APPENDIX 4

CASE STUDIES

AS PRESENTED BY TENANTS UNION VICTORTIA (2006, August) [1]

Contained in

Further Comments to Essential Services Commission Victoria

SMALL SCALE LICENCING FRAMEWORK ISSUES PAPER (2006)

[1] Tenants Union Victoria (2006) Submission(1) to Essential Services Commission Small Scale Licencing Issues Paper August 2006
See also Further Comments on same issues paper 29 September 2006

By e-mail: smallscalelicensing@esc.vic.gov.au

31st August 2006

RE: SMALL SCALE LICENSING FRAMEWORK ISSUES PAPER[2]

The Tenants Union of Victoria (TUV) thanks you for the opportunity to respond the to the Essential Services Commission's Small Scale Licensing Framework Issues Paper.

Who we are

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

Embedded networks and the Residential Tenancies Act 1997

TUV is concerned that the existence of embedded networks creates confusion about the responsibility for payment for utilities for tenants and residents of rented accommodation within these networks.

In many instances, this confusion results in payment of utilities costs in excess of what would normally be required.

The Residential Tenancies Act 1997 (RTA) is the primary legislation governing residential tenancies, including caravan parks and rooming houses, in Victoria.

Sections 52 and 53 of the RTA apportion liability for utilities connection, service and consumption between landlords and tenants and residents of caravan parks and rooming houses: continued…

- *If a rental property is separately metered, the tenant pays for the connection of supply to the property and for consumption;*
- *Owners are liable for the installation and infrastructure costs of the initial connection of service to the property, and for the utilities consumed if the property is not separately metered.*

However, there have been a number of instances whereby residents of dwellings in embedded networks were charged for energy consumption where there is no separate metering. Upon challenge to Victorian Civil and Administrative Tribunal (VCAT), all

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[2] Subject to appropriate citation TUV had previously agreed for its public submissions to be cited in this manner. These direct citations are therefore submitted in good faith to remind the MCE and other interested parties of the sound arguments presented in this valuable outline to exempt regime framework and related issues impacted on those who receive no energy at all but yet are inappropriately imposed with contractual obligation for energy that is not supplied through direct flow of energy. Therefore the arguments concerning alleged sale sand supply of energy are flawed and technically and legally unsustainable.

bills remitted to tenants and residents were found to contravene the Act and the amount paid under these unlawful bills were refunded.

However, despite the clarity of the Act on point of liability for utilities charges, and these VCAT orders, we believe that these practices are still occurring.

The following case studies illustrate the dissonance between the provisions of the Residential Tenancies Act 1997 and billing practices adopted by some bodies corporate or owners/managers of dwellings in embedded networks. In particular, the potential for profiteering from tenants and residents in the provision of utilities need to be urgently addressed.

Case Study 1: Condor Apartments and Arkley Towers, Docklands

The units in Condor Apartments and Arkley Towers at Docklands are all separately metered for water. However, hot water is supplied to each residence through a central boiler utilizing gas. Each residence is not separately metered in regard to consumption of this gas.

Since 2002, residents have been receiving accounts for water consumption, including charges for the provision of hot water. The cold water rate is $1.53/kl but the hot water rate is $10.00/kl.

The supply of water to each residence is controlled by the Body Corporate, who employ a billing agent to render accounts to occupants.

In some instances, tenants in the respective blocks have been asked to sign separate supply agreements with the Body Corporate or the billing agent.

The practice of charging tenants for the gas consumption in the absence of a separate meter prima facie contradicts sections 52 and 53 of the Residential Tenancies Act 1997.

Whilst we have successfully challenged these charges on a number of occasions the Body Corporate concerned has continued to modify the practice of charging including constructing third party agreements purportedly directly with the tenant.

However, despite numerous orders providing refunds for tenants who have paid these exorbitant hot water charges, we believe the practice continues, and that bodies corporate are profiting from inappropriate and unlawful conduct.

Case Study 2: Courtyard Apartments, St Kilda West

The units in this apartment complex are separately metered for cold water. Hot water is provided by a bulk unit, provided by a utility company, that provides gas to heat the water for each apartment. The units are not separately metered in regard to gas.

The utility company remits a bill to the body corporate for the supply of gas to the whole apartment complex. The body corporate estimates the approximate amount of gas supplied to each apartment (inclusive of a small administrative fee) on the basis of hot water consumption, and then remits each occupier a bill for hot water.

The body corporate also charged tenants a $100 "Hot Water Deposit" fee at the commencement of their tenancies, pursuant to one of the body corporate rules of the complex.

When the validity if the gas bills and the Hot Water Deposit fee were challenged by a tenant at VCAT, it was held that, pursuant to sections 52 and 53 of the Residential Tenancies Act:

- *Tenants were not liable to pay either to their landlords or the body corporate for the supply of gas (including an administrative fees in respective same), because the units were not separately metered for gas; and*
- *Tenants were not liable to pay the Hot Water Deposit fee, because this charge derived from the supply of gas to units that were not separately metered for gas. Furthermore, the fee could not be characterized as deriving from the supply of water to the units, and could therefore not be charged to tenants.*

Case Study 3: Willow Lodge Caravan Park, Bangholme

The owner of this caravan park installed water meters to all sites in July 2004, and commenced issuing bills to residents based on readings taken from these meters.

Residents were not given any notice of this change in the provision of services. Prior to the installation of these meters, site rental charges where inclusive of utilities. Site rental costs were not reduced to reflect the new metering regime for water.

A park resident refused to pay water bills remitted to him because he had not been notified by the owner of the change in his tenancy agreement wrought by the installation of the water meters. In July 2005, the park owner commenced proceedings at VCAT to recover the amount owing on the water bills. VCAT found that:

The meters were not installed or approved by the relevant water utility company, as required by the Water Act 1989, s237A; and

The owner did not hold a licence pursuant to that Act and therefore was not permitted to levy water bills on residents

\Therefore, the sites are not separately metered for the purposes of remitting accounts to residents.

We received advice from the relevant water supplier that they had no intention of approving the meters and it was not their role to do so.

Despite this VCAT order, the park owner continued to issue water bills to residents. Bills issued post the date of the VCAT order indicated that payment would be required when the water supplier had approved the meters. However, we were advised by the water supplier that they had no obligation or intention of approving the water meters within the caravan park network.

It appears that this has caused some residents to commence or continue to pay the invalid bills, in fear that they will accrue a greater financial liability due at a later date. Some residents also entered into direct debit arrangements with the park owner to cover these water bills.

In addition, we were concerned that the caravan park owner who had been frustrated from applying the water charges had threatened to increase rents to compensate for this problem. As many of the residents are owners of moveable dwellings that are expensive to relocate it would be difficult for them to resist or respond to such an increase.

This case study provides a number of prima facie breaches of the Residential Tenancies Act 1997:

Section 159 provides that if a caravan park owner ceases to provide services to a resident, the rent must be reduced to reflect this. Water is included in the definition of 'services' for the purpose of this section; and

Section 501(c) of the Residential Tenancies Act makes it an offence to make false representations to a person in regard to the provision of the Act, terms included or to be included in a tenancy agreement, or any matter affecting a person's rights or duties under the Act or a tenancy agreement.

Our concern is that as more embedded networks are created more tenants and residents are exposed to confusing and exploitative practices in the provision of utilities.

Bodies corporate and caravan park owners and management must be made fully aware of the legal apportionment of liability to pay for utilities services, maintenance and consumption contained in the Residential Tenancies Act 1997 and other relevant utilities legislation.

Hot water pricing and the regulation of metering in embedded networks[3]

The previous case studies also demonstrate that there is insufficient regulation protecting consumers in embedded networks from profiteering in regard to the sale of hot water. In the Docklands and Courtyard Apartments cases, the consumer protection provisions of the Gas Industry Act did not apply because hot water, not gas, was being sold. However, because the price at which hot water can be sold in embedded networks is not regulated, on-sellers are able to set their own process and residents may be charged at higher rates than consumers of the same products who do not reside in embedded networks. This is manifestly unfair, and effectively creates two classes of consumer, one of whom is afforded appropriate legislative protections from exploitative pricing by providers, and one who is not.

Furthermore, these case studies also raise the question of the meters used to measure residents' consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained. Again, consumers in embedded networks are not being afforded the same

Furthermore, these case studies also raise the question of the meters used to measure residents' consumption. In embedded networks, metering technology does not have to conform to the legal standards required of meters outside of such networks. This raises questions about the accuracy of these meters and whether they are being appropriately maintained. Again, consumers in embedded networks are not being afforded the same level of protection from unfair practices and exploitation as other utilities consumers, and this must be addressed to ensure parity among Victorian consumers.

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[3] **Comment MK:** I note that the TUV implies that those receiving heated water supplies from a communal water tank in multi-tenanted dwellings are "embedded consumers" The term strictly speaking applies to those receiving direct supply of energy through an electricity network. There is no such thing as a gas network technically, an issue raised by industry participants in direct submissions to the MCER on other matters. The Victorian Orders in Council were exclusive to electricity. If it is the MCE's intention to group recipients of "bulk hot water" under the exempt selling regime this should be made very plan. If not pricing and monitoring controls should be in place, notwithstanding that in contact law and under the revised proposed alternations to generic laws impacting on substantiate unfair contracts, the current arrangements will not be compatible with other consumer protections, with proposed national energy laws relating to direct "flow of energy" regardless of "network" operation changeover or ownership

For the sake of convenience, and given that most funded community organizations seem to deal with the *"bulk hot water issue"* as synonymous with *"embedded: electricity networks*." I have included many of my comments about this issue under the Exempt Selling Section in addition to discussion elsewhere under discussion of the tripartite contractual governance model and discussion of components of the Objective.

Comments on specific issues raised by the Paper

1. Are the current terms, conditions and limitations contained within the OIC sufficient for the regulation of small-scale electricity distribution and/or retailing?

Currently, the OIC does not require small-scale on-sellers to inform customers about the utilities concessions scheme, such as the Non-Mains Winter Energy Concession and the Non-Mains Utility Relief Grant. TUV believes that redrafting the OIC to oblige these on-sellers to provide information about the availability of concessions would rectify this oversight, and enable more vulnerable low-income households residing within embedded networks to access concessions.

We are also concerned that there is no effective compliance and enforcement regime supporting the OIC, and that regulation is driven by complaints rather than by active monitoring of the sector. This is not optimal practice in regard to consumer protection, and needs to be addressed to ensure that all customers enjoy the same level of protection, regardless of whether they reside in an exempt network.

2. What is the value of the current customer review and dispute resolution mechanisms provided under the OIC?

The OIC provides that if a dispute arises, distributors and/or on-sellers are required to inform the customer of their right to have the matter adjudicated by VCAT.

While the ability to access an independent dispute resolution process is important, there are a number of shortcomings with the VCAT process. Fees apply (though these can be waived if the applicant demonstrates financial hardship) and the process is not especially expeditious.

Furthermore, in the absence of enabling legislation, we are concerned that VCAT has no effective jurisdiction to hear and these matters. The Issues Paper (and presumably the Essential Services Commission and the Department of Infrastructure) accepts that VCAT is empowered to adjudicate dispute between consumers and small-scale operators and/or onsellers. Disputes in which the TUV has represented applicants were heard in VCAT's Residential Tenancies List or Civil Claims List, as the Tribunal has express jurisdiction over matters pertaining to the Residential Tenancies Act 1997 or the Fair Trading Act 1999. However, VCAT's jurisdiction to adjudicate disputes between small-scale operators and/or on-sellers and consumers in embedded networks has not been made explicit in legislation of the OIC, and we contend that express provision should be made empowering VCAT to hear these matters to effect an accessible and straightforward dispute resolution.

It is also important to note the reticence of low-income households in marginal tenures (such as caravan and residential parks) to access dispute resolution procedures, because they perceive that making complaints will result in their eviction.

Customers whose housing choices are constrained by poverty are much more likely to be living in substandard conditions, and their fear of potential homelessness makes them more likely to tolerate exploitative conduct on the part of service providers. Consequently, they are less likely to be aware of and to exercise their legal rights. The

availability of the VCAT process alone in these circumstances does little to protect vulnerable households from unfair and exploitative conduct on the part of small-scale distributors and/or on-sellers.

Furthermore, as noted in the Issues Paper at p. 34, there is no regulatory oversight ensuring that the provision of the OIC requiring distributors and on-sellers to inform customers of the VCAT dispute resolution mechanism is being complied with. Without appropriate supervision of distributor and on-seller behaviour, this provision will not provide customers with adequate protection equivalent to that enjoyed by customers who do not reside in embedded networks. This is manifestly unfair, and should be addressed as a matter of urgency.

3. Should customers in small-scale arrangements have access to EWOV? How could this be facilitated? What are the advantages and disadvantages of providing access, including the likely impact on small-scale operators?

TUV contends that all consumers should have access to EWOV, to ensure customer parity and fairness. Consumers qua consumers should all enjoy the same level of governmental and legal protection, regardless of whether they reside in an embedded network.

Furthermore, EWOV's processes have the advantages of being free and non-adversarial.

However, permitting customers in small-scale arrangements access to EVOW would likely involve amending EVOW's Constitution and Charter to include a specific membership category for small-scale distributors and on-sellers. TUV recommends that further work be undertaken to determine the optimal means of effecting access to EWOV for customers in small-scale arrangements.

4. What is the extent to which customers within an embedded network can and do access alternative retailers, what barriers to competitive retail access may exist for customers within an embedded network and how these barriers may be addressed?

Currently, the OIC provides, where metered electricity is sold in an embedded network, the on-seller must inform business customers of their right to purchase electricity from the licensed retailer of their choice. However, this right is not extended to residential customers.

TUV contends that this anomaly should be rectified immediately to ensure that all consumers have the same rights.

In the embedded networks with which we have experience, there is no possibility of alternative supply for an individual consumer and the embedded network supplier is effectively in a monopoly position.

In many embedded networks such as those operated by bodies corporate in high-density housing, alternative supply options would require changing the utility infrastructure.

5. What are the advantages and disadvantages of introducing a registration system for small-scale operators? How could such a system be established and who is the most appropriate enforcement agency is?

TUV supports the development of a registration and/or licensing system for small-scale operators, as this would make it easier to monitor and enforce compliance with regulatory requirements. Without such a system it is difficult to determine the number of operators, the extent of their activities and the number of customers affected.

Our most pressing concern is that the licensing system should provide both clarity and equity of consumer outcomes in both mainstream and embedded networks.

Given it's statutory obligation to protect the interests of Victorian consumers, including low income and vulnerable consumers, with regard to the price, quality and reliability of essential services, we suggest that the Essential Services Commission (ESC) would be the most appropriate enforcement agency.

Please do not hesitate to contact me at the Tenants Union of Victoria on (03) 9411 1410 or 0409 092 949 if you wish to discuss any matters raised in this submission further.

Yours sincerely,

Research & Policy Worker

Tenants Union of Victoria