisions in that one market inevitably impact on related market sectors. In this submission the Tenants Union is concerned to ensure that there is a recognition by the Ministerial Council on Energy (MCE) that specific features of the private rental market are likely to reduce the capacity of tenants to access the benefits of the competitive energy market in Victoria and as a result tenants are likely to be dependent on the protections within the Victorian or national Retail Energy Code to ensure access to a continuous supply of energy.

In terms of the choice-constraint dichotomy, the reality is that the Australian private rental sector serves a dual function, providing choice for the more affluent and constraint for the poor.

The private rental market is highly segmented, offering choice and flexibility for some and limitations for others. The tenure's role within the broader housing market has taken on greater significance throughout the 1990s. According to the recent ABS data, one in four households is a renter household. In Victoria there are 328,176 households living in the private rental market. There are also 54,805 public tenants, making a total tenant population of 382,981. Once seen as a transitional tenure, renting has become the long-term option for many households who are unable to access home ownership.

Ironically, there is evidence that some households who are in a position to exercise market choices trade down in private rental, paying cheaper rents for less amenity, and effectively squeezing out low-income households who are reliant on the private rental market for long-term housing. Significantly, low cost (low rent) housing in the private rental market declined by 28% between 1986 and 1996, at the same time as there was an increase in low-income households renting privately.

The result in Victoria was a shortfall of 36,000 low cost properties across both metropolitan and rural areas in 1996. Little low cost private rental housing is purpose built and a mismatch between the private rental stock profile and changing household needs increases competition for limited stock.

The key structures of the private rental market have not kept pace with the demands on the tenure to provide long-term housing. Importantly, security of tenure remains limited, in most circumstances to an initial six- or twelve-month lease only. The underlying assumption of short-term leasing being that the landlord must retain flexibility in order to capitalize on the investment at any time.

This places low-income households in a precarious position, being essentially at risk of forced eviction at any time after the initial lease agreement expires. Unpublished data from the Residential Tenancies Bond Authority (RTBA) suggests that in Victoria the duration of tenancies in 96% of leases where the duration of tenancy was specified did not exceed twelve months and that the average duration of a tenancy is approximately eighteen months. It is common in cases that extend beyond the fixed-term lease to move onto a periodic lease (month to month)

Under a periodic lease the landlord can end the lease for no specified reason as long as they give the tenant 120 days notice. It is also worth noting that a landlord can give a tenant a 14-day notice to vacate if the tenant's rent is 14 days in arrears, regardless of the lease arrangements.

An ABS study on population mobility in 1999 reported that 66.5% of renters had moved in the previous three years. Of the renters who did not move only 7% were unemployed, suggesting that the likelihood of a person moving increases with unemployment. While all tenants are vulnerable to forced mobility, the risk for low-income households is much greater.

Currently, the rental vacancy rate in Victoria is a historically low 1.2%, indicating that demand for rental property is significantly outstripping supply. Because of increased demand, landlords have no inducement to make improvements to their properties in order to attract potential tenants.

These market conditions also work against any need for landlords to consider the need to ensure that properties are energy efficient and compound the effects of the split incentive that sees landlords responsible for capital costs but tenants responsible for payment of energy bills.

The energy market context

In 2004, and more recently in 2007, the Tenants Union made submissions to the ESC and the AEMC to the reviews of the effectiveness of full retail contestability in the Victorian energy market.

In 2004, the Tenants Union argued that the competitive energy market, in the first two years, had designed products that are contradictory rather than complementary to the fundamental characteristics of the tenancy market.

At issue was the term of the products in the respective markets. As a mature market, the tenancy market had fixed upon short- to medium-term leases of between one and twelve months to serve the needs of market participants. 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. 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 penalise a tenant, as occupier of a property, for the failure of the owner of the property to meet obligations set out in the Distribution and Retail Energy Codes.

The obligations of a tenant are set out in the Distribution Code Section. Those obligations are essentially to use best endeavours to notify the owner or their agent of any alleged non compliance. Section 1.5 states:

1.5 A tenant's obligations

1.5.1 Where a domestic customer has been advised of non-compliance with this Code in accordance with clause 11.2.2 and is unable to remedy the non-compliance as they are not the owner for the supply address, the customer must use best endeavours to have the owner or other person responsible for the supply address fulfill the obligation.

1.5.2 On request, the customer must provide the distributor with evidence that they have notified the owner, or other person responsible, of the non-compliance and of the requirement to comply with this Code.

The Victorian Retail Code provides for a right to be connected without reference to access to the meter but includes a requirement that a tenant provide details of the owner or estate agent. Section 13.3 of the Victorian Retail Code does allow for disconnection of a customer, including a tenant for failure to provide access to the meter. However, the Code also provides a detailed process prior to disconnection that would allow a tenant time to notify the landlord, and if necessary, issue proceedings in the residential tenancies tribunal to require the landlord to provide access to the meter.

The Consultation Paper in Recommendation 1 has proposed that a retailer be allowed to refuse to connect a customer as a pre - condition of supply where there is a failure to provide access to the premises.

Similarly, the Consultation Paper in Recommendation 3 has provided that a distributor be entitled to disconnect a premises for non compliance including failure to provide safe access or meet equipment specifications

The Tenants Union submits that the approach adopted in the Consultation Paper is flawed. Further, the provisions adopted by the Victorian Regulator are legally sound and more appropriate for tenants in view of current tenancy laws in place throughout Australia.

The Tenants Union submits that there should not be a pre - condition that a tenant, as an energy customer, be required to provide access to the meter or the premises. It is unlikely that a tenant would enquire as to the location or accessibility of a meter during a property inspection and compliance with such a pre- condition may be impossible.

The appropriate process should be to require connection and where access has been subsequently denied adopt the remedy set out in the Victorian Retail Energy Code.

13.3 Denying access to the meter

A retailer may disconnect a customer if, due to acts or omissions on the part of the customer, the customer's meter is not accessible for the purpose of a reading for three consecutive bills in the customer's billing cycle but only if:

(a) The retailer or the relevant meter reader has:

- *used its best endeavours, including by way of contacting the customer in person or by telephone, to give the customer an opportunity to offer reasonable access arrangements;*
- *each time the customer's meter is not accessible, given or ensured the retailer's representative has given the customer a notice requesting access to the customer's meter; and*
- *given the customer a disconnection warning including a statement that the retailer may disconnect the customer on a day no sooner than seven business days after the date of receipt of the notice; and*

(b) Due to acts or omissions on the part of the customer, the customer's meter continues not to be accessible.

At a minimum the Tenants Union urges that these requirements should refer to the "unreasonable" failure to comply with the obligation to provide access to the meter. However it is submitted that the Victorian approach is legally preferable and fairer to energy customers.

The Tenants Union urges that the MCE to acknowledge that tenants as customers/occupiers, may be powerless to comply with requirements relating to access or equipment specifications. Further that such obligations fall more appropriately upon the landlord as owner of the property.

B. Other Matters

The Tenants has comments on two other matters raised in the Consultation Paper relating to terms of the Standing Offer.

(a) Undercharging

The proposed provision allows a retailer to backbill for twelve months regardless of the cause of the failure to bill or the hardship caused to the customer.

The Tenants Union is concerned that this provision is outdated and that AAR has not properly considered the impact of this provision on low income customers such as Centrelink recipients and tenants. The evidence in Victoria and the UK has been that billing system failures in the competitive market have given rise to the need for back-billing of this magnitude. That is, after takeovers, retailers have discovered that billing systems have not been compatible and some customers have not been billed for extensive periods of time.

A submission by Jindara Community Programs Incorporated in September 2003(copy attached) examined the impact of this problem on low income consumers in the Victorian market. It is noted that of the twelve case studies in the submission 75% were public or private tenants.

The key finding of the Jindara submission was that "the case studies illustrate that the failure to bill has created impossibly high bills that can only be paid with the assistance of an URG (government grant) or a partial waiver by the retailer. The reduction of the period for recovery of late billing to nine months would increase consumer protection and put pressure on retailers to accept responsibility for the hardship caused by these billing errors."

The Victorian regulator reduced the period for back-billing to 9 months in response to the Jindarra and other similar submissions. The Tenants Union is concerned that an increase in large energy debts arising as a result of longer periods of back-billing will increase the housing stress on low income tenants.

The Tenants Union submits that the proposed increase in the period allowed for back-billing (at least in Victoria and Tasmania) is unacceptable, particularly for Centrelink recipients, and that the MCE should adopt best practice within state jurisdictions in regard to this issue. We believe that a retailer should only recover amounts undercharged during the previous 6 months. We note that best practice is 6 months (Tasmania) and it is the timeframe recommended by the Utility Regulators' Forum.

(b) Payment methods

The Consultation paper has duplicated the options set out in many of the jurisdictional retail codes. A retailer must accept payment by a small customer by any of the required payment methods: in person, by telephone, by mail; or by direct debit.

The Tenants Union notes that Centrepay has not been included in the suite of options as a required payment method. We submit that Centrepay has become an essential payment option during the past decade, and an appropriate payment method for Centrelink recipients, particularly in regard to payment for essential services.

Moreover we believe that direct debit arrangements can impose significant detriment on some low income consumers. In particular, direct debit default fees at $35 – 50 have a disproportionate impact on Centrelink recipients. We believe that in relation to consumers in receipt of Centrelink payments, Centrepay should be available as a payment option. This should be at no cost to consumers.

This suggestion should not prove difficult as most first tier retailers appear to provide access to Centrepay and IPART has recently determined that Centrepay should be considered as a payment plan option for a security deposit exemption. See Pg 125 of the following decision: http://www.ipart.nsw.gov.au/files/Electricity%20Retail%20Review%20-%

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 RPWG[65] 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.

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[65] 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*

TEC has participated in a joint response to completing the table of Recommendations and Comments developed by Allens Arthur Robinson, with other non-government organizations (NGOs) including the Consumer Utilities Advocacy Centre (CUAC), the Consumer Action Law Centre (CALC), the Alternative Technology Association (ATA) and the Australian Council of Social Services (ACOSS). We have attached a copy of the table.

There are two issues we wish to raise in this letter, that is, the treatment of embedded generation and of the National Electricity Market Objective.

Embedded generation

The main drawback from our perception is the lack of clarity about the relationship between the existing Rules, the draft "Code of Practice for Embedded Generation" and the recommendations in this Paper. There appear to be a number of Ministerial Council on Energy (MCE) processes which deal with arrangements for distributed/embedded generation and it has become increasingly difficult to ascertain how they all inter-relate.

The national processes and Issues Papers that relate to this subject – to our knowledge – and which TEC has participated in (as solo agent or with other NGOs) are:

- *The Renewable and Distributed Generation Working Group (RDGWG) commissioned PB Associates to produce a draft national "Code of Practice for Embedded Generation" (February 2006).*
- *The RDGWG also produced a paper on the "Impediments to the Uptake of Renewable and Distributed Energy" (February 2006).*
- *The MCE commissioned NERA Economic Consultancy to produce an issues paper on "Network Incentives for Demand Side Response and Distributed Generation" (April 2007).*
- *In the same process, NERA produced reports regarding draft Rules for distribution network service providers (April 2007).*
- *The House of Representatives Standing Committee on Industry and Resources is undertaking a "Case study into selected renewable energy sectors" (June 2007).*

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.

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.

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 Owners Corporation 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)[66] MCE (2008) [67]and 2009)[68]; the Productivity Commission (2008)[69] and (2009)[70] 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.

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66 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

67 Kingston, M (2008) Submission (2-parts)[67] 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)[67]
http://www.ret.gov.au/Documents/mce/_documents/Madeleine_Kingston_part320081208120718.pdf (Part 3)

68 Kingston, M (2009) Submission to the Gas Connections Framework (GCF) Draft Policy Paper, as a component of the MCE SCO NECF[68]. 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

69 Kingston, M (2008) Submission to Productivity Commission's Review of Australia's Consumer Policy Framework (subdr242) (parts 1-5, 8)

70 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 on 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[71].

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).[72]

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71 In his submission to the Consumer a

72 Essential Services Commission (2009) Energy Retail Code version 6, effective ~~1 January 2009~~ February 2010, effective from April 2010

Elsewhere under Part 4 of the NECF2 Package small customer complaints and resolution is discussed

One of the issues of paramount concern is the extent to which energy policy makers and/or economic regulators seem to be prepared to encroach on the provisions of other regulatory schemes and jurisdictions providing consumer protection or certainty about contractual obligations.

The plight of residential tenants and their eroded rights and redress options is not a new topic. The advent of mushrooming metering and billing agent business under the umbrella of energy provision has given rise to anomalies, and practices, policies and regulations that are seen by many to be blatantly unjust and unfair.

The mere existence of generic laws does not always make them accessible or affordable.

There are gaps in access to redress on substantive grounds. Where the substantive unfair provisions are seen to be driven by statutory policies, it is these that need to be addressed.

In my Part 3 submission to the NECF Consultation RIS I provided detailed discussion of the extent to which current provisions for BHW pricing and charging and the attendant contractual and trade measurement considerations may be falling short not only of best practice, but the fundamental provisions that should drive imposition of contractual status on a *"take-it-or-leave"* basis where the proper contract should lie with Landlords and owners Corporation. 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."*[73]/[75]

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[73] [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 Paper[74] (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"*.[75]

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.

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[74] 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*

[75] A copy of the report is available from the Parliamentary website, at *www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08*.

It is intended that any recommendations that require legislative amendments to the existing provisions of the TPA will be given effect in the second Bill to implement the Australian Consumer Law, which is scheduled to be introduced into the Australian Parliament in early 2010.

The issues highlighted by regulatory overlap between different schemes continue to significantly contribute to confusion in the marketplace; to ongoing consumer dissatisfaction; detriment and expensive though inadequate complaints handling under current structures and redress recourses.

Definitions and interpretations across all affected schemes need to be consistent and all provisions need to be cross-referenced to each other so that it is clear who the final arbitrator is when there is disagreement and also who has control. This is not the way things are working at present.

These factors have made significant contributions towards the inconsistencies. Merely aiming for harmony between all jurisdictions by adopting a single set of laws and rules to be implemented nationwide will not take care of the design gaps.

In the context of energy reforms (but containing principles that could readily be extrapolated to other arenas, I have amply illustrated this in my various submissions to consultative arenas including the Productivity Commission Review of Australia's Consumer Policy Framework (2008) (subdr242parts1-5, 8), submissions to MCE SCO arenas; to the NMI and to the Essential Services Commission's Review of Regulatory Instruments (2008)

Whilst I chose to focus on a single instrument by way of illustration and whilst matters arising from this remain unresolved with segments of the consuming population entirely unprotected as a consequence, the intent was to draw attention to the broader principle of regulatory overlap between schemes.

Since then I have called further attention to other areas of unaddressed concerns, in the light of ongoing reforms with national measurement provisions; energy provisions about to be rubber-stamped with perpetuation of many same design and policy flaws as previously.

NECF2 Workshops presented an outline of the legal architecture that relates to proposed energy laws. Of particular relevance to the National Measurement Institute and regulatory overlap and conflict issues are the national retail market procedures, which for gas come under the Gas Market Retail Procedures, and under the national Electricity Law the Market Settlement and Transfer Procedures, Metrology procedures.

On the issue of trade measurement best practice I note with concern the correspondence from Dr. Laurie Besley CEO and Chief Metrologist to Mr. Drew Clarke as Chair of the AEMO Implementation Steering Committee concerning provisions within the Declared Wholesale Market Rules.

The response of the NMI dated 13 March 2008 to the consultation draft iterates concerns that the NMI's role to establish and maintain Australia's primary measurement standards and providing peak infrastructure that enables measurements in Australia to be accepted nationally and internationally do not become eroded.

Specific recommendations are made in that correspondence regarding definitions in relation to technical interpretation and metering. I have maintained an unwavering position regarding similar concerns about erosion of best practice trade measurement in relation to adopted metrology procedures, which appear to me to be a dog's dinner of inconsistency and poorest practice.

This is the context in which I have repeatedly raised issues of pertinence to NMI policies and practices as they impact on other regulatory schemes and their respective and discrepant interpretations.

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 presentation[76]

"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)[77], 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)

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[76] Moran, E (2005) Interpretation legislation: providing a variety of outcomes Current developments – Statutory interpretation. PowerPoint presentation 4 August 2005

[77] Acronym not to be confused with that used for Consumer Action Law Centre a consumer policy advocacy body with limited casework scope funded by Consumer Affairs Victoria

See Laws, Stephen (2009) 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

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.

Greenberg, Daniel[78]. (2007) *"The nature of legislative intention and its implications for legislative drafting."* Paper presented at Commonwealth Association of Legislative Counsel (CALC),[79] 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. [80]

See summary of article *http://slr.oxfordjournals.org/cgi/pdf_extract/27/1/15*

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

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[78] Daniel Greenberg of Lincoln's Inn, Barrister, Parliamentary Counsel

[79] 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
See summary of article *http://slr.oxfordjournals.org/cgi/pdf_extract/27/1/15*
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[79] 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[79]
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

[80]

"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.

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

Greenberg, Daniel (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12[81]

See also Eamonn Moran, formerly Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Counsel, especially:

Greenberg, Daniel (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12[82]

Greenberg: Daniel Statute Law Review 27(1) 15-28, p15:

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"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

MK COMMENT

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

See also Daniel Greenberg (ed) Craies on Legislation 8th Edn: Sweet and Maxwell 2001 paras 2.1.1 and 2.1.2

Greenberg, Daniel (ed) Craies on Legislation (8th edn, UK: Sweet & Maxwell, 2001, paras 1.1.1 and 2.12[83]

See also Eamonn Moran, formerly Parliamentary Counsel, Victoria and President of the Commonwealth Association of Legislative Counsel, especially:

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.

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

83

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 Owners Corporations 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

Gas and electricity are commodities, whilst their ongoing supply, subject to proof of flow of energy – which in the bulk hot water provisions for example, tacitly endorsed by the MCE apparently on the basis of a deliberate decision to fail to clarify these matters; change jurisdictional provisions to reflect proper contractual responsibility by Owners Corporations for those connections, energizations, re-energizations, augmentations, metering and billing services and the like are clearly not the responsibility of end users of a composite water product.

This has implications for conditions precedent and subsequent tin all the provisions; for unjust and inappropriate disconnection or suspension of the wrong commodity (heated water products); notwithstanding clear definitions within the NECF regarding flow of energy and all of the definitions relating to disconnection, de-energization or suspension. Though not discussed in detail under either each relevant component of the NERL or NERR it should be sufficient to mention here that these considerations impact on provisions throughout the package.

Owners Corporation provisions (see Victoria's provisions which should be adopted in all States and reflected also within the NECF2 Package

Conflicts with tenancy laws operating discrepantly in jurisdictions, thus interfering with the enshrined rights of individuals

Tenancy laws, operating discrepantly in different jurisdictions, In the context of unreasonable obligations placed on residential tenants regarding access to meters, whether energy or water meters where these are in the care custody and control of Owners' Corporations places unjust burdens on end-consumers, including especially those deemed to be receiving energy, when what they receive is a heated water product, and what is disconnected if they dispute the existence of any energy contract is disconnection of heated water supplies. Community organizations have raised this issue previously to no avail.

I have made this a central theme in all my public submissions to no avail, not even to the extent on explaining in Consultation RIS Decisions why this matter has not been appropriately addressed.

Conflicts with and within Building Codes, operating discrepantly in different States, some such as in Queensland similarly failing to respect and uphold the NMI commitment to the principles of legal traceability in the sale and supply of goods, and at least the principle that goods that are measurable are measured by an instrument designed for the purpose; using appropriate scales of measurement

The provisions of tort law within the common law and the rules of natural and social justice which cannot be swept aside at whim for any reason at all.

The spirit and intent of trade measurement laws, relying on recent amendments, the sole authority of the National Measurement Institute in matters of legal metrology and the principles of legal traceability in the sale of commodities.

On 1 July 2010, NMI 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.

From that date, following a three year transition period, the NMI will take responsible for the full spectrum of measurement, from the peak primary standards of measurement to measurements made at the domestic trade level.[84]

The failure of the MCE to acknowledge this both for the wholesale[85] and retail markets will continue to create anomalous interpretations and general marketplace confusion with regard to metrology. There should no doubt of the single authority for trade measurement, regardless of which field is impacted. This is the only conceivable way in which certainty and consistency can be achieved. The only authority with expertise in this area is the National Measurement Institute.

Some utility exemptions have already been lifted others are still pending. I remind the MCE and others impacted that a number of provisions may impact on jurisdictional and federal provisions in other arenas, including 18GD, inaccurate use of measuring instruments; 18GE apply using or supplying inaccurate measuring instrument; 18HE measuring instrument used in transaction to have prescribed scale intervals; 18HF Unreliable methods of measurement; 18HG Limiting use of certain measuring instruments; 18HH apply "correct use of …utility"

Any other amendments impacting on utility instruments used for trade that may be contemplated.

The failure to appropriately distinguish between gas and electricity markets in numerous arenas, including technical and safety considerations, as raised in other contexts with the MCE.[86]

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84 Background (from NMI website) in February 2006 the Council of Australian Governments (COAG) identified trade measurement as one of six regulatory 'hot spots' and asked the Ministerial Council on Consumer Affairs (MCCA) to develop a recommendation and timeline for the introduction of a national trade measurement system.

85 See correspondence dated 13 March 2008 to Chair EMO Implementation Steering Committee c/o NEMB DRET. This communication and its attachment refers to (i) Division 1, paragraph 2 (Definition), commenting that "The NMI suggests that the following definition of 'traceability: as defined in the International Organization of Legal Metrology document OIML V 2-200 (3rd Edn 2007) International Vocabulary of Metrology: traceability is the property of a measurement result whereby the result can be related to a reference through a documented unbroken chain of calibrations, each contributing to the measurement uncertainty." Also refer to Div 1, Para 4 (Technical Interpretation sub-para (2)(b) regarding definition of the joule with reference to the NMI regulations, which have were amended in 2009. Other matters refer to metering uncertainty and calibration; metering installation and data logging, and to transmission to a delivery point that provide for legal traceability. Please also refer to the Business Regulation and Competition Working Group (BRCWG), as one of several working groups established by COAG in 2007

86 See for example submissions by industry participants to the MCE Technical and Safety Draft Plan and Consultation RIS (2009)

Conflicts with Owners Corporation provisions (see Owners Corporation Act 2006 Victoria, the provisions of which should be adopted in other jurisdictions.

Conflicts within existing and proposed energy laws including Gas Codes, definitions of disconnection, de-energization and decommissioning of energy (rather than water supplies as is undertaken by energy suppliers endeavouring to force an explicit market contract with end-users of heated water products).

Perennial confusion over whether water or energy provisions are relied upon and the adoption of the bizarre bulk hot water provisions in three jurisdictions (known as the bulk hot water arrangements has continued to cause detriment to classes of residential tenants entirely neglected within this package either through explicit or implicit endorsement of conflicting and inappropriate jurisdictional provisions elsewhere.

Of particular note is the discrepancy permitted in the interpretation of deemed provisions, disconnection (which energy suppliers and distributors interpret as sanction also to disconnect heated water supplies to end users receiving not energy but a composite water product as a consequence of interpretation of deemed and other provisions within and outside energy current and proposed),

These matters are further discussed in a more dedicated way with reference to trade measurement issues, and have in any case been addressed at extraordinary length in other published submissions, including to the Productivity Commission MCE, and Federal Treasury. Please see my published Deidentified Case Study; Parodied Letters of Coercive Threat; Analysis of the Gas Industry Act (2001) (Vic); and Selected discussion of certain terminology as appendices to my submission to the GCF Draft Policy Paper 2009.[87]

The stance taken by the MCE to refuse to address and clarify these issues within the proposed package may be interpreted as overt or implicit endorsement of inappropriate and unacceptable jurisdictional policies and practices representing gross examples of conflict, overlap within provisions that are technically, scientifically and legally unsustainable. Already there is more than one legal matter on foot in the open courts regarding these provisions which also relate flawed interpretation of the deemed provisions.

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[87] Kingston, M (2009) Submission to the Gas Connections Framework (GCF) Draft Policy Paper, as a component of the MCE SCO NECF[87]. Found at *http://www.ret.gov.au/Documents/mce/_documents/Energy%20Market%20Reform/ec/Madeliene%20Kingston.pdf*
The Addendum component was also submitted to the Federal Treasury, along with the several attachments mentioned
Kingston, M (2009) Submission to Treasury's Unconscionable Conduct Issues Paper
http://www.treasury.gov.au/documents/1707/PDF/Madeleine_Kingston.pdf

It is a good place to clarify that there is no such thing as an embedded customer of gas. There are no embedded gas networks – gas is directly provided. A misguided perception of this and homogenization of the differences between gas and electricity markets and the operations has impacted on other MCE decisions, including those relating to safety and technical considerations, as raised by industry participants with other work groups.

It is therefore very disappointing to see that whilst the opportunity exists to get things right as a national energy law is adopted, the same confusions and anomalies are intended to be perpetuated, leaving providers to choose which laws to abide by, and end-consumers of utilities as residential tenants, and others facing erosion of enshrined rights under multiple provisions

How can this be best a practice approach?

It is to the detriment of the market as a whole if consistency and certainty are not delivered; if there is regulatory overlap, confusion, distortion, and other burdens associated with a hybrid approach wherein shared responsibility between States/Territories and the national regime may be seen to hamper these goals.

Hot spots are certain provisions that continue to represent consumer detriment. These include small scale embedded frameworks (electricity); distortions of contractual and trade measurement practices that represent the grossest examples of regulatory failure.

The devil is always in the detail – and the 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.

As to conflict and overlap with other schemes such as tenancy laws and the intent and spirit of trade measurement laws, which will create further issues for industry and for consumers in relation to certain arrangements seen fit to leave in jurisdictional hands, I believe that the CoAG decision merits revisiting.

The implications of comparative law seem to have been altogether left out of the equation and I remain concerned over gross jurisdictional inconsistencies and lack of clarity within proposed national energy provisions with regard to both energy-specific and other laws, since these matters will impact on how the alleged *"national framework"* will operate.

The focus has been solely on energy laws and there is no evidence of even passing mention of the obligation to avoid conflict and overlap in other schemes.

There are a number of regulatory schemes that the Package has failed to consider at all that overlap and conflict with its provisions.

These include but are not restricted to national measurement provisions, which have undergone substantial change and may be further altered with respect to utility provisions, for which exemptions are being progressively made, consistent with the philosophical commitment of the NMI to uphold the principles of legal traceability in provision of all goods and services for which trade measurement plays a role.

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.

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, Owners' Corporation provisions and the like).

I cite one major matter before the open courts to illustrate my points. It is a retrospective class action claim worth millions and is likely to drag on since energy providers, either licenced or unlicenced have much to lose if this precedent test case is found in favour of the Plaintiff.

The matter has been initiated by the members of Owners' Corporation in relation to alleged supply of energy 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 Owners' Corporation is challenging a number of matters.

The action has been taken against the Developer, who made arrangements with a *"supplier of hot water services and Internet Services,"* namely ServiceLink and involving the input of an energy supplier. Whilst individual owners of an Owners' Corporation 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, electricity and gas are goods, whilst their ongoing supply constitute services.

In this matter 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.

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.

- 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.

  (this last matter raises issues pertinent to proposed revisions to statutory and implied warranty considerations under the Australian Consumer Law (TPA)

MINISTERS OF PARTICIPATING JURISDICTIONS (c/f NGL S22) (sec 110)

I am concerned about the extent to which Ministers ion 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.

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:[88]

"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

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[88] Greenberg, D (2007 ibid p15:
See also Daniel Greenberg (ed) Craies on Legislation 8th Edn: Sweet and Maxwell 2001 paras 2.1.1 and 2.1.2

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

See also 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."

Other useful citations from "The Loophole" the journal of the Commonwealth Legislative Assembly Counsel include these 2009 articles:

Bromley, Melanie (2009) Whose Law is it?—Accessibility through LENZ: Opportunities for the New Zealand public to shape the law as it is made in "The Loophole, Journal of the Commonwealth Association of Legislative Counsel 209 ibid), pp 14-24 (Melanie Bromley, Parliamentary Counsel New Zealand)

Greenberg, Daniel (2009) Access to Legislation – the Legislative Counsel's Role. This article is based on a talk given at the 2009 Conference of the Commonwealth Association of Law Counsel in Hong Kong. It has benefited from the scrutiny of Saira Salimi and Jennifer Cartwright, both of the Office of the Parliamentary Counsel (United Kingdom). (Daniel Greenberg is Parliamentary Counsel UK)

Laws, Stephen (2009) Consistency versus Innovation in The Loophole 2009 (the Journal of the Commonwealth Assembly The Loophole Journal of the Commonwealth Association of Legislative Counsel Stephen Laws is First Parliamentary Counsel, UK

http://www.opc.gov.au/calc/docs/Loophole_October2009.pdf

Keys, John Mark[89] Professional Responsibilities of Legislative Counsel[90]

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[89] Chief Legislative Counsel, Department of Justice (Canada). The views expressed in this paper are those of the author in his personal capacity and are not necessarily those of the Department of Justice (Canada). The author also acknowledges the invaluable comments and suggestions that many of his colleagues in the Department have made on previous drafts of the paper.

[90] 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*[91]

[91] The author is a solicitor, a Visiting Professor of Law at Teesside University, a Senior Associate Research Fellow in the Sir William Dale Centre for Legislative Studies in the Institute of Advanced Legal Studies, London University, a member of the Commonwealth Association of Legislative Counsel and a member of the Council of the Statute Law Society.

SELECTED COMPARATIVE LAW CONSIDERATIONS

DISCUSSION OF JURISDICTIONAL ENERGY LEGISLATION (see Interpretation (s105) AND IMPACTS ON INCONSISTENCY, PARITY AND EQUITY ISSUES

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;

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 revered to DPI policy control before being reclaimed by the VESC after cosmetic repeal of the BHW Charging Guideline 20(1) and transfer of most components to the ERC, with the VESC 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 VESC Regulatory Review (2008) as an available appendix and also selected comparative analysis of interpretations within various energy provisions, existing and proposed as well as comparisons with some National measurement provisions (Att. 13 available upon request).

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;[3]23

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).

In turn this leads to unacceptable market conduct and loss of supply of heated water to residential tenants, who are permitted under sacred tenancy7 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)

Insert

Related contravention: a person engages in conduct that constitutes a related contravention of the applicable industry code; if the person:

)(a) aids, abets, counsels or procures a corpo0rtion to contravene the applicable industry code; or

(c) induces, whether by threats or promises or otherwise, a corporation to contravene the applicable industry code; or'

(d) is in any way, directly or indirectly, knowingly concerned in, or party to, a contravention by a corporation of the applicable industry code; or

(e) (d) conspires with others to effect a contravention by a corporation of the applicable industry code.

These provisions are admirable if the industry codes themselves are consistent with the provisions of generic laws, and other applicable laws, for example national measurement provisions.

Concerns arise as in the illustration above. The existing and proposed energy provisions, which require adherence to industry codes are seriously flawed for the reasons identified above.

In particular proper interpretation of the contractual party; looseness in wording; changes in meaning of fundamental terms, including lack of distinction between the term "customer" and "end-consumer" when deciding the question of to whom electricity or gas or other services such as billing and metering services (in many cases entirely unnecessary since water meters are inappropriately being maintained, upgraded and inappropriately used as instruments through which deemed gas or electricity can be calculated. Since this is scientifically and technically impossible, since gas and electricity do not pass through water meters; nor can either heat or gas volume (or electricity) be calculated using such an instrument.

The industry codes in relation to the "bulk hot water provisions" in multi-tenanted dwellings are entirely inconsistent with every other component of the energy laws regarding flow of energy and legal traceability and with the National Measurement's role in ensuring legal traceability of trade measurements; proper use of instruments and so on.

How can any concept of fairness of proper interpretation of sale and supply of utilities be ensured under these circumstances.

Though not related to electricity or gas, why is water not also listed as a good (commodity). What is the difference. Provision of water for residential or business use appears to be a largely unregulated industry, though there are local laws where direct provision of water is provided.

In the case of multi-tenanted dwellings, it is always the Body Corporate (Owners' Corporation) 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 the are implications for both generic and energy-specific laws – and concerns about the operation of Schedule 4 under these circumstances.

In addition, if there are any provisions for substantive unfair provisions to be imposed on consumers in circumstances where no sale of goods or services to the end-user as consumer can be demonstrated – what is the point of the unfair terms.

The allegation here is that within the energy industry codes, and through explicit and implicit endorsement under proposed national energy laws, there are grossly unjust and

unfair substantive provisions embedded in what is termed deemed or standard term contracts.

There mere existence of water meters or their ownership by energy providers or others cannot possible create a contractual obligation for sale and supply of a good that is not received by the party deemed to be contractually obligation.

The owner of water infrastructure cannot sell water without ownership of that water; and neither can sale and supply of gas or electricity be a legally or scientifically sustainable claim.

What recommendations can be made to rectify this matter within both generic and energy laws?

How can any authority regulating the energy industry have control in the first place of water provisions?

Who will take charge of this matter and ensure that fairness is delivered?

The current situation is untenable.

DEDICATED DISCUSSION OF IMPACT OF LEGAL METROLOGY ON CONTRACTUAL ISSUES –

focus on trade measurement considerations on deemed sale and supply of energy

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 framework[92]

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

"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."

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."

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[92] National Measurement Institute Guide *http://www.measurement.gov.au/trademeasurement/Documents/Guide%20to%20the%20New%20National%20Trade%20Measurement%20Regulations.pdf*

How can such a perception be sustainable when existing jurisdictional and national energy appear to have control over discrepant metrological lexicons, practices and procedures, discrepantly upheld at all levels that are continuing to create confusion within the marketplace at all levels whilst the principles adopted by the NMI require that *"Consumers and businesses alike rightly expect that goods that are sold on the basis of such measures as length, weight and volume, are accurately and faithfully represented."* (NMI Guideline 2010, p4, para 3).

I select specific examples of policy failure and discrepancy especially in relation to metrological issues, citing one topic already discussed at extraordinary length in other submissions to the MCE, ESC, PC NMI and Treasury, but also dealing with industry concerns about discrepancies in overlap and conflict within energy provisions in relation to licencing,[93] inconsistencies in regulation of gas meters.[94]

At a broader level would like to extrapolate from the submission of Standards Australia (2009) regarding alignment with regulatory arrangements managed by Commonwealth State and Territory Governments. Whilst the comments made were in relation to early indication in the development of standard development process as to whether an Australian Standard will become mandatory, the same principle applies to identification of all regulations that are pertinent, embracement of which is mandatory.

I refer in particular to the provisions of the NMI which are not given passing mention anywhere in the NECF2 document.

I further cite and extrapolate from the Electrical Regulatory Authorities Council (2009) submission to the ETSR Consultation RIS

"The proposed governance model is not supported because it allows an industry-led body to provide oversight of the regulation of itself via a Policy Committee containing only one electrical and one gas regulator amongst seven members."

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[93] *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

[94] 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

Problem: Legal traceability for consumption of utilities

The issue of uniformity and consistency was amongst the goals in formulating a new national energy law and ancillary provisions. By allowing retention of the some of the worst of the provisions consumer protection is compromised.

The failure to distinguish within NECF drafting proposals between customers and end-consumers (of energy) or to clarify disconnection or decommissioning, given that it is water supply that is normally disconnected in relation to the BHW provisions is one of many failings within the NECF2 package.

At the recent NECF2 Workshops some providers of energy mentioned that they do distinguish between customers and end-consumers, but the NECF2 package fails to sufficiently clarify this matter or to adopt terminology consistent for example with that used in National Measurement provisions where there is a clear distinction between business and residential premises, between customers and residential customers (as end-consumers) and the emphasis on flow of energy.

Though the concept of *"flow of energy"* is recognized within the NECF2 Package, it could be reasonably claimed that a perceived "ostrich-like approach" in failing to take direct responsibility for those jurisdictional provisions that reflect the poorest regulatory practices causing conflict and overlap within energy provisions and within other regulatory schemes current and proposed and within the common law; causing consumer detriment, market confusion; expensive complaints handling and litigation over contractual matters and inappropriate policies and practices openly condoned by policy-makers and regulators (either implicitly or explicitly) at all levels that have the effect of stripping end-users of their enshrined rights.

Distributors and retailers are effecting disconnection of heated water supplies by the clamping of these maters, 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.

No legally traceable means of calculating individual energy use or quality of heated water supplied (in temperature or flow rate) can be determined using the methods used to calculate consumption and deemed supply of gas or electricity.

In Queensland occupants as end users of such heated water are being charged for both the water and the heat in addition to FRC charges and massive supply and/or commodity charges for the supply of energy even though the provision of heated water is a monopoly with end-users unable to make any choices as to provider of energy or of the heated water, which in Victoria is an integral part of a tenancy agreement

In Victoria no site reading was considered to be necessary at all so the question arises whether any actual readings can be relied upon. In Queensland under energy laws energy providers licenced to sell gas and electricity are charging for both the water volume and the alleged heat using units of measurement not prescribed.

In SA it is more common for site readings to occur, but these are of water meters with conversion factors being utilized to devise by water volume calculation approximate energy use by individuals. Even if such a calculation can be shown to be close to accurate, standard form contracts in tripartite governance models hold distributors responsible only for the heat supplied to a master gas meter but not for the quality or heating value of water actually received by individual renting tenants without separate energy meters. The bulk hot water arrangements are not only inconsistent between States but indicate problems in consumer protection that need to be addressed urgently.

In Victoria gas arrangements relating to the Principal Transmission System have the provision of gas mixing zones. Custody Transfer Meters measure the calorific value every half an hour to address the issue of gas quality.

It is my understanding that retailers buy natural gas by calorific value. One should therefore get what one pays for. Translated gas quality varies depending on the source. Translated gas quality varies depending on the source, coal seam methane has a lower calorific value than natural gas from gas fields like the Santos Moomba fields or the Bass Strait and Otway Basin fields. The quality of gas from these fields also varies over time and depending on the treatment that the gas undergoes or from different fields.

The conversion factors are based on the quality of gas supplied and then averaged over the regulatory period involved in setting the conversion factor. [95]

The conversion factors using water volume calculations to guestimate 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.

[95] Personal communication

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 Owners' Corporations of existing multi-tenanted dwellings, especially in the private arena, to retrofit. This was recommended as far back as 1998.

I do understand that some cost recovery has to be made. My gripe is that contractual responsibility for supply charges are imposed on the wrong parties. Mere ownership of water meters by distributors or energy supplies does not create a contractual obligation for sale and supply of energy where no flow of energy can be demonstrated. I continue to believe that the proper contractual party for all supply charges should be the Landlord or Body Corporate.

Energy distributors do not distribute water in any form, just gas or electricity. For settlement purposes there is only one supply charge imposed on the retailers by the distributors.

The current BHW arrangements were allegedly put in place allegedly to prevent price shock to end-consumers. They do not receive energy and therefore should be responsible for no supply or commodity charges associated with energy supply.

Queensland has no regulatory controls at all and what is considered to be a lucrative hot water supply market (for energy suppliers or distributors) and their servants contractors and/or agents.

There seem to be numerous confusions as to whether this is a water market or an energy market.

However, the proper contractual governance model needs to be in place, which is an issue that I have taken up with the MCE.

Rent hikes occur irrespective of the collusive arrangements in place and even if rents did go up, this would be a fairer and more transparent way in which things can be managed until or unless each recipient has a separate gas or electricity meter with which to measure their actual consumption of energy used to heat their water.

A pertinent public submission is that made to the Essential Services Commission's Review of Regulatory Instruments

Part 2A

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; 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/Owners' Corporation 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 Licencing Framework Final Recommendations (2007) – see especially Overview p vii; page 24

Essential Services Commission (2007) Small Scale Licencing Framework Final Recommendations, Melbourne, p vi

The purpose of the paper was to examine the adequacy of current arrangements for provision of energy (electricity) within *"embedded networks"* with particular reference to the 2002 OIC in place in Victoria, originally intended to capture transitory supply and not be relied upon as an ongoing sole instrument governing such supply.

The OIC is exclusive to exemptions to certain small scale operators for electricity supply (not gas) within embedded networks was adequately meeting its purpose and how consumer protections and competition could be maintained. The small scale licencing exemption framework has now been elevated to the proposed Energy Laws – with implications for metrology procedures of pertinence to the NMI which I can discuss another time.

Those receiving communally heated water that is gas-fired by a single master meter on common property infrastructure belonging to either Developers or Owners Corporations are not embedded customers of gas. This term is used inaccurately because of poor understanding of the legalities and technicalities.

Under the new NECF2 Package the AER will consider applications for licence exemption - which itself raises a number of pertinent issues, some of which are discussed under the

Exempt Selling section of this submission., as well as under complaints handling and redress.

Though only some utility exemptions under revised national measurement provisions have been effected to date with others to follow as soon as all procedural matters are attended to, there are implications for the manner in which current jurisdictional arrangements are being addressed, and also how certain provisions such as the small scale exemptions regime will operate.

I am most concerned that not even passing reference has been made within the NECF2 Package to the requirement for all distributors and retailers to adhere by NMI provisions, or to identify the glaring gaps in provisions contained within the NECF2 package as well as tacitly endorsed within the provisions left to jurisdictional control by energy policy makers and regulators. (I have previously cited the bulk hot water provisions for example as a gross example of policy failure apparently requiring utility providers to explicitly ignore the intent and spirit of national trade measurement requirements, albeit that not all utility exemptions have been effected.

The concerns extend well beyond patterning, licencing and verification procedures, since the use of the wrong instrument, theoretically used to measure or calculate the price for the wrong commodity (cold or hot water meters to approximate actual gas or electricity consumption by end-consumers receiving no flow of energy), applying the wrong units of measurement).

I refer to the legal architecture of the proposed NECF2 Package which will lead to the adoption of the National Energy Retail Laws and Regulations and Rules.

Of particular relevance to NMI provisions are the national retail market procedures, which for gas comes under the Gas Market Retail Procedures, and under the national Electricity Law the Market Settlement and Transfer Procedures, Metrology procedures

Though the NECF2 provisions do provide for *"flow of energy"* to the premises of those deemed to be receiving it, the MCE has decided to entirely overlook what is happening in the marketplace, fanned by misinterpretations of deemed provisions.

By failing to clarify within the energy-specific proposed Law and Rules what should apply as best practice policy, trade measurement and contractual arrangements under the proposed tripartite governance model adopted for the NECF, the MCE is choosing by default to allow inacceptable 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 previsions 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:[96] 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."

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[96] 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*

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.

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.

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.[97]

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)

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[97] 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).

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 competiveness 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 AEMC (2008) Victorian Review of Retail competition effectiveness; and the SA Government's submissions to the AEMC (2009) SA Review, and this Government's Response to the AEMC's seemingly pre-determined decision to also find the SA Australian market for gas and electricity to be competitive.

For a host of reasons I believe the time is over-ripe for direct Federal intervention in matters that have traditionally been left to jurisdictional control. I also believe that the NMI has a golden but possibly limited opportunity to assume more visible profile and control.

Other matters as raised by industry:

Inconsistencies in regulation of gas meters

Envestra has raised the specific issue of inconsistencies between jurisdictions in regulatory requirements for gas meters:

Envestra supplies gas meters to its customers in Victoria and in Albury, New South Wales. But while the same make and model of gas meter is purchased for both jurisdictions, Envestra must maintain separate stocks of gas meters to service its 23 000 Albury consumers and its 525 000 Victorian consumers. This is because New South Wales legislation requires gas meters installed in that state to be stamped with a NSW seal of approval. The additional administrative and operational burden of complying with the NSW legislation is ultimately borne by Albury consumers. (sub. 13, p. 2)

Governments have been working for nearly two decades to achieve greater consistency in trade measurement regulation between jurisdictions. By 2006 all states and territories had adopted Uniform Trade Measurement Legislation.

However, continuing inconsistencies and different interpretations prompted COAG to identify trade measurement as a high priority regulatory 'hot spot'. Work has been progressing on the implementation of a national system of trade measurement to be administered by the Commonwealth through the National Measurement Institute (NMI). The new system is to commence on 1 July 2010.

These reforms will not, however, address the issue of inconsistencies in gas meter regulations. The National Measurement Act 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.[98] 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.

98 [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 Owners Corporation[99] and raises many issues that are pertinent to contractual matters, even though renting tenants are not part of the equation.

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[99] 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.
a) The legality of arrangements for the sale of "Hot Water and Internet Infrastructure;
b) the signing of contracts by the original Owners' Corporation Manager;
c) the alleged contract, allegedly signed by the Owners' Corporation;
d) the possible excessiveness of the charges, using the flawed Victorian algorithm conversion factors and employing hot water flow meters to pose as electricity meters;

In determining a contractual relationship for the sale and supply of energy, flow of energy must be established to the premises of the party deemed to be receiving it.

The definition of connection within the NECF2 Package means a *"physical link between a distribution system and a customer's premises to allow the flow of energy."*

The Victorian Gas Distribution System Code describes The VGDSC describes **DISTRIBUTION SYSTEM** as a network of pipes meters and controls which the Distributor uses to supply gas. A water meter does not form part of that distribution system. It is not associated with the supply of gas as:

"a point on a distribution system at which gas is withdrawn from the distribution system for delivery to a customer which is normally located"

Under the proposed NECF **SERVICE PIPE** means a pipe ending at a metering installation or, for an unmetered site a gas installation, which connects a main or a transmission pipeline to a customer's premises, as determined by a distributor.

A hot water flow meter, the instrument theoretically used in effect as a substitute gas meter under policy-maker and regulator sanction in three different States is not connected to a pipe which connects a main or transmission pipeline to a customer's premises if that customer is deemed to be an end-user of centrally heated water, a composite product, serviced by a single energization supply point. Such an instrument measures water volume only not volume or heat. These instruments are poorly designed to withstand heat in any case.

Creative and unacceptable interpretations as to what kinds of meters represent those that are *"separately metered"* under both energy and non-energy provisions.

Comment MK

Please see further discussion in Apdx 2 analyzing selected provisions from the further Revised Energy Retail Code v7 published February 2010 and effective from April 2010, containing anomalies and conflict within and outside energy laws current and proposed and with numerous other provisions including generic laws current and proposed, residential tenancy laws, Owners' Corporations laws; common law contact and the like.

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e) challenge to operational and service design parameters initiated by the Developer in consultation with the energy providers using hot water flow meters to pose as gas meters, and selection of hot water infrastructure leading to water wastage and inflated charges
f) operational design – relating to flow rate of the hot water being greater than the cold water.
g) the quality of supply and service of all the above alleged supplies and services over a period of six years.

In the case of Owners' Corporations 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 NERCF 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 f or 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 Owners Corporation not the end-user of heated water supplies. This is further discussed in Apdx 1, 2, 6, 7, 8

and Part 1 Div 1 Prelim 105 Meaning of Customer and Associates Terms;

Part 3 Relationship between distributors and customers, a

Division 1 Preliminary 105

Part 3 Division 2 Obligation to provide customer connection services

302 Obligation to provide customer connection service

This does not clarify the position when a Developer or an Owners' Corporation 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***).

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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 Owners Corporation 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 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 Owners Corporations 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.

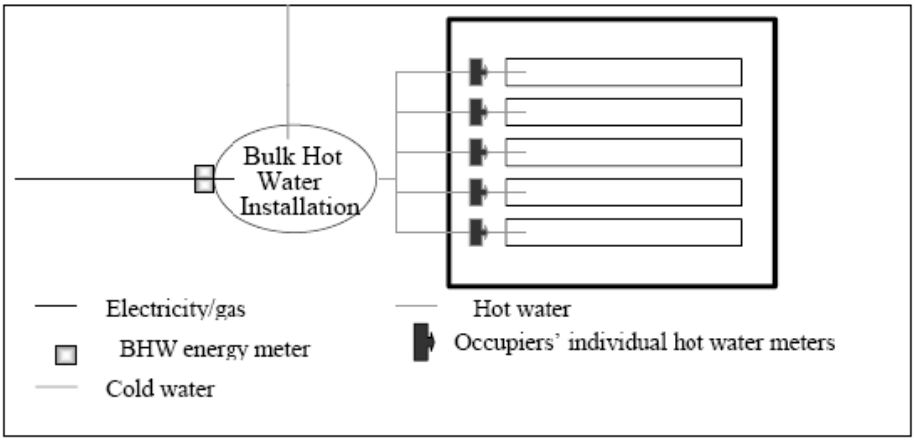
The Deidentifed case study already published with my response to the Gas Connections Framework Draft Policy Paper (2009) (as a component of the NECF) and to the Treasury's Unconscionable Conduct Issues Paper (2009) – appended here once again to draw attention to the injustices.

(4) **De-energization of electricity supply**

The retailer may exercise the right to arrange for de-energization of the customer's electricity supply in accordance with timing determined under the dual fuel contract but no earlier than 15 business days after the date of the de-energization of the customer's gas supply under subrule (3).

See comments above re disconnection of heated water supplies reticulated in water pipes

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

(taken from ESC Deliberative Document prior to adoption of the BHW pricing and charging provisions relying on readings of hot water flow meters, and converting volume of water used into a "deemed gas rate" as a fixed conversion factor requiring ho site readings at all)

The term hot water meter refers to a **hot water flow meter** not gas or electricity meters.

Only one gas meter exists with a Meter Indentifying 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 tome 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 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 SA it is more common for meter readings to occur – also using the Victorian model for conversion factors relying on water volume usage to calculate deemed gas usage.

Whilst intending the package to apply to all Australians the split of regulatory responsibility has created significant anomalies that result in application of the Package some but not all Australians, since the MCE has made a conscious decision not to deal with who are regarded as contractually obligated to both distributors and retailers, though they receive not an iota of energy in the form of gas or electricity demonstrated through flow of energy.

Some possible solutions:

- Withdraw existing the BHW arrangements from energy provisions. Revisit departmental local authority Infrastructure and Planning arrangements that allow perpetuation of the BHW arrangements (see for example Qld Dept of Infrastructure and Planning sanctions Fact Sheet under Building Codes Queensland.
- Allocate responsibility to the appropriate contractual parties - Owners' Corporations
- 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 Owners Corporations and Landlords to upgrade and retrofit with individual meters and instantaneous hot water systems in each residential abode - meeting efficiency and health risk issues in one fell swoop and enabling proper application of metrology procedures that are transparent.

Further Comment:

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 retailers[101]

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/Owners Corporation 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 pract6ice 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 licenced gas providers may provide gas. If there is any move to alter this, technical and safety considerations at the very least must be considered in public safety – deviations at the may be at peril of policy-makers and regulators.

No gas is supplied to end-users of the composite product heated water. The OIC exemptions for small scale licencing apply exclusively to electricity where electricity is being directly supplied through flow of energy regardless of change of ownership or operation of the infrastructure. In the case of gas the distributor supplies a single gas master meter for which he is responsible.

Regardless of whether a distributor owns and operators or leases out hot water flow meters or other non-gas infrastructure; and regardless of whether host retailers purchase such hot water flow meters, such ownership cannot confer contractual rights to claim sale and supply of energy. To that extent the deemed provisions of the *GIA* have been grossly distorted.

The billing and metering services supplied are directly to the Landlord/Owners Corporation, 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 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.

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.

(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 Owners' Corporation 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 term s an d condition s as currently in force o r an y require d alterations.

(2) If there is such an inconsistency, the mode l term s and conditions or required alteration s (as the case require s) 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 approve d standard connection contract o r 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 term s and condition s 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 Owners' Corporation.

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 Owners' Corporation 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 Owners' Corporation.

Division 9 Deemed customer retail arrangements

238 Obligations of retailers

(1) As soon as practicable after becoming aware that a small customer is consuming energy under a deemed customer retail arrangement, the financially responsible retailer for the premises concerned must give the customer information about the following:

(a) the retailer's contact information;

(b) details of the prices, terms and conditions applicable to the sale of energy to the premises concerned under the deemed customer retail arrangement;

(c) the customer's options for establishing a customer retail contract (including the availability of a standing offer);

(d) the consequences for the customer if the customer does not enter into a customer retail contract (whether with that or another retailer), including the entitlement of the retailer to arrange for the de-energization of the premises and details of the process for de-energization.

(2) If the small customer is a carry-over customer of the retailer, the retailer does not have to give the customer the information required under subrule (1) if the retailer has already given the customer a notice under rule 237 relating to a market retail contract and containing that information.

Comment MK

See comments above and the consistent theme in this submission highlight the anomalies that the MCE has chosen deliberately to overlook in relation to the false claim by retailers and distributors, facilitated by jurisdictional sanctions to consider a move-in end-

consumer of heated water supplies to be "consuming energy under a deemed customer retail arrangements.

This reflects failure to adequately interpret sale of goods provisions, implied and statutory warranty provisions; technical and scientific considerations; "flow of energy" concepts; unfair substantive clauses as contained in proposed generic laws and already included in Victorian unfair contract provisions; trade measurement best practice and the fundamentals of contractual law.

Energy that is supplied from a single master meter to fire a single communal boiler tank used to supply heated water is not consumed by end-users of that water and it is preposterous that energy retailers see fit to threaten disconnection of that heated water when becoming aware of a move-in tenant occupying a single dwelling in a multi-tenanted building. As illustrated in the Deidentified Case study already presented and reproduced with this submission, unjust and unwarranted disconnection of heated water supplies to a particularly disadvantaged and vulnerable tenant occurred as a consequence of practices sanctioned at jurisdictional level more explicitly; and tacitly endorsed by the MCE through failure to properly clarify the matter.

standard meter , in relation to a particular small customer, means a metering installation of the type that would ordinarily be installed at the premises of the customer.

Comment MK

This must surely need to be clarified as a gas or electricity meter – this is an energy law. Water meters are being relied upon to make guestimates of the heat used to heat a communal water tank. No flow of energy is effected to the premises of those deemed to be receiving as or electricity.

Problem: Denial of deemed contractual obligation for sale and supply of energy unless retailers can show the existence of contract through legal traceability of consumption of energy

It is these arrangements that are discussed in relation to the preposterous suggestion that an end-consumer of heated water in the absence of any flow of energy into the premises of the party deemed to be contractually obligated to both the retailer and distributor under the NECF2 Package tripartite governance model that has been extensively discussed in all previous submissions to MCE arenas, and in relation to this batch of proposed instruments mainly under Part 1 Division 1 – 3, to a large extent under Interpretation.

See also under objective.

An end-user of heated water in a multi-tenanted dwelling, notwithstanding policy arrangements and jurisdictional codes in place consumer heated water. In Victoria hot water services provided to renting tenants under residential tenancy laws are an integral part of mandated tenancy leases.

A renting tenant enters that agreement with a Landlord on the understanding that no utility bills will represent responsibility for the tenant unless a separate meter is supplied for each utility supplied. Further where water meters are available and have been sanctioned by the Water Authority and subject to suitable licencing and servicing arrangements, as well as complying with any applicable trade measurement provisions, heated water may only be charged to tenants at the cold water rate.

In the bizarre and inappropriate *"bulk hot water policy arrangements*" tacitly endorsed by the MCE through failure to address concerns about regulatory overlap within and outside energy provisions, retailers or their servants/contractors **or agents are issuing up** to several months after a legitimate tenancy is taken up under mandated lease provisions a "vacant consumption letter" that indicates "hot water consumption" is being monitored by or on behalf of the energy supplier, seeking now to charge for such consumption.

It is sometimes unclear from such correspondence whether it is water or energy that the energy supplier is endeavouring to allege contractual obligation.

The sale of goods acts and generic laws require ownership of any good (commodity) that Despite any ownership of satellite hot water meters associated with a communal boiler system, or access to cold water meters supplied water at the mains; and regardless of any deemed usage of gas to heat individual consumption of heated water that is communally heated, an energy retailer would in contract law and generic laws find it extremely difficult to prove that any contract exists at all.

It would be preposterous to suggest fraudulent or illegal supply of energy under circumstances where no energy of any description is received (associated with the "bulk hot water arrangements), as facilitated by flow of energy into premises deemed to be receiving it.

A residential tenant enters into a direct contract with a Landlord or Owners/Corporation under mandated provisions, which in Victoria are unambiguous in relation to utilities.

It is the OC or Landlord who invites the supplier onto the property, requests a single gas master heater to be installed and makes arrangements for a communal water tank to be heated by that gas or electricity meter. That is where the contract lies for the connection installation, sale and supply of energy and any associated costs.

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

The ESC's BHW Guideline 20(1) was repealed by the ESC last year on the pretext that it no longer had policy control of the pricing and charging - which allegedly reverted to the DPI. Its contents were transferred to the Energy Retail Code under Clause 3.

Subsequently, the DPI handed back policy responsibility to the ESC. Under statutory and warranty provisions, gas and electricity are goods. The supply of gas and electricity constitute a service. No gas or electricity are provided within the BHW arrangements.

It is therefore difficult to know what recourses are available. What is being provided is a heated water product. The gas is simply used in its development as a composite product. This has been my consistent argument. Retailers are not licenced by Water Authorities to on-sell water. Landlords are not allowed on on-sell water without a licence.

In Victoria where separate hot water flow meters are used in the calculation of consumption of heated water only the cold water rate may be applied and no additional supplier other cost-recovery charges.

This is anomalous with the Qld provisions, which inadequately protect consumers - you should stress this discrepancy.

Note the analysis by the ESC in the Draft Report re recovery of costs by 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 of 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 Owners' Corporations 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/Owners Corporation.

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.[100]

[100] 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

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)*[101] 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 market[102] is captured by an encumbent retailer who apparently purchased in its entirety the "BHW customer base" in 2007, based not on the number of single gas master meters existed in multi-tenanted dwellings (which for Distributor-Retailer settlement purposes represent a single supply point, there being no subsidiary gas points in the individual abodes of those unjustly imposed with contractual status in terms of sale and supply of gas.

$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.

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

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

- 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.

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**

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 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 Owners' Corporation. 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 Owners Corporation 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".

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 Owners Corporation 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 Owners' Corporation or Developer.

Notwithstanding the interpretation placed by retailers and distributors, either tacitly or explicitly endorsed by policy-makers regulators and/or Rule-Makers of deemed provisions, ignoring the precepts of contractual law and other provisions is at the peril of energy providers and those who sanction such questionable practices

Please note that no part of a water infrastructure or boiler system forms part of an energy distribution system. Regardless of who owns water pipes, water metering infrastructure and the like, mere ownership of such equipment cannot legally or technically create a contract for alleged sale and supply of energy. Supply charges for any such metering or billing duties undertaken, including inappropriate (and often theoretical) meter reading of hot water or cold water flow meters (see the bizarre BHW provisions) are not charges that should be imposed on end-users of heated water that is communally heated in multi-tenanted dwellings.

NEM Representative means a related body corporate (within the meaning of the *Corporations Act 2001* of the Commonwealth) of an electricity retailer that is registered with AEMO as a market customer under the NER and that, directly or indirectly, sells electricity to the retailer for on-sale to customers.

Comment MK

If this is an indirect way of endorsing questionable interpretation of contract law and endorsing the provisions of the "bulk hot water policy arrangements adopted in three jurisdictions and discrepantly applied, then it is an unacceptable distortion of existing and proposed provisions under multiple enactments current and proposed.

The on-selling of electricity must rely on the *"flow of energy"* concept that is embraced by the NECF definitions. No such "flow of energy can be demonstrated within the BHW policy arrangements. If intended to mean change of ownership of electricity transmission (embedded customers) this has a different application, but does raise questions about governance of service obligations, implied and statutory warranty under the generic provisions proposed; licencing and servicing obligations imposed by trade measurement authorities and the like, and has implications also for tenancy laws.

(a) at the standing offer prices; and

(b) under the retailer's form of standard retail contract.

Note—This subsection is a civil penalty provision.

(2) The Rules may provide for the manner and form in which a standing offer is to be made.

(3) Without limiting the power to make Rules relating to the manner and form in which a standing offer is to be made, a designated retailer must publish the terms and conditions of the standing offer on the retailer's website.

Note—This subsection is a civil penalty provision.

(4) A designated retailer must comply with the terms and conditions of the retailer's standing offer.

Note—

Section 213 provides for the satisfaction of a designated retailer's obligation to make a standing offer by making an offer to certain small customers to sell energy under a market retail contract.

205 Standing offer prices

(1) **Publication of standing offer prices**

A designated retailer must publish its standing offer prices on the retailer's website, and the standing offer prices so published remain in force until varied in accordance with this section.

Note 1—

A standing offer price may be a regulated price under jurisdictional energy legislation.

Note 2—

This subsection is a civil penalty provision.

(2) **Variation of standing offer prices**

The designated retailer may vary the standing offer prices from time to time, but a variation has no effect unless—

(a) it is made in accordance with the requirements (if any) of jurisdictional energy legislation; and

(b) the variation (or the standing offer prices as varied) is published on the retailer's website.

(3) **Publication and notification of variation**

The designated retailer must:

(a) publish the variation (or the standing offer prices as varied) on the retailer's website; and

(b) publish a notice about the variation in a newspaper circulating in the participating jurisdictions in which the retailer has customers, notifying customers that—

(i) there has been a variation; and

(ii) the variation (or the standing offer prices as varied) are published on the retailer's website; and

239 Use of prepayment meter systems to comply with energy laws

(1) A retailer who provides customer retail services to a small customer using a prepayment meter system must comply with the provisions of the energy laws relating to the use of prepayment meter systems.

(2) Without limiting subsection (1), a retailer who provides customer retail services to a small customer using a prepayment meter system must ensure that the prepayment meter market retail contract complies with the requirements for a prepayment meter market retail contract set out in the Rules

102 Interpretation –

Comment MK

Discussed also elsewhere, dissecting selected terminology giving rise to confusion, lack of clarity; conflict and overlap with other schemes viz failure to consider implications of comparative law

Other sections impacted:

105 Meaning of customer and associated terms

107 Classification and reclassification of customers

Division 2 Matters relating to participating jurisdictions

109 Participating jurisdiction s (cf NGL s21)

110 Ministers of participating jurisdictions (cf NGL s22)

111 Local area retailers (monopoly considerations)

112 Nominated distributors (monopoly considerations)

114 MCE statements of policy principles (cf NEL s8; NGL s25) 30

Division 4 Operation and effect of National Energy Retail Rules

115 Rules to have force of law (cf N EL s9; N GL s26) 31

Division 5 Application of this Law, the Rules and Procedures to forms of energy

116 Application of Law, Rules and Procedures to energy 31

Each of the above sections is impacted by failure of the MCE to properly clarify the bizarre arrangements that currently exist wherein contractual status for sale and supply of energy is unjustly imposed on end-users of heated water that is centrally heated in a boiler tank and reticulated in water pipes to individual end-user residential premises.

The sale and supply of energy and any other services such as metering and billing are provided to business customers as Owners Corporations 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; owners' corporations 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 energ7) 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:

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(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.

EXEMPT SELLING REGIME

AER Exempt Selling Guidelines—see section 532;

AER exempt selling regulatory function or power means a function or power performed or exercised by the AER under Division 6 o f Part 5 and the Rules relating to exemption s from the requirement to hold a retailer authorization, including (but not limited to) the following:

(a) a decision whether to grant, vary or revoke a n individual exemption;

(b) a decision whether to impose, vary or revoke condition s on an individual exemption;

(c) a decision whether to make, vary or revoke a determination specifying deemed exemption s o r registrable exemption s, including any associate d conditions;

Comment MK

Please see all comments also under Objective. Issues include reliability and security of supply, exclusion of certain segments of the community from protection; clarity; denial of choice and participation in contribution to competition for certain segments of the community; welfare of consumers; implications of gaps in the exempt selling regime and for those receiving no energy at all but rather heated water products, but are unjustly deemed to have energy contracts with distributors and retailers and being subject to threat or actual disconnection of heated water supplies through clamping of hot water flow meters on the basis of distorted and misguided interpretation of the deemed provisions; sale of goods provisions, generic laws and common sense interpretation of proper trade measurement practices.

I am most concerned about many aspects of the exempt selling regime, the extent to which these factors appear to have altogether been missed from consideration of the NECF2 exempt selling regime:

(a) The fact that contestability is simply not an option for the vast majority of those living in multi-tenanted dwellings;

(b) The differences between the gas and electricity markets and the fact that gas is not and should never be part of an exempt selling

(c) In terms of contestability, in practical terms, a high proportion of those residing in multi-tenanted dwellings receiving gas or electricity are a captured monopoly market

(d) Even those who for health and safety reasons cannot use gas at all because of the risks associated withy a naked flame (for example those with particular disabilities), the mere existence of a gas-fired boiler tank in the care custody and control of an Owners' Corporation, or through collusive arrangements between OCs and energy providers, authorized or exempt, an unjust free retail competition charge is applied for gas that is not received at all through flow of gas to the premises deemed to be receiving (refer to the BHW arrangements in three jurisdictions, operating discrepantly)

(e) comparative law considerations including jurisdictional and local laws (for example tenancy laws, Owners' Corporation laws; building code laws, technical and safety provisions; jurisdictional and federal metrology considerations; metrology. Failure to recognize the NMI as the sole authority and expert on trade measurement including metrology is a major policy and provisional flaw and will lead to ongoing confusion, debate, market unrest, expensive complaints handling and possible litigation.

Ministerial Orders in Council at jurisdictional level that facilitate exemption from licences that ought to be better controlled. The OIC's for exempt sellers was exclusive to electricity and intended to capture only those receiving transitory supply. Instead the provisions gave way to lucrative opportunities to exploit the enshrined rights of end-consumers of utilities, under the guise of "creative and innovative opportunities."

The AER will inherit regulation and some decision making over these issues from the ESC and DPI (Victoria) and presumably other states.

Many provisions, including those left under jurisdictional control (such as the BHW arrangements), or dismissed as being of an entirely economic focus rather than relating to components of both economic and non-economic considerations (for example, BHW arrangements; embedded consumers and small scale licencing (electricity only); the issue of regulatory overlap with other schemes has been ignored; and the proposed protections under generic laws, including substantive unfair terms within both standard and market contracts; and unconscionable conduct considerations which are the subject of ongoing evaluation by the Treasury following receipt of expert panel advice.

Impacted are those in private rental accommodation in multi-tented 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 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 recovation process where an exempt seller has not complied with conditions of exemption and cannot show cause why the AER should not revoke the exemption

"… exempt customers should be afforded the right to a choice of retailer."

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[103] as far back as 2007 referring to only scanty consideration b the Retail Policy Working Group's Issues Paper and urging more serious and detailed consideration of the gaps in providing protections to those in embedded networks, stressing that "consumers should not be disadvantaged in any way because of purchase of or receipt of energy through embedded networks." See below

I note that the proposed parameters within the NECF2 Package in relation to exempt selling appear to be scanty with insufficient operational detail or indication of proper level of consumer protection. Since the 2006 Small Scale Licencing review was undertaken by the ESC it has not been transparent either by the DPI or the MCE how the system now known as the Exempt Selling Regime will actually operate, despite some broad generic-style provisions. Some of these have been queried by the AER as the responsible new regulator.

I place in context the undertaking of a Review of the Small Scale Licencing Framework at the request of Minister Theo Theophanous as far back as March 2006.

That Minister had referred to referred to objectives to

1. Facilitate efficiency in regulated industries
2. Facilitate effective competition and promote competitive market conduct; and
3. Ensure that users and consumers (including low-income or vulnerable consumers) benefit from the gains from competition and efficiency.

I turn to some of these issues again shortly, having already discussed them in the context of the NECF2 Package Objectives and perceived shortfalls in meeting those objectives.

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[103] Consumer Action Law Centre (2007) Submission to Retail Policy Working Group Working Paper2 *http://www.ret.gov.au/Documents/mce/_documents/Consumer_Action_Law_Centre20070130111923.pdf*

Minister Theophanous had referred to

"…licence exemption Orders (which are made on Ministerial recommendations) are primarily designed to address incidental, unintended or technical breaches of the standard licencing provisions. Although the exemption process has been recently used to facilitate small scale distribution and selling activities, this is the not intended use of such instruments."

One consideration was *"the extent to which small scale retailing and distribution is emerging as a valued service for consumers in embedded network situations"*

In relation to data about the market, it is most disappointing that thought EWOV as the energy-specific complaints scheme[104] saw fit to undertake a feasibility study of the small scale licencing market but declined to share the information obtained to better inform policy-makers, regulators and the wider community. EWOV in twice responding during 2006 and 2007 respectively to the ESC Small Scale Licencing Review publicly admitted to conflicts of interests. These are discussed elsewhere.

Though EWOV's funding predominantly comes from membership fees paid by its members under mandated provisions for distributors and retailers belong to such a scheme, it also receives funds from Consumer Affairs Victoria. 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 OCI 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."

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[104] Dispute resolute scheme is an incorrect term as discussed in my submission to the PC's Review of Australia's Consumer policy Framework, components of which re repeated below under Complaints Handling

Retail choice:

As observed by Tenants Union Victoria[105], though there are some circumstances were some *limits on consumer's free retail choice* may be considered reasonable *(such as to facilitate community development of embedded generation initiatives or to allow a consumer to sign a long-term contract),* there is consensus that *it is essential that consumers are able to exit the network should participation in the network prove materially disadvantageous"*

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

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

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

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

There is no question that participation in choice and competition is 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 Owners' Corporations may have some choice at the outset over which retailer to choose to supply gas to fire up a single communal boiler tank. The building, metering and utility infrastructure choices are normally determined at the time that a building is erected and is the subject of direct contractual dealings with developers or owners, not renting tenants.

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

Queensland are those living in public housing, most disadvantaged. Even when they receive no gas at all they are required to pay FRC fees[106]

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)*[107] 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

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[106] 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.

[107] 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, 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 market[108] is captured by an encumbent retailer who apparently purchased in its entirety the "BHW customer base" in 2007, based not on the number of single gas master meters existed in multi-tenanted dwellings (which for Distributor-Retailer settlement purposes represent a single supply point, there being no subsidiary gas points in the individual abodes of those unjustly imposed with contractual status in terms of sale and supply of gas.
- On what basis massive supply, commodity, service and FRC charges are imposed on end users of gas so supplied for the heating of a communal water tank, when the services and associated costs property belong to the 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.
- 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.

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

- 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.

Whist 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, PIAC[109] had made same salient points about consumer protection and energy costs in their public submission to the Independent Pricing and Regulatory Tribunal (IPRT), NSW as quoted under elsewhere Objectives

Provision of certain utilities whether or not technically meeting the definition of embedded" (which applies to electricity – there are no gas networks, a misconception frequently held by the MCE) and included, also for the of addressing similarities between the "heated water" appear to be operating in an unregulated environment.

[109] 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

Therefore, I resurrect here the previously expressed views of Consumer Action Law Centre in response to the RPWG Working Paper 2 regarding embedded networks.[110]

Embedded networks

We are concerned that the Paper only scantly considered the issue of embedded networks and small-scale distribution and retailing. In Victoria, there are many such networks which fall outside the scope of regulation, including retirement villages, apartment buildings and caravan parks. The Victorian Essential Services Commission is currently undertaking an inquiry into the regulation of such networks.[10] *We recommend that the RPWG consider the recommendations of that inquiry, and ensure that there is clarity about the regulatory requirements relating to embedded networks. As a minimum, it is our view that consumers should not be in any way disadvantaged or have reduced protections because they purchase or receive energy through an embedded network.*

"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.*

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[110] 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*

I reflect the views and concerns of Consumer Action Law Centre (CALV) (2007a) to the RPWG[111]

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.*

Distributor interface with embedded generators

The Paper notes that additional work in relation to the distributor-embedded generator interface has been undertaken by a parallel MCE work stream, and has included consultation on a draft Code of Practice for Embedded Generation. The Paper recommends that the outcome of this work be incorporated into the regulatory framework proposed by the RPWG.

We support this proposal, and recommend that once adopted, jurisdictions should remove or modify conflicting legislation. We also support the proposal that the Code be reformulated as Rules and be incorporated as part of the 2007 legislative package, rather than proceeding with an AEMC rule-change process. We also support the recommendations made by the Climate Action Network Australia in their submission to the consultation on the draft Code.[9]

Embedded networks

We are concerned that the Paper only scantly considered the issue of embedded networks and small-scale distribution and retailing. In Victoria, there are many such networks which fall outside the scope of regulation, including retirement villages, apartment buildings and caravan parks. The Victorian Essential Services Commission is currently undertaking an inquiry into the regulation of such networks.[10] We recommend that the RPWG consider the recommendations of that inquiry, and ensure that there is clarity about the regulatory requirements relating to embedded networks.

As a minimum, it is our view that consumers should not be in any way disadvantaged or have reduced protections because they purchase or receive energy through an embedded network."

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[111] Consumer Action Law Centre (2007) Submission to Retail Policy Working Group Working Paper2

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[112]

Retailer Choice

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

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

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

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

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[112] See EWOV (2006) Response to ESC Small Scale Licencing Issues Paper and Final Decision
EWOV's Submission to Essential Services Commission Licencing Framework Issues Paper August 2006, p 3
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 Licencing Draft Decision (2007)

If not supplied directly then the end-consumer of heated water communally heated is not the customer of any exempt seller in terms of energy and does not consume energy. Nevertheless this class of consumers has no complaints recourse and must rely on litigation that is unaffordable for most.

Though I refute and deny that end-users of communally heated water are embedded consumers of energy, I discuss this matter here lest the MCE follows the ESC and DPI lead to consider them to be so classed.

I note that the Tenants Union also believes this class to be "embedded" and that on-sellers of water are an unregulated market in respect of alleged energy supply. I disagree with the ESC perception that the RTA is the correct legislative arena for redress. The matter is far more complex since there are many issues inherent in the mere fact that a contract is deemed to exist – with the wrong party and has implications for conditions precedent and subsequent, substantive unfair terms under generic laws; perceptions of illegal consumption of energy by move-in residential tenants relying on RTA protections; carry-over-customers; perceptions of overdue bills; and finally the ongoing threat of disconnection or suspension of heated water supplies where an energy provider claims to be selling energy.

These matters are discussed at great length in other submissions to the MCE, but to make sure I attach as appendices my 2008 submission to the ESC Regulatory Review and the Deidentified Case Study that was submitted to the GSC Draft Policy Paper, in addition to the Parodied letters of coercive threat send to the same arena.

"The AER also supports the proposed policy principle in s 528(1)(c) that exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under the NECF. Currently exempt supply customers in most jurisdictions do not have the same access to n Ombudsman or alternative dispute resolution scheme that is afforded to customers of a retailer. As the AER cannot effect the operation of industry-based statutory Ombudsman schemes (for example, through a condition requiring that an exempt seller participate in such a scheme), jurisdictions and ombudsmen schemes should consider whether it is necessary to extend the jurisdiction of the schemes to customers of exempt sellers to give full effect to this principle."

In principle, a system where multiple bodies are responsible for licence and servicing provisions has the potential to become confusing and complicated by regulatory overlap and conflict, a matter that appears to have been given no thought at all in the formation of the NECF2 Package.

Market participants are required to abide by all laws and provisions not just those within energy, recognizing also the many jurisdcit9onal 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 and exempt selling regime, more particular where service and licencing provisions may conflict and overlap with trade measurement provisions or water industry provisions.

This is more so in view of the fact that energy retailers (and now distributors) facilitated through flawed interpretations of deemed provisions either implicitly or explicitly sanctioned at jurisdictional level under what are commonly known as the "Bulk hot water arrangements" are using questionable methods of calculating and apportioning liability for both consumption charges for energy where such consumption cannot be shown by legally traceable means consistent with National Measurement philosophies; and where massive unregulated and unmonitored supply charges, FRC charges and other unbundles 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 Owners Corporation as controller of premises and proper contractual party.

In circumstances where direct supply of energy occurs through flow of energy, regardless of change of ownership or operation of the facilities, there are also issues of proper trade measurement using prescribed units of measurement.

I summarize the three billing options considered for the bizarre technically and legally unsustainable BHW arrangements adopted in three jurisdictions

1. Option 1: adjustable conversion factor: rejected
2. Option 2 Fixed conversion factor (adopted*)* based on a conversion factor at a cents per litre hot water rate as gazetted
3. Option 3 – Site specific Option – REJECTED a portion gas measured at the site-specific master meter to each individual customer based on their hot water use **–**

I firstly note that those receiving heated water that is centrally heated living in multi-tenanted dwellings are not embedded consumers of gas or electricity.

Hot water is not en energy commodity, though energy may be used to heat it – in such cases from a single master gas meter (and in some cases electricity meter)

Gas consumers of any description are never embedded consumers of energy. Energy is either directly supplied in gas service pipes or it is not. There is no such thing as a gas network. The term network and the term embedded applies exclusively to electricity. The Order in Council (OIC) under consideration by the ESC in discussing the small scale licencing regime referred to is exclusive to energy.

Consideration of those receiving communally heated water was outside the scope of that review, and has no place in the exempt selling regime.

The ESC mistakenly applies terminology in referring to the perception of consumption of energy in providing another good or service – hot water.

The ESC's choice of phase 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 produ8ct.

The service of ongoing supply of gas is made to the Owners' Corporation or Developer of a multi-tenanted property, not to the end user of water – see detailed analysis of these contractual matters in my submission to the ESC Review of Regulatory Instruments (2008) Part 2A, which is appended as part of my submission to the NECF2 Second Exposure Draft

Additional services of metering and billing are also provided to the Owners' Corporation.

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 processes 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-standing 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 Owners' Corporations.

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 Owners' Corporation or Developer who is the proper contractual party (see details of gas licences issued to the host retailers.

They also have implication for the unjust and unreasonable perception that when a residential tenant moves into rented premises unjust or illegal consumption o0f energy occurs by dint of accepting heated water supplies hat 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 Owners' Corporation or Developer.

This is especially so when residential tenancy provisions, at least in Victoria consider hot water services as described without separate metering for each metering utility to be integral part of mandated lease arrangements. This brings us back to conflict and overlap between schemes and failure by energy policy-makers and regulators to consider other laws and the enshrined rights of consumers or businesses under the common law.

There are other implications for unwarranted perceptions of unpaid energy bills under the circumstances described.

There are implications for move in and carry over customers.

And yet the NECF package believes it is adopting a national law and for transition (or other reasons) by continuing to tacitly sanction current arrangements under the BHW provisions, continue to allow unjust and inappropriate provisions

I cite from components of the Essential Services Commission (2007) Final Decision on Small Scale Licencing Framework[113] (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 minimise the cost impact on small scale operators themselves so that they can continue to offer these benefits to their customers.

The Commission has concluded that the current regulatory framework applying to small scale distributors and/or resellers needs improvement. However, it believes that these improvements can be achieved through only minimal changes to the existing framework, minimizing the impact on small scale operators while also improving the customer protection framework.

Once the Commission's role in administering the revised arrangements is clarified, the Commission will undertake a comprehensive consultation process consistent with its Charter of Consultation and Regulatory Practice.

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[113] 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*

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.[114] *Despite this, the Commission has been informed that, in some instances, landlords have separately billed residents for the energy consumed in heating the resident's hot water.*

Sections 52 and 53 of the Residential Tenancies Act (RTA) apportion liability for utility charges between landlords and tenants/residents. If the rental property is separately metered, the tenant pays for connection and supply and landlords are liable for installation costs. If not separately metered, the landlord is responsible for the installation costs and the costs of connection and supply. Despite the provisions of the RTA, information provided by stakeholders suggests that some landlords may be breaching the requirements of the RTA by:

- *separately billing for the gas consumed in heating the water despite apartments not being individually metered for gas consumption — bills are generally based upon quantity of hot water consumed*

1. *charging differential rates for cold and hot water.*
2. *Disputes in relation to this matter have been heard by the Victorian Civil and Administrative Tribunal (VCAT). The Commission's understanding is that VCAT has heard these disputes under the RTA as this is where its jurisdiction rests.*

In these cases, the Commission understands that VCAT has decided that, under the RTA, only volume based water charges may be recovered by landlords. VCAT has ruled that:

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[114] The question of separate metering is an issue of contention. The VESC chooses apparently because of its philosophical views about *"user pays"* to regard hot water flow meters which measure water volume only not gas volume or heat (energy) to be suitable substitute instruments through which to measure or calculate individual gas consumption in the absence of any flow of gas to a given tenants' premises. Here they openly admit to there being no separate metering for the gas or electricity used to heat water. There is no mention of the requirement to have a meter licence, how metering maintenance and replacement should be maintained and monitored and on what basis it is acceptable to strip end-users of their rights under multiple provisions because of attractive *"look through tax entity"* benefits to Landlords/Owners, who do not normally pass these benefits through to the end-uses; who sometimes use exploitive techniques; and who make collusive arrangements with retailers apparently with full sanction from energy policy-makers and "independent" regulators who sometimes do not see themselves externally accountable in any way, purely on the basis of their corporate legal identifies.

- *The RTA (rather than the energy or water industry Acts) provided the legislative provisions that assist in the resolution of these issues.*
- *The landlord (or body corporate) can bill owners for water used, hot or cold, but only at the cold water rate — administrative charges as well as the gas required to heat water can not be charged to tenants under the RTA unless the utility is individually metered.'*
- *The landlord (or body corporate) is not allowed to read the hot water meter and apply the heating conversion factor.*

In a confidential submission, one stakeholder indicated that one issue with the current charging arrangements is that, under VCAT's rulings, the body corporate is left to pass on costs for energy used in heating water through lot liability. As a result, the body corporate cannot provide for the accurate reflection of individual apartment usage.

The Tenants Union of Victoria has indicated that its concern is that:

… as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities. Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act and other relevant utilities legislation. … because the price at which hot water can be sold in embedded networks is not regulated, onsellers 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. [115/[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.

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These remarks indicate poor understanding of the technicalities and legalities involved, of the laws of contract or understand of and respect for the jurisdiction of other schemes.

So it was very clear where the ESC stood almost 3 years ago on this issue. That position has not altered. Of equal concern is where the NECF stands in the brink of rubber-stamping through proposed legislation, potentially carrying forward the same compromised consumer protections through either omission of commission in the spirit and letter of legislative provision.

Meanwhile the very exploitive practices of which the ESC made mention at the outset of this component of its Draft Decision on Small Scale Licencing continue – with energy retailers and other suppliers of energy capitalizing on loopholes and poorly designed and conceptualized decisions to imposed deemed contractual status on end users of heated water supplies reticulated in water pipes.

The concerns expressed by community agencies such as the Tenants Union Victoria, Department of Human Services, Consumer Law Action Centre and Consumer Utilities Advocacy Centre have gone unheeded. The TUV's detailed submission has been selectively quoted, and despite direct advice about the limitations of VCAT's powers, especially in the face of the current Ministerial Orders in Council governing small scale licencing matters, have remained unattended. This would seem to be a philosophical approach based on what the ESC believes is appropriate and notwithstanding other considerations such as the provisions of contractual law

My own concerns in dedicated submissions on the topic to the ESC (Part 2A Regulatory Review of Instruments 2008), and to MCE arenas. I am reproducing the Deidentified Case study and supporting data that was submitted to the Gas Connections Framework last year to gain some currency and refresh the memories of those who appear to have discarded the matter as a "too hard basket" issue.

I repeat the ESC's obligation and counterparts in other states responsibility for ensuring security and reliability of supply of essential goods and services, and of the MCE to intervene in matters that represent detriment, threaten security of supply of essential services; cause consumer detriment and marketplace uncertainty with exploitive practices continue secure in the knowledge that for the most part the end-customer groups most impacted by inadequate protection in these areas are the least likely to be comfortable with legal proceedings or be in a position to pursue this through VCAT or other recourses. As mentioned previously the processes are protected and come with cost in terms of filing fees and protracted stress. It is entirely unacceptable that such groups of end-users of utilities should be left unprotected.

The TUV pointed out that some permanent residents live in rooming houses, and caravan parks. For as long as any residents were permanent proper protections should apply.

Page 6 of TUV's August 2006 submission to the ESC Small Scale Licencing Review (reproduced in its entirety as an appendix) discusses the absence of monitoring and regulatory oversight in relation to OIC; provisions as follows.

"Furthermore, as noted in the Issues Paper at p 34, .there is no regulatory oversight ensuring that the provision of the OIC requiring distributors and on sellers to inform customers of the VCAT dispute resolution mechanism is being complied with. Without appropriate supervision of distributor and on-seller behaviour, this provision will not provide customers with adequate protection equivalent to that enjoyed by customers who do not reside in embedded networks. This is manifestly unfair, and should be addressed as a matter of urgency."

In its follow up submission in September 2006 (also reproduced as an appendix in its entirety) TUV raises further issues relating to the gaps, monitoring of non-compliance, the status of consumers in deregistered networks and any associated RoLR considerations, non-compliance with distribution or disconnection.

No monitoring scheme exists regarding those who are properly considered to be embedded under existing PIC provisions – which are exclusive to metered electricity.

Many misconceptions exist over the proper definition of exempt frameworks, their application and monitoring.

TUV has raised the issue of whether over housing types and tenures should be captured within the regulatory model, and has also mentioned the NHW arrangements and the unregulated on-selling of water, leaving aside what energy providers are endeavouring to do in terms of wrongly claiming "consumption of energy" and implying "illegal consumption of energ7" 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 brining clarity, fairness and proper monitoring of any of these issues – so they go uncheck, 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 plan that they are not only reluctant but also see conflicts of interest inherent in changes to constitution and charter that enable the handling of these complaints.

Again, the philosophical reasoning has been adopted by the regulator(s) without the smallest regard for best practice trade measurement practice, for overlap and conflict with other schemes, and with the enshrined existing rights of individuals.

As a consequence the wrong parties are being held contractually liable for a product they do not receive and which cannot be measured by legally traceable means.

It is not just a matter of costs, but the implications of being regarded a deemed customer without justification, and being expected to accept other contractual obligations that cannot be delivered by residential tenants who have no access to the substitute meters (hot water flow meters) relied upon to guestimate gas or electricity usage by rule-of-thumb imprecise methods.

These matters need to be unambiguously clarified within the new Energy Laws and Rules such that consumer rights do not become further eroded.

I quote directly from the ESC's final decisions in relation to the small scale licencing review 2006 – which has left continuing confusion and unaddressed issues.

ESC 2007 Small Scale Licensing Framework: Final Recommendations, Melbourne.

Charging for the supply of bulk hot water

"This review has assessed the adequacy of the current regulatory arrangements applying to the small scale distribution and/or resale of energy to customers within embedded networks. It has provided an opportunity for stakeholders to assess whether these arrangements are sufficient for regulating the activities of small scale operators and reflect upon the appropriateness of the obligations that they must comply with.

In deciding upon its recommendations, the Commission has given consideration to its objectives under the Essential Services Commission Act 2001, the Minister's views as set out in his letter to the Commission and the current national arrangements as administered by the Australian Energy Regulator.

Another important consideration has been the benefits that small scale distribution and/or reselling activities can provide to their customers and to customers in the broader market. Any revised regulatory arrangements should aim to minimise the cost impact on small scale operators themselves so that they can continue to offer these benefits to their customers.

The Commission has concluded that the current regulatory framework applying to small scale distributors and/or resellers needs improvement. However, it believes that these improvements can be achieved through only minimal changes to the existing framework, minimizing the impact on small scale operators while also improving the customer protection framework.

Once the Commission's role in administering the revised arrangements is clarified, the Commission will undertake a comprehensive consultation process consistent with its Charter of Consultation and Regulatory Practice."

At this stage, the Commission does not have any specific timelines for implementation as these will depend upon the Minister's deliberations on the recommendations and how soon the revisions to the legislation occur. However, the Commission will be aiming to begin implementation as soon as practicable after a response is received.

"Some stakeholders have raised the issue of the way that landlords charge their tenants for bulk hot water.

In this situation, gas or electricity is used to heat the water prior to its circulation to residents. In other words, energy is consumed in providing another good or service — hot water. Each residency is only separately metered for the water consumed and the gas/electricity used to heat the water is not separately metered.[116] *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.*

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[116] The question of separate metering is an issue of contention. The VESC chooses apparently because of its philosophical views about *"user pays"* to regard hot water flow meters which measure water volume only not gas volume or heat (energy) to be suitable substitute instruments through which to measure or calculate individual gas consumption in the absence of any flow of gas to a given tenants' premises. Here they openly admit to there being no separate metering for the gas or electricity used to heat water. There is no mention of the requirement to have a meter licence, how metering maintenance and replacement should be maintained and monitored and on what basis it is acceptable to strip end-users of their rights under multiple provisions because of attractive *"look through tax entity"* benefits to Landlords/Owners, who do not normally pass these benefits through to the end-uses; who sometimes use exploitive techniques; and who make collusive arrangements with retailers apparently with full sanction from energy policy-makers and "independent" regulators who sometimes do not see themselves externally accountable in any way, purely on the basis of their corporate legal identifies.

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*

3. *charging differential rates for cold and hot water.*

Disputes in relation to this matter have been heard by the Victorian Civil and Administrative Tribunal (VCAT). The Commission's understanding is that VCAT has heard these disputes under the RTA as this is where its jurisdiction rests.

In these cases, the Commission understands that VCAT has decided that, under the RTA, only volume based water charges may be recovered by landlords. VCAT has ruled that:

- *The RTA (rather than the energy or water industry Acts) provided the legislative provisions that assist in the resolution of these issues.*
- *The landlord (or body corporate) can bill owners for water used, hot or cold, but only at the cold water rate — administrative charges as well as the gas required to heat water can not be charged to tenants under the RTA unless the utility is individually metered.'*
- *The landlord (or body corporate) is not allowed to read the hot water meter and apply the heating conversion factor.*

In a confidential submission, one stakeholder indicated that one issue with the current charging arrangements is that, under VCAT's rulings, the body corporate is left to pass on costs for energy used in heating water through lot liability. As a result, the body corporate cannot provide for the accurate reflection of individual apartment usage.

The Tenants Union of Victoria has indicated that its concern is that:

… as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities. Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act and other relevant utilities legislation. … because the price at which hot water can be sold in embedded networks is not regulated, onsellers 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

Hot water flow meters measure water volume not heat. They are poorly designed to even withstand heat Even if technology were developed, either energy is being sold or water. It cannot be both.

Energy retailers have no right to sell water and do not own the water in the first place. Mere ownership of hot water flow meters and infrastructure does not create a right of contract or right to on-sell the water or the heat that is used.

The gas supplied to a single master meter is supplied to an Owners Corporation or Developer and is not consumed at all by end-users of heated water.

The National Measurement provisions expect to see legal traceability of goods or services that can be measured by a trade instrument. Utility exemptions will be lifted when all procedures are in place. The NMI is the sole authority on legal metrology.

The ESC is misguided in its suggestions, and has not taken into account numerous comparative law considerations including contract law under common law provisions or substantive unfair terms under generic provisions – these will be incorporated into the new generic laws.

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

These arrangements were complicated, did not prevent price shock to end-consumers, but instead created higher costs, confusion, expensive complaints handling and even litigation.

It is simpler and fairer to require retailers to bill Owners' Corporations directly, to mandate for new buildings to install individual instantaneous water tanks and for the principle of flow of energy to be upheld. Grants should be provided for retrofitting of existing buildings. Boiler tanks of the type described are notorious for harbouring water-borne diseases. One woman died in Queensland on this account using water supplied from a communal water tank that was poorly maintained. The system should not be facilitated but banned. Landlords are not motivated to maintain systems of this nature if there are reward to continue to neglect maintenance responsibilities, which fall into a grey area and remain unmonitored as to outcomes and impacts on end-consumers

The system did not prevent rent hikes, but continued to feather the nests of Landlords unwilling to take direct responsibility or to appropriately fit multi-tenanted dwellings.

This not merely an economic issue with regard to charging, it is entrenched in the principles of contractual law, legal traceability and fairness.

I quote verbatim from the Tenants Union Victoria submission[117] to the ESC's small scale licencing review cited above:

"TUV is concerned that the existence of embedded networks creates confusion about the responsibility for payment for utilities for tenants and residents of rented accommodation within these networks.

In many instances, this confusion results in payment of utilities costs in excess of what would normally be required.

The Residential Tenancies Act 1997 (RTA) is the primary legislation governing residential tenancies, including caravan parks and rooming houses, in Victoria.

Sections 52 and 53 of the RTA apportion liability for utilities connection, service and consumption between landlords and tenants and residents of caravan parks and rooming houses:

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.

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

However, despite the clarity of the Act on point of liability for utilities charges, and these VCAT orders, we believe that these practices are still occurring.

The following case studies illustrate the dissonance between the provisions of the Residential Tenancies Act 1997 and billing practices adopted by some bodies corporate or owners/managers of dwellings in embedded networks. In particular, the potential for profiteering from tenants and residents in the provision of utilities need to be urgently addressed. "

Please see the Appendices for further details and case studies.

"Hot water pricing and the regulation of metering in embedded networks

The previous case studies also demonstrate that there is insufficient regulation protecting consumers in embedded networks from profiteering in regard to the sale of hot water. In the Docklands and Courtyard Apartments cases, the consumer protection provisions of the Gas Industry Act did not apply because hot water, not gas, was being sold. However, because the price at which hot water can be sold in embedded networks is not regulated, on-sellers are able to set their own process and residents may be charged at higher rates than consumers of the same products who do not reside in embedded networks. This is manifestly unfair, and effectively creates two classes of consumer, one of whom is afforded appropriate legislative protections from exploitative pricing by providers, and one who is not.

Furthermore, these case studies also raise the question of the meters used to measure residents' consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained. Again, consumers in embedded networks are not being afforded the same level of protection from unfair practices and exploitation as other utilities consumers, and this must be addressed to ensure parity among Victorian consumers. "

The remainder of the TUV submission deals with specific issues raised by the Paper. Please refer to the appendices for further details of this and related matters.

The Appendices also include the Deidentified Case Study and other material submitted to the Gas Connections Framework Draft Policy Paper and to the Treasury's Unconscionable Conduct Issues Paper since I am determined to bring forward for attention such matters as have been consistently overlooked by the MCE in considering the general and specific rights and needs of residential tenants in particular and upholding a commitment to ensure that the national energy laws and rules reflect a fair and comprehensive coverage in the proper protection of all Australians.

There remain many concerns about how the Exempt Selling Regime and other similar categories of housing types and residential tenants can be appropriately covered – and how the existing provisions will be monitored and evaluated.

As mentioned elsewhere the AEMC has undertaken over 100 Rule Changes but there appears to have been no mechanisms adopted to monitor and evaluate outcomes and sweep for evidence of market failure.

The above section was included in my detailed submission to the NECF2 Package in February this year.

I have since discovered further pertinent matters that are complex and inter-related which I have raised with numerous parties including the AEMC, who is seeking a Rule Change at the instigation of the AEMO; the AER in the process of assuming further national responsibility for energy and water regulation; the ACCC in view of the consumer protection and competition issues involved, as well as the monopoly considerations

I give below the substance of my emailed correspondence to the AEMC of 16 April copied to several other relevant parties and re-sent on 18 April to the generic electronic address. This was copied to several stakeholder bodies including the AER and AEMO

"Proposed Rule Change Provision of Metering Data Services and Clarification of Existing Metrology Requirements Rule Change - Section 107 Notice

I note the second notice of extension given by the AEMC on 15 April 2010 under section 107 of the National Electricity Law to extend the publication date for the Draft Rule Determination to 6 May 2010, on the basis of the complexity of the matters posed under the proposed Rule change at the instigation of the MCE.

I missed out on responding to the original proposal but note that there is an opportunity to respond to the Draft Rule Determination after its publication, for which a period of some two months is likely to be offered – refer to our recent telephone discussion on this matter.

I note this matter was not transparently discussed in the context of the extensive consultations undertaken in connection with the NECF Package and that there were many matters left without clarification or indeed any attention at all. All 41 submitters to the NECF2 package raised objections and concerns about gaps and the consultation processes, albeit that different groups of stakeholders had discrepant perspectives.

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[118] from the description of services by industry participations delivering alleged benefits of AMI and Smart Grid initiatives for *"electric, gas and water utilities"* using e-meter technology.

For example emeter.com describes its services as follows:

"www.emeter.com

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

Jemena describes its services in this regard as follows:

Jemena http://www.jemena.com.au

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

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

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

Jemena is owned by Singapore Power International."

On 19 March 2010, the AER received the revised access arrangement proposal for the NSW gas distribution network owned by Jemena Gas Networks (NSW) Ltd (Jemena).

[118] *www.smartgridaustralia.com*

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.[119]*"*

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

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

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

As of 2010, there were more than 8,000 meters older than 25 years. It is proposed that these meters are gradually removed over 2011-2014. In 2015, the number of units is much greater than in previous years. This is due to increase in number of water meters in apartments due for replacement in that year.

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

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

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

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[119] 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.

1.8.1 Radio frequency data loggers

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

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

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

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

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

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

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

The original reasoning adopted by the ESC in 2004 when the *"bulk hot water arrangements were discussed"* were flawed in the first place.

They sought to validate the provisions, which have been discrepantly adopted in other states by transferring the substance of the Bulk Hot Water Guideline into the Energy Retail Code in the illusion that the arrangements are consistent with generic laws and revised trade measurement provisions, subject to pending lifting of utility restrictions. To defy the intent and spirit and letter of such laws is failure to adopt responsible policy, and will leave providers of utilities at risk.

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

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

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

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

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

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

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

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

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

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

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

If any party should be contractually obligated for any metering and data services it should be the developer or Owners Corporation (Body Corporation) who originally requested the gas or electricity metering installation. Any arrangements as to ownership of water assets, including metering and associated equipment is an arrangement between provider and the controller of premises, normally once developer stage is passed, the Body Corporate, not the end user of heated water.

I am concerned that the 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 Provision of Metering Data Services and Clarification of Existing Metrology Requirements Rule Change - Section 107 Notice

Electricity, Rule Change

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

I note that industry stakeholders have expressed numerous concerns about this matter, to which I have added my own.

As observed by Jemena Electricity Networks (Vic) Ltd (**JEN**) in their submission of October 2009

*"The Rule Change proposal, submitted by AEMO, principally seeks to transfer the current deed-based framework that governs Metering Data Providers (**MDPs**) to a framework contained in Chapter 7 of the National Electricity Rules (**NER**). It does this by creating a new category of MDP in the NER and transferring responsibility for collecting metering data from Type 1,2,3 and 4 meters from AEMO to the Responsible Person (**RP**)."*

Jemena: (16 October 2009)

"Likely Costs to Stakeholders

As outlined above, this consultation is one of several that are currently running that will result in changes to the NER. This clearly raises timing and implementation issues. It also contributes to an increased regulatory burden at a time when the specific need for change at this precise time is unclear.

Need for Rule Change and Timing of Consultation

*The proposed Rule Change is extensive and signals a substantial move from the current NER. The current consultation program is ambitious with several related and overlapping consultations being carried out that are currently at various stages. These include the AEMO consultation on Metering Provider (**MP**)/MDP accreditation and the MCE Smart Meter National Electricity Law (**NEL**) amendments. Jemena understands that the National Stakeholder Steering Committee is developing considered changes for smart metering and suggest that once the final determination is set for this Rule Change it could be used as a firm basis for those changes.*

Jemena submission on AEMC rule change on MDPs.doc

"Service Level Procedures

*Jemena does not support the Service Level Procedures (**SLRs**) contained at the proposed 7.2.9 of the NER. The majority of these SLRs are already contained in the Metrology Procedures at 7.14 of the NER. Jemena would welcome clear and efficient documentation without unnecessary duplications."*

"Changes to Settlement Ready Data

The change to the definition of Settlement Ready Data in Chapter 10 of the NER potentially requires the replication of metering data from AEMO systems to the LNSP on the possibility that AEMO has done additional processing on the meter data. Jemena does not support changes to settlement ready data that would require significant system changes for the replication of metering data from AEMO systems to the LNSP to bring the data across for billing purposes."

SP AusNet's reservations about complexity are noted in their submission of 21 October 2009. This provider is part-owned by the Singapore Power Consortium who has majority share

UED is associated with the Jemena Group, owned by Singapore Power International, a holding company for two other Jemena companies which, also manage numerous other Jemena-related companies, including outsourcing and data providers that appear to be related parties. In relation to both gas and electricity the corporate and ownership structures of Jemena, UED, AGL, Alinta and Multinet (all owned by the Singapore Power Group) there are related matters that are pertinent in the broader context of outsourcing - as raised also with the AER and ACCC - see my correspondence

United Energy Distribution (UED) has raised significant issues regarding smart meters and their pertinence to the issues being considered, as well as other concerns.

Grid Australia in its submission o 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) (inappropriately imposed contractual status on the wrong parties as recipients of water reticulated in water pipes and receiving no energy at all, I hope this matter can be corrected as a matter of policy at the earliest opportunity since the provisions are unfair, create unnecessary costs with bizarre metering arrangements for water meters; and have serious implications for rising costs as a result of inappropriate adoption of metering procedures and practices that are inconsistent within existing energy provisions and with numerous other legislative provisions in other schemes

In my view the issues of smart meters and smart grids are inter-related issues.

The role of the National Measurement Institute as sole legal authority on trade measurement issues, including servicing and licencing issues appears not to have been contemplated or referred to.

It is of concern that decisions of this nature appear to be made without appropriate levels of inter-body collaboration.

The implications of revised generic laws under Trade Practices provisions appear not to have been taken into account. As mentioned Part 1 of the changes to the TPA (Australian Consumer Law) became operational from 14 April 2010, the day of Royal Assent. Further changes as part of the Trade Practices (Australian Consumer Law) Bill (no.2) 2010 are under deliberation by the Senate Standing Economics Committee.

Technical, safety, operational and comparative law considerations appear to have been incompletely considered.

I note that there are no consumer perspectives other than my own as an individual stakeholder belatedly raised.

Notwithstanding lateness, given that the AEMC is still deliberating it would be inappropriate to ignore the thrust of the issues raised simply on the matter of procedure and timelines.

These matters may also be relevant to other inquiries including:

Australian Energy Market Commission

Updates:15 April 2010

Extension of time for the making of Rule Determination for the SA Jurisdictional Derogation (Connections Charging) - Section 107 Notice

Electricity, Rule Change

On 15 April 2010, the Commission gave notice under section 107 of the NEL to extend the publication date of the Rule determination to 6 May 2010. The Commission considered an extension of time is necessary due to a material change of circumstances

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

Please refer to:

Consultation by the AER on the Revised Proposal by Jemena Gas Networks (NSW) Ltd

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.

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

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

NECF 1 Consultation RIS

http://www.ret.gov.au/Documents/mce/_documents/Madeleine_Kingston_part320081208120718.pdf

Gas Connections Framework Draft Policy Paper (2009)

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

NECF2

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

www.ret.gov.au/Documents/mce/emr/rpwg/necf2-submissions.html

http://www.ret.gov.au/Documents/mce/_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/Madeliene%20Kingston.pdf

ESC Review of Regulatory Instruments

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

also

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

www.pc.gov.au/projects/inquiry/consumer/.../subdr242part4

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

http://www.pc.gov.au/__data/assets/pdf_file/0007/89197/subdr242part8.pdf

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

http://www.pc.gov.au/__data/assets/pdf_file/0006/83958/sub007.pdf

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

AEMC

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

examines the structure of the marketplace at the time in some detail, including economic considerations, price and profit margin considerations in the light of commissioned reports; some best practice regulatory issues

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

Finally, I reminded the AEMC of the changes to generic laws and the Media Release issued on 15 April. he first part of the Australian Consumer Law (replacing the TPA) is now in force.

See

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

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 report

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

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

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

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

Des Pearson's findings were (Intro 2.1):

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

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

http://download.audit.vic.gov.au/files/111109_AMI_Full_Report.pdf

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

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

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

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

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

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

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

1. The department's project governance has not been appropriate for the nature and scale of the market intervention the project poses. In particular:
2. Its advice to government on risk assessment has been inadequate
3. The level of community engagement has been inadequate, given the significant effect on consumers
4. DPI has engaged with the project in only a limited way as an 'observer' during its implementation phrase.
5. As there were not enough staff assigned by the DPI to the project, it has not been able to adequate 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 leave. 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 nit was to see *"lack of concrete information on the table"; "lack of real time customer load and behavioural data,* (thus) making modeling difficult. He has long held that *"cost smearing does absolutely nothing for the user/causer pay principle under pinning the market."*

John Dick has also said:

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

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

In relation to gas John Dick had commented that there appears to be *"no national vision/energy policy .The nation is still running on the 1977 Frazer Govt policy of "dig it up sell it off and use the proceeds to import."*

In Queensland there are many concerns about sale of assets. I have discussed some of these in my submission to the NECF2 package, and the implications also for exempt selling regimes, the bulk hot water arrangements, and any warranties and gurantees that may have been provided to the only host retailer who inherited the "bulk hot swater clientele."

A direct victim of these policies whose grievances apparently remain unaddressed made an independent submission to the NECF2 package as the only private individual input. He discusses the Queensland situation, monopoly and exploitation of those least able to fight back and the implications for him and his fellow tenants living in a public authority block of apartments that his poorly maintained.

His efforts to call attention to unfair practices openly endorsed by all concerned were not rewarded with outcomes of any kind..

In a climate where the authorities writing new laws allegedly mindful of appropriate consumer protections, despite the adoption and imminent enhancement of generic laws, one has to ask how confident consumers can afford to be that their interests will be safeguarded by policy-makers and regulators many of whom appear to be operating in vacuum conditions without the collaborative efforts that are required to ensure that guarantees that there will be no duplication, inconsistency or erosion of consumer rights.

The "bulk hot water arrangements" are but the tip of the iceberg.

There are numerous health and safety considerations inherent in the use of stationery inefficient boiler tanks that are not maintained properly, where there is no lagging of pipes and where wastage of water up to 20-0 litres can occur before water is of an acceptable temperature. There is a risk of Leigionnaires disease also. One Australian woman has already died as a direct result of exposure to contaminated water supplied from such a tank.

Far from allowing expensive upgrades with the idea of using remote readings – allegedly of gas but using RF heads on water meters these boiler tanks should be banned and each individual abode retrofitted with a separate instantaneous water heater where direct flow of energy can be measured and charged for burying legally traceable means.

When efforts are made to establish who is responsible the accountability shifting game begins. Aside from the bizarre calculation and trade measurement methods used, expensive contractual debates, erosion of fundamental rights under generic laws result, and consumers remain dissatisfied and unprotected.

It is entirely unacceptable that as new generic laws are put into place a significant lack of governance and coordination appears to be accompanying the roll out of all sorts of so-called innovative ideas, but consumer protections are not in place, remain inadequate and no one body seems to have sufficient responsibility to ensure better outcomes, more guarantees and restoration of consumer confidence.

Therefore I have as a last resort raised these issues as the Senate decides how best to enhance the generic provisions and/or refer the matter for further scrutiny perhaps by the Senate Committee for Fuel and Energy.

Distributors are now proposing to spend huge sums of money fully recoverable from consumers to upgrade the water meters that are not necessary, do not measure gas or electricity, simply because they have been permitted to consider these as suitable instruments through which gas and electricity may be measured. They are not.

My reservations about the governance and accountability of the DPI, the state energy regulator and the self-regulated complaints scheme EWOV are a matter of record in public consultation arenas.

I have also expressed many concerns about the perceived consumer protection gaps in the National Energy Consumer Framework (NECF2) on the brink of being rubber-stamped under legislation particularly in relation to residential tenants, especially in relation to the bizarre bulk hot water arrangements in which in the absence of an energy meter or any delivery of energy facilitated by its flow to the abodes of such tenants, hot water flow meters are being relied upon to measure guestimated gas usage for the alleged heating component of that water and in the absence of any legally traceable means of measuring gas or electricity consumption.

The issues pertinent to proper interpretation of contractual rights and responsibilities in these matters are far from clarified in either the generic provisions or proposed energy provisions. Such clarification as does exist goes to consumer detriment.

The opportunity to thoroughly air these matters existed but squashed. Though I gave up the time to attend a two-day workshop it was made abundantly clear from the outset that the matters would not be addressed or discussed, regardless of merit. but no reasons were provided. The responsible Minister took the same stance with approached individual. I had also gone to the lengths of writing to every single Minister on the MCE.

I am prepared to say quite frankly now that I am extremely unhappy about the levels of accountability or attention to industry-specific protections o0r 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.

COMPLAINTS HANDLING AND REDRESS
RELATES ALSO TO EXEMPT SELLING REGIME

406 Functions and powers of energy ombudsman

(1) The energy ombudsman has the following functions and powers:

(a) to receive small customer complaints and disputes;

(b) to investigate those complaints and disputes;

(c) to facilitate the resolution of those complaints and disputes;

(d) to resolve those complaints and disputes;

(e) to identify and advise on systemic issues as a means of preventing complaints and disputes.

(2) Those functions and powers are to be performed and exercised in accordance with—

(a) this Law and the Rules; and

(b) the energy ombudsman constitution provisions, including (but not limited to)—

(i) procedures for receiving, investigating and facilitating the resolution of small customer complaints and disputes; and

(ii) any relevant monetary limit.

(3) The energy ombudsman may decline to investigate a small customer complaint or dispute where the small customer concerned has not provided the retailer o r distributor with a reasonable opportunity to address the complaint or dispute in accordance with the retailer's or distributor's standard complaints and dispute resolution procedures.

(4) Subsection s (1) and (3) do not affect any functions or powers the energy ombudsman has under the energy ombudsman constitution provisions of this jurisdiction.

I cite directly from EWOV's Submission to Essential Services Commission Licencing Framework Issues Paper August 2006, p 3[120]

Section 4.1.1 – Third party review and customer dispute resolution mechanisms

Comments on the current customer review and dispute resolution mechanisms provided under the Order in Council and the extent to which small scale operators are currently compliant with the Order in Council's dispute resolution mechanisms

As the Issues Paper notes (on page 27), the Schedule to the Order in Council provides that, in the event of a dispute, small scale distributors and/or on-sellers are required to advise the customer of their right to have the matter heard by the Victorian Civil and Administrative Tribunal (VCAT).

For consumers, there are two shortcomings with this provision:

- *Not all customers would regard VCAT as an accessible and practical option. There is normally a fee for taking a dispute to VCAT1 and, as the Issues Paper notes, it can be a lengthy process2. A tribunal forum can also be intimidating for some customers.*
- *As the Issues Paper notes (at page 34), there has been no regulatory oversight of whether this provision (or the other conditions in the Order in Council) are being complied with.*

  EWOV has been contacted by some customers regarding energy and water issues relating to small scale distributors and/or on-sellers. Attachment A to this submission provides a sample of the matters that have been raised.

  Where the complaint has related to a small scale distributor and/or on-seller, EWOV has not had jurisdiction to investigate the matter. EWOV has instead provided these customers with information – for example, about the ESC's guidelines on electricity prices in caravan parks. As EWOV's role and experience of these complaints has been limited, we are not in a position to comment comprehensively on whether small scale distributors and/or on-sellers are advising customers of their right to have their dispute heard by VCAT. Whilst a few of the customers who have contacted EWOV had taken their issue to VCAT, EWOV does not know how these customers became aware of this option.

  "In summary, EWOV wishes to make the following points regarding the practicalities of customers in small scale arrangements having access to the EWOV scheme:

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[120] EWOV's Submission to Essential Services Commission Licencing 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 SSL Draft Decision

Insert link

- *It would be consistent with EWOV being a 'one stop shop' for Victorian consumers with energy and water complaints.*
- *It would benefit customers of small scale distributors and/or on-sellers, as EWOV's services are free to customers and readily accessible (95% of cases are received by phone).*
- *EWOV does not consider that it would be appropriate for the government to unilaterally mandate participation in the EWOV scheme for the following two reasons:*

(1) Any expansion of the EWOV scheme to cover complaints relating to small scale distributors and/or on-sellers would require extensive prior consultation with and approval of the EWOV Board.

(2) If it is proposed that the EWOV scheme should cover a significant number of small scale distributors and/or on-sellers, then an independent feasibility study would first be required to consider the nature of the 'new industry', case estimates, cost allocation methodology, resourcing, staff training, budgeting and funding implications and amendments to EWOV's Constitution and Charter.

Such independent feasibility studies have been undertaken previously – when the scheme expanded to include the natural gas, water and liquefied petroleum gas (LPG) industries.

If, following consultation with EWOV and, if necessary, an independent feasibility study, the decision is made that small scale arrangements should participate in the EWOV scheme, then this decision should be backed up by a clear regulatory

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?

The Issues Paper states (at page 27) there is an initial $5,000 fee to join the EWOV scheme. This information is out-of-date and incorrect.

In May 2006, EWOV's Constitution and Charter were amended to include an ad hoc jurisdiction – so as to allow other participants in the electricity, gas and water industries to join the scheme by agreement, as 'Contracting Participants'. In relation to EWOV's Annual Levy, EWOV's Constitution now provides (at clauses 9.2(c) and 9.2(d)) that, in summary, each Contracting Participant will contribute an amount that EWOV considers equitable based on the Contracting Participant's customer numbers and share of total cases.3

This means there is now scope for a small scale distributor and/or on-seller to join the EWOV scheme as a Contracting Participant, with the Annual Levy as agreed by them and EWOV.

However, EWOV is mindful that the number of small scale distributors and/or on-sellers is potentially very large – although the exact number is not known. The entities involved are diverse and some are complex (for example, an apartment block with managing agents and multiple bodies corporate). EWOV's initial inclination is that it may be preferable to create a new membership category for small scale distributors and/or onsellers, rather than entering into a vast range of separate 'Contracting Participant' agreements. The creation of such a new membership category would require amendments to EWOV's Constitution and Charter[121]/4."

I refer to concerns about industry-specific complaints schemes commonly but misleadingly known as ombudsman, though they do not report to Parliament, but instead are substantially subservient to economic regulators and structured as separate legal entities. Nevertheless they are set up under statutory enactments and ought to be more accountable.

On the basis of EWOV's own concerns about conflicts of interest during the consultative dialogue on small scale licencing policy (see for Madeleine Kingston submission to the PC's Review of Australia's Consumer Policy Framework subdr242part4 repeated in submission to MCE SCO (2008) NECF1 Consultation RIS; repeated in submission to Treasury's Unconscionable Conduct Issues Paper 2009 I have asked some provocative questions:

In failing to share the findings of a feasibility study commissioned by EIV to examine the small scale licencing market, and in expressing so many reservations about wishing to handle complaints arising from dealings of end-consumers with small scale licencing providers, whose interests were EWOV representing in taking such a stance and how does it balance its perceived conflicts of interest?

It seems that EWOV has the right to commission feasibility study about expansion of role for example without publishing results that would help inform public policy decisions (see for example small scale licencing and EWOV's response to the ESC Small Scale Licencing Review discussed elsewhere).

Whose interests were EWOV representing in taking such a stance and how does it balance its perceived conflicts of interest?

- The general community?
- End-users of utilities whether or not actually receiving energy to their respective residential premises? (hot to be confused with the inaccurately applied term :supply address and supply point which have particular technical meanings regarding the double custody changeover point
- Landlords/Owners' Corporations?

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[121] EWOV's Charter found at

- Small Scale Licencees?
- The overseeing entity the current energy regulator (state or federal)?
- Their own legal identity and more insular interests in case of litigation because of the scope for them to be sue and be in sued their own right?
- The politicians of the day?
- How many years will the energy debacle continue without appropriate intervention in terms of complaints redress and energy policy generally?
- What lessons have been learned?

  See further discussion of small scale licencing issues in separate sections.

It is my contention that existing industry-specific complaints schemes, run, funded and managed by industry participants, are insufficiently equipped with the knowledge and expertise to deal with complex cases where legal interpretation and technicalities such as discussed in this document, to say nothing of extraordinary jurisdictional limitations.

Schemes such as for example Energy and Water Ombudsman, endeavour to resolve issues, sometimes by using tactics that are perceived as being *"high pressure conciliation"* methods.

EWOV, for example has been known to seek out independent legal advice to support the stance of industry scheme members, (given that their Constitution is exclusive to scheme members, though Committees do allow some consumer group representation), instead of recognizing their jurisdictional boundaries and knowledge gaps and making timely and comprehensive referrals to policy makers and relevant regulators and the State Ombudsman where statutory policy is seen to be driving unacceptable market conduct.

Reporting of complex cases that remain unresolved for well in excess of twelve months is also an issue.

It is of public concern that EWOV's staff have apparently seen fit to adopt *"legal posturing"* stances by using oral and written legal stances and even threat of premature closure of files if a Complainant sought legal advice by way or seeking legitimate support or exploring legal or other options. This in itself represents a huge infringement of sacred legal rights and is contrary to the principles of the (Victorian) Attorney-General's Statement of Justice.

Until or unless the legislation clearly spells out what is acceptable trade measurement practice, consumer detriment and poor practice standards will continue to be unresolved issues of widespread concern. It is time for these issues, that have been festering for years on end unaddressed, to be appropriately addressed by State, Territories and Commonwealth bodies responsible not only for ensuring consumer protection, but best practice standards and appropriate outcomes.

As to identification of and distinction between conduct that is related to contractual matters and conduct that is more appropriately described as breaches of *TPA* and *FTA* provisions, these matters are not addressed in an appropriate way with a proper understanding of such breaches or appropriate referral.

The direct experiences the subject of case study and account illustrate the convoluted inter-body inter-relationships that remain cloudy and non-transparent both to the public and to the very bodies who are parties to such instrument

In my Part 3 submission, referring to the commissioned independent evaluation undertaken by EWOV's board regarding small scale licence operators, I pointed out that EWOV refused to allow access to those results, thus forcing duplication of the survey if appropriate data was to be obtained.

EWOV publicly resisted all proposals in relation to proposals to extend their involvement to deal with small scale licencing matters impacting on embedded end-consumers *(of electricity since gas consumers can never be embedded, this commodity for safety reasons always being provided directed by the Gas Distributor normally through a retailer or sometimes third parties*.
By its own admission EWOV felt this would raise conflicts of interest for them, presumably since their funds come from their membership, consisting of market participants (energy distributors and retailers and water distributors and retailers)
Comment:

Beyond that I have endeavoured to demonstrate my view that the level of effectiveness, efficiency, fairness, impartiality and proper handling of complaints through the energy complaints scheme EWOV, consistent with mandated benchmarks under the *Gas Industry Act 2001* (Victoria) appear not being consistently met and that perceptions of public bias on the basis of legal posturing and legal stancing and other conduct detailed as a case study appear to be compromising proper access to justice in complaints handling and redress. Finally, the issue of accountability for complaints schemes and proper compliance enforcement are addressed, as well as further comment on advocacy issues.

As summarized in my extensive annotated contents pages, my Part 3 submission mainly addresses issues of redress and enforcement with the focus on government accountability, the complexities of ADR service delivery.

It demonstrates that several bodies believed to be delivering these services are not in fact offering mediation at all, or impartial face-to-face facilitation of pre-court options between parties. Nor do they advocate, arbitrate or have equivalent training to professional ADR providers or those with levels of professional development and training best suited to such provision.

I hope that it will not be too long before these issues are examined and addressed much more closely.

I realize that the current review has its limitations in terms of its reference terms and that it has concluded, subject to finalization, printing and publication of the Final Report Stage 2

I remind the all policy makers and regulators and others of Peter Mair's views citied in Part 1 and 2, and in his own submission to the Productivity's Commission Review of Australia's Consumer Policy Framework (2008) that regulators can often be scapegoats for unpopular (and dare I say inappropriate policies). It is not enough to merely look at regulation since a narrow focus on these parameters will possibly miss the driving forces behind such regulation – which comes from the statutory authorities responsible in the first place for the formation of the vast majority of policies in place.

In the arena of implementation, regulators have scope that often escapes the scrutiny, governance and accountability that the public expect and that should be the cornerstones of improved regulatory practice.

The PC will have many future opportunities to identify what should be tackled next. My view is that a far-reaching long-range strategic plan may assist in policy-making, regulatory, economic and social policy planning, such that mine-sweeping for potential *"hot spots,"* regulatory and performance compromise and early signs of failure can be acted upon before the issues become entrenched and showing signs of festering. At that late stage the canker resembles that of unaddressed festering ulcers that do not respond to more traditional forms of treatment. Metaphorical antibiotic treatments and other such measures have no chance of working well or quickly. In a regulatory and policy-making context the result may often be irreversible damage, entrenched attitudinal impediments to smooth functioning and highly compromised public confidence. Without that all is lost.

On the issue of the silencing of dissent; at least adequate levels of real advocacy for real consumers beyond the policy debate, and effective stakeholder participation and involvement in the public policy debate across the board, I have raised the ongoing concerns of many and have added my lone voice to these concerns.

Industry-specific Complaints Redress

Structure and administrative law coverage

The overall structure of these schemes and their scope, training, skills, jurisdictional limitations and real rather than apparent levels of independent decision-making, have significant implications for regulatory policy making and therefore cannot be taken in isolation from regulatory design.

I quote from Professor Luke Nottage's submission 114 to the Productivity Commission's Review of Australia's Consumer Policy Review

"Particularly in small claims therefore a growing number of consumers are likely to turn to the burgeoning industry-association based "ombudsman" dispute resolution schemes. However these are not designed efficiently to aggregate collective interests.

As mentioned at the outset, Australian consumer law – "in books" and "in action" – has been allowed to slip for too many decades in too many areas to the detriment of consumers more than firms. It urgently needs to be reassessed from first principles in light of current thinking in economics but also many other disciplines and then reformulated comprehensively to maximize its impact on all involved. In doing so however Australia needs also to become more open to developments in the laws practices and community expectations of major trading partners such as Japan and the EU. This will be hard because we had become accustomed to them coming to us for inspiration; but it is now time to learn also from them."

The current structure and accountability parameters of industry-specific complaints schemes generally. in a *"bourgeoning industry"* appears to be such that in addition to more general concerns about the structure of industry-specific complaints schemes; the current legal structure of such schemes gives rise to perceptions of unaccountability. In particular, grey areas of accountability under administrative law necessitate third party accountability through economic regulators (who also believes that is externally unaccountable); or through a statutory authority with overseeing responsibilities only.

An example cited in this submission is Victoria's energy-specific complaints scheme EWOV who is adamant about its independence and alleged unaccountability (because of legal structure and support in this perception from its so-called overseeing entity VESC).

The current structure of industry-specific complaints schemes may often be falling short of community expectation in terms of standards and scope of provision.

The current structure of industry-specific complaints schemes have jurisdictional powers that are exceptionally limited; with policy matters tariffs and a host of issues entirely outside their scope; their binding powers are even more limited, with binding decisions obtainable only with the participant's agreement, which is rarely obtained. There have been a total of 36 decisions in 12 years, and none during the past six years.

There may be room to consider whether schemes that enjoy *"separate legal identity"* and therefore see themselves as untouchable under administrative law. This cannot be in the public interest where these bodies are nominated to field public complaints, including regarding essential services, and where there are concerns about how adequately those complaints are managed and whether public perceptions of bias may be issues.

See full discussion elsewhere in Part 1, 2A and 3 (PC)

The issues of independence, structure, governance, funding and desirable separation from industry-specific regulatory control are more political issues that are outside of EWOV's powers to determine. I have discussed some of these issues in considerable detail in previous submissions to the Productivity Commission, with both open and privileged information in support. Please refer to subdr242part4 and subdr242part5 and to all reference to complaints management within this Component submission, tailored for the energy arenas but also of relevance to the PC in the context of the current Regulatory Benchmarking Project.

Complaints management needs to be reviewed. The excessively close relationship between complaints handling schemes and regulators, and the funding and management structure of these schemes does not afford sufficient independence of jurisdictional power; decision-making; objectivity in the perception of many. case and those like it.

Please refer to extensive discussion about complaints management detailed in a particular case study of both the substantive issues of complaint which included components within and outside EWOV's jurisdiction; and further detailed discussion of the Federal Benchmarks that are mandated under s36 of the *GIA* and s28 of the *EIA* in terms of co-regulatory industry-specific complaints handling requirements. More timely referral to appropriate bodies for those issues outside jurisdiction or too complex for the skills and knowledge base of EWOV complaints handling staff would have been a more efficient way to handle that.

Contrary to popular beliefs, these Federal Benchmarks are not optional or simply desirable, they are mandated. It was not my direct experience that these benchmarks were met in a complaint that was held open for 18 months, barely addressed without any positive end-outcomes from anyone's viewpoint.

Though I concede that there were many external factors, including soaring of complaints figures for a variety of reasons outside of EWOV's control; staff attrition and requirements for re-training were challenges presented to EWOV in complaints management during 2007 and 2008, the fact of the matter is that much room exists for streamlining of process; staff recruitment; skilling. The VESC's assessment of complaints figures in their latest compliance report dated 10 October 2008 appears to minimize the extent of complaints. The figures speak for themselves and are published in EWOV's Resolution 26 Report of September 2008.

It is my considered view that whilst it is most important for a jurisdictional or national peak body for consumer protection to be actively involved in ensuring that strategies and approaches used are consistent with adequate levels of consumer protection and that effective reciprocal consultation takes place between such prescribed bodies and any other entity however structured; the potential for problems arise when funding is provided by the prescribed consumer protection body in terms of defensiveness if there are concerns expressed about the efficacy of the operations of the complaints scheme delegated with the responsibility of fielding all complaints.

Please see all other recommendations and supporting material to obtain a clearer picture of how and why regulatory benchmarking may be long overdue not merely in the efforts to achieve best practice national consistency between jurisdictions and regulatory practice, but because a well-functioning market needs to be well-oiled with responsible, strategically planned regulation that has an eye to the future whilst addressing current needs and attempting to respond to community expectation.

Whilst the CAV once directly dealt with energy-specific complaints regarding the conduct of suppliers of energy they no longer field such complaints, claiming, as does the VESC that EWOV is "set-up" to handling such matters.

Therefore it is left entirely up to the discretion of a co-regulatory body run, funded and managed by industry participants to decide which issues should be referred.

Frequently systemic issues are not appropriately reported to other bodies where they should be. Frequently the skills or tools may be lacking in identifying such issues; or else there may be political or other motivations to suppress such reporting and action. At any rate the EAG in its disturbing Retailer-Non-Compliance Report of 2004 cited elsewhere found that for both EWOV and the EAG systemic reporting, accountability in record keeping and transparency and compliance enforcement represented significant concerns. It is my firm belief that not much as changed since then

If anything organizational cultural attitudes to proper exposure of market failure, other deficiencies and general compliance may have become slacker, rather than improved

Nothing short of a government-managed body that is independently funded, at least adequately governed, with measurable accountability parameters would meet community expectations. Political and funding issues may serve as impediments in the short medium and even long terms.

However, given the nature of essential services and the history of recurrent problems impacting on the industry, it surely cannot be too soon to revisit the history to see what lessons can be learned from what has not worked to date.

The trends identified by EWOV in increased complaints including billing, marketing conduct and disconnection issues should be taken very seriously especially in a climate where full deregulation is months away and likely to be prematurely declared justifiable.

I remain concerned about the all of the views expressed by the EAG in their submission to the 2006 Legislative Package and repeat these in particular.

Recommendation

Consideration should be given to bringing these schemes under the umbrella of administrative law at commonwealth and jurisdictional levels through revised legislation since:

"the Courts have not given us a clear ruling on such a hugely busy dispute resolution sector; legislative intervention is necessary here too[122]

Comment

Standards of service delivery and training – industry-specific complaints schemes

Despite the growing number of consumers …."*likely to turn to the burgeoning industry-association based "ombudsman" dispute resolution scheme, (these schemes) are not designed to efficiently aggregate collective interests"*

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[122] Nottage, Prof Luke, Sydney University Submission 114 to Productivity Commission's Review of Australia's Consumer Policy Framework

Industry-specific complaints schemes are not designed to efficiently aggregate collective interests[123]

I refer to and quote again to Professor Luke Nottage's[124] concerns in original May submission to the Productivity Commission's Issues Paper and attached also to his submission to the PC Draft Report[125]

"Particularly in small claims therefore a growing number of consumers are likely to turn to the burgeoning industry-association based "ombudsman" dispute resolution schemes. However these are not designed efficiently to aggregate collective interests.

Industry-specific complaints schemes often appear to be have sub-optimal resources unable to meet demands in timely manner or to evaluate complex complaints that cross several jurisdictions (for example the bulk hot water arrangements and small scale licencing framework issues)

Whilst many complaints handlers have gained experience in hardship matters, even when outcomes are achievable by agreement between the parties through the intervention of such a scheme, in the case of EWOV, it is frequently the case that the terms of such agreements for repayment of debt by installment plan place end-users of utilities in spiraling debt because of unaffordable installment plans. Therefore community obligations in terms of effective hardship programs are not normally met in terms of optimal outcomes. See for example Andrea Sharam's *Power Market and Exclusions* cited elsewhere and Energy Action Group's disturbing 2004 ESC-EWOV Retailer Non-Compliance Report reproduced in its entirety as an appendix and discussed elsewhere.

Whilst many complaints handlers have gained experience in hardship matters, even when outcomes are achievable by agreement between the parties through the intervention of such a scheme, in the case of EWOV, it is frequently the case that the terms of such agreements for repayment of debt by installment plan place end-users of utilities in spiraling debt because of unaffordable installment plans. Therefore community obligations in terms of effective hardship programs are not normally met in terms of optimal outcomes. See for example Andrea Sharam's *Power Market and Exclusions* cited elsewhere and Energy Action Group's disturbing 2004 ESC-EWOV Retailer Non-Compliance Report reproduced in its entirety as an appendix and discussed elsewhere.

Training support, up-skilling and knowledge base can often be deficient in relation to both energy-specific and non-energy-specific provisions that need to be taken into account in decision-making.

The high turnover of staff in such schemes for a variety of reasons limits continuity of case management.

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123 Ibid Luke Nottage, 114 to PC

124 Associate Professor University of Sydney Co-Director Australian Network for Japanese Law

125 Nottage, Luke (2007) and (2008), Submissions to Productivity Commission's Issues Paper and Draft Reports respectively Australia's Consumer Policy Framework. SUB114

It is not uncommon for complaints to take months to resolve. Delays are conveniently concealed in reporting data (EWOV Resolution Reports) by merely referring to complaints that took longer than 3 months to resolve or close. Reliance may be placed on attrition rates and withdrawals because of delays.

In the case of those with hardship issues, perhaps they move on to professional financial counsellors; perhaps they just fail to thrive because of suspension of essential services.

Inadequate checks and balances make proper assessment of detriments impossible to evaluate.

In the case study cited it was 18 months before the books were closed on a complaint that was not resolved in any way to the satisfaction of any of the parties involved, despite protracted input by the overseeing entity Essential Services Commission. That matter was doubly complicated by policy provisions (bulk hot water arrangements) that made resolution extremely difficult because of the attitude of policy-makers and/or regulators defending policies that appear to be legally and technically unsustainable and in contravention of the explicit requirement to avoid regulatory overlap and conflict with other schemes. This forms a substantial focus in Component submission 2A which in a more abbreviated form is already published on the VESC website as part of his 2008 regulatory review.

The case study is cited and attached to both Part 2A and Part 3, the latter dealing more generally with deficiencies in complaints handling

Regulations that have failed to take into account the requirement to avoid regulatory overlap with other schemes create problems in complaints handling, besides lack of adequate levels of knowledge and understanding of other schemes and the rights of individuals under those schemes. The Bulk hot Water arrangements are a classic example, and the Small Scale Licencing provisions another.

Despite EWOV's extreme reluctance to be allocated dispute resolution responsibility for small scale licencing for reasons that included complexity and overlap with other schemes; staffing levels; and possible conflicts of interests (fairness to existing members; small scale licencees and the public at large), the Victorian regulator has insisted that EWOV assume more responsibility than they appear to be either willing or able to take on.

This is yet another example of deficiencies in decision-making and complaints handling structure.

It also means that accountabilities become blurred and no single body takes overall charge of progressing matters of redress that belong to more than one regulatory arena.

This supports the view that regulatory overlap and conflict with other schemes should be specifically forbidden and that the written laws must also be taken into account.

Overall recommendation – industry-specific complaints schemes

There is much to be considered in terms of how industry-specific complaints schemes could be better structured and funded, even if they retain current structures can be better governed collectively and preferably away from regulatory control and industry-funding.

These schemes should be named External Industry-Specific Complaints Scheme not Ombudsman.

They are not strictly alternative dispute resolution; do not mediate or arbitrate; binding powers are unilateral; only with participant agreement – and extremely rarely obtained in a limited number of case types. To confuse the type of case handling offered by these schemes with those that are professionally managed ADR services is to lump all types of redress together without proper understanding of what is on offer. This was discussed in my submission subdr242part4 and subdr242part5, many components of which will appear in Part 3 to this submission to the PC including case studies to illustrate the points made.

Standards of service can be greatly improved with better skilling within the industries covered and beyond since market participants must obey all laws and provisions and regulatory overlap when it does exist creates specialized challenging problems currently not well understood or addressed by either complaints schemes or by their overseeing regulators under the current structures.

Naming conventions for industry-specific complaints schemes

The public deserves to know more transparently the difference between the two applications of the term Ombudsman. The mere use of the term implies a statutory role and direct accountability to Parliament. The excuse of habit is not sufficient. It is a misleading term in the context of industry-specific schemes and should be altered to eliminate misleading public perceptions. The presumption of public gullibility is no excuse either.

The public may gain an erroneous impression through repeated use of the term *"independent"* when this merely applies to legal identify structure (corporate re-badging), but to the degree of true independent decision-making without regulatory or policy-maker intervention on most matters

Such schemes are normally under regulator thumb and are set up ender industry-specific enactments, with a theoretical but rarely enforced role for peak consumer bodies such as Consumer Affairs Victoria under Fair Trading provisions.

Beyond that ongoing debates exist about who is actually responsible if things go wrong during the investigatory and conciliatory role of industry-specific schemes.

Recommendation

Revert to calling a rose by its name and be more transparent about the nature and limitations of industry-specific complaints schemes commonly but misleadingly known as *"ombudsmen."*

It is a mistake to give the public such little credit. The persistence with calling these schemes "ombudsmen" will not restore public confidence.

In order to avoid misleading public perceptions these schemes should be more accurately described as external industry-specific complaints schemes or the use of the acronym E-ISCS.

I cite from EWOV's 2007 EWOV 6 175 (2007) Submission to ESC Small Scale Licencing Framework Draft Decision[126]

Re: Small Scale Licensing Framework – Draft Recommendations

Thank you for the opportunity to comment further on the Essential Services Commission's (ESC's) Small Scale Licensing Framework – Draft Recommendations (December 2006). This submission will concentrate on the recommendations of most immediate relevance to the Energy and Water Ombudsman (Victoria) (EWOV), namely those about small scale operators being required to become members of EWOV and EWOV establishing a new class of membership for them, on a fee-for-service basis. An attachment comments on the other recommendations.

Draft recommendations relating to membership of EWOV

EWOV is, as it has previously said, open to the idea of customers of small-scale operators having access to its dispute resolution services. Aspects of the recommendation, however, need further investigation, before EWOV is in a position to be satisfied that entry of the previously exempted small scale entities is in the best interests of EWOV, the entities and their customers.

Feasibility Study

In every previous instance where it has been suggested that EWOV's jurisdiction be expanded to accept a new class of members, a feasibility study has been undertaken to fully explore the pros and cons of such a change. Such a feasibility study is particularly important in this case because the number and nature of the potential members are not known. It is therefore hard to estimate the possible number of cases and the impact on workload. If, as has been suggested as a possibility, thousands of new entrants may eventuate, this would constitute the largest and most fundamental change to the scheme's operations since its inception in 1995.

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126 EWOV (2007) Submission to the ESC Small Scale Licencing Review Final Decision *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*

EWOV strongly believes that a feasibility study is required in order to make soundly-based decisions about this matter. Accordingly the EWOV Board will proceed as a mater of haste to undertake the study, to enable the directors of the Corporations Law company Energy and Water Ombudsman (Victoria) Limited to make a sound decision for the company.

More specifically, the purpose of the feasibility study will be for the EWOV Board to fully inform itself about

- *the full number and nature of entities expected to become members of EWOV*
- *a suitable charging basis for their entry into EWOV*
- *a suitable membership category basis for such entry*
- *estimated complaint and enquiry numbers*
- *potential impact on the financial and operational stability of EWOV*
- *policies, processes and systems needed for complaint handling*
- *human and other resource impacts on EWOV*
- *the possible range of services to be offered to the entities and their cost*
- *voting rights and company representation*
- *Charter and Constitution changes.*

This information will assist the EWOV Board deliberations relating to provision for this new type of entity.

Charging for complaint handling

The recommendations state that EWOV membership should be on a 'fee-for-service' basis, without annual membership fees. Such a recommendation at this stage is premature, as a full study will be needed to assess the most sensible basis for charging, if membership of EWOV is found to be a viable option.

The recommendation would mean that EWOV's current members are subsidizing the new members. If the fee-for-service level only meets the incremental costs, these members are making no contribution to EWOV's fixed costs. This is an unacceptable arrangement, and it is difficult to see how it could be equitable for EWOV's existing members.

If the feasibility study outcome is that fee-for-service is realistic, then that option can be pursued. The recommendation appears to have been made on the basis that EWOV may constitute a cost barrier for this group of potential members. As its current arrangements about Contracting Participants make clear, there is provision for annual membership fees to be set on an equitable basis. The current minimum annual membership fee is $2,000 and the Contracting Participant provisions contemplate fees that are even lower than this. If small scale operators are financially viable,

EWOV's initial view, subject to a feasibility study, is that fees of this level should not be a barrier.

Billing of EWOV members

EWOV's current billing arrangements involve six-monthly billing in advance with a reconciliation taking place in the following six months. This has worked well and EWOV has never had to worry about bad debts. The ESC's recommendation would involve setting up a parallel billing system that involved monthly billing in arrears and would almost certainly involve EWOV in issues of debt collection and bad debts. Annual membership fees give EWOV financial security for its fixed costs.

Administration

The invoicing and bill payment for a large number of small entities would potentially be a major addition to the administrative arrangements for EWOV.

Case Management System

The enhancements required for the registration of a large number of new small entities would also pose a major challenge.

It has been helpful to hold discussions with the ESC prior to this final submission being forwarded. Our submission of 25 August 2006 set out our view about the need for a feasibility study, and we continue to hold this view. EWOV appreciates that the ESC is to make its recommendations to government by March 2007. In order not to impede this deadline, we ask that any recommendations which go forward talk about participation in 'an approved dispute resolution scheme' such as the wording in the licences. This will give EWOV time to establish whether it is in fact the best option for dispute resolution in this sector.

Further comments

Attachment 1 sets out EWOV's comments on all of the Draft Recommendations (as listed at pages xiii – xvi of the ESC's paper).

I trust these comments are helpful. If you wish to discuss them further, please contact me on (03) 9649 7599.

Yours sincerely Energy and Water Ombudsman (Victoria)

I also cite EWOV online FAQ's

8. What about bulk hot water? – Extract from EWOV's online FAQs

Is it possible to change the gas retailer for the hot water?

Bulk hot water is the exception to the statement that it's possible to change natural gas retailer. Where a person lives in a block of flats with bulk hot water, they have to stay with the provider of the bulk hot water.

This is because apartments using bulk hot water are not individually metered for the gas used to heat the water. However, a collective choice about the retailer could be made via the Owners' Corporation (formerly called the Body Corporate) or building management.

If there's natural gas for cooking or heating, there will be an individual meter for that — so there is choice of gas retailer. This could mean that gas bills come from two different gas retailers.

Though upholding energy policies, the information provided about the legal obligation of tenants to energy suppliers of energy used to communally heat water supplies in apartment buildings is inaccurate and misleading. Similar advice is provided by EWOV and the DPI in interpreting energy laws and disregarding other regulatory schemes and the enshrined rights of individuals as residential tenants.
Regulatory conflict and overlap is specifically disallowed under s15 of the Essential Services Commission Act 2001. The BHW provisions appear to be defiant of those obligations

http://www.ewov.com.au/html/Community/FAQ.html#bulk_hot_water

Essential Services Commission (ESC) "All About Your New Choice in Gas"

Extract from ESC Brochure "All About Your New Choice in Gas" As cited from CUAC Spring Quarterly 2005 pp11-12

Bulk hot water

People living in multi-dwelling apartment using bulk hot water service will not be able to individually choose their gas retailer for the provision of gas for the purposes of their bulk hot water. This is because apartments using bulk hot water are not individually metered for the gas used to heat water.

- *What to look for in contracts*
- *Retailers will offer customers various price and service packages to attract your business. You should consider and compare what each retailer is offer.*
- *The terms and conditions that you should compare in all contracts may include*
- *The price you pay*
- *How and when you will be billed*
- *When you must pay*
- *Contract length and any penalties – for ending the contract early*
- *Details on disconnection and reconnection*
- *Your rights in complaint handling*
- *Any adjustment for inflation*
- *Any fees involved in termination of contracts*

This comment is contradicted by EWOV when referring to separately metered bulk hot water *"supply address."* Both EWOV and ESC use the term supply address incorrectly throughout documentation and advice. This is a technical term. It is synonymous with supply point and means gas connection point under the *Gas Code* and *ERC*. It has nothing to do with premises. The Gas Industry Act refers to a meter as an instrument through which gas flows.

The *Gas Code* expands this definition to say

"an instrument which measures the quantity of gas that passes through it to filter control and regulate the gas that passes through it and its associated metering equipment. Both these definitions refer to flow of energy.

The deemed provisions in the *GIA* s46 refer to supply and sale of gas, implicitly referring to meters as defined within that enactment.

That being the case, the Landlord/Owners' Corporation is the responsible contractual party.

The advice about separate metering in the printed ESC Brochure is contrary to the advice provided by EWOV, VESC and DPI personnel.

EWOV states in writing to end-users of communally heated water that for the purposes of contract a tenant's apartment is separately metered and that the contractual arrangements are contained within the deliberative documents that remained concealed from public scrutiny for so long after implementation of the BHW arrangements. Those documents and much of the explanatory material may now once again be archived or destroyed and become inaccessible to scrutiny. Certainly the VESC proposes in its Draft Decision 2008 Regulatory Review to repeal the BHW Guideline, and altogether remove the introduction, purpose, authority, and appendices explaining calculation methods. This is discussed elsewhere.

The DPI has taken over policy control of the BWH arrangements and therefore should be the target agency to discuss these arrangements and the appropriateness of their continuance.

The new energy Laws need to be more explicit and to better protect both consumers and energy providers. All laws in all jurisdictions are to be upheld. Energy providers should not have to choose which laws to respect and uphold.

They should not be given instructions that impair their ability to comply with all laws and with best business practice. Their licence provisions, codes and guidelines and any licence exemption provisions, including proper access to redress should not require them to adopt unacceptable practice that infringe and interfere with other regulatory schemes and with the implicit and explicit rights of individuals under other provisions, including the laws of natural and social justice.

It is clear that some representations have been made to air and lobby for improved protections and better business practices in relation to *"bulk hot water arrangements"* for *"the delivery of bulk gas water"* and *"the delivery of bulk electric water."* Both terms are technically nonsensical. Energy retailers do not and cannot deliver such commodities. Water pipes reticulate the water to individual apartments not gas pipes or electrical lines.

Thought the jurisdictional energy authorities had been made fully aware of exploitive practices with on-selling of water and energy by "metering companies" and billing agents for Landlords,[127] impacting detrimentally particularly on low income individuals and others less able to fed for themselves, policies that actively facilitate such practice continue to be upheld.

The combination of policies that erode consumer protection and poor commitment to compliance enforcement have contributed to loss of consumer confidence.

Shown above is an extract from EWOV's website providing advice to the Community under their FAQ screen explaining to residential tenants that they are expected to accept gas retailers providing energization to a single supply point/address as parties with whom they have a contractual relationship, despite the absence of a separate gas meter.

I quote below the published statements from the ESC Brochure *"All About Your New Choice in Gas."*

I am extremely concerned about accountability issues, and have elsewhere expressed my views on perceptions of regulators and complaints schemes that believe themselves externally unaccountable.

The public has a right to vigorously oppose measures that fall short of community expectation, best practice, proper trade measurement; accountability, transparency, regulatory overlap issues and any other matter that impacts on the wellbeing of Australians as taxpayers.

If the structure of bodies fulfilling a public role is producing misguided perceptions of accountabilities this should be corrected.

Now that a statutory authority in Victoria has direct responsibility for the BHW arrangements, perhaps some of these issues can be more directly addressed.

What will the current Government do to ensure that the current practices and anomalies are not perpetuated and carried into the new laws, and what will be done in the interim?

I show below an extract from an ESC Brochure regarding bulk hot water provision, upholding policies that are in conflict with the enshrined rights of residential tenants under other schemes.

The paragraph on bulk hot water is noteworthy in its inaccurate advice to residential tenants about their legal rights.

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[127] See for example Tenants Union Victoria (2006) Submission to VESC Small Scale Licencing Issues Paper quoted and cited in this submission

Similar advice is provided by EWOV currently on their website under their FAQ screen. The least the public can expect is accurate advice about their rights and confidence that the policy provisions of one scheme do not over-ride the rights that already exist under another scheme. Regulatory overlap and conflict is specifically disallowed under s15 of the *Essential Services Commission Act 2001* and the terms of the Memorandum of Understanding between CAV and VESC. The DPI now has policy control over BHW provisions. There are current proposals to attempt to strengthen the existing provisions holding end-users of heated water contractually responsible to gas and electricity suppliers of energy used to heat communal water storage tanks in apartments and buildings.

All costs included consumption and supply or other associated costs are properly the legal responsibility of Landlords and/or Owners Corporations. Current energy policies in three jurisdictions appear to have taken it upon themselves to re-write contractual laws, tenancy laws; owners' corporations laws; common law provisions, and seem also to have introduced unfair contract terms and distortions of the deemed contractual provisions under energy laws as applied to BHW provision.

End-consumers are being imposed with massive supply and commodity charges, and have to pay supply costs twice – once to the provider of their domestic fuel for heating, lighting and cooking, and then for alleged energy provision for BHW for costs that belong to landlords.

How can consumer confidence be restored? When will the BWH provisions be reconsidered in the light of proper practice?

Those supplied with heated water from communal water tanks are not embedded network energy users. They are supplied with no energy at all for the purpose of heating their water supplies. They are being exploited under current statutory and regulatory policies facilitating collusive arrangements between Landlords and supplies of energy.

There appear to be no arrangements in place to monitor metering provision or maintenance, and no approval or licence sanction sought or obtained from water authorities for the use of water meters for the purposes described.

Those unaware of their tenancy rights for whatever reason, receiving such advice from a body called *"ombudsman"* would normally not think of pursuing the matter.

They are likely to implicitly believe that somehow they tenancy rights have been removed and they must accept alleged measurement of water volume using meters that are unlikely to have been approved for use by the water authority to calculate their alleged gas consumption for the communal heating of water.

Though EWOV must abide by the policies adopted by jurisdictional energy authorities, and appear to be substantially under the control of the policy maker and regulators despite their protests about independence, providing this type of inaccurate advice about the legal liabilities of residential tenants on a website or in other dialogue with consumers contributes towards undermining the enshrined rights of individuals.

It also makes it less likely that those accessing the information online will lodge complaints, thus keeping awareness down; complaints figures distorted; and the rights of individuals distorted and made further inaccessible.

Provision of such advice by complaints schemes, policy-makers and regulators disregards the enshrined rights of tenants; decisions by VCAT, the provisions and definitions of the *Gas Industry Act 2001* and the *Gas Code*, wherein a meter is an instrument through which gas flows and supply and sale of gas means facilitation of flow of gas to the premises supplied.

In my direct dealings with EWOV, policy-makers and regulators I was informed that these practices were commonplace and it was implied at one stage that they represented *"best practice."*

Information and advice of this nature needs to be re-examined in terms of its appropriateness. Whilst the provisions remain in place, consumer detriments will continue not only in terms of unwarranted imposition of contractual status on end-users of heated water without separate gas or electricity metering, but also in terms of undermining of rights and consumer confidence in the consumer protection framework.

The very least that the public can expect is accurate information about their rights, more so when they approach a complaints body with a public role known as "ombudsman."

Residential tenants receiving communally heated water have no legal responsibility towards suppliers of energy used for this purpose. Tenancy and Owners Corporation laws are clear about this and VCAT has repeatedly upheld claims from tenants seeking to restore their tenancy rights and hold the Landlord responsible for all utilities that are not separately metered.

Refer again to the Tenant's Union's (TUV) submission to the VESC's 2006 Small Scale Licencing Issues Paper citing several examples of the situations and decisions made in this regard.

Without a gas meter to measure consumption, no contractual relationship exists or ought to exist between the supplier of energy and the end user of heated water. As observed by TUV in discussing p34 of the VESC SSL Issues Paper 2006.

RETAILER OF LAST RESORT ISSUES

At the February 2010 Workshops I raised the view that those facing hardship, should not have to bear any cost-smearing resulting from RoLR events, but also intended the suggestion to apply to any issue where cost-smearing principles were adopted. There are after all only 5% of the NEM market representing those facing hardship, though I am not sure of the figures for gas. Surely it should be possible to cater for the needs of this relatively small group of end-consumers without burdening them further with unaffordable prices. These suggestions were well received and I obtained positive feedback. I hope the suggestion will be taken on board.

In the case of those in *"embedded situations"* it is unclear how consumers will be protected when small scale licencees or those exempt from the exempt selling regime collapse.

Community organizations have repeatedly raised this concern, including Consumer Action Law Centre and Tenants Union Victoria.

Those concerns remain unaddressed and need to be addressed.

More recently Uniting Care has raised the issue of whether it is appropriate to cost-recover the whole amount from customers of costs incurred, such that essential services become entirely unaffordable. They have pointed out that in other arenas such as road maintenance and emergency the Government makes a contribution towards upkeep and costs

COST-SMEARING AND 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.

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 lines[128] and quote this directly

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[128] 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

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 p 31 Cameron speaks of says that industrialized countries like Australia

"….are increasingly recognising that economic wealth alone is not an adequate measure of a society's development.[129]*/*[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.

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.

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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.

[129] Hart, M (1999) Guide to sustainable indicators 2nd edn Sustainable Measures Inc. Andover c/f Cameron, J. W. ibid, p35, citation 73 Notes

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 organisations such as the World Bank,[130]/[23] the United Nations,24 the Organisation for Economic Cooperation and Development[25] and the International Labour Organisation[26] recognise institutional and governance pillars.

*The **institutional** pillar covers the 'formal and informal civic, political and legal arrangements that make up market activity and civic life.'[27] The **governance** pillar covers efforts to achieve an 'informed, pluralistic and involved society but with shared basic norms, standards and aspirations.'28 Some agencies treat these two dimensions as processes for pursuing the three main pillars. (p14)*

"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 report[2]). 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.

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[130] ww.worldbank.org. Cited from ibid Cameron JW (former Victorian Auditor General) 2004) citation 23

CONLCUSION

I am certainly very disappointed over the narrowing of the coverage for consumers, being limited to standard form contracts.

I also believe that businesses should receive a better deal, and that the law should apply to ALL CONSUMERS and ALL SMALL BUSINESSES for ALL CONTRACTS.

From a consumer perspective, as expressed by both funded consumer organizations and by individual citizens, the entire slant and focus of both the stated objective and the content of the national retail energy laws and rules (NERL and NERR) reflects preoccupation with process rather than a "wellbeing framework" as espoused by the Australian Treasury (p. 3 Dr. Steven Kennedy's speech 27 Nov 2009).

The national consumer policy objective of the ACL is *to improve consumer well-being, empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly."*

By contrast the proposed national retail energy provisions have included a diluted version of a consumer protection regime for retail energy by focusing on economic efficiency for the alleged long-term protection of consumers, an unsubstantiated claim that appears top be regularly used to justify continuing dilution of consumer protection wherein the wellbeing of consumers is insufficiently considered, if at all.

The ACL philosophy embraces a commitment to protection for the Australian people at large and is not focused merely on certain segments of the community deemed to be in "most need."

The proposed National Energy Law and Rules appear to fail to embrace the concept of a market in which "both consumers and suppliers trade fairly, or the concept of wellbeing empowerment and protection for all Australians, as is reflected in operational detail and in apparently deliberate omission of certain provisions adopted at state jurisdictional level and at risk of being perpetuated within national energy laws.

There are many other ways in which the proposed energy-specific laws fail to align with generic policy objectives including in relation to standard term and deemed contracts, statutory consumer guarantees, and proper protection under proposed exempt authority regimes.

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.

APPENDICES 1- 9

LIST OF APPENDICES (as separate documents)

Major Deidentified Case Study 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 1
Analysis of the Gas Industry Act 2001 (Victoria) in relation to flawed interpretation of existence of any contract, deemed or otherwise	Appendix 2
Case Study per CUAC *Winters v Buttigieg* VCAT 2004 Bulk hot water charges; inadequate redress	Appendix 3
Case Studies courtesy Tenants Union Victoria – open submission to ESC Small Scale Licencing Review 2006	Appendix 4
Further comment Tenants Union Victoria open submission to ESC Small Scale Licencing Review 2006	Appendix 5
Reproduced comments Tenants Union Victoria open submission to ESC Small Scale Licencing Review Draft Decision 2007	Appendix 6
Reproduced extract NSW Govt Tenants matter parks landlord prosecution Fair Trading Act	Appendix 7
Comparative analysis trade measurement and energy in relation to contract, inconsistency, legal traceability, consequences	Appendix 8
Excerpts Energy Retail Code v7 Victoria February 2010	Appendix 9