COMPONENT RESPONSE TO

ESSENTIAL SERVICES SUBMISSION 2008 REVIEW OF REGULATORY INSTRUMENTS, DRAFT DECISION, AUGUST[1]

AND

MCE SCO NATIONAL ENERGY CONSUMER FRAMEWORK

TABLE OF RECOMMENDATIONS AND POLICY PAPER

MCE SCO NETWORK POLICY WORKING GROUP

AND

NATIONAL TRADE MEASUREMENT INSTITUTE, LEGAL METROLOGY UNIT[2]

AND

PRODUCITIVITY COMMISSION

COMPONENT RESPONSE PART 2A

PREDOMINANTLY SELECTED CONTRACTUAL AND DEFINITIONAL ISSUES IMPACTING ON JURISDICTIONAL BULK HOT WATER ARRANGEMENTS[3]

DETAILED ANALYIS OF REGUALTORY MATTERS

AND PROPOSED CHANGES

Madeleine Kingston

September 2008

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[1] Essential Services Commission (2008) Review of Regulatory Instruments, Draft Decision, 25 August found *http://www.esc.vic.gov.au/NR/rdonlyres/81EBAD29-A5AA-40C9-B9EB-455F6D74DAE9/0/ReviewofRegulatoryInstrumentsDraftDecision.pdf*

[2] This submission discusses in some detail the distortions of national trade measurement policy parameters, and the spirit and intent of National Trade Measurement laws, notably Part V 18R and associated regulations, with lifting of remaining utility exemptions pending but intended, in order to achieve minimal standards of legally traceable trade measurement in all arenas nationwide. Water meters are posing as gas and electricity meters with policy-maker and regulatory sanction
The delay in the lifting of utility exemptions has facilitated exploitation of consumer rights and best practices in trade measurement. Please see this material as supplementary to earlier submissions

[3] These arrangements are in place in three jurisdictions, Victoria, South Australia and Queensland and are at risk of being carried into the national Energy Laws and Rules unless proper clarification is achieved within the Law or direction provided at jurisdictions level such that consumer rights are not compromised and that best practice is maintained

PREAMBLE

As a private citizen, I welcome the opportunity to comment on the Essential Service Commission's Review of Regulatory Burden 2008, and at the same time respond to components of the NECF Table of Recommendations and Policy Paper and more detail, though considerable material has already been provided already to the latter and to other MCE arenas.

In addition, I have created the opportunity to re-target certain agencies and entities that have previous material from me in my campaign to raise awareness on certain regulatory consumer protection and competition issues generally.

This overview component (Part 2)[4] of my submission deals with some philosophical beliefs and views about regulation selectively and in general terms to answer some of the issues raised by other stakeholders.

This material aims to reinforce the view that energy-specific regulation is essential, and that many of the protections in place are desirable and necessary, if not requiring further strengthening and clarification.

The companion submissions 2A and 2B deal with specific matters, including certain existing arrangements that would benefit from review.

As late supplementary submissions these contain the detail that is required to validate the initial points made. Whilst apologizing for late submission of these additional components, I also believe that publication would represent token acceptance of the value of wider stakeholder inputs that are allowable under policies that restrict inputs to nominated consumer consultative committee members, more especially if the deliberations of such committees are not made openly available for wider comment by consistent and timely online publication of outcomes.

I have already expressed by view about robust consultative processes and adequate opportunity for stakeholder consultation. I do not share the views of the VESC that this regulatory review has been the subject of robust consultation, save mostly behind locked doors. The issues paper and the Working Papers that led to Draft Decisions about to be ratified are yet to be made accessible

This submission deals with reinforcement of the view that energy-specific regulation is essential, and that many of the protections in place are desirable and necessary, if not requiring further strengthening and clarification.

In some cases, I believe that review of the instruments is highly desirable because of perceptions of compromised protection and overlap with other regulatory schemes, making certain enshrined rights of consumers inaccessible.

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[4] The numbering has been retained from a sequence of documents intended for the MCE arenas, sine Part 1 is an overview of all documents prepared for the MCE SCO Table of recommendations and other parties.

In addition I deal in considerable detail with a few selected issues of concern with the view to encouraging reconsideration of existing regulations that are seen to be detrimental to consumers and their enshrined rights.

It is important that a forum like this gives stakeholders an opportunity to express what may not be working within regulations, and I hope that the information and comments provided will be seen in the spirit intended and be published openly and transparently, despite criticism of certain regulatory provisions.

On the basis that I believe that aspects of the current Victorian Regulatory Review may have been instrumental in highlighting certain principles in policy, regulatory and legislative reform that deserve to be scrutinized and benchmarked to meet the highest standards of governmental, regulatory and business practice, I have not allowed mere deadlines to prevent me from making my personal contribution towards highlighting areas of community expectation that are being inadequately met.

My observations and conclusions are not intended to be personal or exclusive to any one agency or entity, but I have taken an opportunistic approach to addressing shortfalls as I see them in the hope that the principles will be addressed not only with regard to current energy reform processes, but also be extrapolated to other arenas where reform and benchmarking can be targeted to achieve the best possible outcomes.

Therefore I am seeking publication of these views – for the record, without necessarily believing that these attempts will represent anything more than a journey travelled, and regardless of final outcomes.

As a late-comer to the arena of public consultative processes, it may be premature for me to adopt the stance of a committed cynic. However, I would be less than honest if I pretended to be anything less than jaded at this stage of involvement.

The leeway offered by the MCE SCO is much appreciated with late submission, bearing in mind also that the MCE SCO will also be interested in the material to be included within the Rules and how consistency between jurisdictions may be effectively achievable.

In any case various MCE arenas including the Retail Policy Working Group (RPWG); the Energy Reform Implementation Group (ERIG) and the Department of Resources Energy and Trade (MCE-RET) have already been alerted to some of the issues in previous submissions.

The bottom line is this – I believe that without urgent and serious consideration of certain matters, there is a risk of inadvertently incorporating into new policies, regulations and legislation some of the existing flaws within certain provisions that are long overdue for reconsiderations

The Law needs to be more specific and to clarify issues that have given rise to angst, expensive complaints handling; expensive government administrative burden; and the potential for private litigation.

Market participants need to receive clear unambiguous instructions that do not leave them at potential risk; that do not require them to choose which laws and provisions that must uphold; or that may confuse them as to best business practice parameters.

An unsettled market is one that has no potential to bring the best rewards for the business community or the community at large.

This is a time of major policy regulatory and legislative reform. The climate may be ripe to learn some lessons from the past – and to remember the position the nation was in when the Senate Select Committee on National Competition Policy of 2000 found significant gaps in policy provision and adequate grasp or interpretation of the fundamentals of National Competition Policy.[5]

Reducing regulatory burden is important where those burdens are duplicated unnecessary or harmful. Finding the right balance and choosing the right instruments to either shed or enhance is a highly skilled exercise. More care needs to be taken as to how and when this should be done.

[5] Refer to brief notes on this topic in Component Submission 2A to multiple arenas, including the VESC Regulatory Review and NECF Table of recommendations and Policy Paper and to previous submissions to the Productivity Commission's Review of Australia's Consumer Policy framework

Disclaimers

This material, including all appendices have been researched and collated 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 CRA Report disclaimers and add that

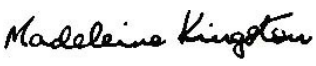
> *"I shall have and accept no liability for any statements opinions information or matters (expressed or implied) arising out of contained in or derived from this document and its companion submissions and appendices) or any omissions from this document or any other written or oral communication transmitted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

Case study material has been deidentified but represents actual case examples of consumer detriments, some seen to be driven by existing policies at risk of being carried into the National Energy Law and Rules.

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.

I request that my contact details be retained on file indefinitely as an interested stakeholder willing to participate in future consultative processes and public hearings also. I would like to be notified of each and every development in this area either with research initiatives, legislative reform recommendations or public consultation opportunities. There is dearth of consumer voices. It has been observed by others that the NEM resounds with a single handed clap that excludes consumers. Access to consumer voice and protections for consumers of gas seem even less accessible.

I would like every possible opportunity to provide direct consumer perspectives whenever consumer issues are at issue. This is one of several components but each intended to stand alone as a dedicated submission on selected topics.



Madeleine Kingston Concerned Victorian consumer

ANNOTATED CONTENTS AND STRUCTURE OF SUBMISSION PART 2A

Summary of clauses to be retained and transferred to clauses 3.3 or 4.2 of the Victorian Energy Retail Code **66-67**

These include:

Clauses 2.1.1;[6] 2.1.3[7], 2.3;[8] selected components of 3.1 of Guideline 20(1) are to be retained and transferred to the Victorian Energy Retail Code.

A discussion is undertaken under MK Comment of each of these clauses of the Guideline to be retained and transferred to the VERC. The discussion presumes VERC intent is to attempt to validate moves to regard the BHW arrangements as quite separate to the remainder of the regulatory framework, regardless of overlap and conflict with other schemes.

(1) 2.1.1 Calculation in accordance with regulated formula under DPI control

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6 Relates to calculation of gas bulk hot water charges in accordance with a regulated formula. The rule is to be retained and transferred to Clause 3.3 of the *Energy Retail Code* under the current regulatory review.

7 Requires publication of the gas BHW rate. This means the gas price in cents per litre that is used to charge customers for energy in delivering gas bulk hot water. The term relevant customer is not used as in s46 of the *Gas Industry Act 2001*. This is defined broadly within the legislation and not confined to natural persons. It simply relates to consumption threshold of no more than 10,000 GJ per annum and can apply to entities. In fact this threshold applies to 1.6 million Victorians, with only 100 larger customers using more than 10,000.

8 Information to be included on bills. Requires retailers to detail on the customer's bill certain information regarding the calculation of the customer's bulk hot water charges. Considered by VESC to be important for customers who consumer bulk hot water to understand their bill. Note this mentions hot water consumption not heat or energy or gas volume. Retailers are licenced to sell gas and energy not composite water products. They sell the energy to landlords based on gas volume calculation to a single energization point on common property infrastructure.

(2) 2.1.3 Publication of the gas bulk hot water rate by retailers

Note the use of the term water as applied to energy retailers licenced to sell gas or electricity only, not composite products, and impliedly to disconnect or decommission gas or electricity not hot water services

(3) 2.1 Details to be included on bills[9]

This single component of the provisions will be retained by the ESC. Formulae policies will revert to the DPI and continue to be regulated, presumably by negotiation rather than by set tariffs

It is unclear how peak and off peak charges will apply or where details of these arrangements will be published and the formulae rationale

Retailers in Victoria are required provide greenhouse gas information on customers' electricity bills are set out in *Electricity Industry Guideline No. 13 - Greenhouse Gas Disclosure on Electricity Customers' bills*.

The purpose of the guideline is to specify, to retailers, the minimum level of information on greenhouse gas emissions associated with generation of electricity that must be included in each bill issued. These include the amount of emissions associated with the amount of electricity to which the bill relates; the amount of emissions associated with the amount of electricity to which each previous bill related within the past 12 months (if information is available), a graphical representation of this data with explanation and the website address www.greenhousegases.gov.au.

The objective is to increase customer awareness of the link between energy use and greenhouse gas emissions and to enable customers to monitor over time their energy consumption and the emissions associated with it

[9] There is a requirement under the *Electricity Industry Guideline 13* for retailers in Victoria to also provide greenhouse gas information on customers' electricity bills, with the objective of increasing customer awareness of the link between energy use and greenhouse gas emissions and to enable customers to monitor their energy consumption, and the emissions associated with it, over time
These include the amount of emissions associated with the amount of electricity to which the bill relates; the amount of emissions associated with the amount of electricity to which each previous bill related within the past 12 months (if information is available), a graphical representation of this data with explanation and the website address www.greenhousegases.gov.au.

[10] VESC Bulk Hot Water Charging Guideline. Formalized in December 2005. Implemented 1 March 2006. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/C0E6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf*

[11] This is a very telling request by the retailers. In providing reasons to view Clause 3.3 of the BHW charging arrangements as redundant, the retailers have referred to small business customers and deregulation of that class of customers. It implies that they actually do consider landlords to be the customer, not the tenants.

Under this heading, a discussion is undertaken of the original rationale behind adoption of this Guideline after various deliberative processes during 2004 and 2005.

The value of retaining these documents in archives is discussed as an important historical record of the rationale and detail relied upon in the adoption of this Guideline in the first place, much of which is to be retained but merely transferred elsewhere. It is not the Guideline itself therefore that is redundant but the numbers of pages that contain it. The repeal has facilitated simplifying but the reasoning behind the Guideline is crucial for a proper understanding of what is happening and how this conflicts with existing regulatory provisions in other schemes

Discussion of implied transfer from deliberative documents of 2004 and 2005 directly into the VERC **183-189**

This proposal is discussed below under Comment of specific proposals, including the lack of transparency at the time of deliberations and formalization of provisions now to be repealed and for the most part transferred elsewhere to Clauses 3.3 and 4.2 of the VERC

Discussion of Repeal of Clause 1 Introduction: Purpose Authority and Application and Implied Repeal or Archiving of the Deliberative Documents that led to their adoption **190-192**

This proposal is on the basis of transfer of BHW policies to the DPI from 1 January 2008, with the VESC retaining responsibility only for what is shown on bills

The implications of the current system of calculation and contractual arrangements are discussed in the context of conflict with other regulatory schemes, trade measurement considerations, including the provisions of the national measurement legislation which will make current calculations formally illegal when remaining utility exemptions are made. The crux of the arguments present is summarized below.

The purpose had been explained as the Commission's requirements for the charging by retailers of energy in *"delivering electric bulk hot water"* or *"gas bulk hot water"* to customers (without specifying **"relevant customers"** from gas or electrical distribution systems

Energy providers deliver gas or electricity not electric or gas hot water or composite water products. End-users receive composite water products reticulated in water pipes without any energization, connection, supply point or supply address associated with their apartments. These are synonymous terms. No transmission pipeline facilitating the flow of gas is reticulated to their apartments. They do not receive energy, but a water product.

The Landlord receives the energy on common property infrastructure. This energy is reticulated in a gas transmission pipe to a water storage tank. All equipment is on common property infrastructure. The water is purchased by the Landlord at the mains from the Water Authority. It is then reticulated to the water tank. All transfers occur on common property infrastructure. The last step is transfer in water pipes belonging to the landlord of heated water to each apartment.

The Landlord forms an implicit or explicit contract with the supplier from the moment of requesting installation of the infrastructure to supply energy to his boiler tank. He takes supply as soon as this is in place and a supply charge applies from that time. The taking of supply does not commence as each new residential tenant or occupier of individual flats turn on a water tap.

Ownership of the hot water flow meters is irrelevant. These are merely devices that calculate water volume usage. Though made to withstand heat they do not measure gas volume, heating value, ambience, temperature. They cannot measure individual consumption or approximate to gas usage

The derived formula is pointless since the Landlord receives energy at a single energization point on common property infrastructure. A single read of the bulk gas meter and a bill to the Landlord would simplify matters and be consistent with the Landlord's existing requirement under residential tenancy legislation to meet supply and consumption costs of heated water supplied to renting tenants where bulk hot water is supplied. These costs are factored to the rent.

For VENCorp Distributor-Retailer settlement purposes, only a single supply and billing point applies consistent with the legislation.

The current arrangements represent regulatory overlap with other schemes. This is disallowed under s15 of the *Essential Services Commission Act 2001*. The arrangements interfere with the enshrined existing rights of individuals under residential tenancy laws. In as far as these arrangements are intended to apply to renting tenants, this is a conflict and represent detriment to them. The arrangements turn suppliers into billing agents and interfere with private contractual arrangements between Landlords and Tenants that are enshrined within the Law under other schemes. No deemed contracts were ever intended to apply to those receiving heated water as a composite product. The flow of energy cannot be facilitated through a water pipe.

The original rationale for the adoption of this Guideline and its contents, most of which are intended to be retained is discussed at some length. This historical information is crucial to understanding and revisiting the validity, appropriateness; legal and technical sustainability of these provisions.

It is unreasonable to expect tenants to go to expense including filing fees that would offset costs to recover costs that should properly be the Landlord's responsibility in the first place. The existing arrangements with two lots of meter reads theoretically add to costs. Supply charges in any case belong to the landlord.

Changes by DPI to Appendix 1 (gas BHW charging) and Appendix 2 (electric bulk hot water charging formulae) using conversion factor algorithms that rely upon theoretical measurement of water volume and Appendix 2.

The implications of the current system of calculation and contractual arrangements are discussed in the context of conflict with other regulatory schemes, trade measurement considerations, including the provisions of the national measurement legislation which will make current calculations formally illegal when remaining utility exemptions are made.

[12] Such a formulae is technically and legally unsound and also represents regulatory overlap with other schemes. The calculation methodology violates and intent and spirit of national trade measurement laws and will become formally illegal with high penalties when remaining utility exemptions are lifted as is the intent. See Section 18R Part V *National Measurement Act 1960*.

BRIEF SUMMARY OF SCOPE OF PART 2

Part 2 deals with a more general range of issues and places the regulatory exercise in some context. Aside from looking at some of the general governance models adopted both by the ESC in this Review and by the Ministerial Council on Energy Standing Committee of Officials' National Energy Consumer Framework's Table of Recommendations and some concerns about consultative processes generally this component is of a more philosophical nature.

Amongst other general considerations It looks at the extent to which competition in Victoria may have been incompletely assessed, providing a collation of opinion, examines selected consumer protection issues and sets the context for current energy reviews.

Part 2 contains certain sections that have been reproduced in Part 2A for completeness These include general comments on policy parameters CESC and MCE SCO Table of Recommendations and Policy Paper (pt 29 Pt 2); General Comment of the VESC Consultation Processes (p20-32) pt2); Brief comment on SCC MCE Governance Model (pp33-34 Pt 2)' Further selected general discussion of regulatory reform philosophies (pp33-34 Pt 2); Selected Reflections on Impact of Prices and Profit Margins on Energy Retail Competition in Victoria[13] (p 64-79 Pt 2); Checklist of incompletely or altogether unaddressed issues in assessment of effectiveness of competition in the gas and electricity markets in Victoria[14] (pp60-00 Pt 2). Sections not repeated from 2 include some general regulatory reform considerations (pp44063 Pt 2); Selected Reflections on Impact of Prices and Profit Margins on Energy Retail Competition in Victoria[15] (p 64-79 Pt 2); Selected Energy Protection Concerns; Selected Metering Issues, including collated views on advanced metering and pre-payment meters.

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13 Impact of Price and Profit Margins on Energy Retail Competition in Victoria. Project report Ref D 11383-00. Commissioned Consultant's Report to AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report*, October 2007, Sydney.

14 Principles may be extrapolated to other States.
See *http://www.aemc.gov.au/electricity.php?r=20070315.165531*
South Australia is the current target – refer to Submission by South Australian Government to AEMC's Second Draft Report
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
See also Victoria Electricity (VE) to AEMC Issues Paper (2007), AEMC First Draft (2007) and AEMC Second Draft Report (2008) respectively
See two-part submission to AEMC First Draft Report Madeleine Kingston (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/013Madeleine%20Kingston%202nd%20Submission%20Part%202.pdf

15 Impact of Price and Profit Margins on Energy Retail Competition in Victoria. Project report Ref D 11383-00. Commissioned Consultant's Report to AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report*, October 2007, Sydney.

BRIEF OVERVIEW OF PART 2B (SEPARATE DOCUMENT)

Selected contractual and definitional issues impacting on jurisdictional bulk hot water arrangements within codes and guidelines

See more extensive discussion under Contractual Matters with focus of deemed contracts; Analysis of BHW and VERC proposed changes Analysis of aspects of NECF Glossary and TOR

See also Part 2 cover letter, index and general reflections regulatory matters

Part 2B is closely connected with Part 2A. The two components should be read in tandem.

Part 2A examines in more detail the jurisdictional provisions for bulk hot water contractual and pricing arrangements, which hold contractually liable end-users of utilities who receive not energy in service pipes transmission pipes or electrical lines, regardless of network arrangements, but rather a composite water product, whilst being directly charged for energy on the basis of using water meters to calculate the *"gas rate"* or *"electricity rate"* that should apply based on water volume usage alone.

Part 2B in direct response to many components of the MCE SCO Table of Recommendations since the issue of Intended to VESC Regulatory Review Draft Decision August; NECF Table of Recommendations; National Measurement Institute,[16],AER

This is a dedicated component to issues pertaining to:

- Best practice regulation and policy, narrowly focused mostly on Bulk Hot Water Provisions and similar impacts on embedded end-consumers
- Contractual and definitional matters
- Some of these considerations extend beyond BWH provisions as these arrangements impact on the entire governance model for contractual arrangements and technical definitions
- Trade measurement
- Regulatory overlap with other schemes

[16] It is recognized that the parameters of the National Measurement Institute's role does not extend to issues of contract, specific energy regulation or wider parameters of consumer protection. Instead the NMI is focussed on best practice trade measurement practices, accountability, and the achievement of legally traceable means of delivering goods and services.

These matters are particularly pertinent:

- Certain procedural matters, including conditions precedent and subsequent;
- The absence of sufficient clarification within the Law regarding disconnection matters generally and with particular regard to how these may be impacted by the BHW arrangements with tacitly permit disconnection of heated water rather than energy.
- Jurisdictional provisions current and proposed and some implications.

The jurisdictional considerations and current and proposed provisions are directly impacted by the contractual governance and definition is central to those relating to BHW issues and also those technically described as "embedded"

However in the one case water supplies are the commodity of supply and in the other energy through an alternative network services. The two issued are frequently confused and therefore insufficient attention is paid to the fundamental differences in perceptions of "supply" parameters.

There is a direct correlation between the VESC's Draft Regulatory Decisions and some of these matters so the two components should be read in tandem.

All components of Part 1 principal recommendations 1.1- 1.48 and 1.78– 1.86 (pp.2- 46)

Many components of Part 3 Recommendations 3.01- 3.11 (pp. 67- 70)

Many components of Part 4 Recommendations 4.1- 4.11 (pp.71- 75)

Components of Part 5 Recommendations 5.1- 5.23 (pp. 76- 84)

Components of Part 6 Recommendations 1.49 -1.76 (pp. 85- 100)

I refer to some general considerations relating to definitions as contained in the SCO NECF Policy Paper, and discussing in general terms some implications and gaps.

The over-riding focus of this submission is contained in subsection 2A, which for the purposes of the Victorian Regulatory Review isolates a single instrument about to be repealed as a Guideline and substantial components transferred to the *Energy Retail Code*. Other crucial components will be either discarded or perhaps become less transparently available, including clarification of interpretation and the specifics of pricing and charging formulae for *"bulk hot water pricing and charging arrangements"*

The matters primarily addressed in Part 2A are in specific response to the proposals made for repeal, transfer or abolition of VESC Guideline 20(1) Bulk Hot Water Charging Arrangements as contained on pp65-67 of the current Stage 1 VESC Regulatory Review, in addition to general discussion about regulatory provisions and the possible interest of other agencies.

It is no accident that these have been taken together or that several agencies have been targeted. The issues raised are so fundamental to the governance model adopted in the Policy Paper of the MCE SCO Table of Recommendations and to decisions as to what should be further included and clarified within the Law rather than within the Rules, that it would be remiss to treat the two consultative initiatives as unrelated exercises with a hit and miss approach in targeting appropriate bodies with current and proposed responsibilities for energy policy and regulation

Material that is specific to case study example has been deidentified but referred to as a tip-of-the-iceberg example of regulations that need to be re-considered in the light of the move to nationalization; the need for consistency and harmonization, whilst adopting best practice; the need to avoid regulatory overlap with other schemes; and the need to adopt trade measurement and economic regulation principles that neither conflict with other laws and provisions; that may leave retailers and other energy providers at risk of litigation or even criminal charges in using certain approaches by way of endeavouring to force unwarranted contractual relationships with end-users of utilities.

It is to be remembered that energy providers are authorized to sell energy through energization points that can show legally traceable measurements and calculations as to consumption and cost.

Energy providers are permitted to restrict or disconnect energy as defined within the law and regulations, but this should be as a last resort. They are not authorized to disconnect hot water supplies, or composite products, especially where these are already included as part of a legitimate mandated rental package under the mandated residential lease terms that residential tenants have an intrinsic right to rely upon

The central contention in this component Part 2B is that there are gaps in the contractual governance model that need to be addressed more closely. It is also proposed that some matters currently under jurisdictional control should be spelled out more clearly in the Law.

The misinterpretation of s46 of the *Gas Industry Act 2001* (Victoria) has unjustly imposed contractual status for the sale and supply o energy, where this is in fact supplied to a single energization point considered for VenCorp Distributor-Retailer purposes to be a single supply point/supply address and single billing point. This upholds provisions within the current legislation also.

All energization/supply points for supply of energy to BWH storage systems are single supply/address points. The distribution systems used for transmission of energy and reticulation of water are entirely different.

There are significant trade measurement considerations also that will be further discussed. This indicates that the NECF lexicon and contractual governance model may have loopholes that will give rise to debate, expensive complaints handling; conflict and possibly private litigation.

The Victorian Energy Retail Code and Gas Distribution System Code (Gas Code) now consistently show the meaning o connection as follows:

> *Connection (b) for gas*
>
> *the joining of a **natural gas installation** to a distribution system **supply point** to allow the flow of gas" (VERC and Gas Code). Therefore supply has a parallel meaning in the context of s46 of the GIA.*

The NECF contractual governance model under 1.25 of the Table of Recommendations provides clear definitions of what constitutes a customer distribution service, thus establishing a contractual obligation to the retailer in the distributor-retailer-customer

The proposed additional definition for meter for BWH provisions is

> *"a device which measures and records the consumption of bulk hot water consumed at the customer's supply address"*

The NECF contractual governance model under 1.25 of the Table of Recommendations provides clear definitions of what constitutes a customer distribution service, thus establishing a contractual obligation to the retailer in the distributor-retailer-customer.

1.25 of the NECF TOR in defining customer distribution services includes these parameters

> - *the connection of the premises to the distribution network to allow the flow of energy between the network and the premises*
> - *where a physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energisation' of the connection);*
> - *maintaining the capability of the network to allow the flow of energy between the network and the premises through the connection; and services relating to the delivery of energy to the customer's premises.*
>
> *The nature, scope and content of initial customer connection services are being dealt with concurrently, as part of the distribution connection & planning requirements work stream of the Network Policy Working Group (NPWG).*

For those receiving heated water supplies that are communally heated by a single supply point on common property infrastructure, the contention put forward is that a new tenant or occupant in a multi-tenanted dwelling is not a "new customer" nor do the individual premises of those parties represent *"new supply points"* or even energization points.

The supply point is connected once at the time that a Landlord seeks to have a gas or electric metering installation fitted for the purpose of heating a communal water storage tank. No further energization takes place. The supply is continuous and happens once as a connection, long before any occupants take up residence in individual flats and apartments. Their apartments have no supply points/supply addresses (meaning connection points) or any equipment associated with gas or electricity supply entering their apartments, regardless of network changeover or ownership. The provisions of existing legislation concerning supply points and that within existing Codes are unambiguous. I becomes a question of proper interpretation of those provisions, leaving aside for the moment the regulatory overlap considerations.

All of these considerations have impacts on conditions precedent, conditions subsequent; disconnection processes, and nature of disconnection (water supplies vs energy); and on proper recognition of Landlord/Owner responsibility. Unless better clarification within the Law is achieved the risk of continuing debate over discrepant will continue to cause angst, detriment, expensive complaints handling and possible litigation

Part 2B seeks the careful consideration of the NECF in further clarifying certain factual matters, with recommendations to regard separately the position of those who are currently regarded as contractually obligated to energy suppliers for the *"delivery of electric hot water"* and the *"delivery of gas bulk hot water"*

These are not terms that make good technical sense or are consistent with existing and proposed legislation and other provisions.

This class of consumers, for the most part from the private rental market in sub-standard accommodation does not receive energy at all. The receive a composite water product which is transmitted in water pipes belonging to a Landlord or Owners' Corporation after the water has been heated in a communal water tank.

The Landlord receives direct supply of energy to heat such a tank, which he commences to take supply of from the moment the metering installation is in place. A supply charge kicks in at that point, not when a succession of residential tenants turn on a water tap using a water product that has no connection whatsoever with the energy distribution system; no energization point at a; no supply or supply address point or connection (synonymous).

The matters primarily addressed in Part 2A are in specific response to the proposals made for repeal, transfer or abolition of VESC Guideline 20(1) Bulk Hot Water Charging Arrangements as contained on pp65-67 of the current Stage 1 VESC Regulatory Review, in addition to general discussion about regulatory provisions and the possible interest of other agencies.

It is to be remembered that energy providers are authorized to sell energy through energization points that can show legally traceable measurements and calculations as to consumption and cost. Energy providers are permitted to restrict or disconnect energy as defined within the law and regulations, but this should be as a last resort.

They are not authorized to disconnect hot water supplies, or composite products, especially where these are already included as part of a legitimate mandated rental package under the mandated residential lease terms that residential tenants have an intrinsic right to rely upon.

The customers allegedly contractually responsible receive no energy at all. They receive hot water reticulated in water pipes. The derived costs are based on reading of water meters, if site-specific reading takes place at all, since this was rejected as a mandated option because of inconvenience and expense to retailers.

It is not the prerogative of legislators; policy-makers; rule-makers regulators, however *"independently"* structured as corporate entities to re-write contractual law; common law provisions; or the terms of other regulatory schemes outside their jurisdiction. The current provisions appear to have the effect of making inaccessible to residential tenants their enshrined rights under multiple provisions.

They are being held contractually responsible with implied *"unauthorized use of energy"* where in fact they are merely relying on those rights and expect their heated water to be provided as part of their mandated lease arrangements.

It seems that the BHW arrangements have effectively misinterpreted the deemed contractual status under s46 of the *GIA* that has been imposed on end users of heated water reticulated in water pipes, and in the absence of any energization, supply point/address point in their apartments. The term supply address is a technical one that is unrelated to the physical surroundings of premises.

Instead it denotes supply of gas or electricity to a connection point, and if supplied through an *"embedded network"* still means the physical receipt of gas or electricity in transmission pipes of electrical lines,. Heated water does not reticulated in water service pipes does not fit that description. Therefore the term *"take supply"* in the *GIA* and elsewhere does not apply to the circumstances described.

These are all issues directly impacted by a contractual governance model that is unambiguous, consistent with other regulatory schemes and best practice parameters.

That is why the matters have been given in-depth treatment in more than one arena in the hope that collaborative dialogue will bring satisfactory outcomes for all concerned.

ADDITIONAL NOTES

Matters of relevance to Consumer Affairs Victoria as the peak Victorian consumer affairs body

Please see conclusions and recommendations

CAV has a revised Memorandum of Understanding dated 18 October 2008 with *Essential Services Commission*[17] which was put in place following a range of enquiries and challenges to the current provisions for BHW.

That MOU reinforces the provisions now contained and expanded within s15[18] of the *Essential Services Act 2001* particular those pertaining to avoidance of regulatory overlap.

The MOU appears to have been taken less than seriously and contains some structural flaws

Nevertheless, the provisions under the *ESC Act 2001* are alone sufficient to require upholding of the requirement to avoid regulatory overlap with other schemes. Additionally, in accordance with s16 of the ESC Act, additional matters have been identified as pertinent, including that current and proposed provisions meet the regulatory overlap provision. There it is not necessary to wait for proposed reforms for residential tenants and other stakeholders to rely implicitly on this and the terms of the residential tenancy protections and mandated lease terms.

It is in that context that the CAV is reminded again of the position of residential tenants and the extent to which existing and proposed provisions may be continuing to represent consumer detriment. It is insufficient to rely solely on cost-recovery retrospective pragmatic options under s55 of the RTA. The reasons are discussed in some detail l under the CAV section below.

The CAV is responsible for some 50 enactments, which include Residential Tenancies Provisions, OC provisions and Fair Trading Provisions which include Unfair Contracts.

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[17] Revised Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria (CAV) and Essential Services Commission Victoria (VESC)

[18] *Essential Services Commission Act 2001*, 62 of 2001 Version 30, with amendments to 1 July 2008, ss15-16. Found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/77CF255331471475CA257478001C2523/$FILE/01-62a030.doc*

Matters of interest to Essential Services Commission Victoria (VESC)

Please see all material and refer particularly principal contentions illustrating inconsistencies between definitions and interpretations between existing and proposed ERC BHW provisions and definitions and provisions of the *GIA* and *Gas Code;* especially deemed provisions reliant on effect supply through gas supply point/supply address (meaning gas connection dependant on flow of gas as described in *"meter"*; disconnection processes; (pp 58-63); analysis of s46 of the *Gas Industry Act 2001* (pp47-59) conclusions and recommendations (pp 273-299), Part 2 and 2B and other written material previously submitted.

Section 43A of the *GIA* is explicit concerning disconnection of gas rather than heated water products and emphasis the essential nature of gas, with mirrored reflections within the EIA

43A (1A) (Gas Industry Act 2001 V34; No 31 of 2001 Part 3

In deciding terms and conditions that specify the circumstances in which the supply of gas to premises may be disconnected,[19] *the Commission must have regard to—*

(a) the essential nature of the gas supply; and

(b) community expectations that ongoing access to gas supply will be available; and

(c) the principle that the gas supply to premises should only be disconnected as a last resort.

Matters of interest to the Department of Primary Industries (Victoria) (DPI)

The DPI has taken over from the VESC most policy issues associated with BHW arrangements, the target topic in sub-section 2A

Please refer to all policy considerations for BHW arrangements, notably as above principal contentions illustrating inconsistencies between BHW ERC definitions definitions in GIA and *Gas Code*; especially meter, supply point/supply address; disconnection processes all impacting on tariff maters. Please refer to derived cost considerations, trade measurement matters; regulatory overlap issues.

[19] Refers to disconnection of gas not heated water products. The term disconnection seems to have taken on a meaning neither intended nor permitted within current and proposed legislation and tacitly upheld in Codes and Guidelines instructing retailers to deem end-users of heated water products as contractually obligated.

Please see conclusions and recommendations; Parts 2A and 2B, and all previous supporting material sent during 2007 concerning policy matters and impacts, illustrated by case study example in a particular matter that remains unresolved after 20 months[20] and contested, with similar potential impacts on some 26,000 Victorian consumers of utilities.

Matters of relevance to VENCorp, Distributors and Energy Retailers

Since distributors are an integral part of the contractual equation within the NECF many matters raised are of significance to Distributors and to VENCorp on the basis of the rules made by VENCorp and monitoring undertaken.

Disconnection has a particular meaning within the Gas Code. It does not extend to disconnection of water whoever owns or maintains the hot water flow meters relied upon to calculated deemed gas usage by end-users receiving a composite water product reticulated in water service pipes to individual apartments

Supply means supply of gas through a physical connection at a supply point/supply address associated with a meter as defined as an instrument through which gas passes. There is no flow of gas through hot water flow meters that measure water volume but not gas or energy (heat).

Creative additional re-definition of meter inconsistent with GIA and the Case Code has given rise to unwarranted imposition of deemed contractual status on end-users of heated water where a single supply point exists for all such points serving to heat communal hot water tanks.

In that case a particular inarticulate, vulnerable and disadvantaged end-consumer of heated water was threatened with disconnection of heated water services if he failed to provide identification and contact details and form an explicit contract with a supplier of energy unable to demonstrate that gas had been supplied using a meter as defined in the GIA, but instead had, under policy instructions used a water meter to measure water volume allegedly used from a communal water tank heated by a single energization point on common property infrastructure. No water dial readings were provided. No justification as to why supply as defined in the GIA was not demonstrable. No explanation as to calculations and how derived; redirection to complaints redress or hardship policies if required; no rationale basis upon which deemed status was imposed.

In a particular vulnerable state soon after hospitalization for incurable mental health conditions and a past history of suicide, the pressure of such demands were instrumental in triggering an explicit suicide plan, the execution of was narrowly averted. Now that the matter is closed the supplier claims the right to continue with issuing "vacant consumption letters warning of disconnection if conditions precedent or subsequent are not met. The supply is to the Landlord/Owner not Tenant. The Tenant receives a composite water product reticulated in water service pipes. That water is certainly heated – by arrangement with the Landlord, who takes supply at a single energization point on common property at the only supply address associated with that supply point with an MIRN number. Other tenants on the same block have received similar demands, many with language barriers or other impediments to understanding their rights and options. The residential tenancy provisions are explicit as to Landlord responsibilities if there is no meter (as defined in the GIA) through which energy consumption can be measured through legally traceable means. The Law needs to include re-clarification

For Distributor-Retailer settlement purposes VENCorp regards these as single supply points, consistent with See all definitions and arguments, notably principal contentions and analysis of deemed provisions and disconnection processes.

Section 43A of the *GIA*. Terms and conditions of contracts for sale of gas to certain customers: refer to express expectations of disconnection of gas. No reference to heated water products. See comments under VESC above and extract from 43A *GIA*.

Matters of relevance to National Measurement Institute

Please refer to previous extensive written submissions to the Discussion Paper and directly to the NMI.

The NMI regulations and in particular Part V 18R are of particular note.

This submission extensively discusses anomalies and concerns about trade measurement practices and how this may be sitting uncomfortably with the existing philosophies of the NMI to seek commitment to legally traceable means of measuring goods and services and achieving accountability. The BHW provisions appear to contravene at least the spirit and intent of the legislation. There are equity issues and regulatory overlap with other schemes including the NMI provisions and residential tenancy provisions.

The derived formulae being used are based on reading water volume using hot water flow meters that are designed to withstand heat but not to measure any form of energy, or related factors such as ambience, heating value, pressure and the like.

Individual recipients of heated water as a composite product are being held contractually responsible for taking supply of energy, where in fact the energy is supplied to the Landlord through gas transmission pipes or electrical cables to a single communal water tank,. From there heated water reaches individual tenants in their apartments in water pipes.

No energization exists. No flow of gas or conduction of electricity occurs in transmitting the heated water to these apartments. The deemed consumption of energy cannot possibly be measured in a legally traceable say.

It is unclear what specific monitored accountabilities there are for maintenance of these devices that are used as if they were gas meters to derive costs based on water meter reading to guestimate deemed gas and electricity usage for energy supplied in transmission pipes to a communal water tank and thence in heated composite product form to individual apartments devoid of energization, supply points; supply addresses (which does not mean square footage but rather has the technical meaning of a supply point and is synonymous with that definition.

The National Energy Consumer Framework (NECF) has introduced the term energization. Those buildings with BHW systems have a new supply once and thereafter gas or electricity is supplied indefinitely. The energy used heats a communal water tank. The heated water is transmitted in water pipes not gas service or transmission pipes. The same applies to electric systems using single supply points to communal heat water.

Matters of interest to MCE Energy Reform Implementation Group

All matters impacting strategic planning during the reform process and subsequent reviews of efficacy; harmonization, clarification of certain matters within the Law; definitions; regulatory overlap considerations.

Matters interest to MCE Retail Policy Working Group

Since all of these matters are of direct relevance to jurisdictions participating in the NECF and since the RPWG is considering all submissions, the matters contained in this component submission and all related submissions are crucial before jurisdictional rules are adopted to achieve consistency but without eliminating existing perceived flaws in conceptual thinking.

Matters of interest to the MCE Network Policy Working Group

Since the contractual model for BHW arrangements relies on derived costs using water meters instead of gas or electricity meters as the instrument of measurement to calculate deemed energy usage, the matters are of crucial importance to the NPWG, not only in terms of consumer protection, but also harmony with other schemes, including national trade measurement provisions and the policy parameters embraced by the National Measurement Institute.

The methodologies used are inconsistent with current provisions under the GIA for distribution, supply and sale of energy and calculation through means of a meter as an instrument which measures the quantity of gas that passes through it to filter control and regulate and flow of gas.

Since the thrust of this submission and Part 2B is focused on proper contractual allocation, and since existing measurement and pricing methods appear to be in conflict with legislative provisions current and proposed, this matter needs addressing within the economic steam. This is discussed in more detail elsewhere.

The transfer of the majority of the existing Victorian BHW provisions to the *Energy Retail Code* appear to be an attempt in the one document to differentiate these provisions from all others by entirely re-defining meters as devices which measure hot water consumption rather than energy consumption.

The provisions imply that alternative definitions for disconnection and decommissioning may also apply, with failure to produce acceptable identification or alleged denial of access to meters triggering justification to threaten and then effect disconnection of hot water supplies (not energy which would affect all tenants in individual apartments residing at the same overall rented property address.

The derived formulae relying on finding a legitimate correlation between water volume consumption and gas consumption is based on flawed reasoning.

The reasoning behind the adoption of a deriving a cost in the first place is questionable.

In any case it is one thing deciding on a derived cost principle, and another adopting a derived cost for the express purpose of creating a contractual model deeming an end-consumer of heated water products to be responsible for energy supplied to a single energization point, which according to existing legislation is also a single billing point if the supply point was in existence prior to 1 July 1997, which is the case in the vast majority of privately-owned buildings that are multi-tenanted dwellings.

The process of arriving at a derived cost by using water meters does not make sense. If the landlord is responsible for the supply costs and supply of energy on the basis of there being a single energization point, all that is required is for the single bulk energy meter to be read to ascertain how much gas or electricity was used. This would save on all administrative costs associated with calculation and billing, and in theory bring costs down.

Matters of interest to Australian Competition and Consumer Commission (ACCC) and Australian Energy Regulation (AER)

Given imminent transfer of retail policy for gas to the AER in 2010 some relevant historical and current details and highlights are summarized for attention as they impact on the operation of the market, contractual considerations, trade measurement considerations and how jurisdictional provisions sit with the proposed NECF. There are many gaps in clarification which will be taken up with the MCE SCO NECF directly. They will also receive this submission to add to other material previously sent.

The ACCC has a responsibility to consumers and works with the CAV and AER under Memoranda of Understanding. These issues are being drawn to ACCC attention again

Matters of interest to Productivity Commission

These issues illustrate matters relating to regulatory reform and benchmarking – of topical interest to the PC. The thrust of these matters is not new and was brought to the attention of the PC during the Review of Australia's Consumer Policy Framework earlier this year with supporting material and open submissions.

Please refer to conclusions and recommendations at the end of this component submission Part 2A.

GENERAL COMMENTS ON POLICY PARAMETERS
VESC, REGULATORY REVIEW 2008 and
MCE SCO Table of Recommendations and Policy Paper

There is a good reason for making a combined response to and to aspects of the Essential Services Commission Victoria (VESC) current Regulatory Review, the MCE SCO Table of Recommendations and the National Measurement Institute (NMI); on the basis of overlapping policy parameters and proposed amendment to Laws and Rules in the move towards best practice nationalization.

With the lofty goal in mind of re-raising community awareness of the anomalies that exist that may be seriously hampering consumer protection and best business and trade measurement practices.

The compacted deadlines for the latter with responses expected by 12 September 2008, after online publication three weeks earlier on 27 August made effective consultative feedback from interested stakeholders almost impossible to achieve.

Undeterred by the restrictive and unrealistic consultation deadlines provided for proper response, I have persisted with preparation of what was a challenging task not only in responding to limited components of the Victorian Regulatory Review, but endeavouring to match the perceptions, facts, conclusions and recommendations to the proposed National Consumer Energy Framework.

This is because I feel the issues are of a paramount importance in terms of best practice policy and regulation; accountability issues; and the implications for future policies and practices, both in a business context and in the context of regulatory reform.

The proposals made regarding contractual and economic models in relation to “bulk hot water arrangements” may seem to be trivial, in as much as, on the face of it, a mere repeal of allegedly redundant provisions is proposed and most provisions are being transferred to an energy code.

My opinion is that these matters are far from trivial. I believe that they go towards highlighting some fundamentally regulatory reform deficiencies.

The BHW provisions appear to have misinterpreted the precepts embraced by the deemed provisions and are at risk of being carried forward into the national template law without the specific clarification that is required, so that such fundamentals as:

- Proper definition of the sale and supply and receipt of energy (as opposed to composite water products
- Proper application of the deemed provisions current and proposed bearing in mind that these always refer to the sale and supply of energy as conveyed through the distribution and transmission systems that are specific to energy (as opposed to supply of composite water products
- Proper application of disconnection processes (relating to energy rather than water where justified and in circumstances where a genuine distribution/retail contract exist for the sale and supply of energy (as opposed to pragmatic, imprecise, legally and technically unsustainable provisions to deem supply of energy).
- Proper compensatory provision under wrongful disconnection provisions for those who may be unjustly and unilaterally imposed with deemed contractual status, outside the parameters of the meaning of distribution and supply of gas or electricity within the GIA and EIA, for the provision of energy that is in fact supplied to a Landlord/Owner at a single energization point to heat a communal water tank on common property infrastructure.
- Proper recognition of the general and specific rights of end-consumers of utilities, especially residential tenants.
- Proper recognition of the necessity for all regulations to reflect not only consistency within a specific legislative jurisdiction, but also with other regulatory schemes and the rules of natural and social justice as well as the fundamentals of contractual law as contained in the written and unwritten laws that need to be taken into account in the design of all regulations and policies.
- Proper recognition of the importance of undiluted transparency, disclosure, and record keeping such that the decisions and processes of government, independent regulators, complaints schemes howsoever structured; policy and rule-makers; prescribed authorities, prescribed agencies; prescribed entities, howsoever structured either as corporate entities or government agencies, deliver best practice and community expectations.

GENERAL COMMENT ON VESC CONSULTATION PROCESSES

The VESC Guideline No 20: Bulk Hot Water Charging Guideline, since 1 January 2008, under the policy control of the DPI specifies the requirements for energy retailers charging for delivery of electric bulk hot water or gas bulk hot water to customers from gas or electrical distribution systems.

The VESC as part of its Regulatory Review published online on 25 August 2008 a Draft Decision, without it seems undertaking a robust and transparent consultation process in several stages as is normally expected, to repeal this Guideline, which has been the subject of protracted attack as being an unfair provision adversely impacting on the enshrined contractual and other rights of end-users of bulk energy without energization points expected to form contractual relationships on a deemed contract basis with energy providers licenced to sell gas or electricity but not composite products.

Since Victoria is aiming to *"lead to way"* to other States at different stages of competitive progression, it is crucial that robust consultation is effected and that all deliberative documents and consultative inputs are transparently reported online. This principle applies to all jurisdictional and national consultative initiatives.

Major changes have already been undertaken through transfer on 1 January 2008 from the ESC to the DPI of most policy matters related to the operation of the soon to be repealed BHW Charging Guideline, and adoption of a Draft Decision for the VESC Regulatory Review, without it seems, a robust and transparent consultation exercise being undertaken for the large range of instruments to be repealed or amended as part of the Review.

Most discussions concerning the ESC Regulatory Review have taken place behind locked doors including only an invited group belonging to a Consumer Consultative Committee (CCC).

The VESC Issues Paper for the current Regulatory Review summarizing initial responses from 14 stakeholders was tabled at closed meetings of the CCC in May and June 2008 respectively, following announcement of the Regulatory Review process in February. Stakeholders expressing an interest in openly participating in these arenas were disallowed from doing so. The Issues Paper itself produced in April 2008 and tabled for the participants for May meetings, which is not published online mentions 12 stakeholders.

The Issues Paper reports that was a brief joint submission from CUAC, CALC and St Vincent de Paul in response to the February Open Letter of invitation.

There was a submission from EWOV the industry-specific complaints scheme funded and managed by industry participants. Utility Choice a price comparison service made a submission to the Open Stakeholder invitation. All other participants were industry based, including ERA, Origin Energy, Simply Energy, SPAusNet; TRUenergy, and United Energy Distribution, Alinta AE and Multinet Gas, who are now under Alinta, taken over by the consortium Babcock and Brown and Singapore Power, the latter government-owned. AGL is part of that group.

Though the highlights of those submissions are mentioned in the Issues Paper – not published online, the submissions to the Review are available. Scant information is made of discussions about the BHW arrangements, or proposal to repeal and transfer, though some industry stakeholders would prefer to see changes deferred till the NECF has a more settled position on final outcomes.

The single public meeting held on 5 August 2007 was not announced in the usual way for stakeholders on the ESC email mailing list, and it was unclear where this was intended to Detailed outcomes of discussions, that is outcomes of Working Papers and discussions undertaken by working groups that have taken place in this way have not been published online.

There are two visible consultative documents openly accessible online. These are the original Open Letter in February 2008 re Consultation that failed to specify the instruments or parameters to be considered; and a VESC Draft Decision dated 25 August 2007 which appeared online on 27 August.

It is of concern that all consultative documentation and discussion documents are not accessible online in connection with the entire Review of Regulatory Instruments – Stage 1 Draft Decision of 25 August, as published on 27 August 2008.

The May Issues Paper that was privately circulated or tabled to members of the Customer Consultative Committee (CCC) in time in May 2008 has not been published online for other interested stakeholders to study and respond.

No-one should have to specifically ask for a personal copy of an Issues Paper or any other consultative document. An attitude of transparency as espoused under the parameters of such bodies as the Victorian Competition and Efficiency Commission, requires:

- *a transparent regulatory decision making process through mandatory public consultation on regulatory proposals;*
- *the ongoing commitment to comprehensive public inquiries into regulatory matters conducted by the VCEC and the State Services Authority.*

Such transparency and minimal standards of public consultation require publication online of all Working Paper documents, Issues Papers, Consultant's Reports and adoption of realistic deadlines for response. Inputs should be publicly sought and where possible encouraged in writing rather than private meetings behind locked doors. All registered stakeholders should be given timely access to all relevant documentation, but publication online is the most transparent process.

Stakeholder interest may extend well beyond the parameters of hardship and hardship policies, the focus of all provisions existing and projected. The implications of conditions precedent and subsequent may have implications for disputed imposition of deemed status as discussed elsewhere, particular in relation to the bulk hot water provisions

A token poorly publicized public meeting at the end of the decision making process to *"inform the general public"* can hardly be taken as a consultative exercise involving the wider community.

The Retail Policy Working Group (RPWG) had undertaken several internal discussions with those belonging to the Group, but outcomes were transparently published and stakeholder input solicited. This is their stand policy though often timelines for response are less than optimal especially given competing demands, conflicting priorities, funding problems, especially in the community arena and individual stakeholders. All such consultative initiatives should embrace the principles of robust consultation with adequate lead time.

If well-resourced commercial companies are struggling to undertake meaningful dialogue because of time constraints, how must under-funded community organizations and individuals feel about the stresses and pressures of stakeholder involvement in public policy decisions.

The lead time proffered in the case of the VESC Regulatory Review Stage 1 of 3 weeks from date of publication of Draft Decision to response date three weeks hence was inadequate to secure widespread community awareness and response time.

This is to be immediately followed by a further Draft Decision on another clutch of instruments to be reviewed, repealed or changed in some way. The response burden on all stakeholders is considerable.

The energy area impacts of every member of every community. Policy impacts are widespread and far-reaching.

Many have expressed concerns about the manner in which far-reaching decisions have been taken across the board at both jurisdictional and federal levels that have not considered the correlation between decisions taken in isolation to others.

Maybe there is room for a broader sweep, enhanced governance at the early stages of planning and a truly joined-up Government approach that is well informed and has had the opportunity to gain wide inputs from many sources. A closed door policy that makes most decisions behind those doors is not a robust one.

Given that there are some 17 of 31 instruments being reviewed or repealed, it would have been most helpful for all consultative documentation and records of discussions to be readily accessible online.

In 2004 and 2005, at the time that of deliberations over the BHW Charging Guideline, deliberative documents were not readily accessible online. They were not made available till many months after the lodgment of a specific unresolved complaint that remained outstanding for 18 months, with the crux of the debate being over who the proper contractual party should be.

At the time of adoption of the VESC BHW Charging Guideline 20(1) and the preceding deliberative discussions, nothing at all was transparent in terms of online publishing of the deliberative processes. Initially efforts were thwarted to seek policy clarification about the interpretation, application and effect of the BHW Guideline from both EWOV and ESC during the course of a complaint that remains unresolved after the 18 months that it was open before the existing Victorian industry-specific complaints scheme, and the VESC. Ultimately the Guideline and its associated deliberative documents from 2004 and 2005 discussions were made available online during mid-2007. Repeal of the Guideline may not make the historical matters and original rationale less accessible, if at all. This is regrettable.

Since the VESC has relinquished most responsibility for these provisions to the DPI save for what is included on bills, it is not certain whether the original documentation will continue to be readily available for scrutiny.

Recommendations:

Update website facilities to ensure that each time any change occurs to online material of interest to registered stakeholders occurs an individual automatic email alert is sent to interested parties. This is standard practice with most agencies or entities so that an instant alert is obtainable when changes are made. It is achievable through webmaster auto alerts

Provide timely notice of future consultative processes.

Provide options for registered stakeholders to provide written material for consideration by Working Party Groups at each stage of deliberation

Publish Working Paper outcomes for further public input

Publish online all Issues Papers in a timely manner

Publish online all Consultants Reports in a timely manner

Make available all previous Codes, Guidelines and Deliberative Documents in archives

Adhere to the principles of consistency with legislation current and proposed[21]

Adhere to principles of avoidance of regulatory overlap with other schemes and the provisions within the unwritten laws, including the rules of natural and social justice[22]

[21] The BWH provisions, definitions and interpretations are inconsistent with the express and implied provisions of the GIA and EIA with regard to the proper application of the terms distribute energy, supply and sale of energy, disconnection; meter; connection; transmission

BRIEF COMMENT ON SCO MCE GOVERNANCE MODEL

The SCO Policy Paper has advised as follows:

> ***Extract MCE SCO Policy Paper Governance –***
>
> *There will be a single set of rules for gas and for electricity to allow stakeholders (particularly customers) ease of access to the new national customer framework – the National Energy Customer Rules. There is, however, no proposal to consolidate the National Electricity Law (NEL) and the National Gas Law (NGL) regimes other than the introduction of a common set of retail customer rules.*
>
> *The new national customer framework will also utilize a contractual model to regulate the arrangements between:*
>
> - *retailers and customers;*
> - *distributors and customers; and*
> - *distributors and retailers.*
>
> *Model terms and conditions for standard retail contracts and minimum terms for market retail contracts, for supply of energy to customers, are to be set out in the Rules.*
>
> *There will be a deemed customer distribution contract between a distributor and a retail customer taking supply via that distributor's network. The customer distribution contract will be set out as model terms in the Rules, and will be supported by direct obligations on distributors in the Rules.*
>
> *In addition, a Retail Support Contract (RSC) between retailers and distributors will be set out in the Rules to regulate the issues that arise upon the retailer supplying a customer connected to the distributor's network*

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[22] The BHW provisions not only conflict with all other energy provisions current and proposed, but represent regulatory overlap with other schemes as disallowed under the ESC Act 2001 and conflict with the unwritten laws. In addition they do not reflect either best practice calculation, trade measurement or adherence to community expectation under the rules of natural and social justice in deeming contractually obligated those who do not receive any energy in the manner outlined within the law and the Gas Code. Therefore transfer to the Energy retail Code of existing BHW provisions will directly clash with other energy provisions existing and proposed and create conflict over discrepant interpretations

MK COMMENT

Some key issues being addressed relate to the broad governance model outlined in the MCE SCO Policy Paper. These issues are crucial to the development of jurisdictional Rules and the plan to harmonize these throughout the States and Territories who will participate in the NECF.

The SCO MCE Table of Recommendations acknowledges that the shift from six jurisdictional retail supply regimes for both electricity and gas to a single national regime is a major regulatory transition, especially since current arrangements, whilst sharing similarities, have developed in different contexts and have had different starting points for the transition.

Since so many of the specific recommendations under MCE SCO Parts 1-6 are impacted by the following considerations, I deal with some general principles relating to contractual matters, regulatory overlap with other schemes and some trade measurement considerations with particular emphasis on the compromised rights of residential tenants and under multiple provisions in the written and unwritten, including common and contractual law; and the rules of natural justices, and under specific enactments such as residential tenancy provisions. Once those principles are aired I will proceed to make additional comments to clarify selected issues under the headings provided.

The annotated contents page details the structure of this component submission and the particular sections of the MCE SCO TOR as well as the VESC Regulatory Review Stage 1 that are targeted in this somewhat narrowly focused submission.

Though time constraints have not permitted response to each component of either the VESC Review or the MCE SCO TOR, many of the issues are more generally addressed in updated submissions that were originally prepared for the Productivity Commission.

Parts 3- 5 deal more generally with consumer policies and regulatory reform issues, whilst Parts 6-9 are entirely energy focused with more technical emphasis on pertinent issues. Therefore all components, which are summarized in Part 1 as an overall Overview with several appendices should be viewed as a whole, though each component can stand alone. Parts 1-9 each contains an annotated table of contents and a dedicated executive summary.

Parts 2, 2A and 2B were submitted to VESC. 2A deals in great detail with 2008 Regulatory Review and is to be read in tandem with 2B which is more focused on the contractual governance model using the MCE SCO NECF Table of Recommendations and Policy Paper Glossary headings.

Part 2 contained a covering letter addressing BHW issues already covered in 2A and 2B and more general regulatory and competition issues treated in more depth in other components for MCE and other arenas

COMMENT ON 1.1 BACKGROUND TO THE VESC REGULATORY REVIEW

The ESC explains that prior to the establishment of the Essential Services Commission set up in 2001 under the Essential Services Act 2001 (ESC Act), its predecessor the Office o the Regulator-General (the ORG) had put into place a suite of regulatory protections to ensure small customer protection in terms of continued access to essential energy supply on fair and reasonable terms, and also provisions for efficient and effective competition in the market.

The need to create service standards and address perceived market failure had heralded new guidelines.

Though the market has evolved significantly since 2001, the findings of the Australian Energy Market Commission (AEMC) regarding the effectiveness of competition in Victoria have not been supported by all stakeholders

I believe that there is a range of significant gaps in the assessment made. I had included a summary of some of these in submissions to the Productivity Commission and believe there is some merit in attaching at least the summary to each component submission to current jurisdictional and national initiatives as an ongoing reminder of at least some of the perceived gaps when decisions are being made to prune regulatory burdens based on *"effective competition"* markers, more so because of the pressure to reduce regulatory burdens across the board.

It makes good sense to rationalize and harmonize regulation in the move towards nationalization, but I reflect the concerns of others that the exercise does not erode consumer protection in the enthusiasm to reduce the costs of regulatory compliance.

Therefore it is encouraging that a National Energy Consumer Framework is being adopted which justifies a review of jurisdictional regulatory burdens where pruning of overlapping regulation can be achieved without compromise to consumer protections.

Edmund Chattoe has raised the issue of whether sociologists and economics can effectively dialogue[23]. This is discussed in a component submission elsewhere.

It is of concern that the social objectives previously included within the *Essential Services Act 2001* (Victoria) are to be removed, since most Australian citizens as consumers would consider that it is the responsibility of the community as a whole to address the needs of those most disadvantaged and for there to be a shared responsibility to ensure health safety and well-being parameters in developing a workable and effective consumer policy framework for energy.

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[23] Chattoe, Edmond, (1995) *"Can Sociologists and Economists Communicate? The Problem of Grounding and the Theory of Consumer Theory"* This research is part of Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Found at http://www.kent.ac.uk/esrc/chatecsoc.html

It is not only the disadvantaged who may suffer from over-emphasis of commercial goals to achieve efficiency in the alleged *"long-term interests of consumers,"* often expressed as achievable by a predominant focus of economic efficiency and economically effective competition, expected to automatically benefit consumers, whether or not these means stripping them of important and enshrined rights.

Arrangements to deal with hardship issues through other means does not mean that other consumer objectives, social and moral obligations are dispensable

Even those without such disadvantage, which is not restricted to financial hardship, have rights that deserve to be upheld. For example unjust imposition of contractual status on private citizens as end-users of energy is unjust whether or not there are any considerations of disadvantage.

Many of the consumer protection instruments in place at jurisdictional level have so heavily focused on hardship matters that other issues impacting on the general population who cannot claim hardship may have been overlooked.

It may be a good time to re-evaluate whether access to energy is available to end-consumers, both small residential customers and small business customers on fair and reasonable terms or whether their needs and concerns are become the target for progressive erosion

Comment on 1.2 Legislative Framework for Draft Decision VESC Regulatory Review August 2008

The legislative framework for the VESC Draft decision in this review (p2) is described broadly as under (1) below taken directly from the revised *ESC Act 2001* with amendments up to 1 January 2008

> *(1) In performing its functions and exercising its powers, the primary objective of the Commission is to protect the long term interests of Victorian consumers with regard to the price, quality and reliability of essential services.*
>
> *(2) In seeking to achieve its primary objective, the Commission must have regard to the following facilitating objectives-*
>
> *(a) to facilitate efficiency in regulated industries and the incentive for efficient long-term investment;*
>
> *(b) to facilitate the financial viability of regulated industries;*
>
> *(c) to ensure that the misuse of monopoly or non-transitory market power is prevented;*
>
> *(d) to facilitate effective competition and promote competitive market conduct;*

(e) to ensure that regulatory decision making has regard to the relevant health, safety, environmental and social legislation applying to the regulated industry;

(f) to ensure that users and consumers (including low-income or vulnerable customers) benefit from the gains from competition and efficiency;

(g) to promote consistency in regulation between States and on a national basis.

(3) Without derogating from subsections (1) and (2), the Commission must also perform its functions and exercise its powers in such a manner as the Commission considers best achieves any objectives specified in the relevant legislation under which a regulated industry operates.

The need for consistency in regulation between States and on a national basis has been recognized by the VESC and is a goal supported by many stakeholders as being appropriate and timely as nationalization initiatives are planned and consolidated.

The decision by the ESC to streamline the regulatory framework has triggered review of its codes and guidelines, of which 17 instruments are targeted for Stage 1 review, with Stage 2 following on its heels during September, placing enormous response3 burdens on interested stakeholders within very short timeframes.

Stage 1 includes 17 of 31 Codes and Guidelines for stakeholder response and review.

Of these this component submission targets in particular Guideline 20(1) Bulk Hot Water Pricing and Charging and related components of the Wrongful Disconnection Provisions.

1.4 It is commendable that the VESC's review is not intended to significantly change the fundamental customer protections in Victoria and that it expects that any substantive changes to the customer protection regulation for Victorian customers will be implemented in accordance with the MCE's decision on the national framework

1.5 Purpose of the Draft Decision (VESC Regulatory Review Stage 1)

I note that the VESC State I Review includes proposals for amendments to the Energy Retail Code (ERC), the Code of Conduct for Marketing Energy Retail in Victoria (the Marketing Code) and the Electricity Customer Metering Code (ECMC), as well as the real of certain energy retail guidelines.

The timescales provided for proper consideration of all Stage 1 proposals before publishing a final decision, coming at a time of demands also in other related arenas and the National Energy Consumer Framework Proposals.

No sooner would the effort been placed into responding to this batch, than the ESC proposes to publish another Draft Decision for Stage 2 proposals.

Though the VESC has mentioned robust stakeholder consultation, the Issues Paper for the Stage 1 proposals contained in this Draft Decision is nowhere to be found online.

The elitist Consultative Consumer Committee may well have had many opportunities to study these matters and ready access to tabled Issues Papers and Working Documents, but other interested opportunities were excluded from those process and access to documents, including summaries of Working Group recommendations.

At the very least the Issues Paper should be a readily accessible document online. Very much at the last minute a matter of days before expiry of the deadline for response to the VESC Draft Decision, as a stakeholder who had expressed an interest in the regulatory review I was provided with a personal .pdf copy of the Issues Paper, too late to have time to study this and incorporate considered responses.

The Draft Decision fails to mention the input of those who submitted privileged or informal material that was pertinent to the Review especially in relation to BHW matters, even though it had been indicated that such material would be taken into account.

This goes towards issues of process relating to transparency accountability and procedural conduct of such Reviews. These are not new concepts since the question of robust and transparent meaningful stakeholder consultation has been raised on numerous occasions by many parties participating in various jurisdictional and national consultative initiatives.

The proposal to repeal the BHW Guideline has been rationalized, but there are concerns that the VESC and DPI may believe that merely transferring most of its provisions and moving from existing deliberative documents associated with the Guideline dating back to 2004 and 2005 certain provisions relating to perceptions of contractual status that can be imposed on end users of hot water services centrally heated on common property infrastructure will have the effect of re-writing contractual law, tenancy law, owners corporation provisions, trade measurement provisions and the provisions within the unwritten laws including natural and social justice rules.

Shown below is an excerpt from the ESC Review approach identified in the Draft Decision (p9) published on 25 August 2008 for stakeholder response by 12 September.

It is noted that there are different definitions within jurisdictions for small customer. However, these all appear to be based on threshold levels. In addition other terms such as *"relevant customer"* and *"prescribed customer"*[24] are important distinctions. I will discuss within this submission jointly to the MCE SCO and to the VESC Regulatory Review.

In Section 2 dedicated mostly to contractual, technical and trade measurement considerations relating to BHW arrangements and embedded customers I highlight some crucial considerations are fundamental to the proper definition of the contractual party, disconnection procedures and provisions; wrongful disconnection provisions, leaving aside the broader considerations of regulatory overlap with other schemes, notably the explicit and unambiguous provisions of the *Residential Tenancies Act 1997*.

[24] Prescribed customer in the Victorian provisions is described as

SUMMARY OF PRIMARY CONTENTIONS Part 2 and 2B

1. That the deemed provisions under the *Gas Industries Act 2001* and *Electricity Industries Act 2000*, and any subsequent deemed provisions, and contractual arrangements are inapplicable to those receiving bulk hot water, that is heated water reticulated in water service pipes to individual abodes (premises) in multi-tenanted dwellings

Action: The further clarifications should be within the new template NECF Law and in the interim through amendment to the *GIA* and *EIA*

Existing and proposed jurisdictional arrangements for *"bulk hot water"* (BHW) should be amended to more accurately and justly interpret the deemed provisions of the *Gas Industry Act 2001* and the *Electricity Act 2001* with reference to the governance contractual model adopted and the calculation and trade measurement practices adopted

Specifically, notwithstanding the terminology, definition and application of contractual provisions in existing and proposed Laws proposed NECF Law should be further clarified with respect to the arrangements and contractual relationships and obligations for those receiving heated water supplies through a single energization point on common property infrastructure of Landlords/Owners or Owners' Corporations (OC).

2. That apart from the deemed provisions, existing and proposed jurisdictional contractual arrangements and trade measurement practices for *"delivery of bulk gas hot water"* or *"delivery of bulk electric hot water"* (BHW) are inconsistent with all other existing energy legislation and other provisions for the supply of energy facilitating flow of energy to premises using a distribution method as contained within the *GIA* or EIA.[25]

Action: The Template Energy Law (NECF) should clarify this with further clarification by subordinate legislation within the GIA and EIA pending nationalization

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[25] Refer to the *Electricity Industry Act 2000 Act No. 68/2000, Part 2, s36 Terms and conditions of contracts for sale of electricity to certain customers;* s39 D*eemed contracts for supply and sale for relevant consumers*, sub-section 1-11; s40A, 40B
Refer to similar provisions under ***Gas Industry Act 2001*****,** s46, sub sections 1-11 *Deemed contracts for supply and sale for relevant customers***;** s48 *Deemed distribution contracts,* subsections 1-12; s48A Compensation for wrongful disconnection (referring to disconnection of gas not water or composite water products, leaving those whose water supply is threatened without similar protection under this section if it is tacitly accepted that disconnection of heated water services may occur if a customer perceived to be obligated to a retailer or distributor fails to comply with prescribed conditions precedent or subsequent to the obligation to supply. If no supply of energy occurs, such refusal is justified. The current BHW arrangements cannot show that supply of energy does occur in relation to end-users of heated water without connection points or transmission of energy to their individual premises

3. That existing and proposed jurisdictional contractual arrangements for *"bulk hot water"* are voidable on the basis that they are inconsistent with the express provisions and intent of the provisions of the *Gas Industry Act 2001* regarding the sale and supply of gas, in as far as the arrangements appear to deem the "*taking of supply of gas at the premises from the relevant licencess"* without such alleged supply satisfying the meaning of distribution and supply of gas through the following means:

- Use of *gas service pipes* or *transmission pipelines* facilitating the flow of gas in effecting the alleged distribution of gas conveyed in gas service pipes, transmission pipes; or for electricity, as conducted by electrical lines
- Use of a *gas fitting* to the premises in question, including a gas meter as defined within the *GIA* as shown below

  The *GIA* defines *gas fitting* to the individual premises of end-users of heated water that *includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas"*

  Specifically use of a *meter* as defined within the GIA as

  "an instrument that measures the quantity of gas passing through it"

  and further defined within the Gas Code as *an instrument through which gas passes to filter control and regulate the flow of gas that passes through it and its associated metering equipment*.

  The BHW Guidelines and proposed re-definition of the term *"Meter"* has introduced terminology that is inconsistent with the express definition of the term "meter" used in the *Gas Industry Act 2001* that is required to supply gas and measure its consumption.

  It is implicit in that definition that a gas meter is required to measure gas and not a hot water flow meter that can withstand heat but not measure gas or heat

  The BHW Guideline and intended definition of "meter" for "BHW" Charging purposes to be incorporated into the *Energy Retail Code* is

  > *"a device which measures and records consumption of bulk hot water consumed at the customer's supply address"*

  Mere transfer from a Guideline to a Code will not over-ride the enshrined definition of a meter as contained in the *GIA*, of *EIA* and as referred to in residential tenancy provisions

The insistence of policy-makers, regulator(s) and complaints schemes on regarding individual flats and apartments as *"separately metered"* if a hot water flow meter exists associated with the water storage hot water system does not validate the application of the term meter, or it's the use of hot water flow meters as suitable instruments upon which to base derived costs for the alleged *"sale and supply of gas"* to end-users of heated water when that water is communally heated on common property infrastructure on the property of landlords/Owners(s) or Owners' Corporations

The premises deemed to be receiving gas under BHW provisions are the individual abodes of occupants in multi-tenanted dwellings receiving heated water, a composite product from which the heating component cannot be separated or measured by legally traceable means as expected under existing provisions in the GIA and proposed provisions with the proposed NECF governance model for contractual relationships.

The water supplied to individual occupants in their respective abodes is communally heated through a single energization point on common property infrastructure.

No gas fitting, gas transmission pipe or gas meter exists in those premises that can facilitate the flow of gas to those premises. Water service pipes do not convey gas. Hot water flow meters do not facilitate the flow of gas. These are located in a boiler room on common property infrastructure and measure water volume only, not gas volume or heat (energy)

- Gas supply through the physical connection of gas from the distribution network to allow *the flow of energy between the network and the premises of end-users as occupants of flats and apartments*[26]

  This means supply of gas using a supply point/supply address (synonymous technical terms denoting connection not the living space of an occupier's abode); or alternatively a transmission pipe connecting a network to the said premises (of individual occupants in multi-tenanted dwellings receiving BHW heated in a communal tank delivered in water service pipes)[27]

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[26] The gas supplied to the single communal water storage tank on common property infrastructure is the property of the landlord, being supplied with energy through a gas transmission pipe connecting the gas meter to the hot water system to communally heat water that is then transmitted in water pipes to individual abodes of occupants in a multi-tenanted dwelling

[27] A single supply point/supply address is on common property infrastructure

- Gas supply as defined under the *GIA* place as defined under the *GIA*[28] applying the definitions of *"customer;" "gas distribution company";*[29] *"distribute" "transmission"; "service pipe"* "*transmission pipeline"; apparatus and works;" "meter" (facilitating flow of gas; capable of measuring gas volume consumption)*[30]

- Gas supply through the *"physical connection that is directly activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energisation' of the connection)*[31]

- Gas supply through facilitation of the *flow of gas (or electricity) between the network and the premises through the connection; and services relating to the delivery of energy to the (alleged) customer's premises, using a gas fitting that "includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas"*[32]

  Connect in the ERC and in the proposed NECF means

  (a) for electricity, the making and maintaining of contact between the electrical systems of two persons allowing the supply of electricity between those systems; And

  (b) for gas, the joining of a ***natural gas installation*** *to a distribution system* ***supply point*** *to allow the flow of gas.*[33]

  Instead reliance is placed on the existence of a hot water flow meter that measures water volume, not gas, and water transmission pipes, to presume *"sale and supply of gas by the relevant licencee to the relevant customer."*

  No stretch of imagination can turn a hot water flow meter into a gas fitting or gas service or transmission pipe.

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28 *Gas Industry Act 2001* Version 036, No. 31 of 2001 with amendments to 25 July 2008 *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

29 *"gas company"* means a gas distribution company, a gas retailer or a gas transmission company; *"gas distribution company"* means a person who holds a licence to provide services by means of a distribution pipeline; Both definitions are from the FIA B36 above

30 Where definitions such as meter are contained in the legislation, this prevails over Codes and Guidelines. The proposed definition of "meter" for bulk hot water charging purposes is inconsistent with the GIA and with the Gas Code, as well as the contractual governance model proposed by the NECF Table of Recommendations and Policy Paper Glossary

31 Wording of the NECF Glossary Paper and Table of Recommendations, consistent with the existing provisions under the GIA

32 Definitions, Gas Industry Act 2001, v36, No 31 of 2001

33 No such connection takes place for those receiving heated water centrally heated in a communal boiler tank belonging to a Landlord, and where a single energization point exists responsible for heating the Landlord's boiler tank. Heated water is reticulated in water pipes to each residential tenant's apartment or flat

- Gas supply through a gas metering installation *"allocated and registered under retail gas market rules developed by VENCorp under section 62 or a gas distribution company under section 63 (GIA) and approved by the Commission under section 65 that are in effect,* using a Meter Identifying Registered Number that is unique to the alleged "customer" as the end-user of heated water products.

  Therefore taking supply of gas means as delivered through a gas meter, not as calculated through a hot water flow meter on common property infrastructure where the energy supplied to the water storage tank is supplied through a single supply point, regarded by VENCiorp as a single supply point for Distributor-Retailer settlement purposes

  The absence of such a gas meter or gas transmission pipeline to the individual abode (premises) of the (alleged) customer of heated water products invalidates any claim that gas is sold or supplied to that end-user of heated water, rather than to the Landlord/Owner or owners' Corporation

  It follows that the derived costs for the Gas Tariff for delivery of bulk gas hot water" (and equivalent means for calculated the *"electricity tariff for delivery of bulk electric hot water"* are based on invalid metering processes, since the GIA expects that a gas meter is used to calculate gas usage and to facilitates *"the flow of gas to filter, regulate and control the gas that passes through it and its associated metering equipment"*

  Gas supply under the meaning applied in the GIA for supply and sale contract[34] – applicable to gas provision through the gas distribution system or gas transmission system involving a physical connection permitted the flow of gas to the premises deemed to be receiving gas.

4. That existing and proposed jurisdictional arrangements for *"bulk hot water"* (BHW) contractual model and policy provisions for derived costs (regardless of actual formulae and actual derived rate determined by the DPI from time to time), based on water volume calculations and conversion to gas and electricity rate tariffs are inconsistent with NECF governance contractual model for connection and supply of energy facilitating flow of energy to premises.[35]

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[34] *Gas Industry Act 2001* version 34, No. 31 of 2001, definitions, supply and sale contract

[35] This is based on the premise that current interpretations of deemed provisions under the *GIA* and *EIA* are incorrectly applied in relation to alleged *"delivery of energy"* for those receiving communally heated hot water through a single energization point
Refer to the deemed provisions under s46 of the *Gas Industry Act 2001* v36 No 31 of 2001 incorporating amendments as at 25 July 2008; and s39 of the *Electricity Industry Act 2000* Act No 68/2000, which are substantially similar in application and meaning apart from differences in section numbers and certain additional clauses peculiar to the GIA

5. That specifically, existing and proposed BHW arrangements inconsistent with intent and meaning of s46 of the *Gas Industry Act 2001* (GIA) for **Deemed contracts for supply and sale for relevant customers** *"take(ing) supply of gas at premises from relevant licensee…."*

6. That specifically existing and proposed BHW arrangements are inconsistent with intent and meaning of s**39** of the *Electricity Industry Act 2001* Deemed contracts for supply and sale for relevant customers

7. That specifically, provision of energy to a single energization point on common property infrastructure of Landlords/Owners of multi-tenanted dwellings to heat a communal water storage tank reticulating heated water to individual apartments does not constitute supply and sale of energy or establish a contract for sale and supply of energy to individual recipients of heated water

8. That specifically the authority of Essential Services Commission Victoria (VESC) under existing energy legislation[36] is limited to disconnection of energy and does not extend disconnection of heated water services receiving water reticulated in water pipes in the absence of any energy connection point or transmission pipes facilitating the flow of energy in the premises alleged to be supplied with energy.

9. That notwithstanding the express provisions regarding disconnection associated with energy, the existing BHW provisions are unjustly facilitating disconnection of heated water supplies to individuals receiving such a composite water product in their apartments reticulated in water pipes rather than conveyed in gas distribution pipelines or electrical lines and that further such disconnection is being either tacitly or explicitly sanctioned by policy-makers and regulator(s) responsible for the energy enactments under their jurisdiction (In Victoria *GIA* 2001 and *EIA* 2000)

10. That the measurement and calculation model adopted for BHW provision is inconsistent with best practice trade measurement practice; the spirit and intent of national trade measurement provisions; the provisions of the NECF Template Law relating to physical connection of energy to the premises deemed to be receiving such energy; and importantly the express current provisions and expectations of the *GIA* and *EIA* for the sale and supply of gas or electricity based on distribution, transmission and metering as defined within those provisions

11. That the current arrangements turn energy suppliers into billing agents for Landlords and/or Owners' Corporations, thus relieving those parties of their mandated obligations. The tenancies laws provide that a Landlord must pay for all consumption and supply costs for utilities, other than for bottled gas that are not metered with a device designed for the purpose that can show legally traceable consumption by individual tenants.

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[36] Refer to *Electricity Industry Act 2000* Act No. 68/2000, Part 2, s36 Terms and conditions of contracts for sale of electricity to certain customers

Action: The Law should recognize the obligations of Landlords and Owners' Corporations, and match energy provisions to reflect this, including conditions precedent and subsequent where it is clear that the Landlord is accepting distribution, supply and sale of energy by virtue of forming either an implicit or explicit contract to deliver energy to a single energization point on common property infrastructure to heat a communal water tank supplying heated water in water pipes to individual apartments

Apart from the "BHW arrangements" the Law should more generally explicitly recognize that it is unreasonable to expect residential tenants to comply with provisions that they are unable to deliver because of Landlord restrictions.

12. That the BHW policy provisions do not embrace the requirement to avoid regulatory overlap with other schemes present and future

13. That the new Law explicitly refers to the obligation of policy-makers and regulators to adhere to the requirement to avoid regulatory overlap with other schemes present and future and with the provisions of the written and unwritten laws including with regard to the unwritten laws

The ESC Act, s6 provides that the Crown is Bound, as shown below. S15 of the Essential Services Act 2001 specifically disallows overlap with other schemes present and future.

Crown to be bound

This Act binds the Crown, not only in right of Victoria but also, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

Better clarity in regulations and commitment to avoid regulatory overlap can reduce conflict, expensive complaints handling and potential private litigation or infringement that may incur civil penalties and/or injunctions.

It is not sufficient to allege regulator instruction under Codes and Guidelines or any other instrument. The explicit and implicit provisions of all enactments, including the *GIA* and *EIA* need to be embraced by each provider of energy.

ANALYSIS OF s46 GAS INDUSTRY ACT 2001

I now analyze in detail the deemed provisions of the *Gas Industry Act 2001* under s46 to support my view that these provisions have been mistakenly applied to those receiving bulk hot water supplies from a single energization point on common property infrastructure.

In that context, I now quote directly and dissect paragraph by paragraph here from s.46 and s48 respectively of the *Gas Industry Act 2001*,[37] administered by the *Essential Services Commission Victoria* (VESC) and overseen by the Department of Primary Industries Victoria, making particular note that the provisions refer to the sale of gas, and must not be inconsistent with the *Gas Distribution Code* published from time to time by the Office of the Regulator General (now Essential Services Commission).

46. Deemed contracts for supply and sale for relevant customers

(1) If a relevant customer commences to take supply of gas at premises from the relevant licensee without having entered into a supply and sale contract with that licensee, there is deemed, on the commencement of that supply,[38] to be a contract between that licensee and that person for the supply and sale of gas—

(a) at the tariffs and on the terms and conditions determined and published by that licensee under section 42; and

(b) on the conditions decided and provided for by the Commission under sub-section (5).

MK Comment

To meet the provisions of this clause (1) the only qualification is *"relevant customer" must be taking supply of gas at the premises from the relevant licencee"*

"relevant customer" has the same meaning as in section 43 as referred under s46 of the GIA

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37 *Gas Industry Act 2001* found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/451636145440e6a2ca25705900078e48/$FILE/01-31a024.pdf*

38

An Order (Order in Council exists dated 29 October 2002. It merely refers to consumption threshold of gas as 10,000 GJ per annum, and is not restricted to natural persons. Some 1.6 Victorian uses or gas consumer that amount. All provisions including the *Energy Retail Code* (VERC) provide for interchangeability of terms, i.e. natural person may be taken for an entity; plural may mean singular and the like

MK Comment

For s46 (1) to apply in respect of

> *"taking supply of gas at the premises from the relevant licencee"*[39]

it must be shown that gas is being taken via a physical gas connection. That single supply point/supply address is on common property infrastructure. For BHW energization points, all of these are regarded as single supply and billing points for VENCorp Distributor-Retailer settlement purposes. The Landlord or Owners' Corporation takes supply.

Gas means gas, transmitted in gas transmission pipes not composite water products, value added products reticulated in water pipes.

Distribute,[40] in relation to gas, means convey gas through distribution pipelines; Gas does not pass through water meters; neither does gas pass through water service pipes. If no distribution takes places, no supply takes place of gas.

Therefore no contractual relationship exists on the basis that heated water has reached an individual apartment in water service pipes, where it can be shown that the premises in question deemed to be receiving "supply of electricity is devoid of connection point' supply/supply address; energization; electrical line delivering the "energy" alleged to have been supplied

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[39] The *Gas Industry Act*, Gas Code; Energy Retail Code (save for the BHW provisions that are to transferred to it from the existing BHW Guideline 20(1) and the essence of deliberative documents of 2004 and 2005 relating to contractual matters); proposed NECF, all expect "taking supply of gas" to mean receiving gas through a gas service pipe or transmission pipe facilitating the flow of gas. Water meters, associated equipment and water service pipes do not facilitate the flow of gas or deliver gas to individual apartments where the water is communally heated in a storage tank on common property infrastructure. Ownership of the water meters does not create a contract or constitute sale of gas to the end-user of heated water in these circumstances. The contract lies with the Landlord or Owners/Corporation either explicitly because of authorization to fit the metering installation or implicitly since the supply has continued at the same supply point/supply address on common property infrastructure

[40] Definitions, *Gas Industry Act 2001* v36, No 31 of 2001, version incorporating amendments as at 25 July 2008

Notwithstanding that the VESC has authority under the *Gas Industry Act 2001* (GIA)[41] and the *Electricity Industry Act 2001 (EIA)*[42] to determine under an Order to specify a class of persons by reference to all who may supply electricity or gas, period of use, place of supply; purpose of use; quantity of energy used (consumption threshold) any other specified factor relevant to the sale of electricity or gas, the central contention in this submission and echoed in Part 2B of this tri-part submission[43] is that energy suppliers do not sell or supply energy to end-users of composite heated water products in multi-tenanted dwellings where the energy is supplied to a single energization point on common property infrastructure owned and controlled by Landlords/Owners or Owners' Corporations (OC)

Further, notwithstanding also that the VESC has the power under current legislation to regulate tariffs for *"prescribed customers"* the contention in this submission is that recipients of heated water products communally heated in a water storage tank and reticulated in water pipes, in the absence of any energy connection point in the individual premises of those parties, or any evidence of transmission of energy to those apartments in gas service pipes or gas transmission pipes or electrical lines, there is no sale or supply energy involved to the end-users of that water as a composite product heated at the request of the Landlord/Owner through a single energization point on common property infrastructure and supplied via either gas transmission pipes or else electrical lines to a communal water storage tank.

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41 *Gas Industry Act 2001* Version No. 036, No 31 of 2001. Version incorporating amendments as at 25 July 2008-09-27 Found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

42 *Electricity Industry Act 2000* Version No. 040 Act No. 68/2000 Version incorporating amendments as at 9 November 2006 found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/75C08FBF1CB61807CA257220001BA107/$FILE/00-68a040.pdf*

43 In direct response to the VESC Regulatory Review 2008; but also to the MCE SCO Table of recommendations Policy Paper, and in addition intended for other relevant authorities and entities, including the proposed national regulator AER, the ACCC,. CAV, NMI

The GIA describes *customer* means a person to whom a gas company transmits, distributes or supplies gas or provides goods or services. Under s22 of the *GIA* it is an offence to distribute gas without a licence other than a gas retailer

transmission pipeline means—

(a) a pipeline for the conveyance of gas—

*(i) in respect of which a person is, or is deemed to be, the licensee under the **Pipelines Act 2005**[44]; and*

(ii) that has a maximum design pressure exceeding 1050kPa—

*other than a gathering line within the meaning of the **Petroleum Act 1998**; or*

(b) a pipeline that is declared under section 10 to be a transmission pipeline—

but does not include a pipeline declared under section 10 not to be a transmission pipeline

Under the definitions of the *GIA*

***transmit** means convey gas through a transmission pipeline;*

MK Comment

No gas is transmitted through a transmission pipeline to the individual abode of an end-user of heated water receiving such water supplies from a communal water storage tank situated on common property infrastructure and supplied with heat from a single energization point on the same common property infrastructure owned and controlled by a Landlord/Owner.

Therefore no supply or sale of gas takes place to that end-user. Therefore no deemed contract exists or can be said to exist, or the necessity to form a market contract. That contract is formed at the time that the infrastructure is in place and the Landlord/Owner accepts the installation at his request

Under the definitions of the GIA, *gas distribution company* means a person who holds a licence to provide services by means of a distribution pipeline. No gas service or transmission pipe is involved in transporting heated water from a communal water tank to the individual abode or an end-user of heated water.

Water pipes transport such a composite water product, from which the heating component cannot be separately measured or transported. Therefore if no distribution pipe is used, no distribution takes place. Therefore no contact exists. The energy is supplied to the Landlord/Owner on common property infrastructure.

[44] *Pipelines Act 2005* found at *http://www.austlii.edu.au/au/legis/vic/consol_act/pa2005117/s5.html*

Under the *GIA "**gas fitting** includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas"*

No such gas fitting as described in connection with the consumption of gas is involved in delivering heated water to the abode of an end-user of heated water that is heated in a communal water tank serving multiple occupants in a multi-tenanted dwelling (BHW). Therefore no supply is taken; in particular no unauthorized gas is consumer or taken. No deemed contract exists or ought to exist.

In addition, under s48 the terms and conditions must not be inconsistent with the *Gas Distribution System Code* published by the Office of the Regulator- (Now Essential Services Commission).

Similarly, electricity does not pass through water meters either nor through water service pipes. If no distribution takes place through electric lines, no supply takes place. Therefore no contractual relationship exists on the basis that heated water has reached an individual apartment in water service pipes, where it can be shown that the premises in question deemed to be receiving "supply of electricity is devoid of connection point; supply/supply address; energization; electrical line delivering the "energy" alleged to have been supplied.

The BWH contractual arrangements are inconsistent with the Gas Code to the extent that all definitions for supply point, supply address, gas transmission, meter and the like are discrepant to those provisions, and also with other provisions current and proposed for the sale and supply of energy, which requires a physical connection, flow of gas or conduction of energy through gas pipes or electricity lines to the premises deemed to be receiving that energy. Water pipes are not substitutes for such equipment. Water meters are not substitutes for gas meters within the Law and within the remainder of all Codes.

These particular provisions and terms stand out as particularly discordant with the remainder of the energy provisions and definitions.

The introduction of a new meaning for meter *"as a device that measures and records consumption of bulk hot water consumed at the customer's supply address*

"Delivery of electric bulk hot water"

"Delivery of gas bulk hot water"

Supply address is the customer's apartment or flat rather than the technical use of the term that is synonymous with supply point and distribution supply point as described within the *Gas Code* and within the legislation.

It is explicit and/or implicit in all energy provisions that supply of gas means taking supply at a connection point for gas, being part of the distribution system.

This means at a distribution supply point (Gas Code=VGDSC; Energy Code=VERC); with synonymous terms "supply point" (VGDSC; VERC); *"supply address" "connection"* (NECF Glossary, Policy Paper {GPP}); *"energization point"*[45] NECF GPP

(2) If a relevant customer—

(a) commences to take supply of gas at premises under a supply and sale contract with the relevant licensee; and (b) that customer cancels the supply and sale contract within the cooling-off period relating to the contract; and (c) that customer continues to take gas from that licensee without entering into a further supply and sale contract with that licensee—

there is deemed, on the cancellation of the supply and sale contract, to be a contract between that licensee and that customer for the supply and sale of gas—

(d) at the tariffs and on the terms and conditions determined and published by that licensee under section 42; and

(e) on the conditions decided and provided for by the Commission under sub-section (5).

MK Comment

As already discussed under (1) above, no supply of gas takes place as defined under the GIA definitions of *"customer;" "gas distribution company;" "transmission"*; "*transmission pipeline;"*

This sub-clause of s46 of the *GIA* refers to agreement to take supply and then defaulting on the agreement by withdrawing before the cooling-off period and then continuing to accept supply.

[45] This term means the same as supply address, supply point, distribution supply point and connection point, but must refer to an existing gas or electricity connection, as defined in the NECF and associated Glossary Policy Paper

Such a circumstances is inapplicable for those receiving heated water that is communally heated by a single energization point on common property infrastructure supplied under either implicit or explicit contract between landlord and supplier. Though the BHW provisions do not acknowledge this, this is what is happening.

Those receiving communally heated water do not get to choose the supplier for the energy used. The Landlord makes that choice at the time of forming a contract and seeking for the installation of the metering installation for energy. It is not the succession of tenants who agree to take supply and then default. They take no energy at all. They take heated water supplies covered under the enshrined mandated terms of residential tenancy leases, lawfully accepted under those terms and residential tenancy provisions.

Those receiving communally heated water in multi-tenanted dwellings are not part of the distribution service since there is

1. *No the connection of the premises to the distribution network to allow the flow of energy between the network and the premises of end-users as occupants of flats and apartments)*
2. *No physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energisation' of the connection)*
3. *No network can facilitate the flow of energy between the network and the premises through the connection; and services relating to the delivery of energy to the(alleged) customer's premises*

That being the case, no contract can exist or been seen to exist, or be required to be acknowledged or formalized by way of an explicit contract.

That being the case, it is improper to demand conditions precedent or subsequent to the obligation to supply in relation to an end-user or heated water products. The obligation to supply, and any reciprocal obligations precedent or subsequent belong to the Landlord/Owner where only a single energization or supply point exists to supply heat to a communal water tank used to supply water to multiple occupiers in a multi-tenanted dwelling.

(3) A deemed contract under sub-section (2) is deemed to commence on the commencement of supply referred to in sub-section (2)(a).

Sub-section 3 above does not apply since (2) does not apply

(4) If a supply and sale contract referred to in subsection 2)(a) is—

*(a) a contact sales agreement within the meaning of the **Fair Trading Act 1999**, sections 65 to 67 of that Act do not apply on the cancellation of that contract;*

*(b) a non-contact sales agreement within the meaning of the **Fair Trading Act 1999**, sections 73 to 75 of that Act do not apply on the cancellation of that contract.*

Subsection (4) does not apply. No agreement takes place. The contract between supplier and landlord is already formed at the time that any given tenant takes up occupancy. A supply charge applies from the moment the infrastructure is in place and normally pre-dates occupancy by any tenant. No new tenant taking up occupancy is a new customer or new supply. There is no supply to the premises of the occupant receiving communally heated water supplies reticulated in water pipes.

(5) Without limiting the generality of section 28, the Commission may decide, and provide for in the licence of a licensee, conditions setting out—

(a) circumstances in which a licensee must continue to supply or sell gas to a customer to whom the licensee supplies or sells gas under a deemed contract under this section after that contract comes to an end in accordance with sub-section (7)(d) or (e); and

Though the circumstances of sale or supply may be determined such circumstances must relate to the supply at a physical gas or electricity connection, regardless of network arrangements or changeover. Reticulation of heated water transported in water pipes to individual apartments does not form part of the energy distribution service at all and the two lots of transmission are unconnected. The heat is merely used to heat a communal water tank. The water is supplied to the Landlord by the Water Authority. The energy is supplied to the Landlord to heat the water storage tank. Thereafter the terms of contract are as mandated in lease arrangements between Landlord and tenant.

(b) events on the happening of which a deemed contract under this section may come to an end.

MK Comment

The event that the supplier wishes to facilitate is capitulation into an explicit market contract for the "delivery of bulk gas water" or "delivery of bulk electric water. This is not technically feasible and cannot be delivered in equipment specific to energy, or calculated and apportioned in a legally traceable manner.

(6) A condition referred to in sub-section (5)(a) must provide for the tariff or tariffs and the terms and conditions for the continued supply or sale of gas to be determined by the licensee.

MK Comment

Notwithstanding that the Governor in Council may regulate tariffs for prescribed[46] customers, such a customer must be the subject of sale of gas. In the case of those receiving composite water products from a communal storage tank under the ownership and control of a Landlord/Owner of a multi-tenanted dwelling, no sale of gas to the end-user of heated water takes place. The same applies to electricity. It is the Landlord/Owner who takes supply of the energy supplied to the communal water tank.

Again, the central issue is not whether any sale or supply of gas or electricity takes place to end-users of heated water supplies communally heated and supplied in water transmission papers rather than gas transmission pipes or electrical lines. The issue is how it has come about in the first place that policy-makers, regulators, complaints handlers and retailers perceive a deemed contract for the sale and supply of gas or electricity of any description to exist with an end-user of composite water products.

The tariffs determined are derived costs using the measurement of water volume to determine deemed gas or electricity usage for the heating of a communal water tank. The costs are apportioned to individual tenants, and proportionate supply charges and non-energy costs calculated by dividing the total amount of gas or electricity supplied to a single energization point the Landlord, by the total number of residential premises at the multi-tenanted dwelling.

(6A) A person who is a relevant customer may be a party to a deemed contract under this section even if the person has previously been a party to a contract for the supply or sale of gas to different premises on different terms and conditions with the same licensee or another licensee.

(7) A deemed contract under this section comes to an end—

(a) if the contract is terminated; or

(b) if the customer enters into a new contract for the purchase of gas from the licensee in respect of the same premises, on the date of taking effect of that new contract; or

(c) if the customer transfers to become the customer of another licensee; or

(d) at the end of 120 days after the day on which the deemed contract commences; or

(e) on the happening of an event decided and provided for by the Commission under subsection (5)(b)—

whichever occurs first.

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[46] A prescribed customer means a person or a member of a class of persons to whom an order under section (5) (of the GIA) applies. See *GIA* found *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

MK Comment

7 (a) – (d) are inapplicable for those receiving heated water supplies in water pipes. The Landlord is responsible for the energy supplied to heat the communal tank and has the implicit or explicit contract.

(8) Sub-section (1) does not apply where the relevant customer referred to in that sub-section commences to take the supply of gas by fraudulent or illegal means.

(9) Sub-section (2) does not apply where the relevant customer referred to in that sub-section takes the supply of gas by fraudulent or illegal means after the cancellation of the supply and sale contract referred to in sub-section (2)(a).

MK Comment

(8) and (9) inapplicable in relation to BHW recipients. No residential tenant receives heated water or energy fraudulently. The heating component of the water supplied is covered in the cost of rent under mandated lease provisions – residential tenancy laws are explicit about this and also the Landlord's liability for all non-energy costs in these circumstances. It is preposterous to hint at illegal or unauthorized supplies of energy in the circumstances. Residential tenants receiving heated water supplies are being threatened with disconnection of heated water if they do not form explicit contracts to replace what represents unilaterally and unjustly imposed deemed contractual status.

(10) In this section—

***"cooling-off period"** means the period within which a relevant customer is entitled under a supply and sale contract or section 63, 67H*

*or 71 of the **Fair Trading Act 1999** to cancel the contract;*

***"relevant customer"** has the same meaning as in section 43;*[47]

[47] An existing Order under s 43 merely defines relevant customer as one who consumes no more than 10,000 GJ per annum. This applies to approx 1.6 million Victorians and is not a term restricted to natural persons. Consumption level must be related to the physical supply of gas (or electricity) facilitating flow of gas or conduction of energy to the premises in question in order for a contractual obligation to exist.
That obligation is with the Landlord/Owner to whose premises on common property infrastructure gas is transmitted to the outlet of a gas meter, and thence in a transmission pipe to a communal water tank for the heating of centrally heated water then distributed in water service pipes to individual apartments. The end-user of heated water is not a "final gas customer" but rather a recipient of heated water that is already paid for within the rent under mandated lease provisions in the absence of any connection point or proof of energy consumption. Charging formulae, the existence of or ownership of hot water flow meters that measure water volume and other considerations are irrelevant unless gas or electricity is supplied.
Residential tenants do not take illegal or unauthorized supply of gas or electricity in these circumstances, but rather fully authorized supply of heated water as part of their private contractual lease agreement with landlord based on mandated standard lease terms. The provisions represent obvious regulatory overlap, besides using methodologies that cannot show legally traceable means of measurement and calculation.

*"**relevant licensee**", in relation to premises, means the licensee last responsible for the supply and sale of gas to those premises;*

*"**supply and sale contract**" means a contract for the supply or sale of gas, whether oral or in writing, or partly oral and partly in writing.*[48]

(11) This section expires on 31 December 2007.[49]

If disconnection of gas or heated water supplies is undertaken by a retailer, with or without tacit or explicit sanction by policy-makers and/or regulator(s) the matter is serious if this occurs where no deemed contract exist; no just cause can be shown for such an action; no energy is supplied by the retailer or distributor on the basis of all the arguments shown above, that is to say, , no supply of gas takes place as defined under the GIA definitions of *"customer;" "gas distribution company;" "transmission"*; "*transmission pipeline."*

[48] No such contract exists or ought to exist between retailer and recipient of heated water that is communally heated through energy supplied at the request of a Landlord/Owner at the time that a metering installation is ordered and in place. The Landlord/Owner has the contract

[49] The deemed provisions under the GIA were extended to 31 December 2008 under subordinate legislation

COMPENSATION FOR WRONGFUL DISCONNECTION

The current practices of threatening disconnection of heated water supplies in order to coerce an end-user of a composite water product into an explicit contract with an energy supplier, using the conditions precedent or conditions subsequent clauses or else alleged denial of access to meters is resulting in material detriment and unfair contractual terms imposed by policy provisions about to be consolidated and perpetuated within the Energy retail Code, with repeal of the current BWH Guideline and transfer of substantial components to the VERC.

These arrangements appear to direct conflict with the express definitions and provisions for the distribution sale and supply of energy as contained within the *GIA* and *EIA*. The GIA provisions relied upon, notably s46 of the Gas Act are analyzed elsewhere in some detail.

Disconnection relates to the disconnection of gas under prescribed circumstances. It does not relate to disconnection of heated water products. If gas disconnection occurred this would effect all occupants in a multi-tenanted dwelling.

If water disconnection occurred, as is normally threatened or effected, this would be contrary to all existing and proposed provisions for distribution, sale and supply of energy and disconnection therefore. This is just as wrongful as any other circumstances where the legislative provisions are not embraced.

Those facing energy disconnection, most usually on hardship grounds are better catered for and have specific redress recourses.

By contrast, those losing or at risk of losing continuity of supply of heated water products reticulated in water pipes, effected or instructed by an energy provider relying on alleging failure to comply with conditions precedent or subsequent, but relying on access to water meters; or else failure to provide acceptable identification and contact details because of disputed contractual status.

Thus energy providers are being required to choose between upholding express and implied provisions with the legislation, whilst at the same time under licence and Energy retail Code provisions expected to regard water meters as the meters referred to within the legislation.

The move to re-define meter within the Energy Retail Code, and include this as an alternative definitional term, despite the express provisions of the GIA will not validate this provision, or render water meters any more suitable as instruments through which gas or electricity consumption can be measured.

The situation will be compounded when advanced metering is in place and remote disconnections are possible. Who will be disconnected in these circumstances when that happens? All of the occupants of a multi-tenanted block with a single energization point regarded as a single supply and billing point for VENCorp Distributor-Retailer purposes? Some of them.

Or will threat to continuity of water supplies remain the mainstay of unmonitored disconnection procedures on the basis of the BWH policy provisions in place?

How will equity needs be met?

How will social and moral parameters be met or the expectations of the community?

How will the community at large, including market participants feel secure about conflicting provisions and the risk of civil pecuniary penalty or criminal charges at worst, or protracted complaints handling and debate at best?

How will end-users of heated water unjustly threatened with continuity to their heated water supplies instead of implicitly replying upon the residential tenancy provisions and the terms of residential tenancy leases as mandated by law be in a position to challenge alleged water consumption if no water meter dial readings are taken?

How would such readings in any case possibly correlate with actual gas consumption, and how will settlement take place regarding bills, even if a 12-month settlement time frame were to be adopted? The water meters are read approximately two months apart from the single supply points used to communally heat a water storage tank on common property infrastructure.

What rules will be in place to explicitly outline the responsibilities of those relying on water meter reading to calculate gas to service, maintain and guarantee the accuracy of the water meters, which in any case can only measure water volume, not gas volume, electricity consumption or heat (energy)?

How can the current arrangements possible.

What form of compensation will exist, be monitored and upheld if wrongful disconnection under such circumstances took place; or even coercive threat of disconnection of water products by way of endeavouring to force an explicit contractual relationship for the distribution sale and supply of energy.

Why should end-users of heated water products pay individual supply charges incorporating the costs of supply to a single supply point/supply address belonging to the Landlord or Owners' Corporation.

Currently massive supply charges are being applied to individuals, relying on the express instructions of the policy-maker and regulator. Some explicitly mention water meter reading fees, which paradoxically are higher for remote reads than site reading. Site-specific reading of meters had been considered too expensive and inconvenient for retailers or their servants contractors and/or agents. Instead, a fixed conversion factor formula was developed using a contractual model that appears to be in conflict with existing legislation and proposed legislation.

Whilst those in public housing or housing managed on behalf of the DHS are differently catered and whilst a service charge is applicable for a range of facilities and services used by those in such housing, equity issues for those in the lower end of the private rental market are not catered for at all in terms of checks and balances, accountability and legally traceable methods through which consumption of any kind can be provided, whether of water, gas or electricity.

It is not the prerogative of energy suppliers under energy laws to act as billing agents for Landlords and Owners' Corporation.

The Landlord is obliged to pay for cold water. The heating component of the water cannot be measured through legally traceable means, using the correct instrument for the measurement of energy consumption, as required under the law.

Therefore, the issue of proper compensation for wrongful disconnection and conduct associated with such disconnection processes, including coercive threat, intimidation and harassment is a grey area left entirely uncovered.

Whilst the generic laws cover such conduct in theory often access to generic recourses is almost impossible. For many the whole legal processes and costs in terms of stress alone, leaving aside financial considerations is very high. Regulatory enforcement is service areas, but apparently improving with supply of goods.

The PIAC in submissions to the MCE arenas have frankly expressed their views about compliance enforcement and weaknesses of the generic laws and access to those recourses.

Numerous submitters to the Productivity Commission's Review of Australia's Consumer Policy Framework (2008) similarly expressed reservations about the efficiency. of the current regulatory framework under generic provisions.

Wrongful disconnection and threat thereof is not a new issues. It is a frequent occurrence. Reliance under current BWH provisions gives no protection whatsoever if disconnection of heated water supplies is relied upon as a strategy through which explicit energy contracts can be solicited; or else actual disconnection can occur for which the legislation makes no provision at all.

These matters need to be properly addressed within the Law.

It is insufficient to leave such important issues to jurisdictional control alone. Whilst the precise timelines and processes to be followed for wrongful disconnection can be covered more generally, the principle as to when it is appropriate for such disconnection to occur is not covered at all.

Unwillingness to provide identification contact details or access to water meters may be an entirely justifiable stance for a residential tenant or other occupant to take given the methods that are being used to calculate deemed energy usage, the instruments used, the calculations made and the complete absence of proof of legally traceable consumption.

S48A Compensation for wrongful disconnection

Customer distribution services will be defined in the Law, for the purposes of the new national customer framework. These may include:

(1) Without limiting the generality of section 28, the conditions to which a licence to sell gas by retail is subject include a condition requiring the licensee to make a payment of a prescribed amount to a relevant customer in accordance with this section if the licensee—

(a) disconnects the supply of gas to the premises of that customer; and

(b) fails to comply with the terms and conditions of the contract specifying the circumstances in which the supply of gas to those premises may be disconnected

(2) A payment under subsection (1) may be made directly to the customer or by way of rebate on the customer's gas bill.

(3) A payment under a condition under subsection (1) must be made as soon as practicable after the supply of gas is reconnected to the premises of the relevant customer.

(4) Nothing in this section affects any other right any person or body may have to take action against a licensee in relation to a disconnection of a supply of gas.

(5)In this section—

prescribed amount means—

(a) the amount prescribed by the regulations for the purposes of this section; or

(b) if no amount is prescribed by the regulations, $250 for each whole day that the supply of gas is disconnected and a pro rata amount for any part of a day that the supply of gas is disconnected;

***relevant customer** has the same meaning as in section 43*

MK Coment

The existing Order in Council defines relevant customer as one who consumers no more than 10,000 GJ of gas per annum. This broad term applies to some 1.6 million Victorians and is not restricted to natural persons. The consumption threshold alone is an insufficient clarification. If no gas is directly supplied through the distribution and supply outlined in the GIA and the Gas Code, no "gas is taken"

As already discussed under (1) above, no supply of gas takes place as defined under the GIA definitions of "customer;" "distribute" "gas distribution company;" "transmission"; "transmission pipeline;"

The NECF contractual governance model under 1.25 of the Table of Recommendations provides clear definitions of what constitutes a customer distribution service, thus establishing a contractual obligation to the retailer in the distributor-retailer-customer interface triangulation. This is shown below for reinforcement:

1.25 Definition of customer distribution services

Customer distribution services will be defined in the Law, for the purposes of the new national customer framework. These may include:

1. *the connection of the premises to the distribution network to allow the flow of energy between the network and the premises;*
2. *where a physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energisation' of the connection);*
3. *the capability of the network to allow the flow of energy between the network and the premises through the connection; and services relating to the delivery of energy to the customer's premises.*

The nature, scope and content of initial customer connection services are being dealt with concurrently, as part of the distribution connection & planning requirements work stream of the Network Policy Working Group (NPWG).

CIVIL PENALITES

I show below an extract from the *GIA* regarding the application of civil penalties and injunctions

56 Civil penalty (GIA 2001 V34, No 31 of 2001

(1) The ACCC may apply to a court for an order under this Division in respect of a contravention by a person of a civil penalty provision or the doing by a person of any other thing mentioned in subsection (2)

(2) If the court is satisfied that a person—

(a)has contravened a civil penalty provision; or

(b)has attempted to contravene such a provision; or

(c)has aided, abetted, counselled or procured a person to contravene such a provision; or

(d) has induced, or attempted to induce, a person whether by threats or promises or otherwise, to contravene such a provision; or

(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or

(f) has conspired with others to contravene such a provision—

the court may order the person to pay to the Minister for payment into the Consolidated Fund such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the court determines to be appropriate having regard to all relevant matters including—

(g) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission; and

(h) the circumstances in which the act or omission took place; and

(i) whether the person has previously been found by a court in proceedings under this Division to have contravened a civil penalty provision.

S. 56(2)(b) amended by No. 39/2005 s. 56(2).

s. 57

57 Injunctions (GIA 2001 V34, No 31 of 2001)[50]

(1)If, on an application in accordance with subsection (2), the Supreme Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute—

(a) a contravention of a provision that, under the MSO Rules, is a regulatory provision or conduct provision of the MSO Rules; or

(b) attempting to contravene such a regulatory provision or conduct provision—

the Court may grant an injunction in such terms as the Court determines to be appropriate.

(2) An application under subsection (1) may be made—

(a) in the case of a regulatory provision, by the ACCC;

(b) in the case of a conduct provision, by the ACCC or a market participant.

[50] *Gas Industry Act 2001,* V34, No. 31 of 2001; s57

SUMMARY OF CHANGES TO BULK HOT WATER PRICING AND CHARGING ARRANGEMENTS (ALGORITHM CONVERSION FACTOR FORMULAE, CONTRACTUAL AND BILLING) UNDER CURRENT VESC/DPI REGULATORY REVIEW

Repeals

(1) BHW Charging Guideline 20(1) (2005) effective date 1 March 2006

(see detailed discussion of this proposal with regard to the concepts embraced, for the most part to be retained and transferred to the VESC

(2) 1.1 Introduction Purpose Authority and Application Date

(see detailed discussion of this proposal)

(2) Implied repeal or archiving of the deliberative documents associated with the VESC Guideline

(3) 2.1.1 Appendix 1 BWH algorithm formula using hot water flow meters to calculate water volume usage and convert to deemed gas usage in cents/litre showing also the guestimate of deemed gas usage in either MJ/litre

The repeal is cosmetic to formalize removal of policy control of the formula from ESC. The DPI will revamp the formula and retain

(4) 2.2.2 Appendix 1 BWH algorithm formula using hot water flow meters to calculate water volume usage and convert to deemed electricity usage in cents/litre showing also the guestimate of deemed electricity usage in KH-h/litre.

The repeal is cosmetic to formalize removal of policy control of the formula from ESC. The DPI will revamp the formula and retain

SUMMARY OF CLAUSES TO BE RETAINED AND TRANSFERRED TO CLAUSES 3.3 OR 4.2 OF THE VICTORIAN ENERGY RETAIL CODE

Clauses 2.1.1;[51] 2.1.3[52], 2.3;[53] selected components of 3.1 of Guideline 20(1) are to be retained and transferred to the Victorian Energy Retail Code.

(1) 2.1.1 Calculation in accordance with regulated formula under DPI control to 3.3 ERC

(2) 2.1.3 Publication of the gas bulk hot water rate by retailers (in cents per litre and conversion factor in MJ/litre to 4.2 ERC

(3) 2.2.1 requires the calculation of electric BHW charges t be in accordance with a regulated formula – transfer to 3.3 of ERC

2.2.2 Appendix 1 repealed and be replaced in ERC with only a reference to the DPI. This may not transparently allow stakeholders to scrutinize how and why charges are being applied

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51 Relates to calculation of gas bulk hot water charges in accordance with a regulated formula. The rule is to be retained and transferred to Clause 3.3 of the *Energy Retail Code* under the current regulatory review.

52 Requires publication of the gas BHW rate. This means the gas price in cents per litre that is used to charge customers for energy in delivering gas bulk hot water. The term relevant customer is not used as in s46 of the *Gas Industry Act 2001*. This is defined broadly within the legislation and not confined to natural persons. It simply relates to consumption threshold of no more than 10,000 GJ per annum and can apply to entities. In fact this threshold applies to 1.6 million Victorians, with only 100 larger customers using more than 10,000.

53 Information to be included on bills. Requires retailers to detail on the customer's bill certain information regarding the calculation of the customer's bulk hot water charges. Considered by VESC to be important for customers who consumer bulk hot water to understand their bill. Note this mentions hot water consumption not heat or energy or gas volume. Retailers are licenced to sell gas and energy not composite water products. They sell the energy to landlords based on gas volume calculation to a single energization point on common property infrastructure.

2.2.2 Appendix 2 is also to be repealed and replaced with only a reference to the DPI. This may not transparently allow stakeholders to scrutinize how and why charges are being applied

(3) 2.3 Details to be included on bills to 4.2

MK COMMENT

A discussion is undertaken of each of these clauses of the Guideline to be retained and transferred to the VERC. It would appear that the intent is to attempt to validate moves to regard the BHW arrangements as quite separate to the remainder of the regulatory framework, and regardless of overlap and conflict with other schemes.

SUMMARY OF PROPOSED CHANGES TO CLAUSES 3.3 OF THE VICTORIAN ENERGY RETAIL CODE (TRANSFERRED FROM BHW GUIDELINE TO BE REPEALED)

Existing clause

3.3 A retailer must issue bills to a customer for the charging of the energy used in the delivery of bulk hot water in accordance with the Commission's Energy Industry Guideline 20 – Bulk Hot Water Charging

Proposed change

The VESC proposes to retain and redraft this clause[54] *to reflect repeal of Guideline No. 20 and to transfer clauses 2.1.2, 2.3 to 3.3 of the ERC, and Clause 3.1 Definitions to the Definitions section of the ERC.*

Clause 2.2.3 is to be moved to Clause 4.2 of the ERC

The VESC notes that AGL, Origin Energy and TRUenergy,[55] *queried whether this clause is redundant given that pricing for small business customers has been deregulated.*

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54 The precise wording of the re-drafting is not clarified and therefore stakeholders cannot comment in detail. However presuming that the existing wording will be retained, all arguments against deeming end-users of heated water products supplied in water pipes that are not part of the gas distribution service (or electricity distribution service) to apartment addresses in multi-tenanted dwellings that have no supply point (energization) point are presented on the basis of the failure of these provisions to meet the contractual, technical and regulatory overlap and conflict test, regardless of the precise details of the derived price arrived at through fixed rate conversion factor formulae. If the rate is fixed according to tank size and presumed share of energy for each tenant, this depends of a method that cannot possibly show legally traceable consumption or requirement to accept contractual obligation. Yet recipients of a composite water product included in their rents are being threatened with disruption or disconnection of their hot water services where these do not form part of the energy distribution system. The water tank belongs to the landlord, who purchases the water from the Water Authority and after purchasing the energy from the energy supplier as a deemed relevant customer or one with an explicit market contract, supplies the heated water in water pipes to individual apartments, with all costs being factored into the rent under the mandated provisions of residential tenancy leases

55 The three retailers providing bulk energy to single bulk energy supply points for the communal heating of boiler tanks in multi-tenanted dwellings). They are allocated supply remits based on geographical allocation and are associated with a specified distributor who is the responsible party for metering, metering installation, service quality, connection and re-connection of equipment

SUMMARY OF CLAUSES TO BE TRANSFERRED TO CLAUSE 3.3 OF THE ENERGY RETAIL CODE FROM BHW CHARGING GUIDELINE:

2.1.1 from BWH Guideline:

"where a retailer charges for energy in delivering gas bulk hot water to a relevant customer, the gas bulk hot water rate, supply charge and final customer billing for the provision of gas bulk hot water are to be determined in accordance with Appendix 1.

2.2.2 Appendix 1 will be replaced with only a reference to the DPI. This may not transparently allow stakeholders to scrutinize how and why charges are being applied

2.2.2 Appendix 2 is also to be replaced with only a reference to the DPI. This may not transparently allow stakeholders to scrutinize how and why charges are being applied

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that is part of the energy distribution system and service. Water tanks and water meters with their service pipes are not part of that system.

It is unclear what service parameters must be met for the water meters that are theoretically relied upon for arriving at the derived fixed price for the supply of energy to a single energization point on common property infrastructure, or why a derived formulae is necessary when under the law only one party is contractually responsible for the energy supplied and the associated non-energy costs – the Landlord or nominee.

SUMMARY OF DEFINITIONS FROM BHW CHARGING GUIDELINE TO BE TRANSFERRED TO 3.3 OF THE ENERGY RETAIL CODE:

"Electric bulk hot water" *means water centrally heated by electricity and delivered to a number of customer supply addresses where the customer's consumption of hot water is measured with a meter and where an energy bill is issued by a retailer*

"Electric bulk hot water conversion factor" *is the conversion factor detailed in this guideline used to convert the measured bulk hot water consumption of a customer's consumption of hot water is measured with a meter*[56] *and where an energy bill is issued by a retailer*

"Gas bulk hot water" *means water*[57] *centrally heated by gas and delivered to a number of customer supply addresses*[58] *where the customer's consumption of hot water is measured with a meter*[59] *and where an energy bill is issued by a retailer*

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[56] The meter referred to is a hot water flow meter. It measures water volume only not energy or electricity.

[57] This refers to delivery of heated water not energy. The energy is delivered to a single energization point on common property infrastructure belonging to the Landlord of multi-tenanted dwellings. The Landlord makes direct contractual arrangements with the supplier to fit the metering installation.

[58] For Distributor-Retailer settlement purposes bulk energy meters represent a single billing point only. This is also reflected in the legislation, as a common sense provision. There are no energization points in individual apartments, so these cannot possibly be the supply address or supply points

[59] The meter relied upon is a hot water flow meter where these exist as satellite water meters. It measure water volume, not gas or heat, though designed to withstand heat. No gas or electricity passes though this device. The heated water is reticulated to individual apartments water pipes that are not part of the gas or electricity distribution system or service. Therefore individual apartments are not supply points or supply addresses.

The meters, regardless of ownership are not suitable substitute supply points. There is no energization or supply point in individual apartments. Regardless of ownership by energy suppliers, these meters are not instruments that show legally traceable individual consumption of the heating component of heated water, a composite water product. The water is reticulated in water pipes from the mains after the Landlord purchases it from the Water Authority. Site-specific reading was not mandated yet water reading fees are being charged or bundled into supply costs. It is the Landlord who has responsibility for energy supply and any associated costs. The derived charging method does not create a contract

The current arrangements have converted energy retailers into providers of heated water entitled to disconnect hot water supplies if identification is not provided or meter access to water meters not obtainable through individual tenants.

Though it was clearly the intent of the guidelines to apportion the definition of supply point to individual apartments, this is inappropriate and inconsistent with all other energy provisions. It also represents overlap with other regulatory schemes, as is forbidden under s15 of the *Essential Services Act 2001,* version 30 with amendments to 1 July 2008. See also s16.

"Gas bulk hot waver conversion factor" *is a factor detailed in this guideline used to convert the gas bulk hot water tariff (in cents per MJ) to the gas bulk hot water rate*[60]

"Gas bulk hot water tariff" *has the relevant meaning set out in Appendix 1*

"Meter means the device" *which measures and records consumption of bulk hot water consumed at the customer's*[61] *supply address.*

Other terms in bold and italics not detailed under BHW provisions have the meaning given in the ERC

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[60] The derived tariff based on conversion factor formulae is calculated by measuring water volume and depends on water tank size. If site-specific reading takes place at all, it occurs about two months apart from a separate reading of the bulk gas meter supplying from a single energization point heat to a communally heated water tank. The hot water flow meter measures water volume only, not gas or heat. If read at all, some two months later a reading is taken of the bulk gas meter by a separate meter reader, The original rationale for rejecting site-specific readings shown in the deliberative documents was that it was too expensive and inconvenient to achieve this. Therefore a fixed rate derived price was determined.

The contractual allocation should depend on the existence in each apartment of a supply point. No such supply point (energization point) exists in apartments. Therefore these apartments and flats are not supply addresses and the end-user of a composite heated product from which the heating component cannot be calculated should not be regarded as the relevant customer. No unauthorized use of gas or electricity takes place. The deemed provisions under s46 were intended to over that situation, but never to apply to composite water products reticulated in water pipes without supply being effected through an energization point, embedded or otherwise.

An embedded network is one which reticulates energy through a network other than the original distribution network. This does not apply to water products being delivered in water pipers rather than energy service pipes.

Some retailers are charging a water meter reading fee that is many times greater for "remote reading" than for site reading. Others are bundling charges into individual supply charges applied to individual apartments, though these are not under the definitions supply addresses since no energization point exists.

The process is equivalent to a billing agent service to the Landlord, though by law the Landlord is required under tenancy provisions to meet all costs for utilities that cannot be measured in a legally traceable manner using a measuring device designed for the purpose. The term *"meter"* has been distorted since the meter used is not part of the gas installation or gas distribution service

[61] The deemed provisions apply to relevant customers, broadly defined on consumption threshold alone (10,000 GJ per annum for gas) This applies to some 1.6 million Victorians and not restricted to natural persons. The BHW provisions appear to have re-written or misinterpreted the deemed provisions, which were intended to apply under s46 to those who took unauthorized supply of energy not water products. No unauthorized supply occurs. Tenants rely on the mandated provisions of residential tenancy provisions through which hot water services that rely on communal heating of water are covered within the cost of the rent.

All new tenants in multi-tenanted dwellings are deemed customers under these creative interpretations since they are not even made aware of the existing of a third party provider of heated water. The terms of their residential tenancy leases include the cost of component of consumption and supply of any utility that is not metered with an instrument designed for the purpose. Hot water flow meters cannot measure either gas or heat. They measure water volume only. Under tenancy laws No supply charges can be made for water even when separate water meters exist. Heated water is an integral component of residential tenancy leases. The provisions interfere with landlord-tenant mandated arrangements under a conflicting regulatory scheme.

Whether the bill is based on any substituted data (consistent with the retailer's obligations under clauses 17.2 and 23.2 of the Electricity Customer Metering Code).

The total amount of electricity (in KW-h) or of gas (in MJ) or of both consumed in each period of class of period in respect of which a relevant tariff applies to the customer and, if a customer's meter measures and records consumption data only on an accumulation basis, the dates and total amounts of the immediately previous and current meter readings, estimates or substitutes

If the retailer elects to include meter readings of accumulated energy usage from an interval meter on the bill, the meter readings of accumulated energy usage based on quantities read or collected from the corresponding meter accumulation register(s)

If the retailer directly passes through a network charge to the customer, the separate amount of the network charge[62]

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[62] There is a single energization point. No supply point or supply address exists in the apartment of an end-user of heated water supplied in water pipes from the communal water tank on common property infrastructure. The cost of regarding each tenant as a **"relevant customer"** despite all the contractual, technical and regulatory overlap arguments presented adds to the overall cost of the energy supplied to a single supply point. The legislation provides that if an energization point for gas existed prior to 1 July 1997 and was a single billing point at that time, it remains as a single billing point. All bundled charges, including supply charges, network charges, commodity charges and the like apply to a single supply point on common property infrastructure and should be presented to the Landlord, along with all consumption charges.
The hot water flow meters measure water volume not gas volume or heat, the composite water product is the commodity that individual tenants take possession of reticulated through water pipes that are not part of the system. In most cases, these are not embedded networks, but the supply is direct from the distributor to the supply address, which is the overall property address. Creative re-interpretation of supply address without an energization point to validate such a perception means that the wrong parties are being held contractually obligated.
The process of arriving at a derived cost by using water meters does not make sense. If the landlord is responsible for the supply costs and supply of energy on the basis of there being a single energization point, all that is required is for the single bulk energy meter to be read to ascertain how much gas or electricity was used.
It is the role of an energy supplier to act as a billing agent for the Landlord or to relieve the Landlord of his mandated responsibilities under other legislated provisions.
The tenancies laws provide that a Landlord must pay for all consumption and supply costs for utilities, other than for bottled gas that are not metered with a device designed for the purpose that can show legally traceable consumption by individual tenants.
The arrangements in place interfere with the enshrined rights of individuals and their private contractual arrangements with Landlords, the terms of which are based on mandated provisions encapsulated within tenancy laws. Regardless of formulae concepts for derivation of costs, the correct contractual party needs to be explicitly made responsible as the relevant customer. It is the landlord who agrees for the installation to be effected and commences to take supply from the moment the infrastructure is in place. It is not the succession of tenants who "take supply" of

For an electricity contract the amount payable for electricity and for a gas contract the amount payable for gas

The pay by date

The amount of arrears or credit and the amount of any refundable advance provided by the customer

A summary of payment methods and payment arrangement options

If the customer is a domestic customer, details of the availability of concessions

A telephone number for billing and payment enquiries and a 24-hour contact telephone number for faults and emergencies

If the customer is a domestic customer, in relevant languages, details of interpreter services and

If the bill is a reminder notice, contact details for the retailer's complaint handling processes

The VESC Draft Decision recommends

Retention and amendment of clause 4.2 (o) to require retailers to include the distributors names on bills

Refer consideration of Clause 4.2(h) to stage 2 of the Review

Clause 4.2(h) refers to customers with interval meters. This is to be addressed in Stage 2 of the review

The VESC has explained that all existing Victorian obligations for information on the bill (with the exception of 4.2(h) (interval meters) are included in the proposed draft NECF. Therefore no changes are to be made to existing obligations with the two exceptions mentioned.

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energy. The enegization once established is continued without interruption. There are no "new supply" customers in the form of successive residential tenants.
These considerations are central to establishing a just and fair contractual model for energization of hot water systems (tanks) communally heated on common property infrastructure. Additional costs of calculation through derived formulae add to Landlord costs and therefore to rents in total. The rationale used for the contractual and costing formulae is therefore flawed.
Even if the end-users were well able to afford the costs, there is no prospect of residential tenants taking steps to enhance energy efficiency goals since they are not permitted to install any devices or equipment that would achieve this. The incentives must lie with landlords, with subsidies to upgrade inefficient systems

To be transferred to Clause 4.2 of the ERC from the existing BHW Guideline is Clause 2.1.3 from the latter:

"A retailer must publish its gas bulk hot water rate (in cents per litre), any applicable supply charge (in cents) and the conversion factor (MJ per litre) used to determine those prices and charges whenever any of the above components change.

Clause 2.1.3 requires the publication of the gas bulk hot water rate by retailers. It is to be retained and transferred to add to all other clauses shown above regarding billing practices

Proposed transfer of billing requirements from BHW arrangements to ERC:

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

The relevant gas bulk hot water rate applicable to the customer in cents per litre

The relevant electricity rate(s) being charged to the customer for the electricity consumed in the electric bulk hot water unit in cents per KW-h[63]

The relevant electric bulk hot water conversion factor for electric bulk hot water in KWh/kilolitre

The total amount of gas bulk hot water or electric bulk hot water in kilolitres or litres consumed in each period or class of period in respect of which the relevant gas bulk hot water rate or electricity tariffs apply to the customer and, if a customer's meter measures and records consumption data only on an accumulation basis, the dates and total amounts of the immediately previous and current meter readings or estimates

The deemed energy used for electric bulk hot water (in KW-h) and

Separately identified charges for gas bulk hot water or electric bulk hot water on a customer's bill

[63] This phrasing adds to confusion. Relevant customer is not defined. Bulk hot water unit is out of place. There is only a single energization point. The hot water flow meter measures water volume not electricity or heat. Bills are expressed in energy.

SUMMARY OF PROPOSED CHANGES TO CLAUSES 4.2 OF THE VICTORIAN ENERGY RETAIL CODE

4.2 ERC

Existing Obligations:

A retailer must include at least the following information in a customer's bill:

The customer's name and account number, each relevant supply address and any relevant mailing address

Each relevant assigned meter identifier and checksum, or, if any case there is no assigned meter identifier, the customer's meter number or another unique identifying mark assigned to the customers metering installation.[64]

The period covered by the bill

The relevant tariff or tariffs applicable to the customer, whether the bill is based on a meter reading[65] *or is wholly an estimated bill*

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64 In the case of BWH arrangements creative interpretation of the term meter and metering installation, contrary to all other existing and proposed provisions defining an energization point, this terminology has left it wide open for the wrong parties to be made contractually responsible; for billing information currently contained on bills to refer to *"gas usage"* and allocate a "unique number other than a Meter Identifying Number (MIRN). The fact is that there is but a single energization point on common property infrastructure and for Distributor-Retailer settlement purposes a single billing point also exists for all bulk gas meters heating communal water tanks in multi-tenanted dwellings.
A customer supply address is not an apartment without an energization point. The supply address is that of the overall property street address at the outlet of the meter on common property infrastructure. The Landlord agrees to take supply by direct implicit or explicit arrangement with the retailer; and commences to take supply from a single energization point from the moment the distribution infrastructure is in place.

65 If despite all contractual considerations and regulatory overlap the BHW arrangements are retained in the short or long term without due regard to regulatory overlap and the technical considerations, including national trade measurement considerations, then the bill should at least state that water meters are being used to calculate deemed gas or electricity usage, not energization points, and that a conversion factor algorithm formula is being applied. Otherwise mention of a meter under the column *"gas usage"* implies the existence of a gas meter as an energization point that is individualised.
The term "your hot water consumption is being individually monitored" on "vacant consumption letters" demanding an explicit contractual arrangement under pain of threat of disconnection of hot water supplies, also implies direct calculation through an individualized energization point.
At the end of the day, the landlord of OC is the proper contractual party and all bills for supply charges and consumption charges for bulk energy supplied to boiler tanks communally heated should go directly to landlords.

MK Comment:

The billing arrangements are questioned with regard to determining the correct contractual party for those receiving heated water that is communally heated (BHW arrangements) The current calculation method and formulae will become formally illegal when the national measurement laws lift remaining utility exemptions. Cold water meter exemptions have already been lifted. The contractual and technical arguments relating to this are presented elsewhere in more detailed discussion

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The price shock prevention argument is weak and invalid. Landlords continue to raise rents regardless of how is presented with a bill on the basis of deemed contractual status till forced into an explicit contract under pain of threat of disconnection. The arrangements for those receiving heated water centrally heated need to be re-evaluated in the light of all arguments present. In any case the current calculation methodology will become formally illegal when national trade measurement laws lift remaining restrictions on utilities, as is the intent.

It cannot be appropriate to leave retailers and distributors vulnerable on the basis of flawed instructions that force them to choose which laws and rules to uphold. The question of regulatory overlap with other schemes appears not to have been factored into the arrangements at all.

OVERVIEW OF BHW PROVISIONS AND IMPACTS

The existing bulk hot water provisions impact on some. **26,000** Victorian bulk gas consumers using a total of approx 2100 master bulk gas meters are affected by this Guideline and approximately 206 using the 15 only master bulk electricity meters (Origin and AGL only).

Supply remit provisions divide the service provision load between three host retailers for the master bulk gas meters in Victoria.

In South Australia and Queensland similar contractual and calculation principles are embraced for "delivery of gas bulk hot water" and "delivery of electric bulk hot water."

The legislation provides for dir4ect delivery of energy using the methodologies and definitions already embraced within the Law and adopted in principle in the NECF proposed template Law

Mirror provisions in two other States, South Australia and Queensland similarly adversely impact on end-consumers who should not be considered to be contractually responsible. The provisions have assumed responsibility, improperly and without just cause to re-write contractual law.

Simply because at jurisdictional level in the three states similar BHW provisions have been adopted (Victoria, South Australia and Queensland) this does not make the arrangements for contract legally or technically sound or consistent with the requirement to avoid regulatory overlap with other schemes

Shuffling the content of arrangements from one group of documents to another, or even to energy-specific legislation will not counter-act the fundamentally flawed reasoning that appears to be engineered their adoption, and to be facilitating attempts to consolidate the arrangements rather than re-consider the legal, technical, contractual and regulatory overlap validity of the arrangements and to determine who the correct contractual parties should be.

A central issue is to more explicitly define within the Law the question of a *"customer supply address"* or *"relevant customer supply address"* needs to be clarified in relation to those receiving communally heated water supplies individual without individual energization points, and where the only energization point heating a communal water tank is that for which a Landlord is responsible, since the energy is supplied to that point on common property infrastructure and is not reticulated to the end-user of heated water through the energy distribution system at all, but rather directly to the Landlord's communal water tank on common property infrastructure.

That raises the question of why the proposed Law has not explicitly stated that jurisdictional or other arrangements may not overlap with other schemes. This is an explicit requirement under s15 of the *Essential Services Commission Act 2001*; forms part of the Memorandum of Understanding between Consumer Affairs and Victoria, and presumably will also be reflected in provisions between CAV and the proposed regulator, AER.

By the same token consumer protection counterparts in other jurisdiction should be insisting that regulatory overlap is avoided current and proposed in all policies and regulations in place, including codes, guidelines and any applicable licence provisions.

The definitions of supply remit, proper definition of customer and customer obligation (in the case of multi-tenanted dwellings and Owners' Corporation obligations to take direct responsibility for both consumption and supply charges but the heating component of bulk hot water since no separate meters exist designed for the purpose of measuring what is consumed by individual tenants in terms of the gas or electricity used for that heating component.

It is not the prerogative of policy-makers, rule makers and regulators to re-write contractual law. Those parties have a legal compliance obligation also, including with regard to compliance with any legislation or provision that requires avoidance of overlap with other schemes, proposed. Such an obligation exists within s15 of the *Essential Services Act 2001* (ESC Act) and the terms of a Memorandum of Understanding (MOU) dated 8 October 2007, between Consumer Affairs Victoria and Essential Services Commission Victoria (VESC). These issues are discussed in some detail under the heading *"Regulatory Requirement"*[66] and Regulatory Overlap[67]

Unless these matters are addressed under black letter law or in some way as to recognize the explicit and implicit obligation of energy regulators the same contractual issues will arise again and again to widespread consumer detriment.

Of the 26,000 Victorians who are end-users of energy used to heat communal hot water tanks in blocks of apartments and flats.

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[66] This is a term incorporated into the *Gas Distribution System Code* and discusses the obligation to comply with all jurisdictional, and Commonwealth legislative and other provisions, including bylaws, local laws; codes, guidelines and the like. If any of these provisions represents regulatory overlap, problems arise, with expensive debate, conflict and possible private litigation being possible consequences.
If regulations are devised that conflict within their own legislative ambit and/or other schemes and the other provisions within the written and unwritten laws (the common law), including social and natural justice, this also represents problems.
The adoption of a water-tight contractual governance model is therefore crucial and is discussed at some length elsewhere

[67] The NECF does not including any mention of the requirement for jurisdictions to avoid regulatory overlap. This is a significant omission and needs to be attended to, so that proper clarification is available to all stakeholders. In addition, any replacement legislation or provision for the Essential Services Commission Act 2001 and any succeeding provision should reflect the same.

Of these approximately a third reside in subsidized renting housing many in high rise flats managed by Department of Human Services or delegates. These are treated differently by billing purposes under the current BHW provisions and the arrangements also endorsed under residential tenancies provisions.

This is despite the obligation under the *Essential Services Commission Act 2001* that there should be no overlap between regulatory schemes. The two arrangements will be shortly discussed.

Under s6 of the ESC Act 6:

> ***Crown to be bound***
>
> *This Act binds the Crown, not only in right of Victoria but also, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.*

If the DPI now has control over policies previously under VESC control, it is implicit that there is an obligation to uphold the principles of the provisions referred to. Anything less than that would be grossly failing community expectation and responsibility.

There are two groups of unilaterally imposed *"contractual arrangements"* purporting to over-ride existing provisions under residential tenancy provisions and other conflicting regulatory schemes.

One billing arrangement applies to residential premises using bulk hot water systems and receiving energy from a single point in privately rented blocks of flats and apartments; the other relates to such apartments and flats as are rented to low income and other disadvantaged groups by the Department of Human Services (DHS) or delegates. In the latter case, no dispute exists as to who the contractual party may be – the Owners' Corporation (OC).

In the case of the former group the renting tenants are currently unilaterally and unjustly imposed with contractual status; unreasonably held contractually responsible for providing safe, unhindered and convenient access to hot water flow meters (which measure water volume not gas or energy (heat); which meters are normally behind locked doors in a boiler room in the care custody and control of OC or Landlords.

The current BHW provisions and absence in the proposed consumer framework template predominantly focused on contractual matters and selected aspects of conduct gives rise to many considerations impacting on the unjust interference with the existing rights of end consumers of bulk energy with single energization points on common property infrastructure; imposes unfair contractual terms concerning access to meters (in this case meaning the hot water flow meters).

Billing Option 1 – the subject of BWH Guideline 20(1)

Many low income tenants on a very similar income threshold occupy privately rented property. Many of these consumer sub-sets live on a borderline fixed income comparable to or marginally greater than that considered to be eligible for social security benefits and or rental and utility subsidies.

They do not gain the benefit of highly subsidized government-managed accommodation, namely DHS and delegate public housing. Their position is not comparable to those benefiting from Arrangement 2 Billing Arrangements as described exclusive under tenancy laws to DHS public housing tenants or delegates of DHS entities.

The only class of Owners' Corporation (Body Corporate) permitted under residential tenancy laws able to apply a service charge that also included the guestimated individual allocation of heated water and other service costs.

For those in privately rented property not covered by those provisions, the tenancy laws are quite clear and should be sufficient in themselves for the purposes of clarifying who contractual parties should be.

Residential tenancy laws do not permit private Landlords to pass on costs for any utility or component (except for bottled gas) that is not individually metered with an instrument designed for the purpose. A hot water flow meter does not serve the purpose of measuring either gas volume or heat. The single bulk gas meter measures gas volume only not heat (energy). The bills are expressed in energy.

The practice of billing individual tenants (occupiers) where any component of utility is not metered with a utility meter designed for the purpose (other than bottled gas is disallowed under residential tenancy provisions is the central theme of re-visiting the contractual models in place and proposed as extensively covered in this component submission.

Though this practice is common and *"industry practice"* as suggested by EWOV, this does not make the practice fair equitable, appropriate or legally enforceable. Regulators and industry complaint schemes, are turning a convenient blind eye to practices that directly impact adversely on the enshrined rights on end-consumers of bulk energy and excuse this under the guise of common practice.

For those in commercial rented accommodation, the obligation lies with the Landlord under residential tenancies legislation to meet all consumption and supply charges for all utilities (except bottled gas) that are not individually metered.

The existence of separate hot water flow meters does not imply that the gas is separately metered as has been suggested by EWOV and is apparently applied in *"industry practice."*

In general commercial landlords are expected to bear the cost of installing individual meters for all utilities. Unfortunately those living in properties with gas bulk hot water systems are generally of low income already at a disadvantage in poorly maintained sub-standard accommodation.

They cannot afford rising costs for bulk hot water commercial applied in addition to the costs already included within their rent. Hot water services are an intrinsic part of a residential tenancy lease.

Threat of disconnection of such a service is inappropriate. These threats are not being issued by landlords but rather by profit-making energy suppliers who see a huge profit in bulk hot water service provision where imprecise calculations, options to omit site visits altogether; and to apply supply charges, often improperly imposed on end-users of bulk energy whose consumption levels of the heating component of heated water cannot be measured through legally traceable means. In any case such practices will become formally illegal when remaining utility exemptions under national trade measurement laws are lifted as is the intent.

Regulatory consistency between states and federal jurisdictions and between various schemes should be a goal of achieving proper nationalization and harmonization besides meeting the minimal standards of best practice, common sense, fairness, justice and upholding of existing enshrined rights of individuals.

Many providers of utilities, including water authorities have excellent hardship policies that measure up to scrutiny and for the most part meet required standards.

However not everything is about hardship. There are broader issues of equity across the board for all Australian consumers regardless of means.

Regulatory overlap with other schemes makes access to enshrined and sacred residential tenancy rights to be secured. Cost recovery options are insufficient.

Beyond the provisions in place conceptually for the derived costing formulae used to calculate charges for energy received by OC entities in the public sector such as the DHS, who have numbers of high rise dwellings in their ambit, there are others for whom such derived costing may be applied in the corporate sector.

The BHW Guideline VESC 20(1) about to be repealed and transferred to the VERC deals only with the contractual and billing model adopted for other parties. Nevertheless, both the Guideline and the VERC refer to interpretative provisions that do not restrict the use of a singular term to mean a natural person, but includes numerous entity categories.

The term relevant customer is reflected under the deemed provisions of s46 of the *Gas Industry Act 2001* and is included also in some of the descriptive terminology used within the Guideline and proposed inclusion in the VERC.

However, the precise drafting has not been revealed yet. This is an integral component of proper community consultation. Others have commented on inability to make a comprehensive response to something not yet drafted to openly discussed as to the finer points of drafting. This is a procedural gap in the consultative process that needs to be addressed before finalization and adoption of the Draft Decision proposals.

The Issues Paper of May, which is not published online does not explain the rationale for examining the BHW Guideline with the view to repeal, but the Draft Decision refers to the DPI involvement on formulae-based derived prices, which is not quite the same thing as making the contractual model redundant. Therefore it is mystery why so much has been made of the redundancy of the Guideline.

It is worth noting here again, that the three host retailers who provide energization through pre-allocated Distributor believe that the Guideline is redundant because deregulation of small customers has already occurred. This is a telling perception, as it indicated that the retailers themselves believe that the proper contractual party is a "small business." viz Landlords and OCs.

These are crucial considerations when examining how the derived prices are calculated and contractually apportioned. Having said that small business, including landlords and OCs have as such right to transparency and disclosure as anyone else, and inclusion on bills or elsewhere of pertinent and sufficient information to keep them informed as to the basis on which calculations are made and how derived, so that they can monitor any discrepancies

The residential tenancy provisions allow for two price increases a year and deem Landlords to be directly contractually responsible for all utilities, consumption and supply other than bottled gas that cannot be measured and apportioned to individual residential tenants through legally traceable means.

The heated component cannot be separated from the composite water product, therefore the Landlord is responsible under the law. Failure to acknowledge these provisions under other jurisdictions represents an attempt to operate in a regulatory vacuum and does not reflect best practice. In any case the ESC under its own enactment, the *ESC Act*, s15 is required to avoid regulatory overlap past and present.

If the DPI now has control over policies previously under VESC control, it is implicit that there is an obligation to uphold the principles of the provisions referred to. Anything less than that would be grossly failing community expectation and responsibility.

The MCE SCO Table of Recommendations and Policy Paper does not deal at all with the issue of avoidance of regulatory overlap with other schemes, a concept which not only reflects common sense and best practice, but also is prudent if avoidance of angst, injustice, conflict, expensive debate and even litigation is to be avoided to see nothing of the implications of flaunting the spirit and intent of trade measurement practices that are already consider it an offence, and will be formalized once remaining utility restrictions are lifted.

It is argued that consumption threshold alone may be distorting the proper labeling of relevant small customer. This mainly applies to those end-users receiving bulk energy to heat centrally heated hot water services in privately rented apartment blocks and flats where only a single energization point exists; for the purposes of VENCorp rules and under other provisions that connection point is considered to be a single billing point.

This matter is also discussed under Contractual Matters (Distributor-Retailer-Customer Interface and Small Customer headings).

Certain matters deserve close scrutiny with the view of further clarifying definitions.

The following matters are crucial in reconsidering expanded definition of small customer retail customer in order to allow for the specification of who the **relevant** customer is for contractual purposes, both financial and other, beyond mere consumption threshold levels as at present and proposed.

The legislative and other regulatory arrangements, including regulatory overlap with other schemes; and conflict within existing and proposed energy provisions with regard to the bulk hot water arrangements in general for residential tenants with consumer detriments illustrated by case study example the specific details of which have already been provided to a number of statutory agencies and complaints bodies in the course of investigation of anomalies; and the deidentified selected details of which are including in this and multiple submissions to other state and federal arenas.

These issues are central to examining the provisions in the context of existing laws, rules, and other provisions, and the proposed National Energy Consumer Framework. However, a more detailed discussion about proposed provisions and implications is undertaken in Part 2B.

Certain issues stand out discussed relatively briefly under the headings below and elsewhere in analyzing the precise proposals made by the VESC and DPI for the BHW provisions. Nothing much as changed in terms of the conceptual thinking or contractual model adopted about to be perpetuated by transfer of most provisions to the Energy Retail Code (VERC).

It would seem that it is not that the BHW VESC Guideline 20(1) (2005)[68] itself that is redundant but the numbers of pages that contain it. The repeal has facilitated simplifying but the reasoning behind the Guideline is crucial for a proper understanding of what is happening and how this conflicts with existing regulatory provisions in other schemes.

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[68] VESC BWH Charging Guideline 20(1) (2005), implemented 1 March 2006 after deliberations during 2004 and 2005. Five stakeholders, including a single community organizations. Details of deliberations ultimately made available online during mid-2007 after protracted challenge to the legal and technical validity of the provisions was made on behalf of consumers highlighting the case of a particularly inarticulate, vulnerable and disadvantaged consumer, the deidentified case history details of which are referred to within this submission and elsewhere with the aim of raising community awareness generally to anomalies, regulatory overlap considerations and contractual governance issues, including the proper interpretation and application of deemed provisions and many definitions within the current and proposed energy provisions.
Further clarification with the NECF Law and jurisdictional provisions is crucial regarding the application of the deemed provisions and consequences, including disconnection and decommissioning of "hot water products" rather than energy.

The opportunity during the current regulatory review has therefore not been seized to re-examine the original conceptual thinking in the light of greater emphasis on nationalization, not only within the energy industry, but across the board. For example failure to consider national measurement provisions and intents; the requirement to avoid regulatory overlap between schemes (sd15 ESC Act, with amendments to 1 July 2008 and MOU 18 October 1997 CAV and ESC) and with the common law.

Billing arrangement 2

Billing option 2 was not discussed at all in the context of the introduction of the Guideline, save in passing. The focus of the Guideline was on how the contractual and billing model would apply to residential tenants and other occupants, predominantly in the private housing arena.

This to those using Department of Housing or delegate subsidized rented accommodation, many of them high rise blocks; the other applies to all others. Residential tenancy considerations are crucial and will also be discussed under the contractual considerations.

The customer in Billing Option 2 in these cases is unquestionably the Owners' Corporation, in these cases statutory authorities or their delegations from the community sector.

These **"relevant"** customers are charged a fixed rate that does not rely at all on meter reading of conversion factors. The rate charged is a fixed rate. Because of high subsidy provided to renting tenants in DHS or delegate public housing, these bodies are permitted, with residential tenancy law sanction to charge tenants an overall service fee that includes access to multiple services including laundry facilities, heated water and the like.

Please note the use of the term **"relevant"** under s46 of the *Gas Industry Act 2001*. Though part of the BHW Guideline incorporates the term without explanatory notes, elsewhere the unclarified term "customer" has been used.

The NECF adopts the term *"customer"* only on consumption threshold alone, which is insufficient.

Bulk hot water systems and selected contractual considerations

Configuration and systems used

Most bulk hot water systems have a water storage tank situated on common property infrastructure, from which heated water is reticulated in water service pipes to various individual apartments occupied for the most part by residential tenants.

The landlord is the contractually obligated party for receipt of water from the mains supplied by the Water Authority, and must pay for all charges, including service charges.

The water from the mains supply is reticulated in water pipes to a storage tank which has varying capacities. See conceptual diagram below.

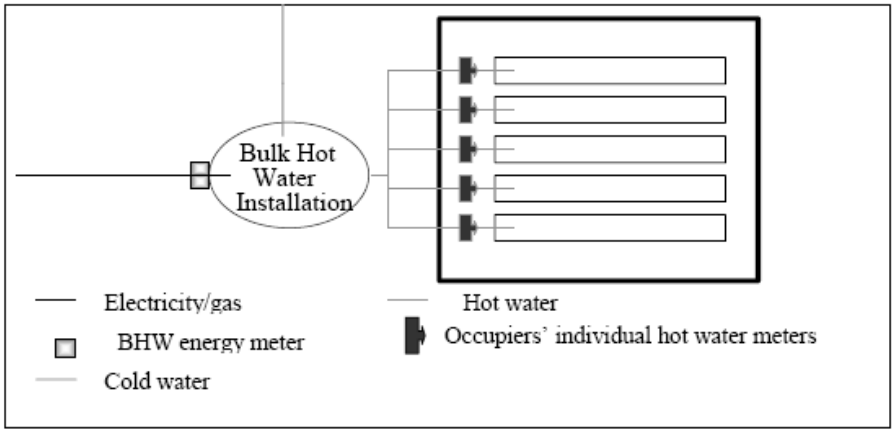
For these facilities, which are mainly in older buildings of 30-40 years old, though some may be newer a single energization point exists on common property infrastructure.

There are no subsidiary boiler tanks in the apartments of individual occupants in buildings of this vintage with BHW systems. These individuals receive heated water supplies a composite water product from which the heating component cannot be separately measured in a legally traceable way. The heated water is reticulated in water service pipes not energy pipes, regardless of network ownership or hot water flow meter ownership. These issues do not create contractual obligation

No service pipe as defined in the Gas Code exists in the flat of apartment occupied by a renting tenant or other occupier receiving bulk hot water. A **service pipe** is a pipe ending at a metering installation or for an unmetered site a GAS installation which connects a main or a **transmission pipeline** to customer's premises as determined by a distributor. The water pipe is not such a pipe.

No gas meter exists in the apartment or flat of a tenant or other occupier using a communal hot water service that is centrally heated by a single gas meter (energization point). No service or transmission pipe associated with the provision of heated water (BHW) enters the apartment or flat of a tenant receiving communally heated water from a communal water tank.

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

Distribution Supply point/supply address/connection point/energization point (synonymous terms)

There are no energization points (gas distribution supply points) that are associated with the individual apartments occupied by those receiving heated water that is communally heated. The same applies to electricity distribution points in principle.

Since the term supply point and supply address are synonymous within the *Gas Distribution System Code* (Gas Code), it follows that application of the term *"supply address"*[69] to the apartment of an end-user is inappropriate.

Therefore, logically the end-user of a composite water product reticulated in water pipes from common property infrastructure is not the relevant customer for then purposes of liability for energy consumption and supply charges associated with provision of energy to communal water tanks on common property infrastructure

VENCorp Rules deeming for settlement arrangements between Distributor-Retailer that bulk energy connections to be single billing points, with the double-custody changeover point being at the outlet of the meter, located on common property infrastructure; This is upheld also within existing energy regulations including the legislation

The Gas 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"*

[69] The VERC has harmonized under the Energy Retail Code the definitions from the Gas Code. Supply point and supply address have exactly the same meaning. The term ancillary point is obsolete since it is synonymous with supply point and supply address also. A supply address is not where an occupier resides. It is where an energization point exists that is part of a gas distribution system and service that is associated with equipment and service pipes through which gas flows.
Occupiers in multi-tenanted dwellings receive a composite water product in water pipes not in service pipes through which gas flows, whether or not part of an embedded network. The term embedded, which is clearly explained in the Embedded Generation lexicon does not refer to provision of heated water, but to provision of energy in energy-related service pipes.

Similar concepts are embraced within the NECF in referring to connection and energization points.

For the purposes of examining the concept of energization, no new supply takes place when a new tenant moves into rented premises serviced by a single communal hot water tank for hot water supplies that are part of the mandated terms of residential tenancy leases under the legislation

Once the original connection is achieved, energization is ongoing. No disconnection or decommissioning takes place to disrupt continuity of supply of the energy supplied to the Landlord at a single energization point on common property infrastructure

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 and its associated servicing piping is not part of a gas installation or gas transmission pipeline to the end-user's premises in an individual apartment or flat in multi-tenanted dwelling.

The customer's premises as defined above means the point at which the pipe enters a metering installation. That is where the energy is received – by the Landlord on common property infrastructure. The gas is transmitted in a transmission pipeline, not to the end-user's premises, but to a communal water tank, still on common property infrastructure. After that all transmission takes place in water pipes reticulating heated water to individual apartments.

An understanding of this sequence may help to dispel myths about the proper application of the terms supply point and supply address and therefore proper allocation of contractual responsibility. The current provisions fail to recognize these technicalities or to distinguish the true concept of "embedded customers" receiving energy rather than water in transmission pipelines that involve the flow of gas not the flow of heated water.

Though for dual fuel provision, a transmission pipeline does enter the end-user's premises, and therefore that end-user is the appropriate contractual party, for BHW the provision of gas (or electricity) ends at the outlet of the mains, thereafter being connected to the communal water storage tank on common property infrastructure.

A hot water flow meter, the instrument 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.

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

Awareness of these adopted practices as sanctioned by policy-makers rule-makers and regulators should be widely promoted.

Though discussed more fully elsewhere with the emphasis on disconnection provisions within jurisdictional provisions, I isolate some related disconnection concepts, since it cannot have been the intent of the existing legislation or proposed NECF template Law to regard disconnection as meaning suspension of hot water supplies for those receiving heated water from communal water tanks on common property infrastructure, given all the explanations as to how gas is transmitted and the requirement for there to be a *"flow of gas"* demonstrated if a customer is to be deed to be the relevant contractual party.

Inconsistent definitions between BWH and all other energy –specific definitions and provisions

For policy and regulation to be effective a thorough understanding of the applicable

Policy-makers, regulators and complaints handlers need to be able to provide accurate advice to the public about their rights and obligations. The deemed provisions require re-clarification within the Law and so do the technical terms so that the term "meter" and other terms do not acquire meanings that are inconsistent with existing or future provisions and their intent in terms of the contractual governance model to be adopted. This needs to be consistent in all jurisdictions with due regard to the existing rights especially of residential tenants

It is suggested that less than optimal understanding of these terms may have led to flawed reasoning in the contractual and calculation models used.

This is discussed in further detail in Part2B in the context of the proposed NECF energy template Law, but for the purposes of this brief definitions, I make some observations and provide clarification of terms that appear to have become distorted in everyday use in determining contractual obligation and defining various classes of premises, customers, equipment, supply remit and calculation instruments and methods.

The BWH definitions and provisions are inconsistent with all other existing energy provisions, about metering,[70] supply points and ancillary supply points (taken as one under existing legislation), supply address (with the same meaning as supply point); energization point; billing points)[71]

Customer Contract (terms implying the same)[72] – see s46 of the *GIA* and analysis

s46 of the *GIA* refers to relevant customers. These are defined in an OIC dated 29 October 2002 as those who consumer no more than 10,000 GJ of gas per annum. This applies to some 1.6 million Victorians and not restricted to natural persons. The deemed provisions refer to gas not hot water services, water products.

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70 No meters as defined in the legislation reside in individual apartments receiving bulk hot water. There is no distribution supply point for gas associated with the provision of heated water to tenants

71 Under the *Gas (Residual Provisions) Act 1994* provides that any gas connection point in existence prior to 1 July 1997 considered as a single supply billing point remains so. In this case the building was built in 1972, the Distributor has supplied gas to the property since that time; and both the bulk gas meter and the satellite hot water flow meters have been in existence also since that time. Note the bulk gas meter measures gas volume not heating; the hot water flow meters measure water volume only not heat or gas. Under Residential tenancies provisions the Landlord is responsible for any utility not separately metered (other than bottled gas). The term meter implies use of an instrument designed for the purpose.

72 See analysis of s46 of the *Gas Industry Act 2001*. Taking supply means from a physical connection where energy is received. Taking supply of heated water does not meet that descried. Therefore the deemed provisions under s46 do not apply to end-users of heated water products reticulated in water pipes rather than gas transmission pipes or electrical lines

If no connection point or gas transmission pipe exists for individual transmission of gas to any premises the supply point is at the outlet of the mains. For BHW these are always a single supply and billing point. See discussion below of technical terms

Pertinent technical considerations:

This brief list of terms is discussed below. More extensive discussion takes place in Part 2 under the Table of Recommendations headings for the NECF. Therefore it would be helpful to read Part 2A and 2B in tandem.

Customer

Prescribed Customer

Relevant Customer

Deemed Customer

Retailer Supply Remit[73]

Classes of Premises

Classes of Consumers

Supply Point

Distribution supply points (same as supply point and supply address)

Supply Address

Distribution Supply Point

Supply

Connection Point/Connection/

Energization

Gas Service Pipes

Gas Transmission Pipes

Electrical Service Lines

Disconnection/Decommissioning/Disconnection-Reconnection[74]

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[73] Under the philosophies adopted by the NECF and also as reflected in current Victorian provisions, including the Gas Code (apart from the BWEH provisions) a retailer's supply remit cannot extend to premises where no exchange of energy takes place. That is to say, an end-user of heated water without any form of energy connection or energy transmission pipe or electrical line cannot be part of an energy supplier's supply remit. It is not his role to be a Landlord Aide or Billing agent, seeking to secure two sources of funds for the same commodity – the hot water services are an intrinsic part of a rental lease and part of common property infrastructure. The supply remit definition ends at the outlet of the meter to which the energy is supplied, or in embedded networks transmitting energy, where the energy is physically supplied to the premises. Therefore no deemed contract should exist or be seen to exist between distributor-retailer and end-user of heated water under energy laws. The tenancy laws and owners corporation laws cover this contractually, and cannot just be re-written by policy makers and regulators in other jurisdictions.

Customer

To qualify for the term customer, relevant customer, deemed customer, small customer, business customer, large customer or any other form of customer for the purposes of energy supply a connection point must exist that supplies energy to the relevant premises. There is no such connection point at which energy the flow of energy is facilitated to the premises (living quarters) or those receiving communally heated water from a water storage tank on common property infrastructure.

In the absence of that energy connection point no distributor-retailer-middleman-customer relationship exists, therefore no deemed customer status.

Relevant Customer of other Prescribed Customer

A Ministerial order in Council defines this simply as one who consumes no more than 10,000 GJ gas per annum which applies to some 1.6 million users of gas in Victoria and not restricted to natural persons.

User means user of gas or electricity not heated water products

Deemed Customer

This is discussed elsewhere through sentence by sentence analysis of s46 of the Gas *Industry Act 2001*, with similar correlations for electricity.

The same applies. Supply under all legislated energy provisions always means supply of gas or electricity not water at the inlet, outlet or mans at the double custody change-over point. The exchange takes place when the gas leaves the service pipe. The transmission pipe carries the gas to the water storage unit. All this takes place on common property infrastructure after the landlord takes supply at the outlet of the gas or electricity meter.

Therefore the Landlord/Owner is the relevant customer for all interpretations, including if deemed provisions apply. This is highly unlikely as in order for a new supply to be effected, the Landlord/Owner must in the fist place provide details and authority at the time of connection.

Also, all supply or energization points for "BHW" purposes are considered under the legislation to be single supply and billing points.

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[74] This refers to disconnection of energy under certain circumstances after all proper process have been followed. It does not refer to restriction or disconnection of water products. End-users of heated water products that are included in their rental package under mandated lease terms are being threatened with disconnection of their heated water if they refuse to comply with forming an explicit contract with the supplier for energy that is supplied to the landlord on common property infrastructure. This impacts on demands for acceptable identification, personal details and unjust demands for access to water meters behind locked doors in the care custody and control of the landlord

This reflected in the VenCorp MSO Rules also, as for Distributor-Retailer settlement purposes a single supply and billing point is taken. Any premises with a supply point that was a single billing point as at 1 July 1997 remains a single billing point – with a single supply charge – to the Landlord/Owner where this is for energization of a supply point used for heating communal water tanks.

A **relevant customer** is one who consumes no more than **10,000 GJ** of gas per year according to the Gas Industry Act 2001 and associated Ministerial Order in Council. That applies to some 1.6 million Victorians and the definition is not restricted to natural persons.

The term relevant has been dropped from the proposed NECF TOR.

It is important to note the discrepancy between the figure of 10,000 GJ and 5,000 in the Victorian Energy Retail Code and the Victorian Gas Distribution System Code.

The deemed provisions were intended mostly to refer to those receiving energy domestic supply of gas for heating or cooking, or in the case of premises supplied with an individual meter for measuring the heating component of heated water, such as a free-standing unit. They can also apply to businesses.

These provisions were never intended to apply to single bulk energy meters used for the heating of centrally heated water supplied from water tanks on common property infrastructure, using water meters owned by energy suppliers as substitute energy meters.

That is what current arrangements appear to endorse and allow under guidelines and policy provisions, but such provisions are flawed in the first place.

That does not make the arrangements viable, just, legally enforceable or consistent with common law contract provisions and a multitude of other provisions.

Jurisdictional policy makers and regulators seem to be interpreting as unauthorized supply as applicable to residential tenants who legitimately take possession of rented premises under mandated lease provisions where a single energization point exists on common property infrastructure belonging to a Landlord or OC, and where the cost of consumption and supply are covered under those mandated provisions.

DEEMED (VERC)

DEEMED *in respect of an* ***energy contract*** *means an* ***energy contract*** *deemed to apply between a* ***customer*** *and a* ***retailer*** *under the* ***Electricity Act*** *or the* ***Gas Act*** *and* ***deemed contract*** *has a corresponding meaning.*

DEEMED CUSTOMER (VERC)

DEEMED CUSTOMER *means a person who is* ***deemed*** *to have an* ***energy contract****.*[75][76]

[75] With policy-maker and regulator sanction those receiving a heated water product – a composite product – are being deemed to be contractually obligated to energy suppliers against all the rules of fundamental contractual laws, tenancy laws and proper trade measurement practice. As a consequence residential tenants are being prevented fro the quiet enjoyment promised under their lease terms and the right to agree to pay only once for heated water – within the rent as a mandated right under those provisions. Again – the issue of regulatory overlap. The deemed provisions were put in place with energization points in mind not water products. They were not intended to be exploited and distorted as they have been.

[76] The NECF clearly expects there to be a physical connection point on the premises of a customer that facilitates the flow of energy. For gas this means a service or transmission pipe to those premises. For electricity this means an electrical line. Supply address does not apply to the four walls. It has a technical meaning of a connection point and is synonymous with supply point, distribution supply point and connection point in all existing and proposed provisions.

ANALYSIS OF s46 GAS INDUSTRY ACT 2001

I reproduce here an analysis of the deemed provisions of the *Gas Industry Act 2001* under s46 to support my view that these provisions have been mistakenly applied to those receiving bulk hot water supplies from a single energization point on common property infrastructure.

In that context, I now quote directly and dissect paragraph by paragraph here from s.46 and s48 respectively of the *Gas Industry Act 2001*,[77] administered by the *Essential Services Commission Victoria* (VESC) and overseen by the Department of Primary Industries Victoria, making particular note that the provisions refer to the sale of gas, and must not be inconsistent with the *Gas Distribution Code* published from time to time by the Office of the Regulator General (now Essential Services Commission).

46. Deemed contracts for supply and sale for relevant customers

(1) If a relevant customer commences to take supply of gas at premises from the relevant licensee without having entered into a supply and sale contract with that licensee, there is deemed, on the commencement of that supply,[78] *to be a contract between that licensee and that person for the supply and sale of gas—*

(a) at the tariffs and on the terms and conditions determined and published by that licensee under section 42; and

(b) on the conditions decided and provided for by the Commission under sub-section (5).

MK Comment

To meet the provisions of this clause (1) the only qualification is *"relevant customer"* must be taking supply of gas at the premises from the relevant licencee"

"relevant customer" has the same meaning as in section 43 as referred under s46 of the GIA

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77 *Gas Industry Act 2001* found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/451636145440e6a2ca25705900078e48/$FILE/01-31a024.pdf*

78 Take supply means take direct supply of gas through a connection point, supply point/supply address; service transmission pipe that directly allows the flow of gas to the premises deemed to be receiving the gas. Water service do not facilitate the flow of gas to the premises of individual occupants of premises that are served by communal water tanks for their heated water supplies. No gas passes through the water meters associated with the water tank. The hot water flow meters measure water volume only, not gas or heat (energy); or electricity.

An Order (Order in Council exists dated 29 October 2002. It merely refers to consumption threshold of gas as 10,000 GJ per annum, and is not restricted to natural persons. Some 1.6 Victorian uses or gas consumer that amount. All provisions including the *Energy Retail Code* (VERC) provide for interchangeability of terms, i.e. natural person may be taken for an entity; plural may mean singular and the like

MK Comment

For s46 (1) to apply in respect of

"taking supply of gas at the premises from the relevant licencee"[79]

it must be shown that gas is being taken via a physical gas connection. That single supply point/supply address is on common property infrastructure. For BHW energization points, all of these are regarded as single supply and billing points for VENCorp Distributor-Retailer settlement purposes. The Landlord or Owners' Corporation takes supply.

Gas means gas, transmitted in gas transmission pipes not composite water products, value added products reticulated in water pipes.

Distribute,[80] in relation to gas, means convey gas through distribution pipelines; Gas does not pass through water meters; neither does gas pass through water service pipes. If no distribution takes places, no supply takes place of gas.

Therefore no contractual relationship exists on the basis that heated water has reached an individual apartment in water service pipes, where it can be shown that the premises in question deemed to be receiving "supply of electricity is devoid of connection point' supply/supply address; energization; electrical line delivering the "energy" alleged to have been supplied.

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79 The *Gas Industry Act*, Gas Code; Energy Retail Code (save for the BHW provisions that are to transferred to it from the existing BHW Guideline 20(1) and the essence of deliberative documents of 2004 and 2005 relating to contractual matters); proposed NECF, all expect "taking supply of gas" to mean receiving gas through a gas service pipe or transmission pipe facilitating the flow of gas. Water meters, associated equipment and water service pipes do not facilitate the flow of gas or deliver gas to individual apartments where the water is communally heated in a storage tank on common property infrastructure. Ownership of the water meters does not create a contract or constitute sale of gas to the end-user of heated water in these circumstances. The contract lies with the Landlord or Owners/Corporation either explicitly because of authorization to fit the metering installation or implicitly since the supply has continued at the same supply point/supply address on common property infrastructure

80 Definitions, *Gas Industry Act 2001* v36, No 31 of 2001, version incorporating amendments as at 25 July 2008

Notwithstanding that the VESC has authority under the *Gas Industry Act 2001* (GIA)[81] and the *Electricity Industry Act 2001 (EIA)*[82] to determine under an Order to specify a class of persons by reference to all who may supply electricity or gas, period of use, place of supply; purpose of use; quantity of energy used (consumption threshold) any other specified factor relevant to the sale of electricity or gas, the central contention in this submission and echoed in Part 2B of this tri-part submission[83] is that energy suppliers do not sell or supply energy to end-users of composite heated water products in multi-tenanted dwellings where the energy is supplied to a single energization point on common property infrastructure owned and controlled by Landlords/Owners or Owners' Corporations (OC).

Further, notwithstanding also that the VESC has the power under current legislation to regulate tariffs for *"prescribed customers"* the contention in this submission is that recipients of heated water products communally heated in a water storage tank and reticulated in water pipes, in the absence of any energy connection point in the individual premises of those parties, or any evidence of transmission of energy to those apartments in gas service pipes or gas transmission pipes or electrical lines, there is no sale or supply energy involved to the end-users of that water as a composite product heated at the request of the Landlord/Owner through a single energization point on common property infrastructure and supplied via either gas transmission pipes or else electrical lines to a communal water storage tank.

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81 *Gas Industry Act 2001* Version No. 036, No 31 of 2001. Version incorporating amendments as at 25 July 2008-09-27 Found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

82 *Electricity Industry Act 2000* Version No. 040 Act No. 68/2000 Version incorporating amendments as at 9 November 2006 found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/75C08FBF1CB61807CA257220001BA107/$FILE/00-68a040.pdf*

83 In direct response to the VESC Regulatory Review 2008; but also to the MCE SCO Table of recommendations Policy Paper, and in addition intended for other relevant authorities and entities, including the proposed national regulator AER, the ACCC,. CAV, NMI

The GIA describes *customer* means a person to whom a gas company transmits, distributes or supplies gas or provides goods or services. Under s22 of the *GIA* it is an offence to distribute gas without a licence other than a gas retailer.

transmission pipeline means—

(a) a pipeline for the conveyance of gas—

(i) in respect of which a person is, or is deemed to be, the licensee under the ***Pipelines Act 2005***[84]*; and*

(ii) that has a maximum design pressure exceeding 1050kPa—

other than a gathering line within the meaning of the ***Petroleum Act 1998****; or*

(b) a pipeline that is declared under section 10 to be a transmission pipeline—

but does not include a pipeline declared under section 10 not to be a transmission pipeline

Under the definitions of the *GIA*

transmit *means convey gas through a transmission pipeline;*

MK Comment

No gas is transmitted through a transmission pipeline to the individual abode of an end-user of heated water receiving such water supplies from a communal water storage tank situated on common property infrastructure and supplied with heat from a single energization point on the same common property infrastructure owned and controlled by a Landlord/Owner.

Therefore no supply or sale of gas takes place to that end-user. Therefore no deemed contract exists or can be said to exist, or the necessity to form a market contract. That contract is formed at the time that the infrastructure is in place and the Landlord/Owner accepts the installation at his request.

Under the definitions of the GIA, *gas distribution company* means a person who holds a licence to provide services by means of a distribution pipeline. No gas service or transmission pipe is involved in transporting heated water from a communal water tank to the individual abode or an end-user of heated water.

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[84] *Pipelines Act 2005* found at *http://www.austlii.edu.au/au/legis/vic/consol_act/pa2005117/s5.html*

Water pipes transport such a composite water product, from which the heating component cannot be separately measured or transported. Therefore if no distribution pipe is used, no distribution takes place. Therefore no contact exists. The energy is supplied to the Landlord/Owner on common property infrastructure

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

No such gas fitting as described in connection with the consumption of gas is involved in delivering heated water to the abode of an end-user of heated water that is heated in a communal water tank serving multiple occupants in a multi-tenanted dwelling (BHW). Therefore no supply is taken; in particular no unauthorized gas is consumer or taken. No deemed contract exists or ought to exist

In addition, under s48 the terms and conditions must not be inconsistent with the *Gas Distribution System Code* published by the Office of the Regulator- (Now Essential Services Commission).

Similarly, electricity does not pass through water meters either nor through water service pipes. If no distribution takes place through electric lines, no supply takes place. Therefore no contractual relationship exists on the basis that heated water has reached an individual apartment in water service pipes, where it can be shown that the premises in question deemed to be receiving "supply of electricity is devoid of connection point; supply/supply address; energization; electrical line delivering the "energy" alleged to have been supplied

The BWH contractual arrangements are inconsistent with the Gas Code to the extent that all definitions for supply point, supply address, gas transmission, meter and the like are discrepant to those provisions, and also with other provisions current and proposed for the sale and supply of energy, which requires a physical connection, flow of gas or conduction of energy through gas pipes or electricity lines to the premises deemed to be receiving that energy. Water pipes are not substitutes for such equipment. Water meters are not substitutes for gas meters within the Law and within the remainder of all Codes.

These particular provisions and terms stand out as particularly discordant with the remainder of the energy provisions and definitions

The introduction of a new meaning for meter *"as a device that measures and records consumption of bulk hot water consumed at the customer's supply address*

"Delivery of electric bulk hot water"

"Delivery of gas bulk hot water"

Supply address is the customer's apartment or flat rather than the technical use of the term that is synonymous with supply point and distribution supply point as described within the Gas Code and within the legislation

It is explicit and/or implicit in all energy provisions that supply of gas means taking supply at a connection point for gas, being part of the distribution system.

This means at a distribution supply point (Gas Code=VGDSC; Energy Code=VERC); with synonymous terms "supply point" (VGDSC; VERC); *"supply address" "connection"* (NECF Glossary, Policy Paper {GPP}); *"energization point"*[85] NECF GPP

(2) If a relevant customer—

(a) commences to take supply of gas at premises under a supply and sale contract with the relevant licensee; and (b) that customer cancels the supply and sale contract within the cooling-off period relating to the contract; and (c) that customer continues to take gas from that licensee without entering into a further supply and sale contract with that licensee—

there is deemed, on the cancellation of the supply and sale contract, to be a contract between that licensee and that customer for the supply and sale of gas—

(d) at the tariffs and on the terms and conditions determined and published by that licensee under section 42; and

(e) on the conditions decided and provided for by the Commission under sub-section (5).

MK Comment

As already discussed under (1) above, no supply of gas takes place as defined under the GIA definitions of *"customer;" "gas distribution company;" "transmission"*; "*transmission pipeline;"*

This sub-clause of s46 of the *GIA* refers to agreement to take supply and then defaulting on the agreement by withdrawing before the cooling-off period and then continuing to accept supply.

[85] This term means the same as supply address, supply point, distribution supply point and connection point, but must refer to an existing gas or electricity connection, as defined in the NECF and associated Glossary Policy Paper

Such a circumstances is inapplicable for those receiving heated water that is communally heated by a single energization point on common property infrastructure supplied under either implicit or explicit contract between landlord and supplier. Though the BHW provisions do not acknowledge this, this is what is happening.

Those receiving communally heated water do not get to choose the supplier for the energy used. The Landlord makes that choice at the time of forming a contract and seeking for the installation of the metering installation for energy. It is not the succession of tenants who agree to take supply and then default. They take no energy at all. They take heated water supplies covered under the enshrined mandated terms of residential tenancy leases, lawfully accepted under those terms and residential tenancy provisions

Those receiving communally heated water in multi-tenanted dwellings are not part of the distribution service since there is

4. *No the connection of the premises to the distribution network to allow the flow of energy between the network and the premises of end-users as occupants of flats and apartments)*
5. *No physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energisation' of the connection)*
6. *No network can facilitate the flow of energy between the network and the premises through the connection; and services relating to the delivery of energy to the(alleged) customer's premises*

That being the case, no contract can exist or been seen to exist, or be required to be acknowledged or formalized by way of an explicit contract

That being the case, it is improper to demand conditions precedent or subsequent to the obligation to supply in relation to an end-user or heated water products. The obligation to supply, and any reciprocal obligations precedent or subsequent belong to the Landlord/Owner where only a single energization or supply point exists to supply heat to a communal water tank used to supply water to multiple occupiers in a multi-tenanted dwelling.

(3) A deemed contract under sub-section (2) is deemed to commence on the commencement of supply referred to in sub-section (2)(a).

Sub-section 3 above does not apply since (2) does not apply

(4) If a supply and sale contract referred to in subsection 2)(a) is—

*(a) a contact sales agreement within the meaning of the **Fair Trading Act 1999**, sections 65 to 67 of that Act do not apply on the cancellation of that contract;*

*(b) a non-contact sales agreement within the meaning of the **Fair Trading Act 1999**, sections 73 to 75 of that Act do not apply on the cancellation of that contract.*

Subsection (4) does not apply. No agreement takes place. The contract between supplier and landlord is already formed at the time that any given tenant takes up occupancy. A supply charge applies from the moment the infrastructure is in place and normally pre-dates occupancy by any tenant. No new tenant taking up occupancy is a new customer or new supply. There is no supply to the premises of the occupant receiving communally heated water supplies reticulated in water pipes.

(5) Without limiting the generality of section 28, the Commission may decide, and provide for in the licence of a licensee, conditions setting out—

(a) circumstances in which a licensee must continue to supply or sell gas to a customer to whom the licensee supplies or sells gas under a deemed contract under this section after that contract comes to an end in accordance with sub-section (7)(d) or (e);

and

Though the circumstances of sale or supply may be determined such circumstances must relate to the supply at a physical gas or electricity connection, regardless of network arrangements or changeover. Reticulation of heated water transported in water pipes to individual apartments does not form part of the energy distribution service at all and the two lots of transmission are unconnected. The heat is merely used to heat a communal water tank. The water is supplied to the Landlord by the Water Authority. The energy is supplied to the Landlord to heat the water storage tank. Thereafter the terms of contract are as mandated in lease arrangements between Landlord and tenant.

(b) events on the happening of which a deemed contract under this section may come to an end.

MK Comment

The event that the supplier wishes to facilitate is capitulation into an explicit market contract for the "delivery of bulk gas water" or "delivery of bulk electric water. This is not technically feasible and cannot be delivered in equipment specific to energy, or calculated and apportioned in a legally traceable manner.

(6) A condition referred to in sub-section (5)(a) must provide for the tariff or tariffs and the terms and conditions for the continued supply or sale of gas to be determined by the licensee.

MK Comment

Notwithstanding that the Governor in Council may regulate tariffs for prescribed[86] customers, such a customer must be the subject of sale of gas. In the case of those receiving composite water products from a communal storage tank under the ownership and control of a Landlord/Owner of a multi-tenanted dwelling, no sale of gas to the end-user of heated water takes place. The same applies to electricity. It is the Landlord/Owner who takes supply of the energy supplied to the communal water tank

Again, the central issue is not whether any sale or supply of gas or electricity takes place to end-users of heated water supplies communally heated and supplied in water transmission papers rather than gas transmission pipes or electrical lines. The issue is how it has come about in the first place that policy-makers, regulators, complaints handlers and retailers perceive a deemed contract for the sale and supply of gas or electricity of any description to exist with an end-user of composite water products.

The tariffs determined are derived costs using the measurement of water volume to determine deemed gas or electricity usage for the heating of a communal water tank. The costs are apportioned to individual tenants, and proportionate supply charges and non-energy costs calculated by dividing the total amount of gas or electricity supplied to a single energization point the Landlord, by the total number of residential premises at the multi-tenanted dwelling.

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86 A prescribed customer means a person or a member of a class of persons to whom an order under section (5) (of the GIA) applies. See *GIA* found *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

(6A) A person who is a relevant customer may be a party to a deemed contract under this section even if the person has previously been a party to a contract for the supply or sale of gas to different premises on different terms and conditions with the same licensee or another licensee.

(7) A deemed contract under this section comes to an end—

(a) if the contract is terminated; or

(b) if the customer enters into a new contract for the purchase of gas from the licensee in respect of the same premises, on the date of taking effect of that new contract; or

(c) if the customer transfers to become the customer of another licensee; or

(d) at the end of 120 days after the day on which the deemed contract commences; or

(e) on the happening of an event decided and provided for by the Commission under subsection (5)(b)—

whichever occurs first.

MK Comment

7 (a) – (d) are inapplicable for those receiving heated water supplies in water pipes. The Landlord is responsible for the energy supplied to heat the communal tank and has the implicit or explicit contract

(8) Sub-section (1) does not apply where the relevant customer referred to in that sub-section commences to take the supply of gas by fraudulent or illegal means.

(9) Sub-section (2) does not apply where the relevant customer referred to in that sub-section takes the supply of gas by fraudulent or illegal means after the cancellation of the supply and sale contract referred to in sub-section (2)(a).

MK Comment

(8) and (9) inapplicable in relation to BHW recipients. No residential tenant receives heated water or energy fraudulently. The heating component of the water supplied is covered in the cost of rent under mandated lease provisions – residential tenancy laws are explicit about this and also the Landlord's liability for all non-energy costs in these circumstances. It is preposterous to hint at illegal or unauthorized supplies of energy in the circumstances. Residential tenants receiving heated water supplies are being threatened with disconnection of heated water if they do not form explicit contracts to replace what represents unilaterally and unjustly imposed deemed contractual status.

(10) In this section—

"cooling-off period" *means the period within which a relevant customer is entitled under a supply and sale contract or section 63, 67H*

or 71 of the ***Fair Trading Act 1999*** *to cancel the contract;*

"relevant customer" *has the same meaning as in section 43;*[87]

"relevant licensee"*, in relation to premises, means the licensee last responsible for the supply and sale of gas to those premises;*

"supply and sale contract" *means a contract for the supply or sale of gas, whether oral or in writing, or partly oral and partly in writing.*[88]

(11) This section expires on 31 December 2008.[89]

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87 An existing Order under s 43 merely defines relevant customer as one who consumes no more than 10,000 GJ per annum. This applies to approx 1.6 million Victorians and is not a term restricted to natural persons. Consumption level must be related to the physical supply of gas (or electricity) facilitating flow of gas or conduction of energy to the premises in question in order for a contractual obligation to exist. That obligation is with the Landlord/Owner to whose premises on common property infrastructure gas is transmitted to the outlet of a gas meter, and thence in a transmission pipe to a communal water tank for the heating of centrally heated water then distributed in water service pipes to individual apartments. The end-user of heated water is not a *"final gas customer"* but rather a recipient of heated water that is already paid for within the rent under mandated lease provisions in the absence of any connection point or proof of energy consumption. Charging formulae, the existence of or ownership of hot water flow meters that measure water volume and other considerations are irrelevant unless gas or electricity is supplied. Residential tenants do not take illegal or unauthorized supply of gas or electricity in these circumstances, but rather fully authorized supply of heated water as part of their private contractual lease agreement with landlord based on mandated standard lease terms. The provisions represent obvious regulatory overlap, besides using methodologies that cannot show legally traceable means of measurement and calculation.

88 No such contract exists or ought to exist between retailer and recipient of heated water that is communally heated through energy supplied at the request of a Landlord/Owner at the time that a metering installation is ordered and in place. The Landlord/Owner has the contract

89 The deemed provisions under the GIA were extended to 31 December 2008 under subordinate legislation

If disconnection of gas or heated water supplies is undertaken by a retailer, with or without tacit or explicit sanction by policy-makers and/or regulator(s) the matter is serious if this occurs where no deemed contract exist; no just cause can be shown for such an action; no energy is supplied by the retailer or distributor on the basis of all the arguments shown above, that is to say, , no supply of gas takes place as defined under the GIA definitions of *"customer;" "gas distribution company;" "transmission"*; "*transmission pipeline."*

As noted on pp59-61, the move to re-define meter within the Energy Retail Code, and include this as an alternative definitional term, despite the express provisions of the GIA will not validate this provision, or render water meters any more suitable as instruments through which gas or electricity consumption can be measured.

The situation will be compounded when advanced metering is in place and remote disconnections are possible. Who will be disconnected in these circumstances when that happens? All of the occupants of a multi-tenanted block with a single energization point regarded as a single supply and billing point for VENCorp Distributor-Retailer purposes? Some of them.

Or will threat to continuity of water supplies remain the mainstay of unmonitored disconnection procedures on the basis of the BWH policy provisions in place?

How will equity needs be met?

How will social and moral parameters be met or the expectations of the community?

How will the community at large, including market participants feel secure about conflicting provisions and the risk of civil pecuniary penalty or criminal charges at worst, or protracted complaints handling and debate at best?

How will end-users of heated water unjustly threatened with continuity to their heated water supplies instead of implicitly replying upon the residential tenancy provisions and the terms of residential tenancy leases as mandated by law be in a position to challenge alleged water consumption if no water meter dial readings are taken?

How would such readings in any case possibly correlate with actual gas consumption, and how will settlement take place regarding bills, even if a 12-month settlement time frame were to be adopted? The water meters are read approximately two months apart from the single supply points used to communally heat a water storage tank on common property infrastructure.

What rules will be in place to explicitly outline the responsibilities of those relying on water meter reading to calculate gas to service, maintain and guarantee the accuracy of the water meters, which in any case can only measure water volume, not gas volume, electricity consumption or heat (energy)?

How can the current arrangements possible.

What form of compensation will exist, be monitored and upheld if wrongful disconnection under such circumstances took place; or even coercive threat of disconnection of water products by way of endeavouring to force an explicit contractual relationship for the distribution sale and supply of energy.

Why should end-users of heated water products pay individual supply charges incorporating the costs of supply to a single supply point/supply address belonging to the Landlord or Owners' Corporation.

Currently massive supply charges are being applied to individuals, relying on the express instructions of the policy-maker and regulator. Some explicitly mention water meter reading fees, which paradoxically are higher for remote reads than site reading. Site-specific reading of meters had been considered too expensive and inconvenient for retailers or their servants contractors and/or agents. Instead, a fixed conversion factor formula was developed using a contractual model that appears to be in conflict with existing legislation and proposed legislation.

Whilst those in public housing or housing managed on behalf of the DHS are differently catered and whilst a service charge is applicable for a range of facilities and services used by those in such housing, equity issues for those in the lower end of the private rental market are not catered for at all in terms of checks and balances, accountability and legally traceable methods through which consumption of any kind can be provided, whether of water, gas or electricity.

It is not the prerogative of energy suppliers under energy laws to act as billing agents for Landlords and Owners' Corporation.

The Landlord is obliged to pay for cold water. The heating component of the water cannot be measured through legally traceable means, using the correct instrument for the measurement of energy consumption, as required under the law.

Therefore, the issue of proper compensation for wrongful disconnection and conduct associated with such disconnection processes, including coercive threat, intimidation and harassment is a grey area left entirely uncovered.

Whilst the generic laws cover such conduct in theory often access to generic recourses is almost impossible. For many the whole legal processes and costs in terms of stress alone, leaving aside financial considerations is very high. Regulatory enforcement is service areas, but apparently improving with supply of goods.

The PIAC in submissions to the MCE arenas have frankly expressed their views about compliance enforcement and weaknesses of the generic laws and access to those recourses.

Numerous submitters to the Productivity Commission's Review of Australia's Consumer Policy Framework (2008) similarly expressed reservations about the efficiency. of the current regulatory framework under generic provisions.

Wrongful disconnection and threat thereof is not a new issues. It is a frequent occurrence. Reliance under current BWH provisions gives no protection whatsoever if disconnection of heated water supplies is relied upon as a strategy through which explicit energy contracts can be solicited; or else actual disconnection can occur for which the legislation makes no provision at all.

These matters need to be properly addressed within the Law.

It is insufficient to leave such important issues to jurisdictional control alone. Whilst the precise timelines and processes to be followed for wrongful disconnection can be covered more generally, the principle as to when it is appropriate for such disconnection to occur is not covered at all

Unwillingness to provide identification contact details or access to water meters may be an entirely justifiable stance for a residential tenant or other occupant to take given the methods that are being used to calculate deemed energy usage, the instruments used, the calculations made and the complete absence of proof of legally traceable consumption

S48 A Compensation for wrongful disconnection

Customer distribution services will be defined in the Law, for the purposes of the new national customer framework. These may include:

(1) Without limiting the generality of section 28, the conditions to which a licence to sell gas by retail is subject include a condition requiring the licensee to make a payment of a prescribed amount to a relevant customer in accordance with this section if the licensee—

(a) disconnects the supply of gas to the premises of that customer; and

(b) fails to comply with the terms and conditions of the contract specifying the circumstances in which the supply of gas to those premises may be disconnected

(2) A payment under subsection (1) may be made directly to the customer or by way of rebate on the customer's gas bill.

(3) A payment under a condition under subsection (1) must be made as soon as practicable after the supply of gas is reconnected to the premises of the relevant customer.

(4) Nothing in this section affects any other right any person or body may have to take action against a licensee in relation to a disconnection of a supply of gas.

(5)In this section—

prescribed amount means—

(a) the amount prescribed by the regulations for the purposes of this section; or

(b) if no amount is prescribed by the regulations, $250 for each whole day that the supply of gas is disconnected and a pro rata amount for any part of a day that the supply of gas is disconnected;

***relevant customer** has the same meaning as in section 43*

MK Comment

For the record, the existing Order in Council defines relevant customer as one who consumers no more than 10,000 GJ of gas per annum. This broad term applies to some 1.6 million Victorians and is not restricted to natural persons. The consumption threshold alone is an insufficient clarification. If no gas is supplied

As already discussed under (1) above, no supply of gas takes place as defined under the GIA definitions of "customer;" "gas distribution company;" "transmission"; "transmission pipeline;"

The NECF contractual governance model under 1.25 of the Table of Recommendations provides clear definitions of what constitutes a customer distribution service, thus establishing a contractual obligation to the retailer in the distributor-retailer-customer interface triangulation. This is shown below for reinforcement:

1.25 Definition of customer distribution services

Customer distribution services will be defined in the Law, for the purposes of the new national customer framework. These may include:

4. *the connection of the premises to the distribution network to allow the flow of energy between the network and the premises;*

5. *where a physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energisation' of the connection);*

6. *the capability of the network to allow the flow of energy between the network and the premises through the connection; and services relating to the delivery of energy to the customer's premises.*

The nature, scope and content of initial customer connection services are being dealt with concurrently, as part of the distribution connection & planning requirements work stream of the Network Policy Working Group (NPWG).

The customers allegedly contractually responsible receive no energy at all. They receive hot water reticulated in water pipes. The derived costs are based on reading of water meters, if site-specific reading takes place at all, since this was rejected as a mandated option because of inconvenience and expense to retailers.

Premises/Classes of Premises

The term premises in terms of a defined connection point within the NECF template means one to which energy is directly supplied. For gas this means direct transmission through a gas transmission pipe (unless a supply pipe to outlet, inlet or mains supply). For electricity this means through an electrical line.

Otherwise a customer's premises is not defined as the point of supply. In fact the term supply point and supply address are synonymous with a connection point that facilitates the direct supply of energy.

Bearing in mind the NECF definition of customer connection that determines whether supply of energy takes place creating any contractual obligation, these considerations are crucial. The flow of energy must take place to the premises in question to determine whether a supply has occurred. This must be through either service or transmission pipes for gas; or through electrical lines for electricity. Water pipes do not serve as substitutes whether the water is heated, piping hot, lukewarm or cold.

Retailer supply remit

This term cannot extend into the living quarters of an individual occupier of a multi-tenanted dwelling unless there is either an energy connection point for the service (supply point/supply address)

For gas the gas must be passing through a service pipe or else a transmission pipe facilitating the flow of gas to the premises in question.

For BHW the transmission of energy occurs to the outlet of the meter and thence to the hot water storage system. No gas passes through a hot water flow meter.

The composite product heated water is transmitted in a water pipe to individual apartments.

Geographical boundaries, classes of premises and classes of customers are terms that relate to the direct supply and sale of energy not heated water products.

Therefore no deemed status can apply and hence no obligations under conditions precedent or subsequent.

Energization

Energization has a similar meaning except that it refers to an existing energy connection that has been re-activated.

It requires the flow of gas or conduction of electricity to the premises involved. This occurs just once – on common property infrastructure. The energy travels a short distance to the boiler tank in a gas transmission pipe or in an electrical line. Thereafter the product becomes a composite water product reticulated to individual apartments in water service pipes after the water is supplied by the water authority to the outlet of the mains – to the Landlord as the responsible contractual party.

The term supply point is synonymous with supply address and implies an energized or new connection in relation to gas (or electricity). For gas these terms are together defined within the existing legislation as synonymous with ancillary supply point. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points.

In all cases a customer supply address is a technical term unrelated to the four walls that represent living quarters. In energy terms supply address does not have the same meaning as in postal addresses.

Premises therefore means one where the physical supply of energy is transmitted. Energy does not flow through water meters or water pipes. Therefore no energy is supplied to the individual flat or apartment of a recipient of heated water, notwithstanding that energy was originally supplied to a communal water tank to heat stored water in a water tank owned and operated by a Landlord. It is the landlord who receives the energy after directly arranging supply with the supplier. Network changeover has nothing to do with this or embedded networks, or ownership of hot water flow meters. These are distractions that disallow the appropriate technical definitions that are contained with existing and proposed definitions. The Law needs to be clearer.

Definition of supply point/supply address, class of premises; supply remit and meter as applicable within energy laws and provisions are sufficiently distorted without further complication. The same comments apply to the other terms, supply point, supply address.

Supply point/supply address/distribution supply point

Since supply points and ancillary points are taken as one for embedded networks the parent/child concept has been introduced

The terms supply point and ancillary supply point are synonymous under the legislation and the *Victorian Gas Distribution System Code*. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points.

Since supply points and ancillary points are taken as one no need for mention of the latter, though for embedded networks the parent/child concept has been introduced).

All of these are intended to imply for gas, gas supply points and take into account the metering and metering installation concepts and definitions that apply to gas. The same applies in principle to electricity.

From the time of that the Essential Services Commission undertook deliberation, structuring, adoption and implementation of the existing BHW Charging Provisions, (2004 and 2005) with implementation on 1 March 2006 of the Guideline 20(1) now to be repealed and for the most part[90] transferred to the *Energy Retail Code* Clauses 3.3 and 4.2 respectively, supply points, supply address, relevant customer and meters have been defined in such a way as to be entirely inconsistent with all other existing and proposed provisions.

The ESC was originally responsible for development of the algorithm conversion factor formulae in use (soon to be repealed and replaced with similar provisions following negotiation of regulated price).

On 1 January 2008 the DPI took over the responsibility for the formula and tariff to be used, presumably with the regulated tariff to be negotiated with retailers. It is unclear how off-peak rates will apply or where the revised formula details currently contained in Appendices 1 and 2 will reside and whether these will be transparently available online on the DPI, ESC and/or retailers' websites.

Ready accessibility to such information is crucial to providing informed consent, at least on websites, though not all stakeholders are internet literate, or would know where to look unless a specific web link is provided on bills.

Transmission of gas occurs in transmission pipes that can facilitate flow of gas to defined premises. That cannot occur with water meters.

Service pipes supply gas to the inlet or outlet of a meter or to the gas mains. No water pipes are involved in that distribution of energy.

For electricity, an electrical line is involved in transmission to the mains or outlet or inlet of meter, not to a water meter or to the individual living quarters of an end-user of heated water that is communally heated.

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[90] Barring the 1.1 Introduction: Purpose, Authority and Commencement date the explanations for the algorithm formula (how the calculation is actually made); interpretation – how to interpret the Guideline; Appendices 1 and 2 outlining the algorithm conversion factor formula after calculating water volume usage allegedly *"individually monitored"* for each tenant in a multi-tenanted bloc of flats and apartments) (without the necessity for site-specific reading);
Instead a mere reference to the DPI will be included. The DPI has taken over policy responsibility for the conversion factor formulae and tariffs; whilst the ESC retains responsibility for what is included on the bills under 2.3 of the Guideline, to be transferred to 4.2 of the VERC.

Meter

A new alternative definition for meter for BWH provisions is:

> *"a device which measures and records the consumption of bulk hot water consumed at the customer's supply address"*

This terminology provides a misleading impression of the term *"customer"* and *"supply address."*

As shown above customer means one who receives gas or electricity through energy service or transmission pipes or else electrical lines. This does not mean water pipes, which do not transport or facilitate the flow of energy. Neither do not water flow meters.

Creative distortion of the meaning of *"separate metering"* by policy-makers, regulators, complaints handlers and energy suppliers does not dilute the strength of existing legislation under other schemes.

As mentioned in the footnotes above, the term supply point is synonymous with supply address and implies an energized or new connection in relation to gas (or electricity). For gas these terms are together defined within the existing legislation as synonymous with ancillary supply point. For gas energization points that were installed prior to 1 July 1997, the existing legislation considers these to be single billing points.

Conversion Factor

This is a derived cost that for BHW water depends theoretically on the reading of a water meter that can measure only water volume and nothing else. The quantity of water used is used to determine a "gas rate" for that water, to arrive at a pure guess as to the deemed gas that has been used. In technical terms this is not a feasible calculation.

No gas passes through water meters. At best these methods provide rough, rule-of-thumb, imprecise guestimates of the amount of gas or electricity used by end-users of heated water.

It is for that reason that the residential tenancies provisions require Landlords/Owners to take direct responsibility for all consumption and supply charges (other than for bottled gas) that cannot be precisely measured and apportioned using an instrument designed for the purpose of measuring actual gas or electricity consumption.

The derived costing formula adopted by the *Bulk Hot Water Charging Guideline (20(1)* endorsed by the Essential Services Commission relating to supply charge alone was a significant part of the agenda for a detailed discussion had taken place during August 2004 and reported in September 2004 between the Essential Services Commission (ESCV) and *"industry stakeholders"* about supply charges and the *"conceptual model"* for cost recovery based not on actual site specific readings, but rather on a cost recovery formula designed to recover costs in other creative and pragmatic ways.

Three creative pricing options had been considered in relation to the formula for charging for bulk hot water. The site-specific option was rejected because of cost of implementation and inconvenience involved in actual meter reading on site, as was the adjustable conversion factor option.

Interpretation of terminology used is quite misleading, since the use of the term "hot water meter" does not specify whether it refers to the gas meter or simply the water meter replied upon from which magical, imprecise and *"fixed rate tariff"* algorithm calculations are made to guestimate the amount of *"deemed gas"* used to allegedly heat each individual's heating component liability, without assessing whether the water supplied is actually hot, and without using any instrument that allows gas to pass through it as an instrument that measures the quantity of gas passing through it and includes associated equipment attached to the instrument to filter, control or regulate the flow of gas.

The methods used will become formally illegal when remaining utility restrictions are lifted.

Supply charges are evidently calculated the amount of gas supplied to the single energization point on common property infrastructure supplied to the Landlord divided by the number of individual flats of apartments receiving heated water.

This exercise turns retailers into billing agents for Landlords where no ion-selling of the deemed energy used is allowable under tenancy laws since no connection point exists and no valid means of calculating energy usage for individual use is available.

For VENCorp Distributor-Retailer settlement purposes a single supply and billing point exist, consistent with existing legislation

The ESC was originally responsible for development of the algorithm conversion factor formulae in use (soon to be repealed and replaced with similar provisions following negotiation of regulated price).

On 1 January 2008 the DPI took over the responsibility for the formula and tariff to be used, presumably with the regulated tariff to be negotiated with retailers. It is unclear how off-peak rates will apply or where the revised formula details currently contained in Appendices 1 and 2 will reside and whether these will be transparently available online on the DPI, ESC and/or retailers' websites.

Ready accessibility to such information is crucial to providing informed consent, at least on websites, though not all stakeholders are internet literate, or would know where to look unless a specific web link is provided on bills

It may be of interest to VENCorp that despite the fact that for Distributor-Retailer purposes for energization points supplying gas to bulk hot water boiler units (storage units) communally heated for heated water supplies supplied in water pipes to multiple tenants, such energization points are considered to be single supply and billing points, retails are instructed by the current Regulator and through policies sanctioned by the DPI to directly bill individual tenants for their heated water supplies, which they already pay for under the mandated terms of their leases.

This arrangement is contrary to all existing concepts concerning energisation and gas distribution supply points in particular

The formula is about to be reconsidered by the DPI and tariffs may change. However the central principles are likely to be similar. Appendices 1 and 2 are to be repealed from the Guideline provisions, most of which will be transferred to the VERC.

Under the legislation *Gas Industry Act 2001* and *Gas Industry (Residual Provisions) Act 1994,* supply (energization) points that were considered to be single billing points as at 1 July 1997 continue to be regarded as single billing points.

This is relevant to VENCorp because for distributor-settlement purposes bulk hot water energization points for gas meters are considered to be single supply points. This means they should also be single billing points.

Under the same current legislation, supply points and ancillary points are one and the same. These refer unquestionably to energization points. This is also the case within the NECF Table of Recommendations.

The transfer of the requirement from the BHW Guideline to the ERC is intended to perpetuate the current provisions expecting retailers to hold end-users of heated water as contractually responsible, regardless of the fact that the meter used for calculation is not an energization point, but rather a hot water flow meter that measures water volume only not gas or heat.

This gives rise not only to regulatory review considerations, but also to considering practices that violate the spirit and intent of the trade measurement provisions and will become formally illegal just as soon as remaining utility restrictions are lifted.

Massive supply charges are being applied to individual end-users of heated water, a composite water, the consumption of which, if read by meter reading at all is a product that cannot possible provide information on gas usage or heating.

Though the requirement is for retailers to follow the current rules, the proposed NECF governance contractual model involves distributors as well as retailers in a triangulated contract.

Therefore retailers may be requested to disconnect heated water services if an end user of heated water as a composite product refuses to provide acceptable identification by way of forming an explicit contract; or refuses the interpretation that the deemed provisions apply; or else is unable or unwilling to become involved in endeavouring to meet any perceived obligation to provide access to water meters residing behind locked doors.

This has direct implications on both retailers and distributors, especially if the latter is responsible for reading these water meters.

Circumstances could arise in which a dispute over contract may not be resolvable through the nominated industry-specific complaints scheme EWOV or any appeal process to VENCorp on the basis of an affected party dispute. The AER's role as national Regulator may also have some bearing.

Likewise the likelihood that the regulator will uphold current policies may mean that an expensive civil dispute could arise over measures that have the practical effect of making inaccessible enshrined rights of end users under other schemes, notably residential tenancy provisions.

Though VENCorp may not be directly concerned with other schemes, the implications are clear – the current arrangements have the potential to give rise to civil disputes involving all parties.

In addition, a situation could arise where criminal charges may be laid on the basis of coercive threats of disconnection by any party, or actual disconnection by any part on the basis of a perceived legal entitlement to disconnect and end consumer of heated water without an energization point through which the heated component can be justly measured through legally traceable means.

It seems that policy-makers and regulators believe the existing provisions, which are based on what seem to be legally and technically unsound premises for BWH contractual and calculation policies, are transferred from a Guideline to a Code this will somehow rectify the original design flaws in the policies and validate any measure that retailers and/or distributors may wish to take on the basis of instruction. This form of reasoning may not be as sound as it may appear.

These arrangements seem to have been put in place without proper consideration of the ramifications for all parties involved.

My goal is to resurrect community awareness of an issue that has for many years been conveniently swept under the carpet because of the technical challenges involved.

The simplest thing would be to hold Landlords or OCs legally responsible for the contractual arrangement to supply gas to premises that have bulk hot water systems in place whereby water supplied by the water authority is centrally heated and supplied in a distribution system that has nothing whatsoever to do with the energization system referred to in all other places within the energy provisions current and proposed.

This would make the arrangement consistent with residential tenancy provisions.

It is not the role of a retailer or distributor to take on the position of billing agent for landlords or to interfere in sacred contractual arrangements between landlords and tenants. That is what the current arrangements appear to be doing.

If policy-maker or regulator or complaints scheme decides on the likely course of upholding policies, notwithstanding the explicit obligation under the *Essential Services Commission Act 2001 t*o avoid regulatory overlap with other schemes, and other provisions under trade measurement laws

Some Disconnection considerations

4.1 (iv) Disconnection

Interested (or affected) party, in relation to a gas meter, means:

> *(1) (a) a person (including an end user customer and a supplier) to whom gas is conveyed through the gas meter, or*
>
> *(2) (b) a supplier who supplies gas to other persons (including end user customers and other suppliers) through the gas meter, or*
>
> *(3) (c) a network operator from whose distribution system gas is conveyed through the gas meter.*

In terms of disconnection in relation to a distribution system, for gas this means:

> *"the separation of a natural gas installation from a distribution system to prevent the flow of gas."*

Alternatively *decommissioning*[91] in relation to a *distribution supply point*, is to take action to preclude gas being supplied at that *distribution supply point* (e. g. by plugging or removing the *meter* relating to that *distribution supply point*).

None of these technical definitions or concepts is compatible with disconnecting hot water supplies connected to a mains water supply at the outlet of the meter associated with common property infrastructure in rented blocks of apartments or flats; in circumstances where no energization point or distribution supply point exists in individual apartments and flats rented out.

[91] Decommissioning – refer to VENCorp Rules

The current wrongful disconnection procedures are applicable to retailers. Nevertheless if a distributor accepts retailer instruction to disconnect heated water services rather than adopt the definition of disconnection that is enshrined in all provisions as

> *"the separation of a natural gas installation from a distribution system to prevent the flow of gas*

This is not a matter that should be taken lightly since it has enormous ramifications for the integrity of the market and community confidence generally in the rules.

That can have a snowballing effect that may have a negative effect on the market generally so is raised here to promote awareness of the implications of the policies in place.

It is argued that consumption threshold alone may be distorting the proper labeling of relevant small customer. This mainly applies to those end-users receiving bulk energy to heat centrally heated hot water services in privately rented apartment blocks and flats where only a single energization point exists; for the purposes of VENCorp rules and under other provisions that connection point is considered to be a single billing point. This matter is also discussed under Contractual Matters (Distributor-Retailer-Customer Interface and Small Customer headings)Deemed contracts are being creatively used to apply to recipients of hot water services who have no energization points in their apartments. The deemed contract for those who receive bulk energy to heat communal water tanks properly belong to Landlords or OC.

The current application of deemed contracts as unilaterally and unjustly imposed on end-users of heated water as residential tenants are unfair and strip end users of their enshrined rights under other provisions. This needs to be clarified within the Law.

The deemed contract provisions in the *Gas Industry Act 2001* are intended to apply to those who

- accept a contract for the sale and supply of energy (as opposed to heated water products conveyed in water pipes) and then refuse to pay, allowing for cooling off provisions
- were the subject of standing offers at the time of introduction of FRC in 2003 for those without market contracts*(note these standing offers are the subject of proposed abolition under the recommendations of the AEMC)*
- have illegally accepted unauthorized supply of energy

Those who move into new rented premises on the understanding that the rent includes water supplies hot or cold under the provisions of standard mandated terms of tenancy leases.

These residential tenants most certainly do not access energy in any unauthorized way. They are however, threatened and penalized as if they have broken moral codes or laws by relying implicitly on the enshrined terms of the residential tenancy leases under mandated terms provided for under tenancy provisions and in the common law with regard to contractual rights.

None of these parties normally refuse to take proper responsibility where energy is legitimately supplied; where separate meters for energy can be properly apportioned to them, and where there is a clear contractual relationship that needs to be formed for say an energy retailer offering dual fuel for heating, light and cooking purposes.

Tenants protected by their enshrined rights do not under the *Residential Tenancies Act 1997* (Victoria) legally have to pay for such supplies unless each component of utility supplied can be separately metered, in the gas of gas and electricity (other than for bottled gas) by a meter representing an energization point.

Creative distortion of the meaning of *"separate metering"* by policy-makers, regulators, complaints handlers and energy suppliers does not dilute the strength of existing legislation under other schemes.

A residential tenant does not take supply of energy for bulk hot water services, but of a composite product, heated water, the heating component of which cannot possibly be separated from the water or measured in terms of heat or gas volume by using a water meter. The tenant accepts heated water supplies as an integral component of a standard tenancy lease.

In the case of bulk hot water the energy supplied is not separately metered at an energization point through an instrument intended for purpose and cannot possibly be measured through a water meter even if separate water meters exist.

Thus such end-users are not illegally "commencing to take supply" but by refusing to become contractually obligated to the energy supplier are exercising existing entitlements under Acts of Parliament to be free of water charges (a) where energy efficient devices are not fitted in each apartment: (b) the energy component cannot be measured with a suitable trade measurement instrument through which individual consumption of the heating component can be measured.

Some associated contractual considerations

It is not the role of an energy supplier to act as a billing agent for the Landlord or to relieve the Landlord of his mandated responsibilities under other legislated provisions. The tenancies laws provide that a Landlord must pay for all consumption and supply costs for utilities, other than for bottled gas that are not metered with a device designed for the purpose that can show legally traceable consumption by individual tenants.

The arrangements in place interfere with the enshrined rights of individuals and their private contractual arrangements with Landlords, the terms of which are based on mandated provisions encapsulated within tenancy laws. Regardless of formulae concepts for derivation of costs, the correct contractual party needs to be explicitly made responsible as the relevant customer. It is the landlord who agrees for the installation to be effected and commences to take supply from the moment the infrastructure is in place. It is not the succession of tenants who *"take supply"* of energy.

Once established as a new supply at the request of the Landlord/Owner, the supply of gas (or electricity) is continued without interruption. There are no *"new supply"* customers in the form of successive residential tenants, and therefore no new "deemed" customers in succession under s46 of the *GIA*, when tenants move into apartments for the first time.

The supply of energy to the single connection point for gas (or electricity) is continuous from the time the infrastructure is put in place. There is one relevant customer – the one who receives the energy at the outlet of the meter on common property infrastructure, and through gas (or electricity) transmission pipes receives reticulation of those supplies to his property, the communal water tank, also on common property infrastructure as discussed above.

The existing legislation provides that where a single energization point existed prior to 1 July 1997, and where that supply point (supply address), was considered a single billing point, it continues to be regarded as such.

For Distributor-Retailer settlement purposes, the VENCorp provisions regard all Bulk Hot Water energization (supply points) as single supply points/supply addresses.

The calculation formulae model does not reflect that the proper contractual party is the Landlord or Owners' Corporation under other regulatory schemes and this should also be reflected within energy legislation for both procedural practices and conduct.

There is normally no *"embedded network"* involved in private rented stock, though these do exist in some cases.

There is a technical difference between those receiving supplies from "embedded networks and those systems where the original distributor is the responsible party for metering, metering installation, metering maintenance and direct distribution through the distributor service.

The differences are discussed under *"Embedded Networks/Generation"* elsewhere providing a case example that was successfully contested before VCAT *(Winters v Buttigieg VCAT 2004)*.[92] In that particular case an embedded network provider was endeavouring to charge an end user of bulk hot water ten times the legitimate amount for water consumed.

Despite the similarities between those who are *"embedded customers"* because of the use of embedded networks, the technical differences to some extent set this group apart from those "relevant customers" whose distributor is constant and responsible for delivery of energy to the outlet of the mains without any exchange of hands in the transmission network process.

Most matters referred to in this submission relate directly to the second class of consumers – **non-embedded relevant customers** as Landlords or OCs, who supply heated water in water pipes that are not part of the energy distribution system or service at all.

That distinction is crucial in determining contractual obligation. It has been overlooked altogether within the BHW provisions that endeavour to apportion contractual obligation to individual end-users. It has also been overlooked in the NECF. Without clarification a minefield of confusion, debate and conflict and discrepant interpretations will arise in relation to the proper application of deemed provisions. Deemed issues are discussed in further detail under that heading and under discussion of 1.27 and 1.9 NECF TRO in both supplementary components of Part 2 (that is Parts 2A and 2B).

The MCE SCO Policy Paper is to be commended on recognizing that the introduction of a national customer framework will require careful transitional management including the timing of implementation phases as each of the jurisdictions must make significant changes to current jurisdictional regulatory frameworks.

The Landlord in the first place, normally at the time of original erection of a multi-tenanted dwelling invites a supplier to install a gas or electric metering installation at the outlet of the meter on common property infrastructure for the purpose of supplying energy through transmission papers to heat the water in the storage tank, also on common property infrastructure.

The distribution supply point is the point at which gas leaves the distribution system pipe and enters the outlet of the meter on OC (OC) infrastructure. The Landlord or OC *"commences to take supply"* when the gas leaves the distribution pipe and enters the outlet of the meter on Body Corporate infrastructure. This is known as the double-custody changeover point.

Once the infrastructure is in place, supply commences and a supply charge applies immediately, even before occupancy of any tenant.

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[92] As reported in CUAC's September Quarterly 2005, *"Embedded Networks – Disconnected Customers*, pp11-12. Article by Tim Brook

The energization concept embraces the principle that supply is reinstated to an existing connection to distinguish from new supply. Residential tenants are not taking a new supply and do not have connection or supply points in their respective apartments when using a communal bulk hot water service in multi-tenanted private dwellings.

The decision by energy suppliers and others to creatively apply this term "deemed contract" to those after FRC who were supplied by bulk gas energy through a single meter following either an implicit or explicit arrangement with the OC , does not impose a legal contract with the end-user of bulk energy.

The term *"commence to take supply"* as referred to under s46 of the *Gas Industry Act 2001* (GIA) refers to a *"relevant customer."* This term is as defined under a Ministerial Order in Council (OIC) under s43 of the *GIA*. The OIC relied upon is that dated 29 October 2002, which defines relevant customer broadly as one who consumes no more than 10,000 GJ of gas per annum.

The term is not confined to a natural person, and can mean one of several entities, including OCs and other incorporated bodies or statutory authorities. The consumption threshold applies to some 1.6 million gas users.

A legitimate challenge exists to any perception or provision that imposes deemed contractual status or creatively interprets the phrase *"commence to take supply."*

A just and proper definition of *"taking supply of energy"* needs to be determined as well as a determination of the proper contractual party. If the energy taken can be shown to have a valid individualized connection point this is a reasonable premise. If this is not achieved or if reference is retained within existing Rules or within the Law to specify *"hot water supplies"* as a composite product of which heat is a component; a direct overlap and conflict is perpetuated with other regulatory schemes, including the residential tenancy provisions.

In order for a fair interpretation to be made of such arrangements, one has to define who the customer is – beyond mere threshold considerations, since a residential tenant in an apartment block receiving heated water through a single connection point at the outlet of the meter on common property infrastructure takes supply of heated water – a composite water product reticulated in water pipes after energy from a single energization point has been supplied to a communal water tank on the common property infrastructure of a Landlord or OC where a communal hot water services exists serving multiple residential tenants.

The heated water is included as an integral part of mandated lease arrangements that includes in the rent all consumption and supply costs (other than for bottled gas) that is not separately metered through legally traceable means using a meter designed for the purpose. Hot water meters, which solely measure water volume, not gas or heat, are not such instruments.

The question of regulatory overlap has been previously mentioned and is a crucial part of determining the proper contractual party. Before reiterating the residential tenancy and OC provisions I deal with selected technical matters impinging on how *"taking supply"* is defined and how it should be defined.

The issues impacting on contract relate to whether the customer is the *"relevant (deemed) customer"* as referred to in the legislation, also remembering that in all of the energy legislation, codes and guidelines reference to a person or customer does not necessarily import the status of a natural person, but can include a number of entities including OC entities;

These complexities and nuances are legal and technical matters not as clearly understood even by those making the rules. I venture to say that poor understanding of the niceties of contract law have given rise to interpretative flaws.

The general perception that existing interpretations apply simply because of pragmatic arrangements that do not even uphold the intent and spirit of trade measurement provisions has given rise to apparent exploitation of those least able to fight back – the soft the targets who have faced detriment from the outset.

The original conceptual thinking that led to the adoption of the BHW Guidelines contained in the deliberative documents and the Guideline, did not mandate for site-specific reading, so it is a mystery why meter reading and denied access to hot water flow meters is an issue at all, frequently given as a pretext for threatened disconnection of hot water services.

Irrespective of the arrangements in place for BHW Charging (the contractual and derived pricing model) Landlords continue to raise rents as permitted under residential tenancy provisions, normally twice a year after the first year of a fixed term lease. Therefore the arrangements have done nothing to achieve the central goal of "preventing price shock to consumers" and achieving better transparency.

The location of the double-custody changeover point for gas (and electricity) is at the outlet meter at a single supply point/supply address/connection point/energization point, located on common property infrastructure

The common perception that the existence of separate hot water flow meters associated with each apartment represents *"separate metering"* under energy provisions is flawed. They do not under existing energy-specific legislation.

Hot water flow meters, designed to withstand heat, but not to measure either gas volume or heat not supply points/supply addresses as energization points Thus the concept that these represent separate metering. The concept blurs the distinct line between measurement of water and energy and reticulation of the two products in entirely different service distribution systems – the one in water service pipes, the other in gas transmission pipes.

Gas meters, including those used for bulk energy provision to supply hot water tanks measure gas volume only not heat or water. Gas bills are expressed in energy. Though for wholesale gas distribution, the heating value is measured and monitored, no such provisions exist for other situations.

The terms bulk gas meter and hot water flow meters are frequently incorrectly used interchangeably by various parties, including those allocated the task of complaints handling

No quantity a quantity of gas can pass through hot water flow water meters to filter control and regulate the flow of gas. Algorithm conversion factor formulae using both water meters and gas meters purporting to meet energy and other provisions for legally traceable measurement of individual consumption by end-users of energy supplied to bulk hot water tanks in privately rented apartment blocks and flats.

This goes towards the contractual debate and who should be held legally responsible. The provisions of other schemes makes this clear – the Landlord (or delegate such as OCs. The existing and proposed consumer framework does not make it clear.

These considerations are central to establishing a just and fair contractual model for energization of hot water systems (tanks) communally heated on common property infrastructure. Additional costs of calculation through derived formulae add to Landlord costs and therefore to rents in total. The rationale used for the contractual and costing formulae is therefore flawed.

Even if the end-users were well able to afford the costs, there is no prospect of residential tenants taking steps to enhance energy efficiency goals since they are not permitted to install any devices or equipment that would achieve this. The incentives must lie with landlords, with subsidies to upgrade inefficient systems

I refer again to provisions of the requirement under the *Essential Services Commission Act 2001* to avoid regulatory overlap between other schemes;[93] and the requirement under the specifics of the revised MOU between the CAV and ESC, in large part triggered by this particular complaint to avoid regulatory overlap (current and future).

The cost of regarding each tenant as a **"relevant customer"** despite all the contractual, technical and regulatory overlap arguments presented, adds to the overall cost of the energy supplied to a single supply point.

The legislation provides that if an energization point for gas existed prior to 1 July 1997 and was a single billing point at that time, it remains as a single billing point. All bundled charges, including supply charges, network charges, commodity charges and the like apply to a single supply point on common property infrastructure and should be presented to the Landlord, along with all consumption charges.

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[93] The ESC seems to have been willing to entirely overlook this obligation. The SCO Table of Recommendations and Policy Paper has omitted all mention of such an obligation. It cannot be fair or reasonable to attempt in any provisions to over-ride the enshrined rights of consumers under other regulatory schemes; or to disregard the jurisdiction of such schemes by diluting their effect through making jurisdictional provisions of other schemes inaccessible

The hot water flow meters measure water volume not gas volume or heat, the composite water product is the commodity that individual tenants take possession of reticulated through water pipes that are not part of the system. In most cases, these are not embedded networks, but the supply is direct from the distributor to the supply address, which is the overall property address. Creative re-interpretation of supply address without an energization point to validate such a perception means that the wrong parties are being held contractually obligated.

This discussion is not about the precise details of the algorithm formulae adopted, which is apparently subject to further consideration and possible revision by the DPI in Victoria, but rather the philosophical framework that drives the contractual model adopted necessitating the use of hot water flow meters in the first place, in order to apportion contractual responsibility for energy costs to end-users of heated water supplied to a single energization point.

A dilemma is faced by retailers in terms of the ongoing provision of energy services and BHW supply arrangements. On the one hand they are expected to uphold the terms of their licences by adopting the provisions of all codes and guidelines which include the BWH arrangements; and on the other observing their obligation under licence to sell disconnect or restrict gas and energy not hot water products, composite water products or other such products.

The process of arriving at a derived cost by using water meters does not make sense. If the landlord is responsible for the supply costs and supply of energy on the basis of there being a single energization point all that is required is for the single bulk energy meter to be read to ascertain how much gas or electricity was used.

It is the role of an energy supplier to act as a billing agent for the Landlord or to relieve the Landlord of his mandated responsibilities under other legislated provisions. The tenancies laws provide that a Landlord must pay for all consumption and supply costs for utilities, other than for bottled gas that are not metered with a device designed for the purpose that can show legally traceable consumption by individual tenants.

The arrangements in place interfere with the enshrined rights of individuals and their private contractual arrangements with Landlords, the terms of which are based on mandated provisions encapsulated within tenancy laws. Regardless of formulae concepts for derivation of costs, the correct contractual party needs to be explicitly made responsible as the relevant customer. It is the landlord who agrees for the installation to be effected and commences to take supply from the moment the infrastructure is in place. It is not the succession of tenants who *"take supply"* of energy. The energization once established is continued without interruption. There are no "new supply" customers in the form of successive residential tenants.

These considerations are central to establishing a just and fair contractual model for energization of hot water systems (tanks) communally heated on common property infrastructure. Additional costs of calculation through derived formulae add to Landlord costs and therefore to rents in total. The rationale used for the contractual and costing formulae is therefore flawed.

Even if the end-users were well able to afford the costs, there is no prospect of residential tenants taking steps to enhance energy efficiency goals since they are not permitted to install any devices or equipment that would achieve this. The incentives must lie with landlords, with subsidies to upgrade inefficient systems

As mentioned above, the legislation provides that if an energization point for gas existed prior to 1 July 1997 and was a single billing point at that time, it remains as a single billing point. All bundled charges, including supply charges, network charges, commodity charges and the like apply to a single supply point on common property infrastructure and should be presented to the Landlord, along with all consumption charges.

The belief that the BHW provisions effectively over-ride all other existing energy provisions for other metered gas supplies is flawed, leaving aside overlap and conflict with other regulatory schemes current and proposed; and the trade measurement and calculation methods used.

Common practice or common interpretation of provisions by policy-makers; regulators, retailers and distributors alike do not represent best practice, appropriate practice or just practice.

By the same token common practice involves the use of terminology in communications of coercive threat addressed to The Occupier, dignified as *"vacant consumption letters"* implying unauthorized or illegal use of energy as defined under s46 of the *Gas Industry Act 2001*. Missing from the conceptual thinking is proper interpretation of the term relevant customer.

These communications from retailers are often received many months after a tenant moves into a block of flats or apartments as a routine first contact strategy including threat of disconnection of hot water services within 7-10 days (rather than the gas or electricity for which licences are provided currently). It is entirely unclear how retailers become aware of changes in tenant occupation and what impacts this may have on the privacy rights of individuals.

This is illustrated in the specific case study cited wherein without prior communication, or request for *"acceptable identification",* explanation for the basis of any deemed contract other than *"hot water consumption is being individually monitored,"* misleadingly implying the use of gas meters in determining energy use.

In the common law, contractual arrangements such as are currently imposed on end-users of bulk energy in privately rented flats and apartment blocks would not be upheld in any case.

Neither would the provisions, calculation methodology, trade measurement practice meet the requirements of the spirit and intent of national trade measurement laws; and their effect once existing utility exemptions are lifted.

The proposed energy consumer framework appears to have omitted clarification of this and the requirement to respect existing protections under other regulatory schemes and existing consumer rights under those schemes.

The belief that a supply relationship exists between Retailer and Tenant (or between Tenant and Distributor) under the conditions described where only a single energization point exists is flawed.

The entire regulatory framework current and proposed other than the arrangements under the BHW Guidelines (and whether or not also included in jurisdictional codes) is flawed and a direct contradiction in terms regarding both technical matters and contractual law.

There is a requirement under the *Essential Services Commission Act 2001* to avoid regulatory overlap between other schemes.[94]

The requirement under the specifics of the revised MOU dated 18 October 2007,[95] between the CAV and ESC, to avoid regulatory overlap (current and future).

Despite this the deemed provisions currently relied upon under s46 of the *Gas Industry Act 2001* (Victoria) (GIA) specifies the use of the term *"relevant customer"* and all previsions specify that the use of any term in the singular can also be taken to be plural and the use of a term implying natural person can also be taken to be an entity.

In subsequent letters threats addressed to "The Occupier" using letter box drop techniques, some retailers threaten disconnection of hot water services and also threaten to refuse reconnection unless acceptable identification is provided.

Though the Rules and the proposed law allows for requests for acceptable identification, contractual maters as discussed are crucial to interpretation as to whether this is proper practice for those who are end-users but not appropriately contractually obligated for the heated component of water and associated supplies.

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[94] The ESC seems to have been willing to entirely overlook this obligation or to comment on it

[95] Revised MOU between CAV and ESC, in large part triggered by a particular complaint as illustrated by the case study cited, which remained open and unresolved before EWOV for 18 months without ultimate resolution; and also before the ESC, with the ESC claiming that they do not handle individual complaints, impliedly even when matters are outside of the jurisdiction of EWOV

SELECTED FORUMULAE CONSIDERATIONS AND CONTRACTUAL IMPACTS

The transfer of the majority of the existing Victorian BHW provisions to the *Energy Retail Code* appear to be an attempt in the one document to differentiate these provisions from all others by entirely re-defining meters as devices which measure hot water consumption rather than energy consumption.

The provisions imply that alternative definitions for disconnection and decommissioning may also apply, with failure to produce acceptable identification or alleged denial of access to meters triggering justification to threaten and then effect disconnection of hot water supplies (not energy which would affect all tenants in individual apartments residing at the same overall rented property address.

The derived formulae relying on finding a legitimate correlation between water volume consumption and gas consumption is based on flawed reasoning.

The reasoning behind the adoption of a deriving a cost in the first place is questionable.

In any case it is one thing deciding on a derived cost principle, and another adopting a derived cost for the express purpose of creating a contractual model deeming an end-consumer of heated water products to be responsible for energy supplied to a single energization point, which according to existing legislation is also a single billing point if the supply point was in existence prior to 1 July 1997, which is the case in the vast majority of privately-owned buildings that are multi-tenanted dwellings.

The process of arriving at a derived cost by using water meters does not make sense. If the landlord is responsible for the supply costs and supply of energy on the basis of there being a single energization point, all that is required is for the single bulk energy meter to be read to ascertain how much gas or electricity was used. This would save on all administrative costs associated with calculation and billing, and in theory bring costs down.

The original goal of *"preventing end-consumers (of communally heated water) from price shock"* is flawed since they were not the intended relevant customer under s46 of the *GIA*.

The hot water flow meters measure water volume not gas volume or heat, the composite water product is the commodity that individual tenants take possession of reticulated through water pipes that are not part of the system. In most cases, these are not embedded networks, but the supply is direct from the distributor to the supply address in service pipes for which the distributor has direct responsibility. The double-custody change-over point is the overall property address at the outlet of the meter, with a further transmission pipe reticulating water to a communal water tank on common property infrastructure.

Creative re-interpretation of supply address/supply point/connection point without an energization point to validate such a perception means that the wrong parties are being held contractually obligated.

In addition, the concept of using such a formula based on the use of water meters in calculating gas consumption for the purpose of imposing contractual status on end-users of heated water, adds to, rather than subtracts from costs. Bill generation; backroom and IT costs; the costs of disputes and enquiries; meter reading costs and a host of other considerations do not "prevent consumers from price shock."

Water meter reading fees whether isolated and individually disclosed or part of bundled costs that include network tariffs that are unspecified add to the overall cost of supply, regardless of the contractual considerations and regulatory overlap issues.

Water meters have to be serviced and replaced in addition to servicing of the gas meters supplying the energization for the water tanks. No-one is clear about responsibilities for this and how monitoring or data-keeping should occur. Enforcement of any breaches was found by Hawkless Consulting in 2006 to be weak if at all existent. Perversely, in some jurisdictions (South Australia and Queensland) water meter reading fees are higher for remote reading than for site-reading.

Some trade measurement considerations associated with the formulae concept

The trade measurement considerations impact also on contract and on the conceptual formula for derived costs using a hot water flow meter as the instrument of measurement upon which those costs are based. The NMI are discussed here briefly and in more depth elsewhere.

National Measurement provisions[96] provide that:

> *"a person whose act or omission causes or is likely to cause a measuring instrument in use for trade to give a measurement or other information that is incorrect is guilty of an offence if the person acted or omitted to act with the intention of causing that result of with reckless indifference to whether that result would be caused"*

It is incorrect to suggest that a hot water flow meter can "monitor gas consumption or that a contractual relationship exists under the current trade measurement practices for BHW because of the existence of hot water flow meters.

The NMI Legal metrology philosophy recognizes that:

> *In a modern society, many activities need reliable, legally traceable measurement, so that we can be confident of their integrity. These include:*
>
> - *trade measurements, such as in the supply of electricity, gas and water;*
>
> *In trade the buyer expects to receive fair measure. Usually it is not feasible for an individual consumer to check this so governments establish legal metrology systems to protect consumers' interests. Although systems for regulating weights and measures have existed in many societies for thousands of years the range of consumer transactions has increased with time and with technological advances*

[96] Lifting of utility exemptions is in progress. Cold water meters have already been exempted. Refer to Part V 18R of the National measurement Act 1960, the default provision in Victoria. This is discussed elsewhere in more detail.

Expressing a bill in cents/MJ will convey the impression of usage of a gas meter unless this is expressly stated on the bill. There are implications for trade measurement considerations, since merely expressing the term megajoule (MJ) on the bill, given the instrument used from which the formulae are derived may not in itself meet national measurement requirements.

The use of the terms *"hot water meter"* will convey the impression of the use of a gas meter or electric meter. Use of the term "hot water consumption individually monitored" will convey to most people the impression of the use of a gas or electric meter, not a water meter. Very few will be motivated to check the meanings on the Energy Retail Code or anywhere else.

Site specific rejected as too expensive to measure and collect data from meters as input Bulk HW meter; hot water consumed (satellite meters); and total hot water consumed by all the residences (thus turning the billing process into a water meter exercise contrary to the spirit and intent of trade measurement provisions). See response from TXU (now TRUenergy) to BHW Review July 2004[97]

See Response to ESC Draft Report Review BHW Billing dated 6 August 2004 from AGL ES&M[98] re transparency of cents per litre rate; site number inconsistencies and off-peak rate for electric BHW (customers paying full general rate. Mentions site-specific billing too hard in projected FRC environment – a decision taken as read.

See Response dated 19 September 2005 from EWOV on Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August). [99]

See Response to ESC from St Vincent de Paul (SVDP dated 27 July 2004[100]. Confirms lack of transparency in arrangements especially re conversion factor; compliance enforcement forthwith of repayment of overcharging as specified in Retail Code and as previously applied to TXU (now TRUenergy); confirms desirability for site specific reading to counter-act price-shocks to individuals especially for those with poorly maintained residential premises including Office of Housing, DHS; suggests new and replacement installations be site specific.

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97 Response from TXU (now TRUenergy to ESC Review BHW July 2004. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/CD7E8430-868E-4C42-A937-08E7082F57CA/0/Sub_TXU_BulkHotWaterJuly04.pdf*

98 Response to ESC Draft Report Review BHW Billing dated 6 August 2004 from AGL ES&M re transparency of cents per litre rate

99 Response dated 19 September 2005 from EWOV on Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August)

100 Response dated 27 July 2004 from St Vincent de Paul BHW Review July 2004. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/6BE152A1-1F27-47C2-B47A-0C32825670F3/0/Sub_StVincentDePaul_BulkHotWaterJul04.pdf*

- Option 1: adjustable conversion factor: rejected

- Option 2 Fixed conversion factor (adopted*)* based on a conversion factor at a cents per litre hot water rate as gazetted

- Option 3 – Site specific Option – **REJECTED**[101] a portion gas measured at the site-specific master meter to each individual customer based on their hot water use

Merely transferring the existing Rules for BHW arrangements from retailer licencing requirements to Codes, such as the Victorian Energy Retail Code will not in law have the effect of removing enshrined consumer rights or overlap with other regulatory schemes as is specifically disallowed under the terms of the *Essential Services Commission Act 2001* and there terms of the Memorandum of Understanding between Consumer Affairs Victoria and the Essential Services Commission, which perhaps now belongs also the DPI with current policy control over BHW matters

[101] Under such circumstances how can bill smoothing, reconciliation, overcharging and undercharging under the contractual model both jurisdictional and under the NECF be embraced

Some contractual considerations

It is not the role of an energy supplier to act as a billing agent for the Landlord or to relieve the Landlord of his mandated responsibilities under other legislated provisions. The tenancies laws provide that a Landlord must pay for all consumption and supply costs for utilities, other than for bottled gas that are not metered with a device designed for the purpose that can show legally traceable consumption by individual tenants.

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Once established as a new supply at the request of the Landlord/Owner, the supply of gas (or electricity) is continued without interruption. There are no *"new supply"* customers in the form of successive residential tenants, and therefore no new "deemed" customers in succession under s46 of the GIA, when tenants move into apartments for the first time.

The supply of energy to the single connection point for gas (or electricity) is continuous from the time the infrastructure is put in place. There is one relevant customer – the one who receives the energy at the outlet of the meter on common property infrastructure, and through gas (or electricity) transmission pipes receives reticulation of those supplies to his property, the communal water tank, also on common property infrastructure as discussed above.

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That distinction is crucial in determining contractual obligation. It has been overlooked altogether within the BHW provisions that endeavour to apportion contractual obligation to individual end-users. It has also been overlooked in the NECF. Without clarification a minefield of confusion, debate and conflict and discrepant interpretations will arise in relation to the proper application of deemed provisions. Deemed issues are discussed in further detail under that heading and under discussion of 1.27 and 1.9 NECF TRO in both supplementary components of Part 2 (that is Parts 2A and 2B).

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The Landlord in the first place, normally at the time of original erection of a multi-tenanted dwelling invites a supplier to install a gas or electric metering installation at the outlet of the meter on common property infrastructure for the purpose of supplying energy through transmission papers to heat the water in the storage tank, also on common property infrastructure.

The distribution supply point is the point at which gas leaves the distribution system pipe and enters the outlet of the meter on Owners' Corporation (OC) infrastructure. The Landlord or OC *"commences to take supply"* when the gas leaves the distribution pipe and enters the outlet of the meter on Body Corporate infrastructure. This is known as the double-custody changeover point.

Once the infrastructure is in place, supply commences and a supply charge applies immediately, even before occupancy of any tenant.

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[102] As reported in CUAC's September Quarterly 2005, *"Embedded Networks – Disconnected Customers*, pp11-12. Article by Tim Brook

The energization concept embraces the principle that supply is reinstated to an existing connection to distinguish from new supply. Residential tenants are not taking a new supply and do not have connection or supply points in their respective apartments when using a communal bulk hot water service in multi-tenanted private dwellings.

The decision by energy suppliers and others to creatively apply this term "deemed contract" to those after FRC who were supplied by bulk gas energy through a single meter following either an implicit or explicit arrangement with the Owners' Corporation , does not impose a legal contract with the end-user of bulk energy.

The term *"commence to take supply"* as referred to under s46 of the *Gas Industry Act 2001* (GIA) refers to a *"relevant customer."* This term is as defined under a Ministerial Order in Council (OIC) under s43 of the GIA. The OIC relied upon is that dated 29 October 2002, which defines relevant customer broadly as one who consumes no more than 10,000 GJ of gas per annum. The term is not confined to a natural person, and can mean one of several entities, including Owners' Corporations and other incorporated bodies or statutory authorities. The consumption threshold applies to some 1.6 million gas users.

A legitimate challenge exists to any perception or provision that imposes deemed contractual status or creatively interprets the phrase *"commence to take supply."*

A just and proper definition of *"taking supply of energy"* needs to be determined as well as a determination of the proper contractual party. If the energy taken can be shown to have a valid individualized connection point this is a reasonable premise. If this is not achieved or if reference is retained within existing Rules or within the Law to specify *"hot water supplies"* as a composite product of which heat is a component; a direct overlap and conflict is perpetuated with other regulatory schemes, including the residential tenancy provisions.

In order for a fair interpretation to be made of such arrangements, one has to define who the customer is – beyond mere threshold considerations, since a residential tenant in an apartment block receiving heated water through a single connection point at the outlet of the meter on common property infrastructure takes supply of heated water – a composite water product reticulated in water pipes after energy from a single energization point has been supplied to a communal water tank on the common property infrastructure of a Landlord or OC where a communal hot water services exists serving multiple residential tenants.

The heated water is included as an integral part of a mandated lease arrangements that includes in the rent all consumption and supply costs (other than for bottled gas) that is not separately metered through legally traceable means using a meter designed for the purpose. Hot water meters, which solely measure water volume, not gas or heat, are not such instruments.

The question of regulatory overlap has been previously mentioned and is a crucial part of determining the proper contractual party. Before reiterating the residential tenancy and owners' corporation provisions I deal with selected technical matters impinging on how *taking supply* is defined and how it should be defined.

The issues impacting on contract relate to whether the customer is the *"relevant (deemed) customer"* as referred to in the legislation, also remembering that in all of the energy legislation, codes and guidelines reference to a person or customer does not necessarily import the status of a natural person, but can include a number of entities including Owners' Corporation entities.

These complexities and nuances are legal and technical matters not as clearly understood even by those making the rules. I venture to say that poor understanding of the niceties of contract law have given rise to interpretative flaws.

The general perception that existing interpretations apply simply because of pragmatic arrangements that do not even uphold the intent and spirit of trade measurement provisions has given rise to apparent exploitation of those least able to fight back – the soft the targets who have faced detriment from the outset.

The original conceptual thinking that led to the adoption of the BHW Guidelines contained in the deliberative documents and the Guideline, did not mandate for site-specific reading, so it is a mystery why meter reading and denied access to hot water flow meters is an issue at all, frequently given as a pretext for threatened disconnection of hot water services.

Irrespective of the arrangements in place for BHW Charging (the contractual and derived pricing model) Landlords continue to raise rents as permitted under residential tenancy provisions, normally twice a year after the first year of a fixed term lease. Therefore the arrangements have done nothing to achieve the central goal of "*preventing price shock to consumers"* and achieving better transparency.

The location of the double-custody changeover point for gas (and electricity) is at the outlet meter at a single supply point/supply address/connection point/energization point, located on common property infrastructure.

The common perception that the existence of separate hot water flow meters associated with each apartment represents *"separate metering"* under energy provisions is flawed. They do not under existing energy-specific legislation.

Hot water flow meters, designed to withstand heat, but not to measure either gas volume or heat not supply points/supply addresses as energization points Thus the concept that these represent separate metering. The concept blurs the distinct line between measurement of water and energy and reticulation of the two products in entirely different service distribution systems – the one in water service pipes, the other in gas transmission pipes or in electricity lines for electricity.

Gas meters, including those used for bulk energy provision to supply hot water tanks measure gas volume only not heat or water. Gas bills are expressed in energy. Though for wholesale gas distribution, the heating value is measured and monitored, no such provisions exist for other situations.

The terms bulk gas meter and hot water flow meters are frequently incorrectly used interchangeably by various parties, including those allocated the task of complaints handling.

No quantity a quantity of gas can pass through hot water flow water meters to filter control and regulate the flow of gas.

Algorithm conversion factor formulae using both water meters and gas meters purporting to meet energy and other provisions for legally traceable measurement of individual consumption by end-users of energy supplied to bulk hot water tanks in privately rented apartment blocks and flats.

This goes towards the contractual debate and who should be held legally responsible. The provisions of other schemes makes this clear – the Landlord (or delegate such as Owners' Corporation {OC}). The existing and proposed consumer framework does not make it clear.

These considerations are central to establishing a just and fair contractual model for energization of hot water systems (tanks) communally heated on common property infrastructure. Additional costs of calculation through derived formulae add to Landlord costs and therefore to rents in total. The rationale used for the contractual and costing formulae is therefore flawed.

Even if the end-users were well able to afford the costs, there is no prospect of residential tenants taking steps to enhance energy efficiency goals since they are not permitted to install any devices or equipment that would achieve this. The incentives must lie with landlords, with subsidies to upgrade inefficient systems.

I refer again to provisions of the requirement under the *Essential Services Commission Act 2001* to avoid regulatory overlap between other schemes;[103] and the requirement under the specifics of the revised MOU between the CAV and ESC, in large part triggered by this particular complaint to avoid regulatory overlap (current and future).

The cost of regarding each tenant as a **"relevant customer"** despite all the contractual, technical and regulatory overlap arguments presented, adds to the overall cost of the energy supplied to a single supply point.

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[103] The ESC seems to have been willing to entirely overlook this obligation. The SCO Table of Recommendations and Policy Paper has omitted all mention of such an obligation. It cannot be fair or reasonable to attempt in any provisions to over-ride the enshrined rights of consumers under other regulatory schemes; or to disregard the jurisdiction of such schemes by diluting their effect through making jurisdictional provisions of other schemes inaccessible

The legislation provides that if an energization point for gas existed prior to 1 July 1997 and was a single billing point at that time, it remains as a single billing point. All bundled charges, including supply charges, network charges, commodity charges and the like apply to a single supply point on common property infrastructure and should be presented to the Landlord, along with all consumption charges.

The hot water flow meters measure water volume not gas volume or heat, the composite water product is the commodity that individual tenants take possession of reticulated through water pipes that are not part of the system. In most cases, these are not embedded networks, but the supply is direct from the distributor to the supply address, which is the overall property address. Creative re-interpretation of supply address without an energization point to validate such a perception means that the wrong parties are being held contractually obligated.

This discussion is not about the precise details of the algorithm formulae adopted, which is apparently subject to further consideration and possible revision by the DPI in Victoria, but rather the philosophical framework that drives the contractual model adopted necessitating the use of hot water flow meters in the first place, in order to apportion contractual responsibility for energy costs to end-users of heated water supplied to a single energization point.

A dilemma is faced by retailers in terms of the ongoing provision of energy services and BHW supply arrangements. On the one hand they are expected to uphold the terms of their licences by adopting the provisions of all codes and guidelines which include the BWH arrangements; and on the other observing their obligation under licence to sell disconnect or restrict gas and energy not hot water products, composite water products or other such products.

The process of arriving at a derived cost by using water meters does not make sense. If the landlord is responsible for the supply costs and supply of energy on the basis of there being a single energization point all that is required is for the single bulk energy meter to be read to ascertain how much gas or electricity was used.

It is the role of an energy supplier to act as a billing agent for the Landlord or to relieve the Landlord of his mandated responsibilities under other legislated provisions. The tenancies laws provide that a Landlord must pay for all consumption and supply costs for utilities, other than for bottled gas that are not metered with a device designed for the purpose that can show legally traceable consumption by individual tenants.

The arrangements in place interfere with the enshrined rights of individuals and their private contractual arrangements with Landlords, the terms of which are based on mandated provisions encapsulated within tenancy laws. Regardless of formulae concepts for derivation of costs, the correct contractual party needs to be explicitly made responsible as the relevant customer. It is the landlord who agrees for the installation to be effected and commences to take supply from the moment the infrastructure is in place. It is not the succession of tenants who *"take supply"* of energy. The enegization once established is continued without interruption. There are no *"new supply"* customers in the form of successive residential tenants.

These considerations are central to establishing a just and fair contractual model for energization of hot water systems (tanks) communally heated on common property infrastructure. Additional costs of calculation through derived formulae add to Landlord costs and therefore to rents in total. The rationale used for the contractual and costing formulae is therefore flawed.

Even if the end-users were well able to afford the costs, there is no prospect of residential tenants taking steps to enhance energy efficiency goals since they are not permitted to install any devices or equipment that would achieve this. The incentives must lie with landlords, with subsidies to upgrade inefficient systems.

As mentioned above, the legislation provides that if an energization point for gas existed prior to 1 July 1997 and was a single billing point at that time, it remains as a single billing point. All bundled charges, including supply charges, network charges, commodity charges and the like apply to a single supply point on common property infrastructure and should be presented to the Landlord, along with all consumption charges.

The belief that the BHW provisions effectively over-ride all other existing energy provisions for other metered gas supplies is flawed, leaving aside overlap and conflict with other regulatory schemes current and proposed; and the trade measurement and calculation methods used.

Common practice or common interpretation of provisions by policy-makers; regulators, retailers and distributors alike do not represent best practice, appropriate practice or just practice.

By the same token common practice involves the use of terminology in communications of coercive threat addressed to The Occupier, dignified as *"vacant consumption letters"* implying unauthorized or illegal use of energy as defined under s46 of the *Gas Industry Act 2001*. Missing from the conceptual thinking is proper interpretation of the term relevant customer.

These communications from retailers are often received many months after a tenant moves into a block of flats or apartments as a routine first contact strategy including threat of disconnection of hot water services within 7-10 days (rather than the gas or electricity for which licences are provided currently). It is entirely unclear how retailers become aware of changes in tenant occupation and what impacts this may have on the privacy rights of individuals.

This is illustrated in the specific case study cited wherein without prior communication, or request for *"acceptable identification",* explanation for the basis of any deemed contract other than "*hot water consumption is being individually monitored,"* misleadingly implying the use of gas meters in determining energy use.

In the common law, contractual arrangements such as are currently imposed on end-users of bulk energy in privately rented flats and apartment blocks would not be upheld in any case.

Neither would the provisions, calculation methodology, trade measurement practice meet the requirements of the spirit and intent of national trade measurement laws; and their effect once existing utility exemptions are lifted.

The proposed energy consumer framework appears to have omitted clarification of this and the requirement to respect existing protections under other regulatory schemes and existing consumer rights under those schemes.

The belief that a supply relationship exists between Retailer and Tenant (or between Tenant and Distributor) under the conditions described where only a single energization point exists is flawed.

The entire regulatory framework current and proposed other than the arrangements under the BHW Guidelines (and whether or not also included in jurisdictional codes) is flawed and a direct contradiction in terms regarding both technical matters and contractual law.

There is a requirement under the *Essential Services Commission Act 2001* to avoid regulatory overlap between other schemes.[104]

The requirement under the specifics of the revised MOU dated 18 October 2007,[105] between the CAV and ESC, to avoid regulatory overlap (current and future).

Despite this the deemed provisions currently relied upon under s46 of the *Gas Industry Act 2001* (Victoria) (GIA) specifies the use of the term *"relevant customer"* and all previsions specify that the use of any term in the singular can also be taken to be plural and the use of a term implying natural person can also be taken to be an entity.

In subsequent letters threats addressed to "The Occupier" using letter box drop techniques, some retailers threaten disconnection of hot water services and also threaten to refuse reconnection unless acceptable identification is provided.

Though the Rules and the proposed law allows for requests for acceptable identification, contractual maters as discussed are crucial to interpretation as to whether this is proper practice for those who are end-users but not appropriately contractually obligated for the heated component of water and associated supplies.

Elsewhere protracted discussion is undertaken regarding the implications of the imposition of deemed status on end-users of composite water products where no service or transmission pipe is involved at all (embedded or otherwise) in transmitted energy to the residential premises of end-users of communally heated water tanks supplying heated water to tenants and other occupiers of multi-tenanted dwellings, instead of formalizing contractual arrangements with the Landlord or Owners' Corporation. Note these definitions within the ERC.

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104 The ESC seems to have been willing to entirely overlook this obligation or to comment on it

105 Revised MOU between CAV and ESC, in large part triggered by a particular complaint as illustrated by the case study cited, which remained open and unresolved before EWOV for 18 months without ultimate resolution; and also before the ESC, with the ESC claiming that they do not handle individual complaints, impliedly even when matters are outside of the jurisdiction of EWOV

> ***additional retail charge*** *means a charge relating to the sale of* ***energy*** *by a* ***retailer*** *to a* ***customer*** *other than a charge based on the* ***tariff*** *applicable to the* ***customer*** *and which must be calculated in accordance with clause 31 of this Code. To avoid doubt:*
>
> *(a) any network charge relating to the supply, but not sale, of* ***energy*** *to a* ***customer's supply address*** *is not an* ***additional retail charge*** *(whether or not the network charge is bundled in the* ***retailer's tariff****);*
>
> *(b) without limiting paragraph (a), any charge the* ***retailer*** *may impose as a direct pass through of a distribution tariff, excluded service charge for electricity, ancillary reference tariff for gas or other charge imposed on the* ***retailer*** *by a* ***distributor*** *for* ***connection*** *to, or use of, the* ***distributor's*** *distribution system is not an* ***additional retail charge****; and*
>
> *(c) any amount payable by a* ***customer*** *to a* ***retailer*** *for the* ***customer's*** *breach of their* ***energy contract****,*[106] *whether under an* ***agreed damages term*** *or otherwise, is not an* ***additional retail charge****.*

It is the contention within this submission that BHW arrangements are directly facilitating unacceptable market in addition to use of flawed reasoning precepts inherent within the sanctioned provisions, which in any case in terms of contract are contained in deliberative documents of no legal weight.

Even if the same provisions were to be reiterated within a jurisdictional Energy Code or within legislation, such a move would not validate the fundamentally flawed reasoning that fanned the sanction and adoption of the BWH provisions on the weak pretext of *"preventing consumers from price shock,"* where the proper contract lay with Landlords and/or Owners' Corporations (OC).

The existing BHW provisions fail to acknowledge this or to clearly spell out who the contractual party should be, in recognition of the validity of other regulatory schemes and the enshrined rights of end consumers of bulk energy within the written and unwritten laws.

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[106] In the event of regulatory overlap, where an end-consumer of heated water disputes the validity of a deemed contract or requirement to form an explicit contract with an energy supplier because of other protections under tenancy or other schemes, the issue of alleged breach of energy contract by a supplier and all that entails, may legitimately be counter-acted with arguments of breach of implied contract by the supplier, regardless of the licence instructions, codes, guidelines, OICs or even legislation instructing the supplier to impose contractual status on the wrong parties, in breach of specific requirements under the *ESC Act* to avoid regulatory overlap and conflict with other schemes.

Regardless of where the existing BHW provisions are contained and iterated within energy regulations current or proposed, they would still represent regulatory overlap with other schemes and the rights of individuals elsewhere within the written and unwritten laws; poor understanding of contractual law and what would be legally sustainable; appalling trade measurement practices as already evidenced within the spirit and intent of existing national trade measurement laws (with remaining utility exemptions pending).

The water is supplied to the outlet of the meter and sold by the Water Authority directly to the Landlord and/or OC on the basis of a direct agreement and contract between the those parties and the energy supplier.

DISCUSSION OF REPEAL OF VESC GUIDELINE 20(1)[107]

This proposal is on the basis of transfer of BHW policies to the DPI from 1 January 2008, with the VESC retaining responsibility only for what is shown on bills. However, the contractual model has been upheld and reinforced by both the DPI and the VESC.

Please see all definitions and comments examined in other sections.

A general discussion is provided here of the philosophy behind this Guideline and the implications of transfer and retention in current form of most provisions, including contractual provisions seen to have distorted the intent of deemed provisions and definitions pertaining to provision of energy; supply address and supply point; energization (using the term separate metering when referring in fact to hot water flow meters that measure water volume not gas or heat); disconnection processes.

The value of retaining this document in archives is discussed.

The repeal of this Guideline may provide a misleading impression. These provisions are not disappearing. For the most part their contents are being transferred elsewhere at a time when no settled position has been reached in the deliberations of the NECF regarding embedded networks, embedded consumers and those whose position reflects similar challenges in determining a fair and proper means of apportioning contractual liability.

The PriceWaterhouseCooper (PwC) Report commissioned by the ESC in connection with this Regulatory Review identified the costs associated with complying with existing administrative requirements. However, as noted by the ESC in on p1 of their Draft Decision (August 2008) may not necessarily reflect the actual savings that may be achievable. The ESC also concedes that the PwC report was prepared on the basis of information reported by regulated businesses.

Such businesses have repeatedly shown a desire to altogether do without regulation especially in a climate that has been deemed by the AEMC to be effectively competitive. There are many who disagree with the perception that competition within the electricity and gas business has been as effective as the AEMC findings indicate. An appendix details some of the areas which may have been altogether missed or overlooked in that assessment, so heavily relied upon by the VESC. This is discussed elsewhere with particular reference to the CRA Report commissioned by the AEMC; the paucity or complete unavailability of the data replied upon and the disclaimers made by CRA on that basis.

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[107] VESC Bulk Hot Water Charging Guideline. Formalized in December 2005. Implemented 1 March 2006. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/C0E6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf*

The PriceWaterhouseCooper Report in estimating the current cost associated with the administrative burden that existing regulation imposes on regulated business in their own perception did not isolate the BHW arrangements as a "culprit" regulation incurring costs, the amendment or removal of which may result in savings.

In fact it would seem that the existing arrangements do add a burden as they stand. It would make far more regulatory sense to change the provisions to make them compatible with other regulatory schemes, such as the residential tenancy and OC provisions, leaving aside the calculation methodologies used that will become formally illegal when national trade measurement laws lift remaining utility exemptions,

The measures being undertaken may allow apparent concealment of certain issues, and clarification of others in endeavours to bolster the rationale and validate provisions that should be subjected to strenuous scrutiny lest they be included in the proposals for harmonization and consolidation of jurisdictional Rules or even transferred into the National Energy Consumer Framework (NECF), which surely did not intend hot water meters to be regarded as energization points or retailers to delivery hot water services instead of energy – to the correct contractual parties.

There is a strong case for the NECF to formally clarify contractual arrangements regarding bulk energy provision so that the proper contractual party is clearly identified.

I remind all parties that the *Essential Services Commission Act 2001* has an obligation under Section 15 to avoid regulatory overlap with other schemes and further obligations to consult with prescribed bodies (notably Consumer Affairs Victoria) when changes are made that affect stakeholders within a regulated industry (s16 ESC Act 2001). See also Memorandum of Understanding between CAV and ESC dated 18 October 2007.

There are strong grounds for re-examining jurisdictional powers and regulatory instruments that have the effect of rendering inaccessible enshrined rights of individuals under other regulatory schemes and under other provisions within the written and unwritten laws.

Moves by policy makers and regulators to expand their jurisdiction boundaries by unilaterally over-riding the provisions within other regulatory schemes can be interpreted as a mark of complete disrespect for the authority and boundaries of those schemes, many of which have worked hard to effect measures of consumer protection that should be consistently reflected throughout regulatory schemes. This is discussed further elsewhere.

Attempts by policy-makers and regulators to re-write contractual, tenancy, owners' corporation, trade measurement and other consumer protections in the written and unwritten law by adopting codes and guidelines and relying on deliberative documents of no legal weight do not make the provisions legally or technical sound or sustainable or consistent with community expectation.

Before discussing the implications of repeal of the Guideline and transfer of most of its contents elsewhere within the jurisdictional provisions I begin by proffering perspectives about the implications of the Guidelines and its contents and examine the extent to which these provisions are at all meeting best practice or other requirements in regulatory implementation or reform.

I follow this broad examination of the provisions by specific dissection of the implications of retention, repeal or amendment to individual sections as detailed on pages 65-67 of the VESC Draft Decision in the current regulatory review of instruments.

Repeal of the Guideline appears to have provided an opportunistic means by which contractual premises and provisions contained within deliberative documents can be given a more visible *"profile."*

Such a transfer from deliberative documents and Guidelines to an Victoria *Energy Retail Code* (VERC) will not in law (including contract law and the spirit and intent of national trade measurement provisions which also have a direct impact on contract), validate the premises under which the provisions were made in the first place, following deliberations during 2004 and 2005 apparently behind locked doors, with only one of five submissions to those deliberations being a community organization. The issues of transparency are discussed elsewhere.

It is noted here however again that though the deliberative documents and the Guideline the subject of proposed appeal (VESC Guideline 20(1) Bulk Hot Water Charging are now transparently available online, their exposure online did not occur till mid-2007 after direct challenge of the validity of the provisions in their application to residential tenants receiving a composite water product rather than energy to an energization point.

Further discussion of the purpose of the Guideline and its provisions, most of which are to be retained and transferred elsewhere is undertaken under the heading PURPOSE.

The issues are not simply about how the VESC has undertaken to reduce regulatory burden, counted in pages, not implications for consumers or energy providers.

The repeal of Guideline 20(1) will enable certain crucial components to be removed, including the interpretative section, and perhaps the Appendices showing the charging formulae, which will be determined by the DPI. The result may be even less transparency.

The intent under the current VESC Regulatory Review is to transfer several components from the Guideline and associated deliberative documents to the Energy Retail Code (VESC). Other components will be repealed.

It is unclear how Appendices 1 and 2 outlining charging formulae for the "*delivery of gas"* to a single energization point on common property infrastructure belonging to Landlords and/or Owners' Corporations can be charged instead to end-user recipients of heated water supplies, communally heated and reticulated in water pipes to individual tenant's apartments, in the absence of any energization point for such tenants.

The phrasing used under 2.1.1 is

> *"where a retailer charges for energy in delivering gas bulk hot water to a **relevant** customer the gas bulk hot water rate supply charge and final customer billing for the provision of gas bulk hot water are to be determined in accordance with Appendix 1.*

Much debate has occurred regarding the proper interpretation of the term relevant, which is mentioned in the deemed provisions, not that they are intended to apply to those receiving heated water supplies under the circumstances described, and without any individualized energization point. It is not the role of an energy supplier to be a billing agent for the Landlord, or enter into a contractual triangle with the landlord and tenant. Their arrangements for the supply of premises and services are unmistakably contained in an enactment, and that enactment holds the landlord responsible for meeting the all utility costs unless they can be calculated by legally traceable means using a measuring device that can provide those results, in this case a gas meter that is individualized.

No such device exists. What is used for calculation is a hot water flow meter that is designed to withstand het but not to measure heat, gas, electricity ambience, temperature or anything else. The water measure is used to calculate a rate at which the gas should be charged, and the amount of gas used is a "deemed."

Leaving the calculation method aside for a moment, the Landlord takes supply from the time he agrees for the gas infrastructure to be put in place and a supply charge applies from that time long before a succession of tenants take possession of apartments that are served by water pipes carrying a composite water product and where there is no gas service pipe serving those apartments in terms of delivery of heated water.

In the case of embedded consumers if they are supplied with energy through an embedded generator the circumstances are slightly different.

Ownership of the hot water flow meters does not create a contractual relation. Instruction under licence to use certain calculation methods whether or not they meet national standards or expectations does not create a contractual relationship. Retailers are tending to own water meters by direct arrangement with landlords and with regulator sanction, under the BHW provisions, but none o this has the effect of re-writing contract law, common law provisions, residential tenancy provisions, owners' corporation provisions or trade measurement laws.

That is where the crux lies, but the complications relate to disconnection threats and processes which do not sit comfortably with the existing framework.

The disconnection issues in relation to these particular matters at least should be explicit in the law. It is unacceptable to endeavour to strip away from a residential tenant his enshrined rights and imply that he has taken unauthorized supply of energy because energy has been used to heat the heated water that he receives from the landlord as an integral part of his rent.

These issues raise matters of credit rating; material detriment; social and moral obligation, especially to vulnerable consumers more readily threatened by coercive conduct. However politely put, if threat of loss of essential services becomes an issue, there is the potential for serious material detriment.

If it is the intent of the Law that retailers should become billing agents or contractual parties in a different triangle of contractual arrangement this should be clear and a public debate should inform outcomes.

The provisions of the residential tenancy provisions are explicit that no supply charges for water supply and that other than for bottled gas, no consumption charges can be applied unless a separate meter, meaning an energization point designed for measuring that utility, is used in calculation and apportioning of costs.

Their apartments are being inappropriately considered supply points and supply address. See further discussion later of the legalities and technicalities which go to contract and appropriate practice

Mere transfer from deliberative documents to Codes will not validate the arrangements from the perspective of best practice trade measurement; contractual rationale; regulatory overlap and conflict with other schemes. See protracted discussion elsewhere, including in Part 2 as a combined response to the VESC and NECF Table of Recommendations and Policy Paper.

The revised Memorandum of Understanding dated 18 October 2007, between Consumer Affairs Victoria and Essential Services Commission (VESC) specifically disallows overlap or conflict (current and proposed) with other regulatory schemes. Further discussion of the terms of this MOU are discussed in detail elsewhere, including Part 6. A relevant extract is shown here.

This MOU reinforced the provisions contained in the *Essential Services Commission Act 2001* regarding avoidance of regulatory overlap. Such a provision is a common-sense one for all legislation and regulation implemented or proposed.

The specifics of the MOU[108] between the CAV and ESC updated on 18 October 2007, replacing the previous MOU of 2004. Under Clause 4 of the MOU the role of Consumer Affairs Victoria is described as follows:

> ***4 The role of Consumer Affairs Victoria***
>
> *4.1 CAV is responsible for maintaining an effective framework for consumer protection services in Victoria and for providing an effective business licensing and registration function. The role of CAV is*
>
> *(a) protect and promote the interests of consumers*
>
> *(b) ensure markets work in the interests of consumers and the broad community; and*
>
> *(c) improve access to consumer protections services, particularly for vulnerable consumers*

That MOU merely reinforced existing requirements under the *Essential Services Commission Act 2001* to avoid overlap and conflict with other regulatory schemes. With out without agreement, legislation or other provisions, such a concept represents best practice in regulation

[108] Memorandum of Understanding between CAV and ESC 18 October 2007. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/5CF8C62C-0314-4FD3-B792-FA8E6520769F/0/MOU_CAV_Oct07.pdf*

I now show below an extract from the current version of the *Essential Services Act 2001*

Version No. 030[109]

Essential Services Commission Act 2001

No. 62 of 2001

Version incorporating amendments as at 1 July 2008

15 Consultation

(1) This section applies to the Commission and to prescribed agencies for the purpose of ensuring that—

(a) the regulatory and decision making processes of the Commission and prescribed agencies are closely integrated and better informed; and

(b) overlap or conflict between existing and proposed regulatory schemes is avoided.

(2) In this section ***prescribed agency*** *means a person, body or agency which—*

(a) has functions or powers under relevant health, safety, environmental or social legislation applying to a regulated industry; and

(b) is prescribed for the purposes of this section.

109 Extract from *Essential Services Commission Act 2001* No 62 of 2001 Version 30 incorporating amendments to 1 July 2008 (VESC)
http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/9E90F948BEAB65E9CA2573B700229938/$FILE/01-62a021.doc

s. 15

(3) the Commission must as early as practicable consult with a relevant prescribed agency—

(a) in the making of a determination; and

(b) in the conduct of an inquiry, after first consulting with the Minister; and

(c) in preparing and reviewing the Charter of Consultation and Regulatory Practice.

(4) If requested in writing to do so by the Commission, a prescribed agency must consult with the Commission—

(a) in relation to any matter specified by the Commission which is relevant to the objectives or functions of the Commission under this Act and under relevant legislation; or

(b) in respect of a matter specified by the Commission which may impact on a regulated industry.

(5) A prescribed agency must ensure that consultation occurs as early as practicable in the regulatory, advisory or decision making processes of the prescribed agency.

(6) The requirements under this section are in addition to any other requirements or processes under any other legislation or regulatory scheme.

16 Memoranda of Understanding

(1) In this section ***prescribed body*** *means— s. 16*

(a) a person, body or agency which—

(i) is a prescribed agency; or

(ii) represents the interests of users or consumers; and

s. 16

(b) is prescribed for the purposes of this section.

(2) The Commission and a prescribed body must enter into a Memorandum of Understanding by a date determined by the Minister.

(3) A Memorandum of Understanding—

(a) must include such matters as are prescribed; and

(b) may include any other matters that the parties consider appropriate.

(4) The Commission must ensure that a Memorandum of Understanding is published—

(a) in the Government Gazette; and

(b) on the internet.

I repeat the provisions of s6 of the ESC Act below

Extract from ESC Act 2001, s6, v30 amendments to 1 July 2008

Crown to be bound

This Act binds the Crown, not only in right of Victoria but also, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

The VESC may be structured as an *"independent regulator"* from a legal structure perspective in terms of incorporated (as is the complaints scheme EWOV with whom it is so closely aligned.

This is a re-badging strategy extremely common in government operations. This does not make these regulators except from the reach of the *Public Administration Act 2004* (PAA) or any other accountabilities. The Chairperson of the ESC and any delegate acting in that position has express responsibilities to the PAA.

In addition, the DPI has oversight over the *Gas Industry Act 2001* (GIA) and the *Electricity Industry Act 2000* (EIA) which both come under the ambit of the Victorian Regulator VESC.

EWOV the Victorian industry-specific complaints scheme has particular accountabilities under s36 of the GIA and s28 of the EIA to uphold the Federal Benchmarks of Industry-Specific Complaints Handling, more especially given their public role in operating effectively as a public body or prescribed body in having functions or powers under relevant health, safety, environmental or social legislation applying to a regulated industry. This relates to their front-line role in fielding complaints against providers of energy and participating in the public policy debate about reform measures that have impacts on consumers.

In that role EWOV requires adequate support from the statutory authorities to whom it has accountabilities under its Charter and Constitution and various Memoranda of Understanding undertaken in a spirit as between prescribed bodes.

Whilst perceptions of accountability may well become blurred through re-badging strategies involving incorporation of components of statutory authorities, the definiti9ons of prescribed authorities, and of prescribed entities or bodies is clear within various statutory enactments, and embraced also within the values of the State Services Authorities.

I will leave more detailed discussion of these considerations for another component submission, but for the purposes of this contained response to the MCE SCO Table of recommendations and the VESC Regulatory Review, I include these as passing observations, since it is important for existing new legislators, policy-makers, rule-makers and regulators to be clear about their responsibilities and accountabilities.

In addition it is important for statutory authorities and their associated regulators and complaints schemes to be aware of the risks of ignoring the terms of the enactments under which they operate, including the requirement to avoid regulatory overlap current and future.

These principles, as a matter of best practice must be incorporated into the new energy Laws and regulations, reinforced and monitored in the interests of best practice governance and accountability – an area of particular interest and inquiry for the Productivity Commission, who has been asked to provide advice to the government about how regulatory benchmarking parameters can be enhanced.

Since this submission is intended for multiple parties, I hope inclusion of these comments will be seen in the spirit intended and also to remind all stakeholders of the importance of accountability and regulatory benchmarking generally.

If the DPI now has control over policies previously under VESC control, it is implicit that there is an obligation to uphold the principles of the provisions referred to. Anything less than that would be grossly failing community expectation and responsibility.

It is not the prerogative of legislators, rule-makers, s and policy-makers and/or regulators to operate in vacuum conditions without acknowledging the effect and validity of other regulatory schemes and the requirement to avoid regulatory overlap or erosion of access to enshrined consumer rights under other provisions are failing to keep up with community expectation and best operational practice.

Transfer to the *Energy Retail Code* of these provisions from the existing Guidelines and deliberative documents will not validate the provisions further. In terms of trade measurement, calculation processes or contractual concepts

Alternatively transferring the existing Rules for BHW arrangements from retailer licencing requirements to Codes, such as the Victorian *Energy Retail Code* or anywhere else by Regulators, Policy-Makers and Ministers through whatever means will not in law have the effect of removing enshrined consumer rights or overlap with other regulatory schemes, as is emphasized under the terms of the Memorandum of Understanding between Consumer Affairs Victoria and the Essential Services Commission (VESC), which perhaps now belongs also the DPI with current policy control over BHW matters.

Therefore the question of legal and sustainability needs to be examined as a first principle and implications for both end-consumers of energy or heated water, especially residential tenants in rented apartments and flats without separate relevant energization points through which legally traceable calculations can be made and apportioned.

In the absence of such energization points or calculation methods, the contract, under residential tenancy laws lies with the Landlord for provision of energy to heat communal boiler tanks on common property infrastructure. These principles are examined in more detail shortly.

Validity of provisions generally

Within the existing and proposed BHW arrangements to be adopted by the DPI the VESC, the presumption is that by transferring from guidelines and deliberative documents to the *Energy Retail Code* (Victoria) instructions to energy providers, including retailers under licence provisions; or for that matter to any other instrument, will validate those provisions and make them more legally or technically sustainable. Even provisions under an enactment can be challenged within the common law if the premises upon which they are made defy proper practice, represent regulatory overlap or else do not measure up to legal scrutiny on a number of grounds.

Regulatory overlap is expressly disallowed under the provisions of the *Essential Services Commission Act 2001*. The BHW provisions appear to represent such overlap, both with regard to current and proposed legislation. The COAG commitment requires not only harmonization but due regard to other laws and provisions in the effort to achieve national consistency within and outside the energy industry.

Retailers and distributors need to feel secure that the instructions that they are given are not producing the intended or unintended outcome of expecting them to choose which laws they are expected to uphold; to undertaken practices that fall short of best practice, including trade measurement practices; and will not in the future because of breach of trade measurement provisions leave them open to criminal charges and penalties; and that the disconnection processes that they undertake will not also leave them vulnerable to private litigation and/or criminal charges

Any instructions through licence, code, Ministerial Order or legislation to rely on metering data that is not based on a meter that can calculate the quantity of gas that is used for any purpose; and my implication within the arrangements tacitly or explicitly sanctioning the imposition of contractual status on the wrong parties, using trade measurement practices that cannot show legally traceable consumption of contractual status, can ultimately be shown to be invalid and legally sustainable.

In addition, the contract terms that include safe unhindered and convenient access to such meters as reside behind locked doors encapsulated within the arrangements also represent unfair and unjust terms, since for residential tenants, notably those in apartment blocks, access to keys or meters behind locked doors is simply not feasible as the landlord does not normally allow this.

In the original adoption of, and proposed retention of much of the content of the Bulk Hot Water Charging Guideline by transfer to other provisions, there appears evidence of poor understanding by policy makers and regulators across the board of the legal and technical issues that invalidate the policy standpoint current and proposed, leading to distortions as to the proper contractual party.

A good starting point for this discussion is proper application of the term deemed supply arrangements.

This is the premise which has been used to establish the perception in the minds of policy-makers, regulators and retailers alike of a *"retailer right"* to unilaterally and retrospectively impose contractual obligation for consumption and supply charges and meter access on innocent residential tenants who have not taken unauthorized supply of heated water, but rather have rightly relied upon their enshrined rights under other regulatory schemes.

Missing from explicit mention in the proposed National Energy Consumer Framework and glossary under the TOR provisions is mention that regulatory requirements mean:

> *"Any applicable Commonwealth or Jurisdictional or local law; subordinate legislation legislative instrument or mandatory regulatory requirement including industry, codes and standards.*[110]

Having said that, it is inappropriate for there to be conflict between energy codes, guidelines, standards and licence provisions and between those instruments and the Law. This is currently the case within the Victorian energy provisions, such as to cause confusion, expensive complaints handling and debate as to the effect of current energy provisions as well as their direct and indisputable overlap with other regulatory schemes.

In addition, omitted from explicit mention in the proposed NECF is the expectation that there be no overlap with other regulatory schemes. This is the minimum expectation that consumers should have so that their general and specific rights under multiple provisions do not become further diluted or made inaccessible as is currently the case, and despite specific provisions with the (Victorian) *Essential Services Commission Act 2001* and the explicit terms of their revised Memorandum of Understanding dated 18 October 2007 with the Victorian consumer protection body Consumer Affairs Victoria (CAV).

The absence of mention of this crucial point in the proposed Law is a significant gap in the provisions and should be addressed as a matter of urgency in the interests of best practice and at least adequate consumer protection.

The proposed Rules governing the roles of distributors, retailers and customers in relation to the retail supply of energy to customers explicitly relate to gas or electricity, not water,

See appendix for current explanations for calculation methodologies.

The explanatory notes and Appendices are to be repealed but it is unclear where they will reside in the future or whether they will be at all accessible for scrutiny and clarification.

The DPI has policy control now for these provisions, except for what is retained on the bills which is still under the control of the Essential Services Commission.

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[110] As explicitly iterated within the existing (Victorian) *Gas Distribution System Code, Definitions*. found at *http://www.esc.vic.gov.au/NR/rdonlyres/EE2CCEFC-E57E-40A1-A6C6-4C570DAD49D3/0/CorrectNewMarkuptobeincludedGDSC_version90__NR020708.pdf*

A more detailed discussion of the obligation to avoid conflict and overlap with other regulatory schemes is discussed elsewhere, noting the provisions of s15 and s16 of the updated *Essential Services Commission Act* v30 to 1 July 2008.[111]/[112]

Deemed supply arrangements in the proposed National Energy Consumer Framework Law refers to:

> *"any circumstance where a customer is taking a supply of energy from a retailer without the customer and retailer having agreed to enter into a standard retail contract or market retail contract."*

This broad definition will leave open a minefield of debate and confusion to consumer detriment and energy provider uncertainty.

A just and proper definition of *"taking supply of energy"* needs to be determined as well as a determination of the proper contractual party.

Some of the issues highlighted in this submission to the TOR include

1. the legislative and other regulatory arrangements, including regulatory overlap with other schemes as expressly forbidden under the *Essential Services Act 2001* and its MOU with the CAV; with regard to the bulk hot water arrangements in general for residential tenants with consumer detriments illustrated by case study example.
2. the deemed contractual arrangements that are applicable multi-dwelling apartments and bulk hot water supply; and the parties that may be subject to these arrangements
3. The existing rights of end-consumers of energy and water in terms of regulatory overlap with other regulatory schemes with conflicting provisions as to the responsible parties in BHW arrangements impacting on residential tenants and the specified rights of Landlords and/or OC under certain enactments; as well as the implications of adoption of trade measurement practices that violate the spirit and intent of existing national laws which will formally render those practices invalid and illegal with high penalties when remaining utility exemptions are achieved.
4. the dilemma faced by retailers in terms of the ongoing provision of energy services and BHW supply on the one hand being expected on the one hand, to uphold the terms of their licences by adopting the provisions of all codes and guidelines which include the BWH arrangements; and on the other observing their obligation under licence to sell disconnect or restrict gas and energy not hot water products, composite water products or other such products.

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111 *Essential Services Commission Act 2001*, v30 found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/9E90F948BEAB65E9CA2573B700229938/$FILE/01-62a021.doc*

112 See also published revised Memorandum of Understanding between Consumer Affairs Victoria and Essential Services Commission

In a more general context concerning deemed supply arrangements in response to the NECF Table of Recommendations under consultation and consideration, I refer to some of the provisions proposed by the NECF which appear to already be in place, but with a slanted interpretation when it comes to defining a deemed customer of heated water supplies rather than energy.

Nearly all of the provisions under the NECF obligation to supply, supply arrangements and distributor contractual arrangements have an impact on the discussion of how any of these arrangements can be justly and fairly applied to end-consumers of communally heated water as residential tenants, given the gross overlap with provisions they rely upon under other schemes.

Since similar considerations also apply to the proposals contained in the VESC Regulatory Review, I discuss the whole principle of deemed supply arrangements here to cover both consultative initiatives.

> ***1.10 When a deemed supply arrangement arises***
>
> *The Rules will provide for deemed supply arrangements to arise in the following circumstances:*
>
> - *where a small customer occupies premises that are already connected to the distribution system and commences to take a supply of energy; and*
> - *where a current standard or market contract terminates without new supply arrangements having been established, subject to any provision in the contract itself concerning the terms and conditions to apply on termination.*

I support CUAC's response to this proposal that:

> ***CUAC Response to NECF Table of Recommendations Clause 1.11***
>
> *We are concerned that a retailer will be able to develop a deemed supply tariff with no regulatory oversight to ensure it is fair and reasonable, and is not punitive.*
>
> *That concern is exacerbated given there remain numerous instances of problems with customer transfers in all jurisdictions.*

I refer to Clause 1.12 in the NECF Table of Recommendations proposal Duration of Deemed Supply arrangements:

> *Deemed supply arrangements for residential and small non-residential customers will continue until the customer enters into another contractual arrangement*
>
> *Small customers are required to take appropriate steps to enter into a supply contract and thereby exit deemed supply arrangements no later than six months after deemed supply taking effect. If after six months, the customer has not entered the customer has not entered into a contract, the retailer will be entitled to arrange for disconnection of the premises.*
>
> *If the customer has already provided the required deemed supply notice under recommendation 1.13 (name, contact details and acceptable identification), and if not advised to the contrary, the retailer may take the customer to be requesting supply under the standing offer, and may transition the customer to the standard retail contract.*

CUAC responded as follows:

> *If a customer is meeting his/her obligations we do not understand why disconnection is permitted. Disconnection must be used only as a last resort. This provision therefore needs to align more clearly with customer protections around connection and disconnection.*

Whilst I support CUAC's views here, I also note that they seem to have been made with regard to those who are taking supply from energization points. They were not, I believe, intended to apply to those receiving heated water supplied to a landlord on common property infrastructure where the consumption and supply costs are properly included within mandated tenancy terms.

4.3.4 ESC Regulatory Review August 2008

Bulk Hot Water Charging Guideline

As mentioned on p19 of the Draft Decision:

> *Guideline 20 BHW Charging Guideline specifies the requirements for energy retailers charging for delivery of electric bulk hot water or gas bulk hot water to customers from gas or electrical distribution systems*

The provisions need to be much clearer as to whether a composite product is being delivered or gas or electricity from the energy distributions systems.

A hot water flow meter is not part of the gas or electrical distribution system in any context. It is not concerned at all with energy distribution. It is merely an instrument that measures water volume alone, not gas or heat, and it does not reticulate heated water.

The plumbing associated with the communal boiler tank reticulates heated water from the tank to multiple end-recipients, not of energy, which is no longer in the form of energy, but rather a composite product – heated water.

That heated water is an integral part of the mandated residential lease terms and should not be creatively interpreted as a substitute energization point or ancillary energy meter or supply point which can magically create a new supply address for energy – the tenant's individual apartment by a process of unjust shuffling of contractual obligation from Landlord or Owners' Corporation to individual tenants, most of them vulnerable living in older sub-standard blocks of flats and apartments, often 30-40 years old.

In any case, for the purposes of current legislation, gas supply and ancillary points and considered to be one and the same.

For VENCorp distributor-retailer settlement purposes, only a single supply and billing point exists for all bulk gas meters. In addition, the provisions of the *Gas Industry (Residual Provisions) Act 1994*, taken as one with the *GIA* specific that for all gas connection points that were single billing points as at 1 July 2007 remain single billing supply points.

Thus the provision of bulk gas is always to a single gas energization point – the outlet of the meter is not directly supplied to any meter in the resident's apartment, which is not the supply address or the supply point for that reason.

Yet the jurisdictional plan is to reinforce a requirement of retailers or energy to apply individual supply charges on end-users where only one such energization point exists and where current licences do not extend to the provision or reticulation of heated water to end-users in these circumstances.

The VERC proposes that clarification be placed in the VERC that the obligation to connect only applies if the retailer has agreed to offer a market contract or the obligation to supply applies. That is *"If a retailer has an obligation to connect,"* which is presumably the phrase intended to precede the paragraph about in the existing provision under Clause 2

The implications of this proposed revision are that the retailer may decline to offer a market contract at all unless *"obligated."* There is no clarification as to where the obligation lies. Does this refer to standing offers and/or deemed contracts?

The question of whether *"new supply"* (of energy) can be imposed on a residential tenant who is receiving heated water supplies as a composite product from a single energization point on common property infrastructure is can be "deemed" a customer" is examined in detail elsewhere.

Similarly whether it is legally acceptable for an energy supplier to disconnect heated water services that form an integral part of a residential tenancy lease under mandated tenancy terms that form part of the contract between landlord and tenant arises if the retailer and the Rules interpret the existence of a "deemed contract" until an explicit contract with the energy supplier is supposed.

Regulatory overlap issues and the technical debate as to whether a contract exists at all with a residential tenant receiving bulk hot water rather than energy is explored elsewhere.

A central issue is to define within the Law the question of a *"customer supply address"* or relevant customer supply address" needs to be clarified in relation to those receiving communally heated water supplies individual without individual energization points, and where the only energization point heating a communal water tank is that for which a Landlord is responsible, since the energy is supplied to that point on common property infrastructure and is not reticulated to the end-user of heated water through the energy distribution system at all, but rather directly to the Landlord's communal water tank on common property infrastructure.

Simply because at jurisdictional level in the three states similar BHW provisions have been adopted (Victoria, South Australia and Queensland) this does not make the arrangements for contract legally or technically sound or consistent with the requirement to avoid regulatory overlap with other schemes

That raises the question of why the proposed Law has not explicitly stated that jurisdictional or other arrangements may not overlap with other schemes. This is an explicit requirement under s15 of the *Essential Services Commission Act 2001*; forms part of the Memorandum of Understanding between Consumer Affairs and Victoria, and presumably will also be reflected in provisions between CAV and the proposed regulator, AER.

By the same token consumer protection counterparts in other jurisdiction should be insisting that regulatory overlap is avoided current and proposed in all policies and regulations in place, including codes, guidelines and any applicable licence provisions.

The definitions of supply remit, proper definition of customer and customer obligation (in the case of multi-tenanted dwellings and Owners' Corporation obligations to take direct responsibility for both consumption and supply charges but the heating component of bulk hot water since no separate meters exist designed for the purpose of measuring what is consumed by individual tenants in terms of the gas or electricity used for that heating component.

Jurisdictional energy regulators quite simply cannot re-write contractual law and expect to be themselves complying with legal obligation or best practice. That is exactly what they have attempted to do in the case of the bulk hot water pricing and charging arrangements.

Unless these matters are addressed under black letter law or in some way as to recognize the explicit and implicit obligation of energy regulators the same contractual issues will arise again and again to widespread consumer detriment.

I again refer, in the case of Victoria to the explicit Objects of the Memorandum of Understanding between the two relevant prescribed agency regulators, namely Consumer Affairs Victoria (CAV) and Essential Services Commission (ESC) dated 18 October 2007 under Clause 2(b)

> *"overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries)."*

Both the regulator, VESC and the industry-specific complaints scheme EWOV have been directly informed by Consumer Affairs Victoria about that obligation

Though the DPI has now taken over policy control over the BHW provisions, the same principles should apply. The *Essential Services Commission Act 2001 (ESC Act)* provides for this and the MOU was simply a reminder about the obligation to avoid regulatory overlap with other schemes present and proposed.

I remind policy-makers, law-makers and regulators alike at all levels, jurisdictional and federal of the obligation to respect provisions under multiple provisions including common law provisions and when assessing best practice and existing or proposed policies must respect enshrined protections in the written and unwritten law, including common law contractual provisions.

Once more I stress these obligations since they are repeatedly forgotten in the formulation of policies and regulations.

The proposal within the Policy Paper is noted to support transitional regimes for jurisdictions to move to the national customer framework, designed to accommodate transitions from existing jurisdictional definitions of small customers to the national regime as and when this occurs. Another term commonly used is prescribed customer.

It is of concern that though some jurisdictional Codes (for example the Victorian Retail Energy Code) (ERC) provides for vulnerable consumers, particularly those with medical conditions that require continuous access to energy supply, there are some gaps in the provisions. At present it is possible to register with the retailer as a medical exemption address once a contract for energy supply has been establish, with the intention of preventing disconnection of energy supplies in the future. This arrangement is commendable.

However, where there is an unresolved debate about the existence at all of any contract because of discrepant interpretations of existing energy laws or because of regulatory overlap between other schemes that have the effect of compromising the specific and general rights of end consumers under multiple provisions within the written and unwritten laws; and where a dispute exists about whether a deemed contract exists at all or should exist; or whether a market contract should be forced upon a residential tenant as an end-consumer of say, bulk energy, where the proper contract lies with the Landlord/Owner or Owners' Corporation (OC), the existing protections are entirely inadequate.

In the case study cited with implications discussed throughout this component submission as a response to the SCO TOR, I have highlighted circumstances where just such a dispute has led to an impasse after 18 months of fruitless debate over interpretation of existing laws, notably the deemed provisions under the *Gas Industry Act 2001* (Victoria) which refers to "relevant customer."

In that case (and others similar), inadequate protection against disconnection exists where it has been documented that the end-consumer the subject of debated contractual obligation to the supplier has been threatened disconnected nonetheless with disconnection not of energy but "hot water services" by the energy retail supplier relying on s46 of the *Gas Industry Act 2001* (GIA) .

Nowhere in any of the provisions is disconnection of hot water services provided for. The Wrongful Disconnection provisions do not mention hot water flow meters as a disconnection source.

It measures water volume not gas or heat. The water is purchased by the Landlord who is contractually obligated to the water authority. It is then reticulated to the communal water tank, and after being heated by a single energization point on common property infrastructure, thence reticulated in the Landlord's water pipes to various apartments. Though disconnection and decommissioning have precise meanings within the regulations and rules, the hot water flow meters as a device to measure hot water consumption are being used as levers through which explicit contracts can be formed with end-users of composite water products, whose residential tenancy leases under mandated terms cover them in any case, with the heating component of the water covered in the rent. The supply contract lies with the landlord implicitly or explicitly from the moment the infrastructure is in place, but is easier to threaten a tenant who relies on heated water in the hope that he does not know his right, won't find out or has limited capacity to fight back.

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 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.

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

Awareness of these adopted practices as sanctioned by policy-makers rule-makers and regulators should be widely promoted.

The current and proposed BHW provisions at jurisdictional level implement and endorse practices that imply a right to impose a deemed contractual status on end-users of energy[113] in circumstances where no individual energization[114] point exists for end—users of composite water products from which the heating component cannot be separated or measured by legally traceable means, and notwithstanding the various discrepant interpretations of the existing deemed provisions under s46 of the *Gas Industry Act 2001* and proposed provisions for the NECF that fail to clarify matters in relation to absence of energization points.

The current and proposed BHW arrangements at jurisdictional level are seriously flawed for a multitude or reasons briefly summarized here and discussed further under Deemed Supply Arrangements.

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[113] Notwithstanding that all interpretations within energy provisions qualify that the use of the singular may be taken as plural; that the use of terms importing natural person may be taken also to imply entities such as corporations, including Owners' Corporations or other bodies

[114] *"the establishment of a physical connection of the premises to the distribution network to allow the flow of energy between the network and the premises"* – the wording used in the MCE SCO Table of Recommendations

The current provisions appear to defy the fundamental and broader precepts of contractual law, including under energy and other provisions in the written and unwritten law.

These considerations go far beyond contract agreements or their absence and include unacceptable, unfair and inappropriate trade measurement practices that are contrary to the spirit and intent of national trade measurement provisions.

It is not the prerogative of energy policy makers rule makers and regulators to re-write contractual law and render inaccessible enshrined rights of individuals under other schemes or in the unwritten law.

Implement the trade measurement practices and fail to recognize the lack of individual energization points are factors that in themselves negate perceptions of a contractual relationship and have the effect of undermining existing contractual relationships between landlords and tenants protected under the provisions of residential tenancy and Owners' Corporation provisions. See extract below from the *National Measurement Act 1960*, (NMA) the default provision in Victoria and from 1 July 2010 to be the only trade measurement provision to be applicable at national level.

Implement practices that could be seen as unfair under existing unfair practice provisions within the Fair Trading and Trade Practices enactments with references to the former being peppered within the Victorian *Energy Retail Code* and possibly other such Codes in other State jurisdictions.

However clear the bills may seem to some, the practices have potential to mislead (see ss52, 53 c 55A of the TPA and mirrored provisions in the FTA. (see examples and explanations contained elsewhere).

The current BHW provisions in contractual terms do not provide end-use customers with a transparent framework within which to understand the roles and responsibilities of each party providing a service, or even whether they should be contractually responsible at all.

Under other schemes it is patently clear that the Landlord or Owners' Corporation is held responsible for all utility consumption and supply charges that cannot be shown to be separately metered through individual connection points designed for the purpose and measured in a legally traceable way (other than bottled gas).

Inconsistencies in interpretation of energy-specific legislative in addition to prohibited overlap with other regulatory instruments and are rife. Unless these anomalies are corrected in the existing and proposed laws, and the proper contractual party(ies) held contractual liable for energy supplies for which no separate energization point exists, ongoing consumer detriment will be the outcome.

I below the proposed meaning of the term energization within the intended NECF law.

> ***ENERGIZATION (SCO MCE NECF Policy Paper)***
>
> *The establishment of a physical connection of the premises to the distribution network to allow the flow of energy between the network*

Note the Victorian Gas Distribution Code refers to connection as

> ***CONNECTION***
>
> *"the joining of a gas installation to a distribution supply point to allow the flow of gas"*

The concept of energization and the proper allocation of contractual status are inextricably linked and discussed throughout this tabled response to the TOR as a component response

A hot water flow meter which measures water volume but not gas or heat (energy) is not an energization point. However, under the bizarre bulk hot water arrangements in three states, such meters are posing as gas meters representing energization supply points.

Consequently though only one energization point exists for bulk gas meters, normally readily accessible on common property infrastructure; individual residential tenants with no energization points under the Law are being held contractually responsible; their rented flats of apartments considered to be supply points and supply addresses and disconnection of heated water, a composite product being threatened or effected, with the sanction of jurisdictional policy-makers and regulators in three states, Victoria, SA and Qld.

This not only represents distortion of terminology and energy-specific regulations codes and guidelines (apart from the BHW provisions), but also gross regulatory overlap with other regulatory schemes and infringement of consumer rights. Such practices should be explicitly forbidden within the Law. The current arrangements will become formally illegal once remaining utility restrictions are lifted from national trade measurement provisions

SOURCES

Glossary, SCO MCE Policy Paper; Table of Recommendations NECF;

Victorian Essential Services Commission Draft Decision Regulatory Review August 2008

VESC Bulk Hot Water Guideline 20(1) (2005) and associated deliberative documents and proposed amendments, notably BHW arrangements and repeal or transfer of clauses into Energy Retail Code.

Victorian Gas Distribution System Code (VGDS)

National Measurement Act 1960, Part V 18R and associated regulations

MK's Comment

NECF TERM: CONTRACTS FOR SMALL CUSTOMERS

MEANING

The Rules will contain Model Terms and Conditions for a standard retail contract.

This will not include a regulated retail tariff, but will be accompanied by a "standing offer" tariff which must be published by the designated retailer.

However, where jurisdictional retail tariff regulation continues, the obligation to offer supply under a standard retail contract in the national customer framework will be capable of operating with reference to the relevant regulated tariff where jurisdictions choose to do so.

The content of the standard retail contract terms has been taken from existing jurisdictional standard retail contracts, and where possible, rationalized in order to achieve efficiencies. The content includes: requirements for billing, security deposits, disconnection (and re-connection) procedures, how charges are calculated, and complaints and disputes.

Where small customers take energy supply and no contract exists, deemed supply arrangements will apply. The tariffs, terms and conditions applicable to these deemed supply arrangements are the relevant designated retailer's standard retail contract tariffs, terms and conditions. However, a separate deemed supply tariff may apply where this is published by the retailer.

Retailers will be required to include minimum terms and conditions (taken from the standard terms and conditions) when offering supply to small customers under market retail contracts.

Retailers will be held accountable for the marketing conduct undertaken on their behalf so that retailers take responsibility to ensure appropriate compliance with energy marketing requirements set out in the Rules.

Customers will have a contractual responsibility to pay their energy bills by the due date.

SOURCES

SCO MCE Policy Paper NECF and Table of Recommendations

MK Comment

See comments especially under Deemed Contract Arrangements

I strongly support the obligation to supply being placed in the Law and agree others including the joint response from the National Consumer's Roundtable on Energy that

the Obligation to supply should have uninterrupted supply and not be disconnected on the basis of incapacity to pay alone.

However, there is another scenario that has not been considered – the position of those who are unjustly imposed with a deemed contractual status or the future potential of pressure to form a direct market or standing offer contract, and who stand by their existing rights under conflicting and overlapping provisions in other regulatory schemes.

Such a case arose in the context of a particular case study cited in numerous submissions to many arenas, and mentioned herein by way of illustration.

In that case a young person with a long psychiatric history and suicide background with more recently developed medial problems requiring guaranteed ongoing supply of hot water services, was threatened coercively with disconnection of his hot water supplies within seven days as a first line approach in contacting him as an unnamed Occupier of a rented apartment in a multi-tenanted block of flats supplied through a single energization point with bulk gas to the outlet of a meter on common property infrastructure under the care custody and control of a Landlord and/or Owners' Corporation (PC).

He had taken up residence in good faith, had all his utility connections confirmed and formed a direct duel fuel contract for domestic heating and cooking, for which he accepted full contractual responsibility. The standard mandated terms of a tenancy lease under the provisions of the *Residential Tenancies Act 1997* (RTA) (Victoria) provided that it was landlord responsibility to meet all utility consumption and supply charges (other than bottled gas if that existed) that could not be measured separately with a meter designed for the purpose for each component of utility received.

The only item therefore that was not his responsibility under *RTA* provisions was the cost of consumption and supply of the composite product heated water. Though water meters had been installed several decades earlier at the time that the buildings were erected, the landlord had never charged for water or used the water meters for the purpose of apportioning water costs. There were no water efficient devices fitted in each individual apartment.

The Tenant took up his tenancy having extended his limited disability pension budget to his maximum limits, knowing that under the provisions of the RTA the cost of heated water was included in his rent. The previous tenants occupying the same apartment for three years had never paid any water bills for heated or cold water.

Many months after taking up tenancy, the tenant received an open letter addressed to The Occupier of his apartment, from an energy supplier with whom he had had no previous contact demanding that he provide identification details and contact details on the basis that his individual consumption of heated water could be individually monitored (without specifying how and which devices were used) and implying that it was therefore necessary for him to provide his details and set up an account for the supply of heated water if he wished his hot water supplies to continue.

There had been no previous attempts to explain the basis on which such a demand could legitimately be made, the legislative or other instruments relied upon; why he should accept those provisions above the sacred provisions of his tenancy lease; how the heated water consumption was measured; why he should pay for the heated component of water when no separate energization point existed through which his consumption of energy for the purpose of providing his share of heated water could be calculated.

Nor was there any direction to complaints redress options or hardship options, or informed consent in any other context concerning the supplier's unreasonable and unjust demands.

The Tenant was very disturbed by this demand, and could see no justification for it. He had not long been out of hospital at the time and was not in a stable mind-set.

Though the matter had been taken up for him with the industry-specific complaints scheme EWOV, some weeks later, during the course of an unresolved complaint which spanned 18 months and remained unresolved at the time of file closure, a second letter of coercive threat of was issued as a "letter box drop" also addressed to the Occupier of his apartment.

This time the matter disturbed him greatly in the throes of dealing with other pressures and a particular phase of his psychiatric illness for which he had recently been hospitalized. He reacted a few weeks later by planning and finding the means to take his life on the grounds that life had become too stressful for him, a suicide plan that was narrowly averted. He could not see any justification for the demands made.

Though the supplier would have been unaware of his peculiar vulnerabilities at the time that the first threat was issued, but the time of the second threat these had been made abundantly clear to the supplier by the complaints scheme. Nonetheless, the supplier had shamelessly stated that they would continue to issue *"vacant consumption letters"* in a disconnection process to which they felt entitled. There was no question of apology which was issued through the complaints scheme some 16 months later, and rejected.

No agreement was possible to reach about the justification for imposition of a deemed contractual status. The matter remains unresolved and the potential threat of further disconnection is again an issue. This is despite the statements made by the OC that the Landlord expected to hear directly from the supplier to discussed any perception of overdue bills. None had been issued, and perceptions of over dues waived.

The OC advised the Tenant to ignore further threats and felt that the supplier should be directed to contact the Landlord directly, with whom the supplier had had previous contact, had full contact details, and with whom direct arrangements had been made to supply bulk energy to the property. Residential tenants do not normally have access to Landlord contact details. However, the OC details are normally transparently displayed on the buildings offering rented apartments and flats to residential tenants, and it is always possible for a supplier to reach a Landlord through that source.

If any supplier believes he has a right to payment for services, it is normally the supplier who initiates contact.

In this case, encouraged by the unjust provisions of the Bulk Hot Water Charging Arrangements, the supplier had endeavoured to imposed deemed contractual status on a Tenant instead of the Landlord or OC. The Regulator finally confirmed after 18 months of debate that the supplier had been instructed under licence provisions to bill individual tenants, effectively using water meters as substitute energization points and making deemed calculations of heated water consumption.

Both the Complaints Scheme and the Regulator and finally the jurisdictional policy maker were made aware of further enhanced vulnerabilities impacting on the Tenant by way of correspondence from his treating team referring to his delicate condition at best; his long psychiatric history of suicide attempts; and further newer developments impacting on his medical and physical health and necessitating ongoing continuity of supply to hot water services.

Despite all parties being made aware of this, the threat of disconnection of heated water remains a possibility. No appropriate regulatory action has been taken.

Instead, there are moves to strengthen existing BHW provisions by transferring the terms from the BHW Guideline and deliberative documents associated with it to the Energy Retail Code.

The implications of breaches of fair trading and alleged breaches or potential breaches of the trade practices provisions are not discussed here, save to say that those who are most vulnerable have continuity of supply threatened not simply on the basis of hardship, but also because of seemingly irresolvable contractual debates, that will never be resolved whilst regulatory overlap exists between schemes and consumer rights are eroded in such a way as to render their enshrined rights largely inaccessible.

Though low fixed income was certainly a factor, the crux of the debate was over whether the regulatory framework should apply to those in his position where no energization point existed through which his alleged consumption of gas to heat a communal water tank could be fairly calculated and apportioned using an instrument designed for the purpose. A hot water flow meter is not such an instrument.

These details are provided to illustrate what has been happening through the existing jurisdiction BHW arrangements in three jurisdictions, Victoria, South Australia and Queensland.

Residential tenants are seen as soft targets and are being coerced into accepted deemed contractual status where this properly belongs to a Landlord or OC.

In this case the option of redress through the *Residential Tenancies Act 1997* (RTA) was not viable or appropriate because of the Tenant's condition; the unfairness of having to outlay funds upfront, accept all other contractual responsibilities, wait 38 days; produce filing fees likely to offset recovery costs and face unnecessary stresses. It was not the landlord who made the threats or refused to pay bills. The Supplier simply chose not to bill the Landlord and relied on the provisions of existing BHW Pricing and Charging Guidelines to justify inexcusable conduct.

Current and proposed jurisdictional rules relating to BHW pricing and charging for residential tenant usage include connection arrangements and definitions of *"customer"* that distort the original parliamentary intent of deemed provisions under existing legislation in relation to bulk hot water arrangements; defy national trade measurement provisions in spirit and intent and will become formally illegal when remaining utility exemptions are lifted.

Therefore the provision that:

> *Where small customers take energy supply and no contract exists deemed supply arrangements will apply.*

needs further clarification, lest the same anomalies and compromised consumer protections and rights are carried forward into the finalized NECF template energy Law.

The deemed provisions under the *Gas Industry Act 2001* (Victoria) expired on 31 December 2007, but were apparently renewed for a further year till 31 December 2008, the date on which handover to the AER had been expected. If the timelines have now slid a further 12 months, these may be renewed again, or else retailers may rely on an option to withdraw services unless a market contract or standing offer exists.

In the case of those receiving bulk hot water supplies in apartment blocks, severance of gas supply to the single energization point on common property infrastructure would affect all tenants who are unjustly imposed with deemed contractual status with most coerced into capitulation ultimately for fear or loss of heated water.

Severance of heated water would represent direct interference of the direct contractual relationship and agreement between landlord and tenant and would cause in those circumstances material detriment (as in the case of the case study cited).

Distortion of the terms *"commence to take supply"* and of the disconnection processes, has led to unjust and unfair practices that appear to be endorsed by policy-makers and regulators alike and supported by complaints schemes relying on policy and legislative interpretation from the overseeing bodies.

The Victorian Regulator has proposed in relation to a Retailers Obligation to connect[115] that the clause relating to connection will be retained in the ERC with *"minor re-drafting"* but no precise wording.

The proposed change is that the Commission will clarify that:

> *"the obligation to connect only applies if the retailer has agreed to offer a market contract or the obligation to supply applies. That is "If the retailer has an obligation to connect."*

SCO considers that energy is an essential service and small customers should be able to access a basic supply to meet their needs.

SCO has considered that it is important to differentiate the obligation to offer supply to the higher consumption end of the small customer definition in electricity in order to recognize the potential for innovation and diversity in the price and non-price terms and conditions of supply. This is reflected in the two 'tiers' of electricity customer that benefit differently under the obligation to supply.

Further details with respect to the two tiered obligation to offer supply to certain small customers is discussed in the Policy Paper, and will be developed in the drafting of the exposure draft instruments.

Small business also need to be protected and guaranteed supply

As matters of detail, the Rules will set out:

1. Application procedures (1.1) (see detailed discussion under MK Comment)
2. Retailer information requirements (1.1) (see detailed discussion under MK Comment)
3. Connection services (1.1)
4. Conditions to obligation (1.1) (see detailed discussion under MK Comment)
5. Designating retailers and supply remits 1.2 (see detailed discussion under MK Comment)
6. MCE principles for obligation to supply 1.3 (see detailed discussion under MK Comment)
7. Definition of small customers 1.4 (see detailed discussion under MK Comment)
8. MCE directed review of small customer definition (1.5)
9. Standing offer tariffs (1.6)
10. Specification of terms and conditions (1.7)
11. Standard retail contract terms and conditions in Rules (1.8)

[115] See Victorian Essential Services Commission Regulatory Review Appendix B p27 Retailers Obligation to Connect

- Deemed supply arrangements (1.9)
- Tariffs, terms and conditions of deemed supply arrangements see detailed discussion under MK Comments) (1.11)
- Duration of deemed supply arrangements (1.12)
- Notice requirements for deemed supply arrangements (1.13)

MK Comment

The SCO is to be commended for upholding within the Law the obligation to supply energy and acknowledgement that small customers should be able to access a basic supply to meet their needs.

Energy is a fundamental aspect of the provision of energy as an essential service, as observed by the Public Interest Advocacy Centre, Consumer Utilities Advocacy Centre, Consumer Action Law Centre, Kildonian Family and Child Service and numerous other consumer stakeholders in submissions to the MCE and other arenas.

The SCO has commented on the two-tier obligation to supply based on consumption thresholds or expected consumption thresholds noting that further details with respect to the two tiered obligation to offer supply to certain small customers is discussed in the Policy Paper, and will be developed in the drafting of the exposure draft instruments, which are important steps in ensuring full stakeholder participation.

I join ATA in strongly supporting the obligation to supply being placed in the Law and their rationale that the obligation to supply supports the overriding principles that residential consumers should have uninterrupted access to essential services and that they should not be disconnected due to an incapacity to pay alone. Considering this, they believe that all regulations supporting the obligation to supply (i. e, those relating to access and disconnection) should be placed in the Law, rather than the Rules.

A significant gap in the proposed NECF is discussion of disconnection processes. I believe that this should be covered within the Law instead of the Rules.

I further support ATA's cautions about the needs of small businesses, especially in rural and regional area; those on the borderline of defined consumption thresholds and how differentiating will be achieved in borderline cases or those whose consumption may vary between one year and the next. In particular I am concerned about the reduction of the electricity threshold to 100 MW-h per annum.

The MCE SCO Policy Paper discusses the statutory obligation to offer to supply of energy to small customers. Section 1.1 of the TOR outlines the proposed application procedures for new connections through the designated retailer (Local Area Retailer = LAR) or for existing connections the Financially Responsible Retailer)

- Residential customers and
- Non-residential customers whose actual or estimated energy consumption is less than a threshold level specified in the Regulations

I note that the MCE RPWG has apparently deferred decisions about principles concerning activation or de-activation of the obligation to supply using the terminology shown below

> ***MCE principles for obligation to supply***
>
> *"The MCE should consider agreeing principles to be applied by jurisdictional ministers in determining whether or not to activate or de activate the obligation by making (or revoking) the relevant jurisdictional instruments. However, there is no need for principles to be agreed at this stage concerning the retailers to be designated and the approach to specifying supply remits where the obligation is to be imposed."*

I strongly support the obligation to supply being placed in the Law and agree with others including the joint response from the National Consumer's Roundtable on Energy (NCRE) that the Obligation to Supply should have uninterrupted supply and not be disconnected on the basis of incapacity to pay alone.

I also support the views of the NCRE that the views of all consumers should be sought, including small businesses and particularly rural and regional businesses, who rely on receiving a reasonable offer.

Though the NERC submission to the MCE SCO Table of Recommendations has suggested adoption of the Victorian provision, regarding Retailer's obligation to connect, I note that the VESC during their current regulatory review intends to amend the code to clarify that:

> *"The obligation to connect only applies if the retailer has agreed to offer a market contract or the obligation to supply applies. That is "If the retailer has an obligation to connect."*

MK Comment

All consumers should be protected. An arbitrary threshold can be difficult to monitor, especially where consumption threshold fluctuates from one year to the next. For example someone may go into hospital for several months; change abode for whatever reason or simple change consumption patterns and usage for other reasons. How would their changing consumption levels be re-assigned. The NECR have raised this issue.

I agree that determining small customer definitions on threshold considerations alone has many drawbacks.

I agree with AGL that although distributors' obligations under the customer framework only extent to 'standard connection services, the dispute resolution process should also extent to new connections requiring extension and augmentation (4.1 TOR).

TRUenergy had expressed the view that the principles underlying the obligation to offer should be conducted by the AEMC in the context of the competition effectiveness reviews.

This was proposed on the basis that political considerations would be removed and ensure that the decision is consistent with the market objective and assessment of the level of effective competition.

In relation to imposition of deemed status on end-users of heated water, this has nothing to do with politics or effective competition, but rather the fundamentals on contractual law; tenancy law; trade measurement practice; and various rights under multiple provisions in the written and unwritten laws that are designed for consumer protection.

The contention reflected throughout this submission is that the BWH provisions do not reflect either best practice or the requirement to avoid regulatory overlap with other provisions.

Whilst many additional definitions not included in the SCO Policy Paper glossary or in the Table of Recommendations are currently contained within jurisdictional Codes and Guidelines subject to change at will,[116] there is a case for these essential definitions to reside within the Law, and for the arrangements and interpretations for bulk hot water provisions to also be clarified within the law. It is unacceptable for there to be discrepant interpretations; discrepant provisions.

The flow chart shown on p10 of the SCO Policy Paper refers to taking supply from an energized connection, and to that extent uses language similar to that contained in existing deemed provisions. However, the relevant customer is not clearly defined. An emerged supply point cannot and should not be represented by a water meter.

If left to jurisdictional decision as to whether the obligation applies or not the same problems are likely to arise unless arrested now. In addition the social and equity issues will be addressed by discrepant interpretations as to whether the obligation should apply.

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[116] Note for example that the Victorian *Gas Distribution System Code* is defined as one which is amended by the Commission from time to time. Whilst this provides flexibility that in some circumstances desirable, in the case of the BHW provisions this leaves it open for the VESC or other jurisdictional regulators or policy-makers to maker creative interpretations of contractual matters that should properly be defined within the Law. The same applies to creative changes to the *Victorian Energy Retail Code* or Licence arrangements, as illustrated by the intent of the current Victorian regulator and/or policy-maker to consider amending the VERC to strengthen the appalling and BHW arrangements rather than addressing their shortfalls and implications for consumer detriment.

If each jurisdiction is to individually despite the retailer's supply remit with the above principles in mind, i.e. geographical area; particular premises or classes of premises or particular customers or classes of customers; this not only raises inequity considerations between jurisdictions, but also appears to leave it open to jurisdictions to interpret as they please the definition of a supply remit without regard to the following:

1. Whether any energization point exists or whether energy is distributed at all to an end-user of heated water
2. Whether the distribution system can be re-defined at will each the jurisdictional authority
3. Whether for the purposes of energy regulations it is acceptable to re-define a meter as a device which measures and records the consumption of bulk hot water consumed at the customer's supply address.

Retailers are not water authorities; intermediaries for landlords, or authorized to sell, restrict or disconnect heated water supplies on the basis of a dispute over contract. That is a civil matter, with an unsustainable legal and technical claim about the contractual party; especially given overlap with other regulatory schemes; the attempt to re-write contractual and tenancy laws; and the calculation methods being used to deem a party contractually obligated for receiving energy through a water distribution system not in any way associated. The product received is a composite water product that is included in the cost of rent under residential tenancy provisions.

Under the existing VERC provisions Clause 2:

> *"A retailer must connect a customer at the customer's supply address as soon as practicable after the customer applies for connection in accordance with Clause 1. Without limiting clause 36.1 by no later than the next business day after the application is made or their energy contract commences to be effective (whichever occurs last) the retailer must make a request to the relevant Distributor to connect the customer's supply address to the distributor's distribution system"*

The VERC proposes that clarification be placed in the VERC that the obligation to connect only applies if the retailer has agreed to offer a market contract or the obligation to supply applies. That is *"If a retailer has an obligation to connect,"* which is presumably the phrase intended to precede the paragraph about in the existing provision under Clause 2

The implications of this proposed revision are that the retailer may decline to offer a market contract at all unless *"obligated."* There is no clarification as to where the obligation lies. Does this refer to standing offers and/or deemed contracts?

The question of whether *"new supply"* (of energy) can be imposed on a residential tenant who is receiving heated water supplies as a composite product from a single energization point on common property infrastructure is can be "deemed" a customer" is examined in detail elsewhere.

Similarly whether it is legally acceptable for an energy supplier to disconnect heated water services that form an integral part of a residential tenancy lease under mandated tenancy terms that form part of the contract between landlord and tenant arises if the retailer and the Rules interpret the existence of a "deemed contract" until an explicit contract with the energy supplier is supposed.

Regulatory overlap issues and the technical debate as to whether a contract exists at all with a residential tenant receiving bulk hot water rather than energy is explored elsewhere.

A central issue is to define within the Law the question of a *"customer supply address"* or relevant customer supply address" needs to be clarified in relation to those receiving communally heated water supplies individual without individual energization points, and where the only energization point heating a communal water tank is that for which a Landlord is responsible, since the energy is supplied to that point on common property infrastructure and is not reticulated to the end-user of heated water through the energy distribution system at all, but rather directly to the Landlord's communal water tank on common property infrastructure.

Simply because at jurisdictional level in the three states similar BHW provisions have been adopted (Victoria, South Australia and Queensland) this does not make the arrangements for contract legally or technically sound or consistent with the requirement to avoid regulatory overlap with other schemes

That raises the question of why the proposed Law has not explicitly stated that jurisdictional or other arrangements may not overlap with other schemes. This is an explicit requirement under s15 of the *Essential Services Commission Act 2001*; forms part of the Memorandum of Understanding between Consumer Affairs and Victoria, and presumably will also be reflected in provisions between CAV and the proposed regulator, AER.

By the same token consumer protection counterparts in other jurisdiction should be insisting that regulatory overlap is avoided current and proposed in all policies and regulations in place, including codes, guidelines and any applicable licence provisions.

The definitions of supply remit, proper definition of customer and customer obligation (in the case of multi-tenanted dwellings and Owners' Corporation obligations to take direct responsibility for both consumption and supply charges but the heating component of bulk hot water since no separate meters exist designed for the purpose of measuring what is consumed by individual tenants in terms of the gas or electricity used for that heating component.

Jurisdictional energy regulators quite simply cannot re-write contractual law and expect to be themselves complying with legal obligation or best practice. That is exactly what they have attempted to do in the case of the bulk hot water pricing and charging arrangements.

Unless these matters are addressed under black letter law or in some way as to recognize the explicit and implicit obligation of energy regulators the same contractual issues will arise again and again to widespread consumer detriment.

I again refer, in the case of Victoria to the explicit Objects of the Memorandum of Understanding between the two relevant prescribed agency regulators, namely Consumer Affairs Victoria (CAV) and Essential Services Commission (ESC) dated 18 October 2007 under Clause 2(b)

> *"overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries)."*

Both the regulator, VESC and the industry-specific complaints scheme EWOV have been directly informed by Consumer Affairs Victoria about that obligation.

Though the DPI has now taken over policy control over the BHW provisions, the same principles should apply. The *Essential Services Commission Act 2001 (ESC Act)* provides for this and the MOU was simply a reminder about the obligation to avoid regulatory overlap with other schemes present and proposed.

I remind policy-makers, law-makers and regulators alike at all levels, jurisdictional and federal of the obligation to respect provisions under multiple provisions including common law provisions and when assessing best practice and existing or proposed policies must respect enshrined protections in the written and unwritten law, including common law contractual provisions.

Once more I stress these obligations since they are repeatedly forgotten in the formulation of policies and regulations.

The proposal within the Policy Paper is noted to support transitional regimes for jurisdictions to move to the national customer framework, designed to accommodate transitions from existing jurisdictional definitions of small customers to the national regime as and when this occurs. Another term commonly used is prescribed customer.

It is of concern that though some jurisdictional Codes (for example the Victorian *Retail Energy Code* (ERC) provides for vulnerable consumers, particularly those with medical conditions that require continuous access to energy supply, there are some gaps in the provisions.

At present it is possible to register with the retailer as a medical exemption address once a contract for energy supply has been establish, with the intention of preventing disconnection of energy supplies in the future. This arrangement is commendable.

However, where there is an unresolved debate about the existence at all of any contract because of discrepant interpretations of existing energy laws or because of regulatory overlap between other schemes that have the effect of compromising the specific and general rights of end consumers under multiple provisions within the written and unwritten laws; and where a dispute exists about whether a deemed contract exists at all or should exist; or whether a market contract should be forced upon a residential tenant as an end-consumer of say, bulk energy, where the proper contract lies with the Landlord/Owner or Owners' Corporation (OC), the existing protections are entirely inadequate.

Within the proposed NECF Policy Paper and parameters the use of the term

> *"the establishment of a physical connection of the premises to the distribution network to allow the flow of energy between the network and the premises"*

does suggest the physical existence of a connection point through which energy passes[117] situated in the customer's premises, meaning in the case of residential end-consumers either on the promises or connected to those premises through the flow of energy between network and premises. Such a flow of energy from energy connection point to boiler tank centrally heating water for multiple tenants in a multi-tenanted dwelling does not fit such a description.

Deemed customer distribution contract within the proposed Law and Rules refers to *t*he contract between a distributor and a customer that arises by operation of law when the customer takes supply of energy at a connection point that is connected to that distributor's distribution system.

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[117] Gas meters measure gas volume not heat. These meters should be routinely referred to as *"bulk gas meters"* rather than "bulk hot water meters." The water meters should be referred to as hot water flow meters. The latter measure water volume only not gas or heat
The current practices for BHW allow for each type of meter to be separately read approximately 2-3 months apart with water volume calculations serving to calculate a guestimate as to how much gas was used by individual tenants allocated a hot water flow meter. Residential tenancy laws do not allow charges to be applied other than actual consumption charges where water meters do exist. The algorithm formulae currently in use to calculate guestimated consumption of gas

The distribution system does not include a boiler tank or a hot water flow meter. These items are part of common property infrastructure in the same way as public lighting in blocks of flats and apartments are. No energy supplier attempts to divide the total amount of energy used to light stairwells and public areas in such multi-tenanted dwellings.

An end-user of bulk energy used to heat a communal boiler tank serving multiple tenants takes supply of a composite product supplied by the Landlord under the terms of such a leasse.

It is not the prerogative of energy policy-makers and regulators to strip away existing and enshrined rights of individuals under other schemes, re-defining and effectively re-writing their private and legitimate contracts with Landlords.

Once a Landlord or OC authorizes the supply of bulk energy to a property owned or controlled by those parties, and once the metering installation and infrastructure is in place; supply has commenced and a supply charge applies long before tenants take up residence or turn on any water tap. The supply charges and consumption charges belong to the Landlord who in turns incorporates into the rent the cost of providing rented premises to individual tenants.

The composite product, heated water, is an integral part of a lease and already paid for under those terms unless each utility can be separately metered with an instrument designed for the purpose (other than for bottled gas).

There mere existence of arrangements or instructions under licence or in Codes that defy common sense, proper trade measurement practice and contractual law considerations does not render the arrangements valid, legally enforceable or superior in weight to the provisions of other regulatory schemes.

It is the Landlord or OC who takes supply, sometimes possibly without having agreed to enter a standard retail contract or market retail contract. However, in most cases at least an implicit contract exists between landlord and distributor or retailer when the Landlord or OC requests a bulk energy metering installation to be put in place.

A supply charge applies from the moment that the infrastructure is in place long before any tenant occupies a building or turns on a tap containing heated water. For VENCorp purposes all bulk energy meters represent a single supply and billing point.

This term **METER** should be clearly defined and included under the Law instead of the Rules to be distorted at will, and which is currently being creatively applied to water meters posing as gas meters supplying heat for centrally heated tanks serving multiple tenants in apartments and flats. It should be explicitly stated that all mention to meters means meters associated with energization that are designed to calculate the amount of energy that passes through it (gas or electricity), though meters in themselves do not measure the energy, but rather either gas volume or electricity.The energy produces the heat that heats the communal water tanks in BHW arrangements, but it is not energy that is supplied to the tenants to any direct or energization point. The energy is supplied to the Landlord to his communal water tank on common property infrastructure, and thence,

once the water is heated, carried in water pipes in a distribution system quite distinct from the service pipe concept that facilitates the flow of gas or electricity.

This is so central to the entire regulatory framework, and even applies to embedded networks where it is actually energy that changes is transmission pathway, but is still delivered as energy, rather than a composite water product, the exceptions being again bulk hot water where it is an embedded generator that is supplying the energy.

In most residential apartments this is not the case at all. The energy that the Landlord "takes supply of" at the outlet of the meter is normally in those circumstances delivered through the transmission network for which the original Distributor has responsibility.

I reproduce a section from Part 2B which is more dedicated to an examination of a vas majority of the specific numered components of the MCE SCO Table of Recommendations. The duplication is to contain the contractual considerations with a very direct bearing on the DPI's and VESC's decision to retain the BHW Guidelines with the current contractual allocations and charging formula.

The technical definitions provided below have a direct bearing on contract in common law, aside from regulatory overlap.

DISCUSSION OF IMPLIED TRANSFER FROM DELIBERATIVE DOCUMENTS OF 2004 AND 2005 DIRECTLY INTO THE VERC

These documents were never made transparently available till mid-2007, approximately a year after their adoption. Their clarity and appropriateness have not improved as a consequence of the proposals, nor is the proposed transfer of contractual considerations from deliberative documents and implied licence provisions likely to enhance their legal and technical sustainability. This is discussed at considerable length shortly

This guideline was adopted on 1 March 2006 after several deliberative processes during 2004 and 2005. There were five participating stakeholders, only one of which was a community organization.

A **relevant customer** is simply one who consumers no more than 10,000 GJ of gas per annum, and applies to some 1.6 million Victorian consumers, including entities. The term is not exclusive to natural persons, and the use of any term pertaining to natural persons is taken to also include entities. Only about 100 consumers consuming more than 10,000 GJ – including organizations and entities.

The deliberative documents were not made transparently available or published online till mid-2007 after protracted challenge was made as to the validity of provisions, following unjust coercive threats issued by an energy retailer of disconnection of hot water services. The matter remains unresolved 19 months later.

This may be a good point to examine the original rationale that led to the adoption of these provisions.

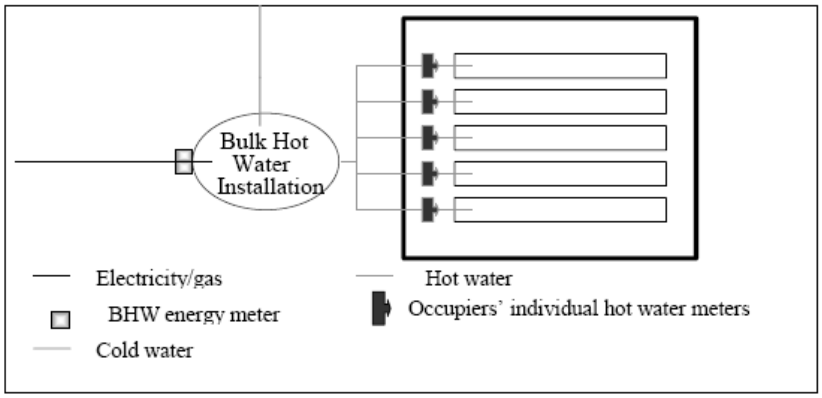
The deliberations mentioned two billing proposals. Of these the existing Guideline and its contents relate to only one of them – that of holding contractually liable end-consumers of communally heated composite water products (as opposed to direct energy supplies regardless of transmission network).

There is a distinction between those who receive energy from a transmission network other than that for which the original distributor is responsible and those who receive heated water products after the energy is supplied by the original distributor to a single energization point. In the latter case, the energy is delivered to the outlet of a meter on common property infrastructure, but there is a single distributor and single retailer involved in the transaction.

In many of these cases the energy used by the end-user is energy in its original form used for heating and cooking, though some may also be receiving *"bulk energy"* for hot water supplies.

Configuration and meter details[118]

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

Comment on Billing Arrangement 1 BHW

In billing arrangement 1, as outlined in the BHW Charging Guideline 20(1) on the brink of repeal and transfer elsewhere, the deemed energy guestimate is made on the basis of conversion factors converting water volume to actual gas usage by magical formula methodologies, to calculate approximations of the amount of gas used by individual tenants, but without the benefit of a gas or electricity meter (energization point) as an instrument which measures the amount of gas (or electricity) passing through it, since gas does not pass through the water meters at all. All references within the energy legislation to gas meters refers to those through which the quantity of gas can be measured to filter, control and regulate the gas that passes through it and its associated metering equipment. Hot water flow meters are not such instruments as much as the current provisions would like to regard them as suitable substitute gas or electric meters. Such a rationale has serious implications for disconnection processes, more so when remote disconnection becomes a reality with the introduction of electricity interval meters. If the same rationale ultimately applies to gas, the same considerations are pertinent.

Disconnection of gas within the energy legislation refers to

> *"the separation of a natural gas installation from a distribution system."*

[118] Source ESC Review of Bulk Hot Water Arrangements September 2004

The distribution system referred to in the legislation and Energy Codes does not include hot water flow meters. Transfer of the existing provisions of the BHW Guideline endeavours to change that by viewing BHW provisions as exempt from all other energy provisions current and proposed, and the original intent behind deemed provisions.

The use of the term under 2.1.1. existing Guideline to be retained under 3.3 VERC

> *"charges for energy in delivering gas bulk hot water to a relevant customer"*

and reference under 3.1 (Definitions) and the term

> *"the customer's hot water is measured with a meter and where an energy bill is issued by a retailer*

Disconnection of hot water flow meters therefore is inappropriate and is not an intended part of the disconnection processes. If gas were to be disconnected in these circumstances, leaving aside the contractual debate all the tenants on the block would be effected. In any case it is inappropriate to rely of coercive threat of disconnection of essential services were a legitimate dispute remains unresolved as to the existence at all of any contract as intended by the legislation. A Landlord other than a DHS entity or delegate is not at liberty to pass on costs for any utility or component (except for bottled gas) that is not individually metered with an instrument designed for the purpose. A hot water flow meter does not serve the purpose of measuring either gas volume or heat. The single bulk gas meter measures gas volume only not heat (energy). The bills are expressed in energy.

The practice of billing individual tenants (occupiers) where any component of utility is not metered with a utility meter designed for the purpose (other than bottled gas is disallowed under residential tenancy provisions.

Though this practice is common and *"industry practice"* as suggested by EWOV, this does not make the practice fair equitable, appropriate or legally enforceable. Regulators and industry complaint schemes, are turning a convenient blind eye to practices that directly impact adversely on the enshrined rights on end-consumers of bulk energy and excuse this under the guise of common practice.

Whilst it may be legitimate for an OC to apportion costs amongst owners if there is only a single bulk energy meter by dividing the cost by the numbers of owners, the same practice applied to residential tenants is a direct infringement of their residential tenancy rights.

In addition estimates based on the consumption patterns of previous tenants mean that distorted outcomes result, since a single tenant occupying an apartment would not have the same consumption levels as the same apartment occupied more two or more tenants.

For those in commercial rented accommodation, the obligation lies with the Landlord under residential tenancies legislation to meet all consumption and supply charges for all utilities (except bottled gas) that are not individually metered. The existence of separate hot water flow meters does not imply that the gas is separately metered as has been suggested by EWOV and is apparently applied in *"industry practice."*

Many low income tenants on a very similar income threshold occupy commercial property. They do not gain the benefit of highly subsidized government-managed accommodation. Their position is not comparable to those benefiting from Arrangement 2 Billing Arrangements as described below and exclusive under tenancy laws to DHS tenants or delegates of DHS entities.

In general commercial landlords are expected to bear the cost of installing individual meters for all utilities. Unfortunately those living in properties with gas bulk hot water systems are generally of low income already at a disadvantage in poorly maintained sub-standard accommodation.

They cannot afford rising costs for bulk hot water commercial applied in addition to the costs already included within their rent. Hot water services are an intrinsic part of a residential tenancy lease. Threat of disconnection of such a service is inappropriate. These threats are not being issued by landlords but rather by profit-making energy suppliers who see a huge profit in bulk hot water service provision where imprecise calculations, options to omit site visits altogether; and to apply supply charges, often improperly imposed on end-users of bulk energy whose consumption levels of the heating component of heated water cannot be measured through legally traceable means. In any case such practices will become formally illegal when remaining utility exemptions under national trade measurement laws are lifted as is the intent.

Meanwhile the arrangements represent appalling trade measurement practice; breach the MOU with Consumer Affairs Victoria to adopt best practice and avoid regulatory overlap present and future; the requirement to avoid regulatory overlap is also reflected within the *Essential Services Commission Act 2001.*In both billing arrangements discussed as the regulator-approved methodology for bulk hot water charges endorsed by ESC after consultation almost exclusively with industry energy providers (barring one electronic submission form a customer of an unspecified "class" and on another by St Vincent de Paul) does not make precise measures of gas consumed by individual at all.

Comment on Billing Arrangement 2 BHW: This involves the retailer billing the body corporate for the gas or electricity consumed by the bulk hot water system as measured by the bulk hot water energy meter, with the body corporate apportioning consumption, determining individual bills and charging individual customers." The billing arrangement 2 was not considered under deliberative document VESC (2004) Review of Bulk Hot Water Billing Arrangements (September)[119] as retailers do not use conversion factors and don't require to read water meters.

This arrangement (2) is sanctioned by the residential tenancies legislation only for DHS body corporate entities or their nominees. It is used particularly for high rise blocks in which the DHS negotiates the best charge for gas at multi-dwelling units and is billed by the retailer for gas consumed directly by the relevant occupier. As such most tenants of public housing are not billed directly by retailers for energy provided for hot water services. Instead, most tenants are charged a flat service fee for gas hot water, which is included in the weekly rent."[120]This arrangement (Arrangement 2) is sanctioned under tenancy laws because DHS type accommodation is already heavily subsidized and an overall service fee, which may include a proportion of bulk hot water flat rate charges not based on conversion factors, but also other service facilities such as use of laundry services is worked out to the benefit of low income residents in that type of accommodation .

Approximately a third of the total contingent of 26,000 Victorians using bulk hot water facilities live in DHS housing as described and benefit from the reduced outlays applicable under Arrangement 2The rest are fair game for those wishing to target the soft targets and avoid direct arrangements with Landlords.

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119 Essential Services Commission (ESC) (2004) Review of Bulk Hot Water Arrangements (September. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/20C3454F-0A47-428B-845B-1D7D85FBE572/0/FinalReviewBulkHotWaterBillingSept04.pdf*
Superseded by Essential Services Commission (ESC) (2005) *Final Decision – Final Decision: Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (Final Decision)" December 2005*
http://www.esc.vic.gov.au/NR/rdonlyres/4554EA66-6F9E-49C8-934E-1E8232D989AC/0/FDP_EnergyRetailCodeAmendmentsFinalDec05.pdf

120 ibid (as for 8 above)

Those at highest risk are the inarticulate vulnerable and disadvantaged with these terms not limited to those on low incomes, but in general those living in properties served by BHW arrangements and communal boiler tanks are generally at least of low or lower income levels. Other soft targets are those with language barriers; newcomers to the country unfamiliar with their rights; those with mental or intellectual disability; cognitive impairment of other such vulnerability.

In the bulk has hot water provisions contained with the allegedly flawed *Hot Water Charging Guideline 20(1)* apparently stripping end-users of bulk energy of inherent rights and protections already *"purchased"* under an Act of Parliament *(Residential Tenancies Act 1997 s53),* and other protections, no separate gas meter exists for individual occupiers of tenanted dwellings, or even owner/occupiers sharing a common property hot water service installation. The general public and even those more closely associated with the gas industry may be forgiven for mistaken the above wording as implying the existence of separate gas meters whether openly displayed or behind locked doors.

In both cases cited above as approved methodology for bulk hot water charges endorsed by ESCV after consultation almost exclusively with industry energy providers (barring one electronic submission form an customer of an unspecified "class" and on another by St Vincent de Paul) does not make precise measures of gas consumed by individual at all.

In arrangement 2, the bulk energy supply is calculated by reading the single meter and body corporate charged. In this case, an approximation is also made by the body corporate in apportioning consumption by rough calculation methods, and charging individual *"customers"* or *"end-users."*

Selected Best practice consultation and transparency issues

As Victorian Treasurer, John Lenders had commented on the key elements of the Reducing the Regulatory Burden (RRB) initiative as follows:[121]

> *The Reducing the Regulatory Burden initiative complements and strengthens the Government's well established best-practice regulation making and review framework.*
>
> *Some key elements of this framework are:*
>
> *– the Victorian Guide to Regulation (updated in April 2007) which sets out the principles and characteristics of good regulation making for all Victorian regulators;*
>
> *– a transparent regulatory decision making process through mandatory public consultation on regulatory proposals;*
>
> *– the Victorian Competition and Efficiency Commission (VCEC) which was established in 2004 to independently assess the adequacy of Regulatory*
>
> *Impact Statements and Business Impact Assessments;*
>
> *– leadership in harmonisation of regulation through collaboration with other Australian governments in areas such as payroll tax and occupational health*
>
> *and safety; and*
>
> *– the ongoing commitment to comprehensive public inquiries into regulatory matters conducted by the VCEC and the State Services Authority.*

On the issue of best practice transparency and consultation I make the following probing comments intended to highlight stakeholder dissatisfaction generally.

The existing BHW Guideline, many of the contents of which are intended to be retained and transferred to the VERC, was adopted on 1 March 2006 after several deliberative processes during 2004 and 2005. There were five participating stakeholders, only one of which was a community organization. The fundamentals of the contractual arguments appear not to have been considered at all, nor the question of overlap and conflict with other regulatory schemes.

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[121] Reducing the Regulatory Burden. Victorian Treasurer John Lenders *http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/RRBProgressReportfor200607/$File/RRB%20Progress%20Report%20for%20200607.pdf*

It was however, recognized at the time of deliberations that the current and proposed trade measurement practices would become formally illegal once remaining utility provisions were lifted under national trade measurement provisions, as is the intent. Meanwhile the national provisions are the default provisions for Victoria.

The current practices will leave energy providers in a vulnerable position in breaching national laws and will also face potential criminal charges and penalties by persisting with the use of illegal methods of calculation and trade measurement. Refer to part V 18R of the *National Measurement Act 1960* and associated regulations.

The deliberative documents were not made transparently available or published online till mid-2007. As with other consultative process it would appear that all deliberations took place behind locked doors with invited parties from government, industry and selected community organizations (if available) belonging to a Consumer Consultative Committee. The wider community had no chance of participation at the time the decisions were made, not that members of the general community regularly become aware of consultative options to participate in public policy

Publication occurred after protracted challenge was made as to the validity of provisions following the issue by an energy retailer under licence of unjust coercive threats of disconnection of hot water services on the basis that an open *"vacant consumption letter"* demanding personal identification details under pain of such threat failed to extract any explicit contract, which the end-user of communally heated water refused to recognize as a valid requirement.

Though hardship considerations are a factor, the crux of the issue was dispute over policy provisions that unjustly imposed contractual status on an end-user of heated water where he had a valid contractual arrangement with the landlord under mandated tenancy provisions which covered the cost of both consumption and supply of the heating component (energy) of that water.

No separate energization point supplied the heat. The gas bulk meter measures gas volume not heat. The bills are expressed in energy. The hot water flow meters measure water volume not heat or gas. The latter are being used to measure water volume which is then converted into deemed gas (or electricity usage) and individually charged to individual end users of heated water as a composite product that the energy retailers are not licenced to sell, or restrict or disconnect.

DISCUSSION OF REPEAL OF CLAUSE 1 INTRODUCTION: PURPOSE AUTHORITY AND APPLICATION AND IMPLIED REPEAL OR ARCHIVING OF THE DELIBERATIVE DOCUMENTS THAT LED TO THEIR ADOPTION

The proposal of the VESC is to remove as redundant the purpose, which explains this as the Commission's requirements for the charging by retailers of energy in "delivering electric bulk hot water" or "gas bulk hot water" to customers from gas or electrical distribution systems.

Creative terms such as *"delivering electric bulk hot water*" and *"delivering gas hot water"* were introduced into the energy lexicon by the BHW Charging Guideline approved in December 2005 and implemented on 1 March 2006.

This is despite the fact that energy providers are approved (currently under licence) to supply energy in the form of gas and electricity, not composite water products. They are under limited circumstances, presumably as a last resort, permitted to disconnect, but disconnection concepts and authority relate to gas or electricity not composite water products. This is discussed further later.

Though Clause 1 providing introduction, purpose, authority and application date are components of the existing Guideline to be repealed the descriptive terms relating to the delivery concept are to be retained. Given their wording and their practical effect in interfering with mandated contractual provisions under other schemes, notably those between landlords and residential tenants in private rental properties, not only should these brief comments be retained, at lest in footnote form in the new home to be given to these provisions – the Energy Retail Code, but the new abode for the provisions should provide web links to any archived deliberative documents that anyone may wish to study for historical or other purposes.

The removal of historical data has been justified by the VESC on the basis of repeal of the Guideline. At the very least the Guideline should remain in archival storage along with the deliberative documents for access to those wishing to examine the history.

The rationale for the adoption of the BHW guidelines is crucial not only for historical purposes but to inform current and future policy makers and regulators of the extent to which the reasoning and practical methodologies adopted conflict with other components of energy regulations, with other regulatory schemes, and best business practice, including the intent and spirit of trade measurement laws.

Repeal of the Guideline may facilitate removal or archiving of this crucial material, which is currently relied upon by the existing industry-specific complaints scheme(s), including the Energy and Water Ombudsman (Victoria) ltd. a company with limited guarantee without share portfolio that fulfills a public role in fielding complaints against energy and water providers, set up under energy enactments under the overall control of the DPI.

From 1 January 2008 the DPI took over from the VESC the policy provisions for BHW charging, notably the formula in use, whilst the VESC apparently retains responsibility for what is shown on the bills.

Thus there seems to be some shared responsibility for the application of these provisions, including what is seen to be flawed interpretation of the deemed provisions of the *Gas Industry Act 2001* he use made of the terms **"relevant customer"** and **"customer"** interchangeably, leaving aside the impacts of trade measurement practices and calculation methods on contractual considerations and best practice, or non-compliance with the spirit and intent of national trade measurement regulations.

Thus, the purpose appears not to have changed at all. The VESC and the DPI clearly intend the purpose to be reinforced not removed. It is important for all stakeholders to know how and why provisions came to be put in place, referring to the fundamental rationale.

Both the DPI and the VESC appear to believe that transfer from deliberative documents and from a Guideline to the *Energy Retail Code* will somehow validate the provisions, calculation methods and contractual issues.

Throughout this sub-section I maintain the view that the provisions are legally and technically unsound and unsustainable in every respect, in the first place for reasons discussed in some detail.

Notwithstanding these reservations, if the purpose has not changed, yet transfer is envisaged to meet the requirements to *"reduce regulatory burden."* Apparently measured in numbers of pagers, the purpose and other historical data should be retained.

The contractual rationale within the informative deliberative documents appears in the first place to be flawed both on legal and technical grounds. This is apparently not recognized by policy-makers and regulators.

Though these matters have been repeatedly brought to their attention, nothing has changed. In fact there are moves to attempt to consolidate these provisions during a time of major energy reform, harmonization and rationalization prior to the adoption of a single energy consumer protection law (NECF) which is predominantly focused on contractual issues.

Some components of the contractual rationale taken from deliberative documents are also to find their way into the VERC, presumably as a means of endeavouring to validate the trade measurement pricing and contractual arrangements

The convenient repeal of the Guideline may be interpreted as a strategic move to remove from scrutiny or ready access the thinking that informed adoption of the provisions in the first place.

In the adoption of these provisions, neither the stakeholders nor the regulator or policy maker appeared to take account of the contractual matters and the incompatibility of the arrangements with the general and specific contractual laws in other schemes and provisions.

The arrangements were adopted allegedly in consumer protection. The fundamental flaw was in determining who the contractual party should be, and in alleged flawed interpretation of the deemed provisions of the *Gas Industry Act 2001,* which refers to the term *"relevant customer"* not *"customer."*

Further I express the view the terminology used is misleading and based on faulty premises. These considerations are not simply about definition or description. They are central to contractual matters and the entire governance model adopted by the proposed National Energy Customer Framework.

I therefore spend some time discussing right at the start the effect of both repeal and retention of the BWH charging provisions. In Victorian the DPI holds policy responsibility, leaving the ESC with responsibility only for regulating what is shown on the bills. Even that area needs to be scrutinized in the light of how bills are to be presented. I will return to this in due course under discussion of Retention of Clause 2.3.

DISCUSSION OF PROPOSAL TO RETAIN CLAUSE 2.1.1. BHW CHARGES REGULATED FORMULA AND INCLUDE UNDER CLAUSE 3.3 OF THE ERC

2.1.1 from BWH Guideline:

*"where a retailer charges for energy in delivering gas bulk hot water to a **relevant customer,** the gas bulk hot water rate, supply charge and **final customer** billing for the provision of gas bulk hot water are to be determined in accordance with Appendix 1.*

2.2.2 Appendix 1 will be replaced with only a reference to the DPI. This may not transparently allow stakeholders to scrutinize how and why charges are being applied

2.2.2 Appendix 2 is also to be replaced with only a reference to the DPI. This may not transparently allow stakeholders to scrutinize how and why charges are being applied

Issue:

Clause 2.1.1 (BHW) requires the calculation of gas bulk hot water charges to be in accordance with a regulated formula. This rule will be retained and transferred to Clauses 3.3 of the ERC.

Draft DPI/ERC Decision

Retain and include in the ERC (Clause 3.3). Appendix 1 to be replaced with DPI reference

Current provision Clause 3.3 of the Energy Retail Code:

A retailer must issue bills to a customer for the charging of the energy used in the delivery of bulk hot water in accordance with the Commission's Energy Industry Guideline 20 – Bulk Hot Water Charging

The VESC notes (from submissions) that AGL, Origin Energy and TRUenergy, queried whether this clause is redundant given that pricing for small business customers has been deregulated

MK Comment:

It is appropriate that the National Energy Consumer Framework (NECF) decides what should be adopted ultimately in terms of national consistency, provided that existing consumer protections are not eroded as a consequence.

The NECF position on embedded customers and those without energization points is still under consideration. Therefore it is a mystery why the Victorian authorities, including the Essential Services Commission and Department of Primary Industries feel the need to make changes and further clarify contractual arrangements where the predications upon which contractual obligation is made appear to be flawed and unaddressed in the first place.

The collective perception of retailers that the BHW Charging Guideline is redundant because pricing for small business customers has been deregulated is a telling one, as expressed by the three retailers supplying bulk energy for communally heated bulk hot water systems on common property infrastructure of Landlords.

Such a perception implies that all three retailers consider the true customer to be a small business not an end-user.

Such an arrangement, i.e. regarding the landlord as the relevant customer and charging him directly for gas or electricity supplied to heat a communal water tank would not only bring the arrangements into line with residential and owners corporation provisions, but would reduce regulatory burden considerably with retailers having to deal with a single party instead of a transient population of residential tenants, at least some of whom would be in a position to oppose the arrangements on the basis of regulatory conflict alone.

In terms of regulatory burden alone, it would surely make far more sense for retailers to obtain certainty and reduction of enquiry and complaint if the Energy Laws and/or Rules were made compatible with the Residential Tenancies provisions by similarly requiring that the Landlord or Owners' Corporation formally takes direct responsibility for consumption and supply charges of any utility that cannot be measured by an instrument through which energy passes or can be measured in a legally traceable manner.

Legal traceability in measurement is the cornerstone of trade measurement provisions. The existing methods will become formally illegal in any case once remaining utility exemptions are lifted by the National Measurement Institute.

On the one hand the Guidelines hold end-users of heated water supplies as contractually obligated despite there being no individual energization point for each end-user residential tenant for receipt of gas; on the other hand, on the basis of their perceptions about redundancy of the Guideline because pricing for small business customers has been regulated, the retailers seem to think that the Landlords are the relevant small business customers for provision of bulk energy to their single energization points for heating of communally heated water tanks.

The suppliers find it easier to target the softer targets when it comes to billing, since being end-users of heated water, those who do not properly understand their enshrined rights under tenancy laws or the technicalities involved, are readily intimidated by threats of disconnection of heated water.

That they are being issued threats and held contractually responsible for a composite water product that the energy suppliers are not licenced to sell, restrict or disconnect does not enter the think patterns of those who perhaps, because of their condition, such being inarticulate, vulnerable and/or disadvantaged. These end-users of heated water may not find knowledge, skills or motivation to seek help to secure their existing fundamental rights under other schemes.

Retailers expect to be notified of the landlord's contact details and/or owners/corporation details, in addition to forming a direct explicit contract with end-users for billing purposes.

This allows retailers to apply the concept of contract law fluidly, using the contract with one party to transfer at will to the other.

In the first place, a landlord accepts a contract either implicitly or explicitly by asking a retailer to arrange installation of the infrastructure that would supply bulk gas to a single energization point on common property infrastructure. The landlord commences to take supply from the moment that the infrastructure is in place. A supply charge is applicable from the time that occurs, not at the time that successive tenants take possession of individual apartments and turn on the taps.

When this does not work they feel they have the option to target the landlord, who was in any case contractually obligated from the time the infrastructure was in place to supply gas to the single energization point. This is a novel concept in contractual transfer, from one party to the next – whoever is most likely to pay, not whoever is legally responsible.

These practices have been facilitated by explicit instructions from policy-makers and regulators to calculate consumption and impose contractual status on the wrong parties, thus leading to an unacceptable form of market, policy and regulatory failure.

Delivery of the gas is the issue. This is clearly defined in all provisions. So is disconnection. None of these provisions refers to water or heated water. A connection point, energization point or transmission pipe must be involved for a customer connection to occur, regardless of network changeover.

End-users of heated water take no supply of gas. The gas is merely used to heat the communal water tank. Once the water is heated, it is not gas that is being supplied at all, but a composite water product. The water is supplied to the Landlord under contract by the water Authority to the outlet of the water mains.

From the mains the water is reticulated either to cold water pipes or to a communal water tank that is centrally heated and supplies heated water of varying temperature to multiple tenants, whose apartments are being inappropriately perceived as energy distribution supply points (energization points).

The heated water is reticulated in water pipes that do not form part of the energy distribution system at all. Regardless of ownership of the meters, the product being received by end-users is heated water, not gas or electricity.

Retailers of energy are authorized (currently under licence) to supply gas or electricity not composite water products.

For Distributor-Retailer settlement purposes, VENCorp treats all bulk energy gas supply points as single energization points. Therefore only a single supply charge should apply to provide the energy to that point, with its use being to heat a communal water tank on common property infrastructure in the care custody and control and ownership of the Landlord or Owners Corporation.

The legislation deems all supply points that were previously considered to be single billing points prior to 1 July 1997 to be single billing points, ongoing. Most buildings with bulk hot water systems pre-date that and for the most part, in the private sector are part of older subs-standard rented accommodation. In other cases, these may be Housing Commission rented stock. Arrangements for this in DHS Housing or their delegates are separately determined and do not depend on any meter reading at all (See discussion under Billing Arrangement 2).

Retailers are capitalizing by charging end-uses of a composite water product from which the heating component cannot be separated or calculated supply charges which often incorporate water meter reading fees. This is an unjust arrangement, especially as the distributor only charges the retailer once – for supply to a single energization point.

In any case, under residential tenancy laws, no supply charges for water supplied can be imposed, so the arrangement, sanctioned by policy-makers and regulators violates tenancy rights of individuals, interferes with direct mandated contractual arrangements between landlords and tenants, and represents overlap and conflict with other regulatory schemes, which is disallowed under s15 of the (Victorian) *Essential Services Act 2001,* and under the terms of the Memorandum of Understanding between the CAV and ESC

The transfer of Clause 2.1.1. to the ERC from the BHW **relevant customer** has been retained as it should be. This is consistent with the term used within the *Gas Industry Act 2001*. Introduction of the term **final customer** implies a customer of direct energy supplies instead of a composite product, heated water, from which the heating component cannot be separated or measured in a legally traceable way.

It is not necessarily the case that a **"relevant customer"** under existing laws (energy and non-energy) is an end-user of bulk energy, where their energy consumption is calculated in cents per litre using water meters as substitute gas meters are **"relevant customers"** in terms of existing legislation under both the *Gas Industry Act 2001(taken as one with the Gas Residual Provisions) Act 1994* and the *Electricity Industry Act 2000.*

A **relevant customer** under existing energy laws refers one who consumes no more than 10,000 GJ per annum, which applies to some 1.6 million gas users, and is not restricted to end-users.

The use of the term ***"final customer"*** in the existing provisions, now to be transferred to the ERC, has unjustly shifted contractual responsibility from the Landlord or Owners' Corporation to end-user tenants whose energy consumption in terms of bulk hot water used cannot possibly be determined through the existing guestimate means using water meters posing as gas meters.

If energy regulations are to retain any respect for the jurisdictional authority under other regulatory schemes these provisions cannot be seen to be appropriate, just or fair.

The bulk gas is connected to the communal boiler tank on common property infrastructure, and therefore the gas is being supplied to the Landlord or OC entities by direct arrangement with the landlord in this case, thus making the Owner the relevant customer. However, neither the Owner nor the OC has refused obligations under the *RTA*.

It is the prerogative of suppliers to present bills directly to Landlords or OC entities, except that they appear to have been exempted from doing so under the BHW energy provisions. Perhaps no-one has grasped yet that having to deal directly with a single party – either Landlord or OC instead of multiple tenants would not only harmonize arrangements between regulatory schemes, but would save enormous administrative burdens on retailers of energy, and enormous costs, assuming that readings of water meters and incorporated also into *"commodity charges."*

Shown below is an extract from the Victorian Energy Retail Code pertaining to general interpretations. The bulk hot water charging Guideline is to be repealed and many provisions transferred to the ERC. The Interpretation Clause 3.2 from the BHW is to be repealed. The single Interpretative Guideline will be shown under 36.2 of the VERC (General) as cited below. Such provisions are standard clauses in most legal instruments and provisions. Of particular note is that plural and singular are interchangeable, and; under *(c) an expression importing a natural person includes any company, partnership, trust, joint venture, association, corporation or other body corporate and any governmental agency and vice versa;*

36.2 General

In this Code including the preamble, unless the context otherwise requires:

(a) headings and footnotes are for convenience or information only and do not affect the interpretation of this Code or of any term or condition set out in this Code;

(b) words importing the singular include the plural and vice versa;

(c) an expression importing a natural person includes any company, partnership, trust, joint venture, association, corporation or other body corporate and any governmental agency and vice versa;

(d) a reference to a clause or appendix is to a clause or appendix of this Code;

(e) a reference to any statute includes all statutes varying, consolidating, re-enacting, extending or replacing them and a reference to a statute includes all regulations,

proclamations, ordinances, by-laws and determinations issued under that statute;

(f) a reference to a document or a provision of a document includes an amendment or supplement to, or replacement of or novation of, that document or that provision

of that document;

(g) a reference to a person includes that person's executors, administrators,

successors, substitutes (including, without limitation, persons taking by novation) and permitted assigns;

(h) other parts of speech and grammatical forms of a word or phrase defined in this Code have a corresponding meaning;

(i) a period of time:

(a) headings and footnotes are for convenience only and do not affect the interpretation of this guideline

In the case of gas this is a meter that can measure the quantity of gas that passes through and its associated metering equipment it to filter control and regulate the flow of gas – thus the concept of an energization point, rather than a subsidiary water meter being used to merely measure water volume through which deemed gas usage is calculated.

The terms relevant customer and final customer appear in the one confusing sentence. Relevant customer is defined in the current legislation under the deemed provisions, as one who consumes no more than 10,000 GJ of gas per annum. This applies to some 1.6 million end-users of gas and is not restricted to natural persons. There are only 100 users of gas who consume more than that amount.

The *Energy Retail Code* contains an Interpretative section. Though the interpretation clause 3.2 is to be made redundant upon repeal of the Guideline, it is assumed that the standard clauses about interpretation will have the effect of making an optional interpretation as to the proper interpretation of the term relevant customer.

Under residential tenancy and owners corporation provisions, the relevant customer for energy supplied to a single energization point on common property infrastructure is the Landlord of Owners' Corporation of multi-tenanted dwellings.

The new term *"final customer"* has appeared in the terminology.

The end-user of heated water is not a final customer of energy at all, nor is his apartment address the supply address.

The end-user receives heated water from water pipes belonging to the landlord after the landlord has purchased the water from the Water Authority and it is supplied to the outlet of the mains. From the mains, the water is reticulated to a communal boiler tank, normally residing behind locked doors.

The boiler tank is supplied with heat from a single energization point. The heated water, of varying temperature quality is then delivered in water pipes as a composite product to individual apartments and flats of tenants in multi-tenanted dwellings.

They have no relationship with the energy supplier or necessity to form one or facilitate one.

The landlord or Owners Corporation makes direct arrangements with a supplier in the first place to provide bulk energy for the heating of a communal water tank.

That is the time that an implicit or explicit oral or written contract is formed. The Landlord commences to take supply from the moment the infrastructure is in place, which includes a gas or electric meter and its associated metering equipment.

Where landlords do charge for water, they may not apply any supply charges at all.

Landlords may not charge for utilities (other than bottled gas) that is not calculated on the basis of actual consumption (not deemed consumption) that can be appropriately measured through legally traceable means using an instrument designed for the purpose. Water meters are not such instruments.

The sacred enshrined provisions of the residential tenancy act may be implicitly relied upon to protect consumers and allow them to refuse contractual relationship with an energy provider acting as a billing agent for the landlord and, albeit with policy-maker and regulator sanction, to use water meters to pose as gas meters or electricity meters, and deem an individual apartment with no energization point to be a supply point or supply address.

The billing is apparently to take place in accordance with Appendix 1 which is to be repealed. The only reference therefore to be made in the ERC is to the DPI and their option to negotiate with the retailer a regulated price which is intended to be laid on end-users of heated water with no obligation to accept deemed contractual status or any form of contract with an energy supplier unless the energy actually received and consumed can be separately measured.

This is not reflected in the VESC provisions (or those of South Australia and Queensland) using calculation methods and contractual arrangements that will become formally illegal as soon as existing utility exemptions are lifted from national trade measurement provisions. Meanwhile, the arrangements represent regulatory overlap with other schemes as is explicitly forbidden under the terms of , s15 of the *Essential Services Commission Act 2001.* The *ESC Act* also requires consistency with other regulations.

Notable overlap exists between the BHW provisions current and intended at jurisdictional level and residential tenancy, owners' corporation and the spirit and intent of the national trade measurement law under Part V 18R of the *National Measurement Act 1960*.

In addition to conflicting with the intent and spirit of national trade measurement provisions, the, as is forbidden under the explicit terms of.

Besides regulatory overlap there are a number of technical considerations impacting on energization, delivery systems, disconnection provisions which impact on the proper definition of supply remit, supply address; contractual party, distributor-retailer-customer interface; and other such considerations. These are discussed in further detail under Contractual Matters.

The current BHW policies and practices appear to facilitate and sanction the following.[122]

CUSTOMER CONNECTION SERVICES

NECF MEANING The connection of the premises of a retail customer to a distribution system in accordance with any applicable requirements in:

- Jurisdictional regulatory instruments; or
- National Rules (meaning the NER, the NGR or the NECR) including regulatory instruments made under those national Laws and Rules;

MK Comment

As a consequence these tenants are being unjustly threatened with disconnection for

- implied unauthorized supply of energy where they are taking supplies of heated water as part of their leases
- alleged failure to comply with metering access and identification requirements, where these should be sought from Landlords or Owners' Corporations, and ought in the first place be available to retailers and other suppliers of energy for the heating of communally heated water tanks in multi-tenanted apartments

In any case, the details of Owners' Corporations are normally transparently available on the walls of buildings that have BHW services

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[122] These allegations are extensively discussed in Component Submission part 2 which deals primarily with definitions and contraction arrangements relating to those without energization points, not all of whom can be technically described as embedded consumers. This is because energy supplied directly from a distributor's system to the outlet of the mains gas distribution or electricity distribution systems on common property infrastructure do not have "embedded networks" where the end user receives energy for direct use. Rather, these end-consumers receive composite products that do not form part of the energy distribution system at all.
The heating component cannot be measured through legally traceable means. The Landlord or Owners' Corporation is the correct contractual party.
By contract those receiving energy for direct domestic use through distribution networks other than the original distributor's network may be receiving not a composite product such as heated water, but nevertheless their consumption cannot be appropriately measured and apportioned.
A number of common considerations impact on the contractual model and terminology used for both groups of end users of energy – those who receive bulk hot water supplies, as a composite product; and those who are more literally "embedded consumers within an embedded network." This technical distinction is imported. Refer *Winters v Buttigeg (*2004) VCAT.

The proposed meaning of the term **ENERGIZATION POINT**[123] within the intended NECF Law, as included in the Policy Paper is:

> ***ENERGIZATION POINT (NECF)***
>
> *The establishment of a physical connection of the premises to the distribution network to allow the flow of energy between the network and the premises of a small customer where a physical connection already exists"*

By contrast, within the Bulk Hot Water Charging Guideline VESC 20(1) (2005) effective 1 March 2006, on the brink of being repealed with most of the contents of soon to be transferred to the *Energy Retail Code* as part of the VESC Regulatory Review defines *meter* for the purposes of BHW

> ***METER (alternative definition from BHW Charging Guideline for transfer to VERC 3.3***
>
> *as a device that measures and records consumption of bulk hot water consumed at the customer's supply address*

A hot water flow is simply a water measuring device to calculate the volume of water used in litres.

There is no correlation between litres and megajoules (gas unit) or kilowatt (electricity unit) that can show legally traceable usage or consumption of energy.

Ownership of meters does not create any contract in law in the absence of a direct energy connection to show the flow of gas (or transmission of electricity) through a physical connection to the apartment of an occupier of a multi-tenanted dwelling.

Utility meters as devices through which water, gas or electricity is measured, do not create competition.

The use of the term energization within the proposed NECF Policy Paper and parameters does suggest the physical existence of a connection point through which energy passes[124] situated in the customer's premises.

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[123] National Energy Consumer Framework Policy Paper; Glossary; NECF Table of Recommendations customer connection services (MSC SCO Policy Paper. This term presumably replaces "*supply point"* and impliedly *"supply address"*

This means that in the case of residential end-consumers either on the premises or connected to those premises through the flow of energy between network and premises. Such a flow of energy from energy connection point to boiler tank centrally heating water for multiple tenants in a multi-tenanted dwelling does not fit such a description.

Neither do these BWH arrangements ensure that rights and responsibilities (and any resulting liabilities) are appropriately allocated to the relevant party. Therefore expensive complaints handling and possible litigation became the characteristics of communication instead of transparent and fair contractual arrangements between relevant parties.

Whilst many additional definitions not included in the SCO Policy Paper glossary or in the Table of Recommendations are currently contained within jurisdictional Codes and Guidelines subject to change at will,[125] there is a case for these essential definitions to reside within the Law, and for the arrangements and interpretations for bulk hot water provisions to also be clarified within the law. It is unacceptable for there to be discrepant interpretations; discrepant provisions.

The flow chart shown on p10 of the SCO Policy Paper refers to taking supply from an energized connection, and to that extent uses language similar to that contained in existing deemed provisions. However, the relevant customer is not clearly defined. An emerged supply point cannot and should not be represented by a water meter.

The term connect has now been incorporated into the Energy Retail Code to match that definition.

The use of the term *final customer* in relation to BHW arrangements is misplaced. Either an energy connection to the premises occurs or it does nt. For VENCorp Distributor-Retailer settlement purposes the single energization point on common property infrastructure is a single supply and billing point. There are no final customers. The heated water does not pass through any connection or transmission pipe as defined under the GIA, the Gas Code, the Energy retail Code or the proposed NECF template.

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[124] Gas meters measure gas volume not heat. These meters should be routinely referred to as "bulk gas meters" rather than *"bulk hot water meters."* The water meters should be referred to as hot water flow meters. The latter measure water volume only not gas or heat
The current practices for BHW allow for each type of meter to be separately read approximately 2-3 months apart with water volume calculations serving to calculate a guestimate as to how much gas was used by individual tenants allocated a hot water flow meter. Residential tenancy laws do not allow charges to be applied other than actual consumption charges where water meters do exist. The algorithm formulae currently in use to calculate guestimated consumption of gas

[125] Note for example that the Distribution System Code is defined as one which is amended by the Commission from time to time. Whilst this provides flexibility that in some circumstances desirable, in the case of the BHW provisions this leaves it open for the VESC or other jurisdictional regulators or policy-makers to maker creative interpretations of contractual matters that should properly be defined within the Law. The same applies to creative changes to the *Victorian Energy Retail Code* or Licence arrangements, as illustrated by the intent of the current Victorian regulator4 and/or policy-maker to consider amending the VERC to strengthen the appalling and bizarre BHW arrangements rather than addressing their shortfalls and implications for consumer detriment.

> ***"supply and sale contract"*** *means a contract for the supply or sale of gas, whether oral or in writing, or partly oral and partly in writing.*[126]
>
> *(11) This section expires on 31 December 2008.*

This clearly means the physical existence of a connection point through which energy passes[127] situated in the customer's premises, meaning in the case of residential end-consumers either on the premises or connected to those premises through the flow of energy between network and premises.

Such a flow of energy from energy connection point to boiler tank centrally heating water for multiple tenants in a multi-tenanted dwelling does not fit that description. Therefore the supply point and supply address as used within the BHW provisions is inapplicable and inappropriate contractually and in terms of proper definition.

Yet end-users of heated water services supplied in water pipes from a communal water tank for which energy is supplied to the Landlord at a single energization point is being held liable by energy suppliers for consumption and supply costs for *"delivery of electric or gas bulk hot water."*

The terms connection, connection point and energization are included in the proposed NECF template to reinforce the concept of the requirement to have a physical connection to the premises in order for supply to occur.

Supply therefore is not effected at the apartment or flat of an occupier receiving communal water supplies, but rather at a single enegization point on common property is transmitted in gas transmission pipes to a boiler tank belonging to a Landlord or Owner who takes supply at the outlet of the meter as soon as agreement is made between that party and the energy supplier to fit the metering infrastructure and that installation is complete. A supply charge applies from that point on, not when a succession of tenants' takes up tenancy under the mandated terms of their tenancy leases enshrined within the Law under tenancy provisions.

The term supply address has been creatively used to imply the apartment of an end-user of heated water supplies, but the term is not about was and space, but rather about an energized connection.

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126 No such contract exists or ought to exist between retailer and recipient of heated water that is communally heated through energy supplied at the request of a Landlord/Owner at the time that a metering installation is ordered and in place. The Landlord/Owner has the contract

127 Gas meters measure gas volume not heat. These meters should be routinely referred to as *"bulk gas meters"* rather than *"bulk hot water meters."* The water meters should be referred to as hot water flow meters. The latter measure water volume only not gas or heat
The current practices for BHW allow for each type of meter to be separately read approximately 2-3 months apart with water volume calculations serving to calculate a guestimate as to how much gas was used by individual tenants allocated a hot water flow meter. Residential tenancy laws do not allow charges to be applied other than actual consumption charges where water meters do exist. The algorithm formulae currently in use to calculate guestimated consumption of gas

The term energization applies to an existing connection. That existing connection resides on common property infrastructure belonging to the Landlord. The supply is not terminated as occupiers of a multi-tenanted building move in and out. New occupiers, for the most part in such buildings, renting tenants, are not new customers with new supply addresses who "commence to take supply" as referred to under s46 of the GIA. They do not take unauthorized supply of energy. They take authorized supply of heated water supplied in water transmission pipes. The authority is enshrined within the Law, under mandated lease arrangements.

Hot water meters are not part of a distribution system for energy in the absence of an energized point individual apportioned. These devices though creatively defined for BHW purposes are not suitable devices through which gas consumption can be measured. Tenants in apartment blocks and flats do not receive energy. They receive heated water the cost of which is covered within the mandated terms of residential tenancy leases. The water is delivered in water pipes. No connection point/supply point/supply address exists in the individual apartments of recipients of heated water.

The energy is supplied to the outlet of the meter on common property infrastructure and is transported in gas transmission pipes to the water storage tank on common property infrastructure. The landlord takes supply of the energy.

As observed, a water meter does not form part of that distribution system. It is not associated with the supply of gas as:

Supply point and therefore supply address are clearly defined in existing provisions. They are synonymous with the definition above for distribution supply point. An energization point is similar except that it refers to reactivation of an existing energy connection.

In the case of BHW once the new supply is in place, energization is a continuous event, since unless the building is pulled down or the Landlord defaults on payment, the connection is ongoing regardless of how many transient tenants pass through.

The Landlord commences to take supply at the outlet of the meter and becomes the relevant customer from the moment of authorization and when the infrastructure is in place. This is not how the BHW provisions are being interpreted.

It is implied that end-users of heated water are accepting unauthorized supplies of gas or electricity, when in fact they are taking up a residential tenancy relying of their protections under another scheme – residential provisions that require the Landlord to pay for all utility components other than bottled gas that is not measured with an instrument fit for and designed for the purpose, namely for energy, a gas or electricity meter that is dedicated.

A single energization point on common property exists for BHW provision, and it heats a communal water tank belonging to the Landlord. The Landlord is the property contractual party.

For VENCorp Distributor-Retailer settlement purposes a single supply point/supply address exists – at the outlet of the meter. Therefore all supply and consumption charges belong to the Landlord. It is not the role of energy to act as billing agents for Landlords/Owners in order to assist with escape of those parties of their obligations. Nor is it the role of policy-makers and regulators to encroach on the existing legislation under other schemes, undermine landlord-tenant contractual relationships, or make inaccessible to individuals their existing enshrined rights under Acts of Parliament.

Massive supply charges, water meter reading fees and allegations of denial of access to meters (meaning hot water flow meters that do not measure gas or electricity, but rather simply water. The derived price is one based on calculation of water consumption.

Under the approved VENCorp Gas Meter Retail Rules supply point means a **gas** transmission **SUPPLY POINT** or a **DISTRIBUTION SUPPLY POINT**[128]

These terms are synonymous with SUPPLY ADDRESS, as also recognized within the VERC. A supply address is not the space between four walls occupied by a residential tenant, but has a technical meaning denoting a new connection or energization connection point in energy terms.

Template law and regulation designers need to be able to distinguish between embedded network energization and bulk hot water provision. The contractual implications are significant. The risk of consumer detriment and regulatory overlap between schemes and with common law provisions is high if these matters are not understood and made crystal clear.

Current and proposed jurisdictional rules relating to BHW pricing and charging for residential tenant usage include connection arrangements and definitions of "customer" that distort the original intent of deemed provisions under existing legislation in relation to bulk hot water arrangements; defy national trade measurement provisions in spirit and intent and will become formally illegal when remaining utility exemptions are lifted.

There are several fundamental flaws in the description given above of what retailers do. They do not deliver *"electric bulk hot water"* or *"gas bulk hot water"* from gas or electrical distribution systems. The heated water is delivered in water pipes belonging to common property infrastructure that have no connection or ancillary connection with the gas or electrical distribution systems.

There is no energization point other the single energization point on common property infrastructure that is on properties with bulk hot water tanks that are centrally heated.

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[128] These definitions are also applicable to the legislation wherein the *Gas Industry Act 2001* and the *Gas (Residual Provisions) Act 1994* are one and the same, and (Victorian) Ministerial Orders in Council also sustain similar definitions; this possibly also applies to South Australia and Queensland but not New South Wales

The (Victorian) *Gas Distribution System Code*[129] (VGSC) defines the **DISTRIBUTION SUPPLY POINT** (synonymous with supply point and supply address) as follows:

> ***DISTRIBUTION SUPPLY POINT (VGDSC – Gas Code)***
>
> *A point on a distribution system at which gas is withdrawn from the distribution system for delivery to a customer which is normally located at:*
>
> - *the inlet of a gas installation of a customer;*
> - *the outlet of a meter; or (as in the case of BHW connection points)*
> - *the end of a main;*
>
> *and includes a "supply point' and an "ancillary supply point" as defined in the Gas Industry Act*[130] *in relation to a distribution system.*
>
> *distribution system means a network of pipes, meters and controls which the Distributor uses to supply gas.*

> ***SUPPLY ADDRESS (VERC)** (synonymous with supply point meaning a physical connection)*
>
> ***supply address***[131] *includes:*
>
> *(a) for electricity, the relevant market connection point (as defined in the **National Electricity Code**) in respect of that supply address; and*
>
> *(b) for gas, the point where gas leaves the distribution system before being supplied to a **customer**, whether or not it passes through facilities owned or operated by another person after that point and before being so supplied*

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129 Changes are corrections to v8 of the *Gas Distribution System Code* applicable between September and December 2008 to be known as v9

130 Supply point and ancillary supply point are taken as one as the same within existing legislation. These definitions are also applicable to the legislation wherein the *Gas Industry Act 2001* and the *Gas (Residual Provisions) Act 1994* are one and the same, and (Victorian) Ministerial Orders in Council also sustain similar definitions; this possibly also applies to South Australia and Queensland but not New South Wales. Under the provisions of the latter, any supply point in existence prior to 1 July 1997 are taken as a single billing point. For the purposes of billing bulk hot water supply points are taken as a single supply point.
The VENCorp distributor-retailer settlement purposes all bulk gas meter supply points are taken as a single billing point. The vas majority of these installations in private rental properties are 30-40 years old and are occupied by tenants on lower incomes, many of them vulnerable, expecting under the enshrined rights of tenancies provisions to have heated water supplied within the cost of their rent, which for the most part rises bi-annually.

SUPPLY POINT (VERC); DISTRIBUTION SUPPLY POINT (Gas Code = VGDSC)[132]

supply point[133] *means the point where gas or electricity leaves the distribution system before being supplied to the customer, whether or not it passes through facilities owned or operated by another person after that point and before being so supplied.*

A supply address is not the space between four walls occupied by a residential tenant, but has a technical meaning denoting a new connection or energization connection point in energy terms.

Concerns have been expressed by many community organizations about the manner in which Landlord/Owner obligations are dismissed in the formation of energy provisions, This submission highlights those concerns again, which also have impacts on refusal by end-users of heated water, where they are clearly aware of their rights, to provide identification and contact details; to become involved in facilitating a contract with the Landlord/Owner or representative (which in any case already exists either implicitly or explicitly from the time that the gas metering installation is completed).

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131 Neither of these definitions applies to a residential tenant's apartment where no energization point exists and no energization meter associated with such premises. The energization point for BHW is a single one and for VENCorp Distributor-Retailer purposes is a single point.

In buildings where the gas metering installation was installed prior to 1 July 1997, the legislation provides this as a single billing point. Regarding tenants' addresses as supply point is to distort all of the fundamental meanings within energy laws and rules and their original intend and the practices adopted for charging represent regulatory overlap and interference with landlord-tenant contracts. The laws did not intend energy supplies to be billing agents for landlords so that heated water could be charged for twice. How could this have been intended to prevent "*price shock to end-consumers"*

132 These definitions are also applicable to the legislation wherein the *Gas Industry Act 2001* and the *Gas (Residual Provisions) Act 1994* are one and the same, and (Victorian) Ministerial Orders in Council also sustain similar definitions; this possibly also applies to South Australia and Queensland but not New South Wales

133 This clearly means the point of connection at the outlet of the meter regardless of what occurs after that point. Supply point and ancillary points and supply address are synonymous under the legislation and the Codes. Energization refers to an existing connection. Once a gas connection is installed for the purposes of providing heat to a communal BHW storage tank, energization is ongoing. No new supply or new customer applies as no re-energization takes place and the supply is at the outlet of the meter on common property infrastructure.

I show below relevant extracts concerning trade measurement and the Victorian *Residential Tenancy Act 1997*, the provisions of which are reflected in other states.

Residential Tenancies Act 1997 - SECT 53

Landlord's liability for various utility charges

53. Landlord's liability for various utility charges

(1) A landlord is liable for-

(a) the installation costs and charges in respect of the initial connection to rented premises of any electricity, water, gas, bottled gas or oil supply service;

(b) all charges in respect of the supply or use of electricity, gas (except bottled gas) or oil by the tenant at rented premises that are not separately metered;

(c) all charges arising from a water supply service to separately metered rented premises that are not based on the amount of water supplied to the premises;

(d) all costs and charges related to a water supply service to and water supplied to rented premises that are not separately metered;

(e) all sewerage disposal charges in respect of rented premises that are not separately metered imposed by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(f) all charges related to the supply of sewerage services or the supply or use of drainage services to or at the rented premises;

(g) all charges related to the supply or hire of gas bottles to the rented premises.

(2) A landlord may agree to take over liability for any cost or charge for which the tenant is liable under section 52.

(3) An agreement under subsection (2) must be in writing and be signed by the landlord.

Residential Tenancies Act 1997 - SECT 54

Landlord's liability for charges for supply to non-complying appliances

54. Landlord's liability for charges for supply to non-complying appliances

(1) A landlord is liable to pay for the cost of water supplied to or used at the rented premises for as long as the landlord is in breach of section 69 or of any law requiring the use of water efficient appliances for the premises.

(2) Subsection (1) applies despite anything to the contrary in section 52 of this Act and Part 13 of the Water Act 1989.

CALCULATION OF CONSUMPTION – TRADE MEASUREMENT AND UTILITY CONSIDERATIONS

I quote below directly from the NMI website:[134]

> ***Responsibility for Australia's trade measurement system is currently shared between the Commonwealth, States and Territories.***
>
> *The National Measurement Act 1960 prescribes the Australian legal units of measurement and describes how to demonstrate that a measurement has been made in terms of those units if this is required for legal purposes. The Act also provides for pattern approval of measuring instruments to ensure that the design of these instruments is suitable for accurate measurement under the normal environmental conditions encountered during use.*
>
> *Uniform Trade Measurement Legislation, developed by the Commonwealth, States and Territories, has been enacted by the States and Territories. Together with individual administration acts and regulations, this legislation provides the States and Territories with the means to regulate the accuracy of measuring instruments used for trade.*

> *The State and Territory governments require that all goods sold by measurement by weight, length, volume, area or count are accurately measured, labelled and the correct price calculated. This includes petrol pumps, shop scales, weighbridges, pre-packed articles, machines for measuring length etc. NMI is responsible for the pattern approval testing of models of measuring instruments. The following fair trading departments are the first point of contact for enquiries about weights and measures used in trade:*

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[134] National Trade Measurement Institute (NMI) *A national trade measurement system*
Found at
http://www.measurement.gov.au/index.cfm?event=object.showContent&objectID=C3EB158B-BCD6-81AC-1DC5A41E29837C8C
Last reviewed 11 March 2008

Future Commonwealth administration

Under the current system, changes to legislation have been introduced at different times in different jurisdictions leading to inconsistencies and different interpretations. Consequently, 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. MCCA subsequently recommended that a trade measurement system administered by the Commonwealth was the best option to remove existing structural problems, to rationalise the different regulatory regimes of the States and Territories, and to address the challenges presented by new measurement technologies.

COAG accepted the MCCA recommendation and, on 13 April 2007, formally agreed that the Commonwealth should assume responsibility for trade measurement. It was subsequently announced that NMI would take responsibility for administering the national system. The transition period for the transfer of responsibility from the States and Territories to the Commonwealth will be three years, with the new system commencing on 1 July 2010.

Trade measurement and utility provisions allow for better trade measurement practices. The current arrangements are in contravention of the spirit of this, despite the existence of remaining utility exemptions that will render current methods of calculation of energy consumption to be both invalid and illegal. Meanwhile, best practice standards for trade and utility measurement are non existent for the calculation of levels of consumption of bulk energy for hot water services that are part of the common property infrastructure of Owners' Corporation.

The National Measurement Institute (NMI) has openly acknowledged that [135]

> *In a modern society, many activities need reliable, legally traceable measurement, so that we can be confident of their integrity. These include:*
>
> - *trade measurements, such as in the supply of electricity, gas and water;*
> - *agricultural and mineral exports;*
> - *detection of drunk or speeding motorists;*
> - *monitoring of workplace noise or environmental contamination;*
> - *assessment of food quality; and*
> - *consumer transactions, such as buying food or petrol.*
>
> *In trade, the buyer expects to receive fair measure. Usually it is not feasible for an individual consumer to check this, so governments establish legal metrology systems to protect consumers' interests. Although systems for regulating weights and measures have existed in many societies for thousands of years, the range of consumer transactions has increased with time and with technological advances.*

The National Measurement Act 1960 Act No 64 of 1960 (with amendments to Act No 27 of 2004) provides as follows:

> ***18R Transactions by utility meters to be in prescribed units of measurement***
>
> *A person is guilty of an offence if:*
>
> *(a) the person sells a quantity of gas, electricity or water for a price; and*
>
> *(b the price is not a price determined by reference to a measurement of a quantity in the unit of measurement required by the regulations.*
>
> *Penalty: 50 penalty units.*

[135] Fact Sheet Legal Metrology – legal traceability of measurements, NMI found at *http://www.measurement.gov.au/assets/documents/nmiinternet/NMI3220060104093102%2Epdf*

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

Regulations associated with that Act, viz, *National Measurement Regulations Statutory Rules 1999 110*[136] currently exempt utility meters providing gas and electricity, but not cold water meters (with qualifying clauses) in all circumstances but there are future goals to remove such exemptions when the infrastructure is in place to accommodate such changes. State legislation in Victoria has not caught up with national standards and provisions,[137] despite the existence of the *Utilities Act 2002* (Victoria) (effective 2003) but without current regulations to match, so rather impotent for the last four years, thus compromising consumer protection).

With reference to the *National Measurement Regulations 1999 Statutory Rules 110*[138] it could be argued that unjust measurements are being applied and unjust pricing formulae *(notwithstanding apparent endorsement by the current Victorian energy regulator)* and that the principle that a penalty should apply to:

"a person whose act or omission causes or is likely to cause a measuring instrument in use for trade to give a measurement or other information that is incorrect is guilty of an offence if the person acted or omitted to act with the intention of causing that result of with reckless indifference to whether that result would be caused."[139]

Determinations of Recognised-value Standards of Measurement

National Measurement Institute:

(a) density of water (dated 21 March 1985)

(b) density of standard mean ocean water (dated 21 March 1985)

(c) dynamic viscosity of water at a temperature of 20°C (dated 21

136 *National Measurement Regulations 1999 Statutory Rules 1999 110 as amended made under the National Measurement Act 1960. Compiled to 1 July 2004 taking into account amendments up to SR 2004 No 132*

137 See further discussion in separate documentation relating to existing utilities provisions, State and Federal, and refer in particular to the National Measurement Institute's role and parameters

138 Ibid *National Measurement Regulations 1999 Statutory Rules 1999 110.*

139 Refer to *National Measurement Regulations 1999 Statutory Rules 1999 110 a amended made under the National Measurement Act 1960 s8(1) amended by No 17/2000 s7(1)*

March 1985)

(d) dynamic viscosity of water at a temperature in the range 19.98°C to 20.02°C (dated 21 March 1985)

Recognised value Standard of the Density of Water

In pursuance of paragraphs 8A(1)(a) and (b) of the National Measurement Act 1960, it was determined that the magnitude of the density of water dt at a temperature t and a mean pressure p shall be a recognized value standard of measurement, provided t lies within the range 0°C to 40°C and p lies within the range 2 × 104 Pa to 106 Pa. For the purposes of this Determination:

When p is 101 325 Pa and t is one of the temperatures listed in Table 2 the magnitude of the density in kg.m 3 is as stated in the table, which is derived from the following formula:

dt = 999.972 – (t – 3.984 9)2 / 506.603 12 × (t + 286.460 1) / (t + 67.760 1) where dt is the density in kg.m

3 and t is the temperature in °C.

(b) When p is 101 325 Pa and t is between two adjacent values of temperature listed in the attached table then the magnitude of the density in kg.m

3 shall be determined from the table by linear interpolation.

(c) When p differs from 101 325 Pa the magnitude of the density in kg.m

3 as stated in the attached table or derived therefrom in accordance with the above linear interpolation shall be algebraically increased by an amount equal to (5.061 9 – 0.030 9 t + 0.000 361 4 t2) ×10

7(p – 101 325).

(d) If the value of t used in the attached table and the above equations does not differ from the true mean temperature of the water by more than 0.1°C, if the value of p used in the equation does not differ from the true mean pressure within the water by more than 1 000 Pa, and if impurities in the water do not exceed 1 part in 105 by mass, the chance is not more than one in one hundred that the density so ascertained differs from the true density by more than 0.05 kg.m

Under Section 89 of the NMA, limits of error for utility meters are described as follows

> *89 Utility meters – limits of error (Act, s 18V)*
>
> *The maximum permissible error for a utility meter is set out in Schedule 12 and in the certificate for the utility meter*

8. Unjust measurement

(1) A person who uses for trade a measuring instrument that is incorrect is guilty of an offence.

- *200 penalty units.*

S. 8(1) amended by No. 17/2000 s.7(1).

(2) A person who uses for trade a measuring instrument in a manner that is unjust is guilty of an offence.

5. 200 penalty units.

(3) A person whose act or omission causes or is likely to cause a measuring instrument in use for trade to give a measurement or other information that is incorrect is guilty of an offence if the person acted or omitted to act with the intention of causing that result or with reckless indifference to whether that result would be caused.

7. 200 penalty units.

S8(4) Substituted by No 17/2000 s7(2)

(4) If an inspector finds a measuring instrument being used for trade that is incorrect or is being used in a way that is unjust, the inspector may give to the owner or user of the measuring instrument a written notice—

(a) stating—

(i) the measuring instrument is incorrect; or

(ii) the way the person is using it is unjust; and

(b) requiring the person to take stated steps to stop contravening the relevant sub-section within a stated period, of not more than 28 days.

S 8(5) inserted by No 17/200 s 7(2)

(5) If the person complies with the notice, the person is taken not to have committed an offence against this section in relation to the circumstances to which the notice relates.

(6) If a person commits an offence against this section, any contract to which the person is a party and which is made by reference to a measurement to which the offence relates is voidable at the option of another party to the contract.

S. 8(6) inserted by No. 17/2000 s. 7(2).

9.Supplying incorrect measuring instrument

(1)For the purposes of this section, a measuring instrument is unacceptable for trade use if it is incorrect or is not of an approved pattern.

(2)If a measuring instrument that is unacceptable for trade use is used for trade, a person who sold, leased, hired or lent it to the person who used it for trade is guilty of an offence. 200 penalty units.

S. 9(1) amended by No. 17/2000 s 8.

Refer to VESC (2005) Bulk Hot Water Charging Guideline 20(1)[140] and all associated deliberative, consultation and decision documents – see VESC website. This Guideline is on the brink of appeal solely because the DPI has taken over the derived price charging formula. This may well mean that access to the original deliberative documents explaining the conceptual thinking that engineered adoption of the Guideline, most provisions to be retained and transferred to the VERC ill be less accessible.

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[140] ESC Energy Industry Guideline 2005 20(1) Bulk Hot Water Charging Guideline (1) (December) found at *http://www.esc.vic.gov.au/NR/rdonlyres/C0E6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf*
ESC Final Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (December) (23 pages) found at *http://www.esc.vic.gov.au/NR/rdonlyres/4554EA66-6F9E-49C8-934E-1E8232D989AC/0/FDP_EnergyRetailCodeAmendmentsFinalDec05.pdf*
ESC Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August) *http://www.esc.vic.gov.au/NR/rdonlyres/37078658-5212-4FA7-8A8E-AC42AB12BDDC/0/DDP_EnergyRetailCodeTechAmend20050810_CommissionPap_C_05_8007.pdf*
ESC 2004 Final Report Review of Bulk Hot Water Billing Arrangements (September) found at *http://www.esc.vic.gov.au/NR/rdonlyres/20C3454F-0A47-428B-845B-1D7D85FBE572/0/FinalReviewBulkHotWaterBillingSept04.pdf*
ESC 2004 Draft Report Review of Bulk Hot Water Billing Arrangements (July) found at *http://www.esc.vic.gov.au/NR/rdonlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf*

Correspondence between February and August 2004 between Department of Primary Industries {DPI} (Victoria) and VESC February – August 2004, notably dated 13 May; 16 July; 11 August 2004 respectively from Richard Bolt, then Exec Dir Energy and Security DPI expressing concerns about BHW billing arrangements Other DPI correspondence and replies from VESC same sources not available online as submissions and concerns from DPI on this matter.

Response to ESC re Draft Report Review BHW Billing dated 29 July 2004 from the Supplier supporting non-site visit billing and supporting option 2, fixed conversion factor without site visits for meter reading CF historic level; 0.49724 MJ per litre in GTO would require retailers to annually gazette CF and cents per litre hot water rate plus appropriate BWH tariff, i.e. Tariff 10/11 all based on conceptual model of billing..

The vast majority of its provisions, along with contractual considerations contained previously in deliberative documents of 2004 and 2005 that led to its formation, and ultimately implementation on 1 March 2006 are to be transferred to the Energy Retail Code.

Since the contractual model is to be retained, and since the VESC will presumably continue to have regulatory control over any breaches of process, including what is included on bills, how disconnection is effected and which commodity is disconnected, it would appear after all that the transfer of provisions to the VERC is not so much a reflection of redundancy as expedience.

The current conversion factor in the said guideline is shown as:

CF = the gas bulk hot water conversion factor = 0.49724 MJ per litre, with the gas bulk hot water tariff shown as "the market tariff applicable to the bulk hot water unit"

"Option 2 Fixed conversion factor (ADOPTED) (See Final Report Review of Bulk Hot Water Arrangements (September 2004) (ESCV) and Bulk Hot Water Guideline (2)(1).

Fix the conversion factor at the historic level of 0.49724 MJ per litre in the GTO (or current equivalent). The billing arrangements for gas BHW then would require the retailers to include the conversion factor and cents per litre hot water rate in the annual gazette of scheduled gas tariffs (along with the appropriate gas BHW tariff, that is, Tariff 10/11).

"Flat rate: All hot water consumption is billed at a flat rate per litre (rate derived from natural gas tariff and multiplied by the conversion factor).

Options considered for the VESC bulk hot water charging guideline 20(1) December 2005:

The several options considered at that time were considered to be "equivalent" to each other provided that the conversion factor was set correctly.

> *"To the extent that they are consistent with the approved tariffs above (Tariffs 04/05 and Tariffs 10/11) retailers can determine how to apportion the gas charge for heating water. Following give options for apportionment…."*

The following options were examined. They indicate the amazing range of conceptual and pragmatic decisions that can be made about apportioning gas usage that most end-users would take to be accurate readings of their own consumption of gas for heating a cold tank, using a meter that was designed to measure individual gas consumption as an instrument through which gas passes and its associated equipment to filter regulate and control gas.

> ***Flat rate:*** *All hot water consumption is billed at a flat rate per litre (rate derived from natural gas tariff and multiplied by the conversion factor*
>
> ***Variable billing (in litres)*** *this formulae involves reading from a master Cold Water and Master Gas Meter*
>
> ***Billing in mega joules (1)*** *this formulae involves reading from a master Cold Water and Master Gas Meter to derive a rate per litre.*
>
> ***Billing in mega joules (2):*** *This formulae is used where no cold water meter is required but the sum of all hot water consumed is divided into the gas consumed from the Master Gas Meter to give a litres per mega joule rate. The gas tariff is then applied to this individual consumption by reading individual (hot water) meters.*

In the bulk hot water provisions contained with the allegedly flawed *Hot Water Charging Guideline 20(1)* apparently stripping end-users of bulk energy of inherent rights and protections already *"purchased"* under an Act of Parliament *(Residential Tenancies Act 1997 s53),* and other protections, no separate gas meter exists for individual occupiers of tenanted dwellings, or even owner/occupiers sharing a common property hot water service installation.

The general public and even those more closely associated with the gas industry may be forgiven for mistaking the above wording as implying the existence of separate gas meters whether openly displayed or behind locked doors.

It takes no imagination to see how these magic formulae might be considered to infringe on contractual consumer rights and fair trading practices.

Importantly, the impact on consumer rights and entitlements under contractual law, fair trading practices, and perhaps trade practice considerations is obvious and deserves careful scrutiny.

The existing provisions impact on existing energy provisions impact on some. **26,000** Victorian bulk gas consumers using a total of approx 2100 master bulk gas meters are affected by this Guideline and approximately 206 using the 15 only master bulk electricity meters (Origin and AGL only). Disparity, discrepancy in service quality; inappropriate threats of disconnection are all issues that deserve urgent policy scrutiny.

Similar provisions in other States similarly adversely impact on end-consumers who should not be considered to be contractually responsible. The provisions have assumed responsibility, improperly and without just cause to re-write contractual law.

CONVERSION FACTORS ORIGINALLY ADOPTED FOR "BHW CHARGING"

Effective date 1 March 2006. Subject to change now under DPI Control. Explanatory Notes to be repealed therefore rationale less transparent

Extract from deliberative documents ECV

Applicable Term: CONVERSION FACTORS

Definition`

*Cost of Supply (Charge) 'theoretical' revenue = (B) = (L * X) + (M * Y) + (N * Z)*

Where L = mega joules recorded at master meters (supplied by retailers)

X = Tariff 10 commodity charge (as per government gazette)

M = number of gas bulk hot water sites (as provided by retailers)

Y = Tariff 10 per site supply charge (as per government gazette)

N = number of gas bulk hot water customers (as provided by retailers)

Z = per customer hot water meter charge (as charged in South Australia to recover additional infrastructure support costs, including meter installation, maintenance and readings)

When A < B, a retailer has recovered less revenue than the theoretical revenue

When A > B, a retailer has recovered more revenue than the theoretical revenue

The BHWCG 2005 Appendix 1 apparently permits:

"Retailer provided gas bulk to water per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant gas bulk hot water unit divided by the number of customers supplied by the relevant gas bulk hot water unit. Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff."

Further the definition of customer gas bulk hot water charge (cents) is shown as below in the Guideline:

*"customer gas bulk hot water charge (cents) = "the customer's metered consumption of hot water (litres) (**not energy measured in cu metres or megajoules**), at a gas bulk hot water price (cents per litre) + customer's supply charge (cents)*

Billing in mega joules (2): This formula is used where no cold water meter is required by calculating the sum of all hot water consumed then divided into the gas consumed from the Master Gas Meter[141] *to give a litres per mega joule rate. The gas tariff is then applied to this individual consumption*[142] *by reading individual (hot water flow) meters.*[143]

"Billing in mega joules (1): this formulae involves reading from a master Cold Water[144] *and Master Gas Meter to derive litres per megajoules*

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141 There is only of energization point serving a communal water tank on common property infrastructure. Though it is understood that a conversion rate is used, it is absurd to attempt to charge for gas based on a litre per megajoule rate or MJ per litre rate.

142 The individual consumption is of water volume only, not gas or heat, neither of which can possibly be measured or approximated to the functions of a hot water flow meter. Since site specific reading of meters was rejected as an option and a fixed conversion factor option adopted instead at the outset, it is mystery how claims can be made that "individual consumption of hot water is monitored and gas charges apply." It is also a mystery why denial of access to water meters is made an issue through which disconnection of heated water can be achieved when no site readings were necessary. This has implications for bill smoothing and estimates. The guestimates of deemed as usage are always estimates based on an unsound calculation formula Changes to tariff or concealment of the formula explanation will not make the practices more sound or appropriate.

143 The site specific reading option was rejected. This calculation appears to revolve around calculating the tank size, occasionally reading the energization gas meter that feeds the tank, and at some other stage before of after reading individual hot water flow meters to calculate water volume. Since if the readings are taken at all they occur some two months apart, it is impossible to know how anyone can know how much heated water was used in total and when the tank was refilled. In any case, the end-user receives heated water a composite product from which the heated component can neither be separated nor calculated. No-one would buy a bag of applies without proof that an instrument designed for the purpose was used to calculate weight at a set price per kilogram. Gas cannot me measured in MJ/litre or kilolitre. Despite re-definition of the term meter for BHW purposes as "a device that records water consumption of bulk hot water consumed at a customer's supply address" the use of the term supply address is inappropriate and the calculate method invalid

144 Water is supplied by a Water Authority to a cold water meter. The Landlord is required to pay for cold water supplied in this way. It is reticulated to a boiler tank in water pipes that are unconnected to the gas distribution system as this is descried in all provisions current and proposed. Measuring the total consumption of cold water and then the gas bulk meter described as "Master Gas Meter" is hardly a legitimate means of calculating individual hot water consumption and allocating contractual status for energy supplied to a single energization point on common property infrastructure

Where hot water flow meters exist they measure water volume not gas volume or heat. Gas energization points measure gas volume not heat or water. The two systems are incompatible since the heat is supplied to a single communal boiler tank.

ELECTRIC BULK HOT WATER CONVERSION FACTOR (Proposed new term for Energy Retail Code to be transferred from existing VESC Bulk Hot Water Charging Guideline 20(1)

"is the conversion factor detailed in this guideline (BWH) used to convert the measured bulk hot water consumption of a customer[145] *(in kilolitres) to a deemed electricity usage (in KW-h)*[146]

MK Comment

CONVERSION FACTOR

See further comments under gas bulk hot water conversion factor below

The conversion factor (as a fixed price rate based on an attempt to correlate water volume with usage of electricity) is to be included on bills in KW-h/kilolitre for delivery of electric bulk hot water. Retailers do not deliver water or arrange for this to be done. They supply through the Distributor energy to a single energization point (supply point) at the outlet of the mains on common property infrastructure. The energy is used to heat a communal boiler tank. The energy is delivered prior to conversion of stored cold water into a composite heated water product.

In strictly contractual terms, delivery of the energy to the mains outlet is a past event. Thereafter what gets delivered is a composite water product in water pipes belonging to the landlord carrying this to individual apartments.

Correctly defining the supply point from an energization viewpoint is crucial to determining contractual responsibility leaving aside any formulae that is adopted for pricing that may not meed trade measurement calculation standards.

Besides calculation there is the question of using an instrument designed for the purpose. With no stretch of imagination can a hot water flow meter, which measures water volume only, not gas or heat, be considered s suitable device through which gas or electricity can be measured and individually apportioned.

The conversion factor is determined by a formula which measures water volume consumption, calculates costs in cents per litre and converts that to deemed gas usage.

It is not the end-user of heated water who receives the energy, but rather the Landlord. Retailers are not licenced to sell restrict or disconnect heated water supplies, yet they threaten to do so and may effect this apparently with policy maker and regulator sanction.

145 Will customer and relevant customer be used interchangeably for these purposes?

146 How will bill smoothing take place? How will overcharging be monitored? How will the maximum number of estimated reads be achieved within a 6 or 12 month period?

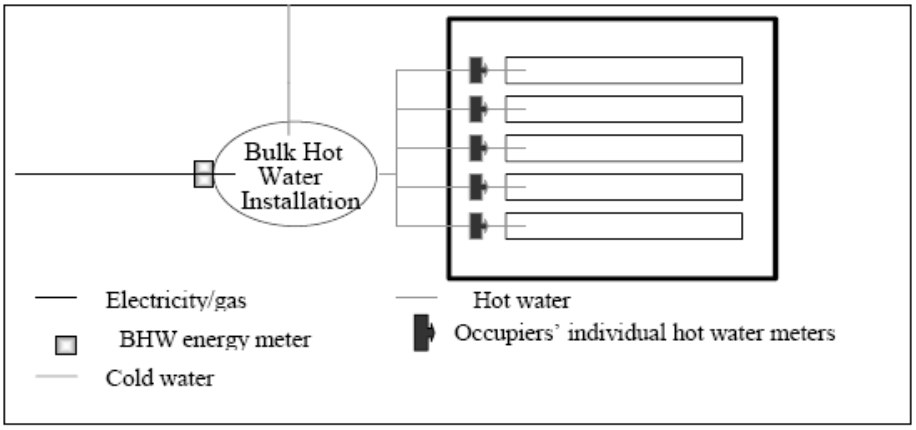
Such calculations will become formally illegal when remaining trade measurement utility restrictions are lifted and will carry high penalties.

Not only will the calculations be invalid but also the use of a device that does not show legally traceable measurement. See Part V 18R of the *National Measurement Act 1960,* the default in Victoria.

This will be not only on the basis of the calculation, but also on the basis of the instrument used to calculate gas or electricity usage.

Please see all other comments under **GAS BULK HOT WATER CONVERSION FACTOR** below

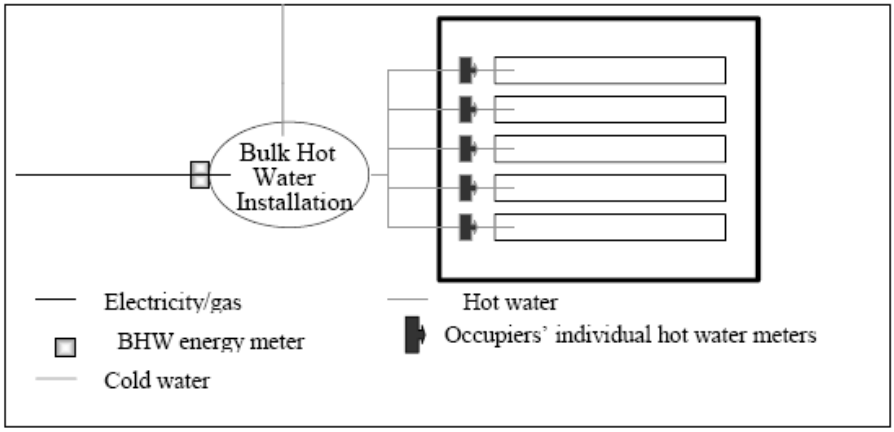
Figure 2.1 Bulk hot water flow of energy



GAS BULK HOT WATER CONVERSION FACTOR (Proposed new term for Energy Retail Code to be transferred from existing VESC Bulk Hot Water Charging Guideline 20(1)

"is the conversion factor[147] *detailed in this guideline (BWH) used to convert the measured bulk hot water consumption of a customer (in kilolitres) to a deemed electricity usage (in KW-h)*[148]

Figure 2.1 Bulk hot water flow of energy



GAS BULK HOT WATER CONVERSION FACTOR

See further comments under *"Electric Bulk Hot Water Conversion bulk hot water conversion factor"*.

The same principles apply. By far the vast majority of BHW storage systems use gas for energization through a single energization point.

The conversion factor, as a fixed price rate based on an attempt to correlate water volume with usage of gas) is to be included on bills in KW-h/kilolitre for delivery of electric bulk hot water. The formulae in itself, derived in such a way, has implications for the contractual matters.

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147 Such calculations will become formally illegal when remaining trade measurement utility restrictions are lifted and will carry high penalties. Not only will the calculations be invalid but also the use of a device that does not show legally traceable measurement. See Part V 18R of the *National Measurement Act 1960*, the default in Victoria

148 How will bill smoothing take place? How will overcharging be monitored? How will the maximum number of estimated reads be achieved within a 6 or 12 month period?

There are numerous contractual implications of the conversion factor philosophy in deriving prices for *"delivery of gas bulk hot water"* and *"delivery of electric bulk water"* terms that do not convey what is happening and how and whether they are compatible with the fundamentals of contractual law and considerations of overlap and conflict also with other provisions,[149] given the complex technical considerations involved. These are discussed shortly under this heading to put into context the derived price concept.

Given that the VESC has retained the contractual rationale of the bulk hot water provisions and proposes to transfer these from existing deliberative documents and a Guideline (VESC Guideline 20(1) Clause 3.3 and 4.2 of the *Energy Retail Code*, it is debatable whether the Guideline is actually redundant. It has merely been moved to another part of the regulations, and the VESC still appears to retain control and decision-making for contractual and disconnection papers.

If this is not the case and the only decision to be retained by the VESC is what is shown on the bills, there are still contractual considerations that need to be considered by the VESC, DPI, Retail Policy Working Group (RPWG), NECF and all other relevant MCE and other arenas.

Meanwhile, under the heading **CONVERSION FACTOR**, I focus on the conversion factor considerations as they impact on measurement and calculation practices that have a direct relation to the spirit and intent of existing national trade measurement laws.

The DPI is to take control of the formulae and negotiation of the regulated price provision of energy used for the heating of communal water tanks, commonly referred to as *"bulk hot water arrangements."*

However, given the trade measurement and derived price through conversion factor formulae to be used, it is pertinent to begin with a discussion of the implications of these principle decisions, which are inextricably bound in with contractual considerations.

Attempts to segregate the two issues will mean incomplete consideration of many of the central factors in the governance model for both contract and the practical application of these provisions. The provisions were sanctioned in December 2005, and adopted on 1 March 2006.

Though the details of the derived fixed price by conversion factor formulae may change, and presumably be transparently published online on the DPI website, the principle remains the same, with both the DPI and the VESC attempting to consolidate and validate the conceptual thinking that led to the adoption of these measurement, calculation and contractual considerations.

The conversion factor is determined by a formula which measures water volume consumption, calculates costs in cents per litre and converts that to deemed gas usage.

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[149] Note s15 of the Essential Services Commission Act 2001 specifically disallows overlap and conflict with other schemes current and proposed, yet the provisions appear to do just that. The same provisions are reinforced in the Memorandum of Understanding (MOU) dated 18 October 2007 between Consumer Affairs Victoria and Essential Services Commission

Such calculations will become formally illegal when remaining trade measurement utility restrictions are lifted and will carry high penalties. Not only will the calculations be invalid but also the use of a device that does not show legally traceable measurement. See Part V 18R of the *National Measurement Act 1960,* the default in Victoria.

This will be not only on the basis of the calculation, but also on the basis of the instrument used to calculate gas or electricity usage.

See further comments under gas bulk hot water conversion factor below.

Gas is measured in cubic meters or megajoules. Electricity is measured in KW/h. Expressing gas in MJ/litre or KW-h/litre is not a technically sound formula since gas cannot possibly be calculated on the basis of water volume. Therefore the fixed conversion factor formulae is in the first place unsound, not technically feasible, and against the most fundamental concepts of acceptable trade measurement practice.

Any measurement that allows for **water volume** calculations or some other equivalent in the price derivation exercise, to be part of the equation that calculates energy consumption is fundamentally flawed and needs to be urgently reconsidered in the interested of best practice standards, to say nothing on upholding the spirit and intent of legislative and other provisions in more than one legislative jurisdiction.

Consumption should be based on actual or estimated energy consumption by reading of a meter designed for the purpose of measuring energy, not water. This was rejected as an option as being too expensive and inconvenient. Leaving aside these considerations and how the price is derived.

In Victoria recently Preston market grocers were fined huge sums for providing produce that was charged in a way that was discrepant to the weighing scales. Whether or not an error, the penalty was high. For goods, enforcement action is taken. When it comes to services, no-one bothers to monitor how things are charged as long as it is convenient.

Whether a landlord is being charged or individual tenants, transparency and good trade practice is surely expected. If the landlord is overcharged it is reflected in the tents. If the tenants are charged they are paying twice, once within their the terms of their leases, and once when a landlord billing agent known as an energy supplier tries to bill them also, apparently with policy-maker and regulatory instruction. This is not acceptable practice either.

The DPI and ESC need to review existing policies and work out how they may be against the principles of best practice – at the very least. Beyond that they are about to become formally illegal with high penalties and they present regulatory overlap with other schemes and with common law rights of individuals. Regulatory overlap and conflict with other schemes is specifically disallowed under ts15 of the *Essential Services Act 2001.*

One would not expect to weigh a bar of chocolate with an oil funnel. Nor would one expect gas or electricity consumption to be measured with the aid of water meters. Yet that is exactly what is happening under current provisions in more than one state. This amazing anomaly practice, evidently endorsed by current state energy provisions and intended trade measurement needs to be urgently addressed, even in the interim, it there is the smallest commitment to consumer interests.

The spirit and intent of existing national and state trade measurement and utility legislation prohibits the use of inappropriate trade measure instruments. Indeed, once utility exemptions are lifted such practices will become not only invalid but illegal. This was recognized at the time of adoption of bulk hot water pricing and charging guidelines currently relied upon in more than one state.

Ultimately lifting of current exemptions will include all gas, electricity and water meters. Some exemptions have already been lifted including for cold water meters.

Current methodologies in use to calculate individual tenants' gas consumption for the heating component of heated water supplied will become both invalid and illegal once those restrictions are lifted. Meanwhile, the debate continues about what should be included in national trade measurement standards.

Under current provisions, water meters, normally owned by energy retailers and fitted with the consent of an Owners' Corporation entity with whom an implicit explicit contract is formed between retailer and body corporate, are currently theoretically used to measure water volume usage by embedded customers without separate gas or electric meters, and then the individual consumption of gas or electricity by such consumers guestimated using magical conversion formulae expressed in cents per litre, whereas gas is measured in cubic meters or megajoules and electricity in KW-h.

Site specific reading options were discussed during deliberations prior to the adoption in Victoria of the Bulk Hot Water Charging Guideline VESC-GL-20(1) 2005 (December).

The decision by energy suppliers and others to creatively apply this term *"deemed contract"* to those after FRC who were supplied by bulk gas energy through a single meter following either an implicit or explicit arrangement with the Owners' Corporation , does not impose a legal contract with the end-user of bulk energy.

These complexities and nuances are legal and technical matters not as clearly understood even by those making the rules. I venture to say that poor understanding of the niceties of contract law have given rise to interpretative flaws.

The general perception that existing interpretations apply simply because of pragmatic arrangements that do not even uphold the intent and spirit of trade measurement provisions has given rise to apparent exploitation of those least able to fight back – the soft the targets who have faced detriment from the outset.

I again refer to National Measurement provisions provide that:

> *"a person whose act or omission causes or is likely to cause a measuring instrument in use for trade to give a measurement or other information that is incorrect is guilty of an offence if the person acted or omitted to act with the intention of causing that result of with reckless indifference to whether that result would be caused"*

The National Measurement Act 1960 Act No 64 of 1960 (with amendments to Act No 27 of 2004) provides as follows:

> ***18R Transactions by utility meters to be in prescribed units of measurement***
>
> *A person is guilty of an offence if:*
>
> *(a) the person sells a quantity of gas, electricity or water for a price; and*
>
> *(b the price is not a price determined by reference to a measurement of a quantity in the unit of measurement required by the regulations.*
>
> *Penalty: 50 penalty units.*
>
> *Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.*

The intent here is not simply to refer to a price that is calculated by algorithm using an instrument not designed for the purpose (i.e. to measure gas volume) but rather to measure another commodity and deem the volume of gas used and therefore the price applicable, leaving aside all of the contractual and technical arguments raised in other contexts.

It is incorrect to suggest that a hot water flow meter can "monitor gas consumption or that a contractual relationship exists under the current trade measurement practices for BHW because of the existence of hot water flow meters.

The NMI Legal metrology philosophy recognizes that:

> *In a modern society, many activities need reliable, legally traceable measurement, so that we can be confident of their integrity. These include:*
>
> *(e) trade measurements, such as in the supply of electricity, gas and water;*
>
> *In trade the buyer expects to receive fair measure. Usually it is not feasible for an individual consumer to check this so governments establish legal metrology systems to protect consumers' interests. Although systems for regulating weights and measures have existed in many societies for thousands of years the range of consumer transactions has increased with time and with technological advances*

Refer the *National Measurement Act 1960* Part V 18R, subject to pending exemptions being lifted for remaining utility meters, using methods that will represent an offence in terms of calculation methodology.

> ***8. Unjust measurement***
>
> *(1) A person who uses for trade a measuring instrument that is incorrect is guilty of an offence.*
>
> *1. 200 penalty units.*
>
> *(2) A person who uses for trade a measuring instrument in a manner that is unjust is guilty of an offence.*
>
> • *200 penalty units.*
>
> *(3) A person whose act or omission causes or is likely to cause a measuring instrument in use for trade to give a measurement or other information that is incorrect is guilty of an offence if the person acted or omitted to act with the intention of causing that result or with reckless indifference to whether that result would be caused.*
>
> • *200 penalty units.*
>
> *(4) If an inspector finds a measuring instrument being used for trade that is incorrect or is being used in a way that is unjust, the inspector may give to*

S. 8(1) amended by No. 17/2000 s.7(1).

S8(4) Substituted by No 17/2000 s7(2)

the owner or user of the measuring instrument a written notice—

(a) stating—

(i) the measuring instrument is incorrect; or

(ii) the way the person is using it is unjust; and

(b) requiring the person to take stated steps to stop contravening the relevant sub-section within a stated period, of not more than 28 days.

S 8(5) inserted by No 17/200 s 7(2)

(5) If the person complies with the notice, the person is taken not to have committed an offence against this section in relation to the circumstances to which the notice relates.

(6) If a person commits an offence against this section, any contract to which the person is a party and which is made by reference to a measurement to which the offence relates is voidable at the option of another party to the contract.

S. 8(6) inserted by No. 17/2000 s. 7(2).

9.Supplying incorrect measuring instrument

S. 9(1) amended by No. 17/2000 s 8.

(1)For the purposes of this section, a measuring instrument is unacceptable for trade use if it is incorrect or is not of an approved pattern.

If a measuring instrument that is unacceptable for trade use is used for trade, a person who sold, leased, hired or lent it to the person who used it for trade is guilty of an offence. 200 penalty units.

DISCUSSION OF THE PROPOSAL TO REPEAL APPENDIX 1 (2.1.2) FROM THE BHW GUIDELINE AND IMPLICATIONS FOR TRANSPARENCY WITH A SINGLE REFERENCE ONLY THE DPI'S INVOLVEMENT IN DETERMINING THE PRICING FORMULAE

Existing Provision

2.1.2 Appendix 1 will not change before 31 December 2007. The Victorian Government will confirm the electric bulk hot water pricing formulae from 1 January 2008 as part of any electricity pricing arrangements applicable for that period.

Issue

The transfer date has passed and responsibility for determining the electric bulk hot water pricing formulae has been transferred to the Victorian Government. This clause is now redundant.

Draft DPI/ESC Decision:

Repeal

MK Comment:

It is to be hoped that if these provisions are retained despite all arguments, the policies and calculation methodologies complete with explanatory information will be transparently published on the DPI, ESC websites and on retailers' websites also.

As with Appendix 2 for electricity, the formulae in current use or anything similar appears to be technically, legally and contractually unsound and also represents significant regulatory overlap with other schemes.

The calculation methodology is inconsistent with the intent and spirit of national trade measurement laws and will become formally illegal with high penalties when remaining utility exemptions are lifted as is the intent. See Section 18R Part V *National Measurement Act 1960*.

Same principles as 2.2.1. See under that heading Repeal of Appendix 1

Repeal of both Appendixes 1 and 2 has been justified by the VESC reference to expiry of transfer date from VESC to DPI and reference to *"gas bulk hot water pricing formulae"* from 1 January 2008 being part of any gas pricing arrangements at the time.

Clause 2.1.1 requires the calculation of gas BHW charges to be in accordance with a regulated formula. The rule will be retained and transferred to Clause 3.3 of the *Energy Retail Code*. Such a transfer will not validate the contractual allocations or trade measurement practices in use and proposed.

This reflects the proposals by the DPI to make changes, either by "negotiated regulation" or set tariffs to Appendix 1 (gas BHW charging) and Appendix 2 (electric bulk hot water charging formulae) using conversion factor algorithms that rely upon theoretical measurement of water volume by relying on hot water flow meters that measure water volume only not gas volume or heat. The single energized bulk gas meters measure gas volume only not heat or water.

There is uncertainty as to where Appendices 1 and 2 will reside and be transparently published. If not published within the VERC, they should be transparently published on the DPI, ESC websites and the websites of all retailers or providers.

There is no clear proposal to include this within the VERC.

Though site reading was not mandated but rather considered at the deliberative stages in 2004 and 2005 too expensive and inconvenient, retailers are continuing to charge water meter reading fees (because the distributor makes these charges) and to threaten disconnection of composite water products, though only licenced to sell gas and electricity as measured through energization points.

Creative conversion of water meters into gas meters and gas supply points does not validate the water hot water flow meters, whoever owns them, as suitable instruments through which to calculate gas or electricity consumption.

The new NECF Law should clearly clarify and differentiate between those receiving energy from energization points and those who are at risk of being considered energy customers, where in fact they are receiving a composite heated water product from the Landlord as part of mandated residential tenancy lease arrangements. The heating component of the energy used to heat a communal boiler tank used by multiple tenants can neither be measured nor apportioned by legally traceable means. The gas bulk meter, considered to be a single billing point within the legislation and for VenCorp distributor-retailer settlement purposes measures gas volume not heat. The hot water flow meters measure water volume not gas or heat

This has implications for deemed supply, distributor supply arrangements, contractual obligations; provision of personal identification, access to meters; regulatory overlap with other schemes and a host of issues fundamental to the current and proposed governance model.

The current formulae is as follows:

> *Appendix 1 extract Gas Bulk Hot Water Charging (to be repealed and replaced in ERC with DPI reference*
>
> **CF (conversion factor) = 0.49724 MJ per litre*
>
> *Gas bulk hot water tariff = the gas tariff applicable to the gas bulk hot water unit (gas tariff 10/11)*
>
> *Where the customers are charged for energy in delivering has bulk hot water pursuant to a market contract*
>
> *CF = the gas bulk hot water conversion factor = 0.49724 MJ per litre*
>
> *Gas bulk hot water tariff = the market tariff applicable to the bulk hot water unit*
>
> *B. **Retailer** provided **gas bulk hot water** per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant **gas bulk hot water** unit divided by the number of **customers** supplied by the relevant **gas bulk hot water** unit.*
>
> ***Retailers** may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.*
>
> *C. **Customer gas bulk hot water** charge (cents) = the **customer's** metered consumption of hot water (litres)*

There is no correlation between water volume measures and deemed gas usage. The derived rate is contrived, imprecise, not legally traceable in terms of consumption, and not an approved method of apportioning contractual status and costs. No matter how the formula is changed, a conceptual model such as this, which has no regard for energization concepts is just not sustainable or just.

There is one supply point/supply address. For Distributor-Retailer settlement purposes a single billing point and a single supply point exists. This should attract a single charge. Instead retailers appear to have leeway to cont up the number of customers deemed to be receiving energy and apportion supply costs amongst them instead of to the Landlord.

Massive supply charges or commodity charges are being included on many bills. Some explain a water meter reading fee which for remote reading is apparently at least three or four times greater than for site reading – which is a perversity.

Retailers can choose not to charge the supply charge or may roll over.

For the small amount of heated water used the charges are unacceptably high.

The tenancy laws are quite explicit about supply charges in these circumstances – they are Landlord responsibility and should be directed to the Landlord.

As to consumption charges, unless legally traceable consumption can be shown for the heated component of water, these are Landlord responsibility also. He must pay for cold water obtained from the Mains.

The heating component cannot be separated from the composite water product.

No gas service pipe or gas transmission pipe carries gas into a tenant's apartment. An individual flat or apartment is not a supply address or supply point which is clearly defined within the Codes and legislation.

The tenant receives a composite water product reticulated in a water pipe unconnected to the gas service pipes that are part of the distribution system and service.

The water meters, though often owned by retailers are merely devices through which water volume can be measured.

The quantity of water used is of no relevance to retailers, who are licenced to sell gas and electricity and to disconnect only those items in a specified manner under specified circumstances.

The contractual rationale endeavours to impinge on the private contractual relationship between landlord and tenant and is based on calculation of a commodity that is unrelated to the energy deemed to be used.

The landlord accepts supply and contractual responsibility from the moment he seeks for the gas or electricity installation to be put in place, and a supply charge applies from that time.

Whilst the energy is supplied to the outlet of the main on common property infrastructure, it is transmitted in gas pipes to a communal water tank belonging to the Landlord on common property infrastructure. Once heated, it is reticulated in water pipes to various apartments. For BHW no gas or electricity is transmitted into individual apartments at all.

Therefore the supply is to the landlord only who should be sent all bills.

These arrangements strip from residential tenants their enshrined rights under multiple provisions the written and unwritten laws, including residential tenancy lease terms as are mandated. The Landlord has to pay for all utilities barring bottled gas unless legally traceable consumption can be shown for utilities utility charged form.

The *RTA* provisions exist for recovery, but the process is slow and cumbersome, from the time of receiving a bill and lodging a claim with the Landlord for reimbursement 28 days must elapse before making a VCAT application. Filing fees are involved which could offset the cost of recovery. There is time, stress and upfront payment required, often at the expense of those who are least able to deal with the stress.

Retailers are not billing agents for landlords.

They are licenced in a particular way to provide a particular commodity. These arrangements make a mockery of the enshrined rights of end-consumers of heated water services that form an integral part of their lease arrangements as mandated.

There is no logical reason to go to the expense of reading two different types of meters, which if read at all, are read some two months apart by separate meter reading parties. The additional processes add to costs and achieve nothing.

Landlords continue to put rents up twice a year as allowed.

If they make collusive arrangements with retailers to provide "billing services" to recover utility costs that are already included in the rent, and are aided in the exercise by regulations that allow contractual, trade measure and calculation methods that do not measure up to scrutiny, what protections can consumers expect at all in terms of upholding their existing rights under other schemes.

The *Essential Services Commission Act 2001* s15 specifically disallows regulatory overlap with other schemes.

There is no reason why landlords cannot be sent the bills directly with transparent accounts of how these are calculated. This would involve a single reading of meters, one lot of calculations and no necessity to deal with a succession of renting tenants, some of who may know enough about their rights to protest.

How can these measures be promoting a confident market?

The current methods will become formally illegal with high penalties when remaining utility exemptions are lifted, as is the intent.

The decision to Repeal Appendices 1 and 2 may conceal how things are done, but there will not make things right, fair or legally and technically sustainable.

The entire Guideline should be reconsidered not merely in determining how many pages or words the provisions can be reduced to in the transfer to the VERC, but how sound the provisions are and reassessment of the true contractual party of the energy supplied.

End-users of heated water in these circumstances are not taking unauthorized supplies of energy. They receive a composite water product. The deemed provisions were never intended to be applied in such a manner.

See discussions elsewhere concerned deemed provisions.

For many privately rented flats and apartments there is no embedded generation or embedded transmission of gas or electricity for BHW purposes, though for some high

rise blocks this may be the cost. Most of the buildings are 30-40 years old not energy efficient and provide sub-standard rented accommodation to low income users.

They do not need the stresses of being badgered to form market contracts with retailers who are encouraged to believe that a legally sustainable contract exists. This is simply not the case under the circumstances.

Retailers should be directed to bill the Landlords. Indeed it seems from the summarized responses from the three host retailers that they believe the customer to be the Landlord in any case, and that the Guideline should be altogether removed form operation because of price deregulation. Contact details for managing agents of rented apartment blocks are normally transparently displayed on the outer walls of the building. There is no justification to badger renting tenants taking up their enshrined rights under other regulatory schemes.

DISCUSSION OF THE PROPOSAL TO REPEAL APPENDIX 2 (2.2.2) FROM THE BHW GUIDELINE AND IMPLICATIONS FOR TRANSPARENCY WITH A SINGLE REFERENCE ONLY THE DPI'S INVOLVEMENT IN DETERMINING THE PRICING FORMULAE

Existing Provision

2.2.2 Appendix 2 will not change before 31 December 2007. The Victorian Government will confirm the electric bulk hot water pricing formulae from 1 January 2008 as part of any electricity pricing arrangements applicable for that period.

Issue

The transfer date has passed and responsibility for determining the electric bulk hot water pricing formulae has been transferred to the Victorian Government. This clause is now redundant.

Draft DPI/ESC Decision:

Repeal

MK Comment:

It is to be hoped that if these provisions are retained despite all arguments, the policies and calculation methodologies complete with explanatory information will be transparently published on the DPI, ESC websites and on retailers' websites also.

As with Appendix 1 for gas, the formulae in current use or anything similar appears to be technically legally and contractually unsound and also represents regulatory overlap with other schemes. The calculation is inconsistent with intent and spirit of national trade measurement laws and will become formally illegal with high penalties when remaining utility exemptions are lifted as is the intent. See Section 18R Part V *National Measurement Act 1960*.

Same principles as 2.1.1. See under that heading Repeal of Appendix

The Appendix 2 formula used in the original Guideline is now subject to change by the DPI and to be published in an unspecified manner included the following arrangements:

> *Where customers*[150] *are charged for energy in delivering electric bulk hot water either by their local retailer or pursuant to a market contract the:*
>
> *Customer electricity bulk hot water charge (cents) = the customer's metered consumption of hot water (kilolitres)*
>
> **electricity tariff rate(s) applicable to the customer for the applicable electric bulk hot water unit (cents per KWh)*
>
> **CF (conversion factor) KWh per litre*
>
> *Where CF = electric bulk hot water conversion factor used by retailers to bill electric bulk hot water customers. The electric bulk hot water conversion factor will have a maximum value of 89KWh per kilolitre. Where customers are currently billed using a lower electric bulk hot water conversion factor, or a lower electric bulk hot water conversion factor, or a lower electric bulk hot water conversion factor for the site is assessed, retailers must bill customers using the lower electric bulk hot water conversion factor.*
>
> *The customer's electricity tariff must be an off-peak tariff if supplied from an off-peak electric bulk hot water unit*

The same principles apply as for gas - the calculations are imprecise, do not rely on any energization point, and use a metering instrument designed to calculate water volume not gas or heat. All calculation provisions; fail to achieve the desired transparency or trade measurement practices that passes muster. As for gas, the current methodology for calculating and individually apportioning consumption will become formally illegal when the national measurement provisions have lifted all remaining utility meter exemptions. Meanwhile they defy best practice in every regard.

Trade measurement and utility provisions allow for better trade measurement practices. The current arrangements are in contravention of the spirit of this, despite the existence of remaining utility exemptions that will render current methods of calculation of energy consumption to be both invalid and illegal. Meanwhile, best practice standards for trade and utility measurement are non existent for the calculation of levels of consumption of bulk energy for hot water services that are part of the common property infrastructure of Owner's Corporation.

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150 The term customer is used here not **relevant** customer as referred to under the deemed provisions under s46 of the *Gas Industry Act 2001*

DISCUSSION OF IMPLICATIONS OF RETENTION OF CLAUSE 2.1.3 AND TRANSFER TO ERC (PUBLICATION OF GAS BHW RATE IN CENTS PER LITRE) AND SUPPLY CHARGE (IN CENTS) AND CONVERSION FACTOR (MJ PER LITRE)

Existing ESC Provision

2.1.3 (BHW) A retailer must publish its gas bulk hot water rate (in cents per litre), any applicable supply charge in cents) and the conversion factor MJ per litre) used to determine those prices and charges whenever any of the above components change

Issue

Clause 2.1.3 requires the publication of the gas bulk hot water rate by retailers

This rule will be retained and transferred to clause 4.2 of the ERC

Draft DPI/ERC Decision:

Retain in ERC (Clause 4.2)

MK Comment:

The instruction is to calculate and publish BHW rate in both cents per litre and megajoules per litre.

Such a formulae is technically and legally unsound and also represents regulatory overlap with other schemes. The calculation methodology violates and intent and spirit of national trade measurement laws and will become formally illegal with high penalties when remaining utility exemptions are lifted as is the intent. See Section *18R Part V National Measurement Act 1960*.

A bulk gas meter (or any other gas meter) measures gas volume only not heat. The bills are expressed in energy, which is not measured at all.

An expression using megajoules per litre for billing purposes is missing the mark by a mile. The hot water flow meter measures water volume but neither gas volume nor heat (energy). There is no valid calculation under current methodologies; no means of determining heat

The idea is to calculate water volume if any site readings are taken at all, separately calculate the total volume of gas used to heat the entire communal boiler and by algorithm formulae magically work out how much gas was deemed to be used to heat the alleged volume of water consumed.

Calculation in this way is an impossible technical feat and does not show legally traceable measurements

DISCUSSION OF IMPLICATIONS OF RETENTION OF CLAUSE 2.2.1 AND TRANSFER TO ERC 3.3. (REGULATED TARIFF RATES) AND SUPPLY CHARGE (IN CENTS) AND CONVERSION FACTOR (MJ PER LITRE. APPENDIX 2 REPLACED BY DPI REFERENCE

Existing Provision

2.2.1 (BHW) Where a retailer charges for energy in delivering electric bulk hot water to a relevant customer, the electric bulk hot water charges are to be based on the appropriate tariff rate(s) applicable to the bulk hot water storage unit and are to be determined in accordance with Appendix 2

Issue:

Clause 2.2.1 requires the calculation of electric bulk hot water charges to be in accordance with a regulated formula. This rule will be retained and transferred to clause 3.3 of the ERC

Draft Decision ESC/DPI Regulatory Review

Appendix 2 to be replaced by DPI reference

MK Comment:

It is unclear what is meant by tariff rate(s) applicable to BHW storage unit.

There is a single storage unit representing a boiler tank in which water supplied to a Landlord or Owners' Corporation is heated by a single energization point.

Most consumers reading the existing provision will remain confused about the terms. They may suggest a separate individual storage tanks in the apartments of tenants.

It should be made clear that water volume is being measured through hot water flow meters that neither measure gas nor heat.

A guess is made as to how much gas is required to heat an entire tank, no allowance is made for temperature, ambience, quality control from a distributor viewpoint (as opposed to lagging and other issues associated with water quality and energy efficiency)

The formulae in current use or anything similar is technically and legally unsound and also represents regulatory overlap with other schemes. The calculation methodology violates and intent and spirit of national trade measurement laws and will become formally illegal with high penalties when remaining utility exemptions are lifted as is the intent. See Section 18R Part V *National Measurement Act 1960*.

This has implications also for Bill smoothing, estimates and meter readings.

Despite clause 5.1 in respect of any 12 month period a retailer may provide a customer with estimated bills under a bill smoothing arrangement if and only if

(1) the amount payable under each bill is initial the same and set on the basis of the retailer's initial estimate of the amount of energy the customer will consumer over the 12-month period

That initial estimate is based on the customer's historical billing data, or where the retailer does not have that data, average consumption at the relevant tariff calculated over the 12-month period. In the six-month period the retailer re-estimates the amount of energy the customer will consumer over the 12-month period taking into account any meter readings and relevant seasonal factors and

If there is a difference between the initial estimate and the re-estimate of greater than 10% the amount payable under each of the remaining bills in the 12-month period is to be re-set to reflect that difference and at the end of the 12-month period, the meter is read and any undercharging or overcharging is adjusted for under clause 6.2 and 6.3 and

(b) the retailer has obtained the customer's explicit informed consent to the retailer billing on that basis.

VERC Draft Decision

Retail and simply and enable variations for market contracts (*)

The reconciliation period will be 9 months to be consistent with the existing obligation for retailers only to be able to recover up to 9 months if undercharging is due to a retailer's error (refer to Clause 6.2)

By contrast the NECF proposal is as follows under 2.2 of the NECF TOR

> ***Comment:*** Use of meter data:
>
> *Unless otherwise permitted, a retailer must base the calculation of charges for a small customer's bill on metering data provided by the distributor or other responsible person in accordance with the Rules.*
>
> *A retailer may base the calculation of charges under a bill on an estimation of a small customer's consumption of energy in the following circumstances:*
>
> *where the customer consents to the use of estimates by the retailer;*
>
> *where the retailer is not able to reasonably or reliably base the bill on a meter reading; or*
>
> *where metering data is not provided to the retailer by the distributor or other responsible person.*

Market Retail Contract Annotation

May be varied by agreement in market retail contracts.

MK Comment:

9 months seems too long, 12 months far too long for both bill smoothing (5.3 VESC Draft Report Regulatory Review) and the NECF TOR and for undercharging provisions (6.2 VESC)

Both Queensland and the Draft NECF allows for a recovery period of 12 months. I believe that 12 months is too long as this places a particular burden on those whose budgets are tight in the first place to face unexpectedly high bills all at once.

I note the comment of VESC under 6.2 undercharging, following EWOV's suggestion that no time limit applies if the undercharging arises as a result of meter access being blocked or unlawful action by the customer.

In the first place it is unreasonable to expect residential tenants to provide safe unhindered access to any meters behind locked doors for the purposes of meter reading. Landlords do not always permit tenants access to meters that are behind locked doors.

However, for the most part meters for regular supply of energy through dedicated energization points are readily accessible. If they are not, it is normally possible for a supplier to make direct arrangements to obtain an energy key to access meters that are located behind locked doors. It is an untidy arrangement to have separate keys and would be impossible for meter readers to keep up with the keys required, so this is a sensible plan.

This raises the BHW provisions yet again in the context of general provisions.

For the most part the meters that are behind locked doors are not energy meters but rather hot water flow meters residing with a boiler tank. These are posing as gas meters in the sense that calculation of *"hot water consumption"* is the basis on which calculations are made for BHW purposes. The hot water flow meters read water volume not gas volume or heat. The single energization points (gas bulk meters), normally readily accessible in a car park of a multi-tenanted dwelling read gas volume only not heat (energy) or water volume.

Tenants in multi-tenanted dwellings do not illegally access energy. They legally take supply from the Landlord as part of their rent heated water, a composite product from which the heating component cannot be separated or measured through legally traceable means using an instrument designed for the purpose.

Yet it is likely to be the perception of the complaints scheme EWOV, who made the suggestion in the first place that refusal or inability to provide access to water meters or refusal to provide "acceptable" identification because of conflict over who should be the contractual party – Landlord or Tenant, represents unauthorized or unlawful activity.

This perception could also be shared by the retailer or distributor relying on flawed regulations permitting unilateral imposition of contractual status on end-users of heated water instead of the proper party – the original recipient of the energy provided to a single energization point on common property infrastructure. That party is the Landlord or representative.

This has a snowballing effect on contractual matters, tenant's credit status; conflicts and expensive complaints handling, all because the regulations in place are in direct conflict with other regulatory schemes.

The broad terms about denied access to meters and denial provision of personal identification that may be acceptable provocations on occasion to herald a cascade of warning notices are not seen to be reasonable when these conditions are expected to be fulfilled by a residential tenant who (a) denies any contract because of protections under a conflicting regulatory scheme in this case residential tenancy provisions; (b) provision of access to meters is not always within the means of residential tenants to proffer.

For meter access this should clearly be by arrangement with the Landlord or representatives. The latter's details are normally transparently available on the building.

For the issue of refused access to identification, I reiterate that despite all existing provisions for BHW charging and the practices associated with it, licence provides codes or guidelines, the bottom line is that renting tenants are protected under laws that cannot be undermined by alternative arrangements that interfere with their protected contractual arrangements with landlords under mandated legislative provisions.

Finally on the question of estimates, leaving aside for the moment altogether the contractual issues and the calculation methods used in estimated BHW consumption these considerations are pertinent:

The usage is always estimated. There is no precise way of calculating individual consumption of the heated component of communally heated water. Water meters cannot fulfill such a task, and they will not be allowed to for long when remaining utility exemptions are lifted.

Next, leaving aside that nothing precise is calculated and correctly apportioned contractually, estimates in these circumstances are normally made on the basis of what the previous tenants used when residing at the same flat. In some cases that may mean that several parties occupied a flat, and the next tenant occupies it solely or with only one other. The volume of heated water used by the previous party over a 12-montrh period or less may be vastly different. One may have used hot water to wash clothing another occasional cold water cycles. There is no fair way of estimating usage when a new tenant moves in and a clear cut reading taken at the time of moving in achievable.

In the case of BHW the whole thing is a guess and there is potential to overcharge on the basis of wild guesses of usage.

This places those receiving heated water at a disadvantage, not the least because of the stresses of being considered contractually obligated to a third party not involved in the first place assessment of rental affordability of contract. At the time of signing a contractual tenancy lease with a Landlord, all things being equal and if barriers of cognition, language barriers, disability or other reasons are not factors, a tenant is normally clear about his rights under tenancy laws.

He budgets for accommodation in sub-standard buildings with bulk hot water supplies because that is all he can afford. He moves in having made legitimate arrangements to form a contractual arrangement with single or dual fuel providers of energy for heating and cooking.

The heated water is a mandated part of his tenancy lease. He does not expect to pay for this at all and does not budget for it. He has no contractual relationship whatsoever to with the supplier of bulk energy to a single energized point on common property infrastructure serving a communally heated water tank which then reticulates not energy but a composite water product to various apartments. These are not recipients of energy. They have no energization points. Meter reading in terms of energy does not apply accept as contained in a formulae method that cannot be legally or technically sustained as a valid means of measuring consumption or establishing a contractual relationship with the energy, even if the energy supplier owns the satellite water meters.

It is not his hot water consumption level that is required, but rather his actual energy consumption if he is to be held contractually liable. This cannot be achieved by using a hot water flow meter that measures water volume but not heat or the heating component.

Yet he has to wear the stigma of being unjustly seen as one who is *"taking unauthorized supplies of energy."* This is nonsense and unsustainable legally. This has an impact on credit reputation and other considerations and cannot be justified.

A complaints scheme under instruction from the regulator as to interpretation of regulations and legislation has *"hands tied"* as a rule, and may be influenced by the mere existence of provisions in rules or other provisions allowing unjust contractual imposition.

It is not the tenant who has done anything unauthorized in these circumstances, but rather the rules are unjust and retailers are left wondering which laws they must obey and how the regulatory overlap conflict issue might affect their ability to recover funds for provision of energy.

It is not that the energy is not provided or that it should be provided free of charge. It is a question of the proper contractual party. That should be the party who authorized supply of bulk energy for heating of a communal tank – the Landlord.

Again, until and unless a just definition is made of "commencing to take supply" unless regulators recognize their requirement to avoid regulatory overlap, expensive complaint debate detriment and possible litigation may be repeat outcomes. This cannot be good for community confidence, retailer certainty, unnecessary burdens on complaints systems.

DISCUSSION OF IMPLICATIONS OF RETENTION OF 2.3 (INFORMATION TO BE INCLUDED ON BILLS) AND RETENTION UNDER 4.2 OF THE ERC

Existing Provision

2.3 Information to be included on bills

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

The relevant gas bulk hot water rate applicable to the customer in cents per litre

The relevant electricity rate (s) being charged to the customer in cents per litre

The total amount of gas bulk hot water or electric bulk hot water in kilolitres or litres consumed in each period or class of period in respect of which the relevant gas bulk hot water rate or electricity tariffs apply to the customer and, if a customer's meter measures and records consumption data only on an accumulation basis, the dates and total amounts of the immediately previous and current meter readings or estimates

The deemed energy used for electric bulk hot water (in KWh); and

Separately identified charges for gas bulk hot water on a customer's bill

Issue:

Clause 2.3 requires retailers to detail on the customer's bill certain information regarding the calculation of the customer's bulk hot water charges

The information is important in enabling customers who consumer bulk hot water to understand their bill

Draft DPI/ESC Decision

Retain and include in the ERC

MK Comment

As noted elsewhere, though the calculation charging and imposition of contractual status principles embraced by the BHW provisions are to be more transparently available as part of the ERC, the fundamental principles governing calculation and contractual status will not become more valid in legal and technical terms because of such a transfer to a jurisdictional energy code.

Even if encapsulated into energy legislation, the flawed reasoning will not improve, not would it be appropriate for these provisions to over-ride existing enshrined provisions within other regulatory schemes.

In any case, when the remaining utility exemptions are achieved, the current methodologies will become formally illegal with high penalties. It may not be sufficient for an energy provider to claim instruction from a Regulator to follow practices deemed illegal or about to become illegal.

Other terms in bold and italics which are not defined in this guideline have the meaning given in the ERC.

Issue

Clause 3.1 defines certain terms used within Guideline 20. Where a defined term has been transferred to the ERC, its definition will be included in the ERC's definition section

Draft Decision

Where a defined term has been transferred to the ERC, its definition will be included in the ERC's definition section

MK COMMENT

In addition to a General Interpretative Section dealing with broad definitions and clarification of terms, Part 9 of the existing VERC includes a set of definitions and interpretations

To the Definition and Interpretation Section of the ERC novel definitions relating to BHW provisions are to be transferred from the existing Bulk Hot Water Charging Guideline20(1) once this repealed. These are shown above, whilst the existing ERC Definitions are outlined below from Part 9

DISCUSSION OF IMPLICATIONS OF EXISTING DEFINITIONS FROM CLAUSE 3.1 BHW GUIDELINE TO BE TRANSFERRED TO ERC

Parallel discussion of selected components of the NECF Table of Recommendations –See Part 2B

Each of the definitions from the BHW guideline is separately discussed. For the existing definitions in the VERC footnotes suffice to make appropriate comments in the context of contractual arrangements and BHW provisions Therefore, the definitions from the VERC have also been reproduced in this section.

Existing Provision

3.1 Definitions

"Electric bulk hot water" *means water centrally heated by electricity and delivered to a number of customer supply addresses where the customer's consumption of hot water is measured with a meter and where an energy bill is issued by a retailer*

"electric bulk hot water conversion factor" *is the conversion factor detailed in this guideline used to convert the measured bulk hot water consumption of a customer (in kilolitres) to a deemed electricity usage (in KWh)*

"Gas bulk hot water" *means water centrally heated by gas and delivered to a number of customer supply addresses where the customer's consumption of the hot water is measured with a meter and where an energy bill is issued by a retailer*

"gas bulk hot water conversion factor" *is a conversion factor detailed in this guideline used to convert the gas bulk hot water tariff (in cents per MJ) to the gas bulk hot water rates (cents per litre)*

"gas bulk hot water rate" *means the gas price in cents per litre that is used by retailers to charge customers for energy in delivering gas bulk hot water*

"gas bulk hot water tariff" *has the relevant meaning set out in Appendix 1*

"meter" *means the device which measures and records consumption of bulk hot water consumed at the customer's supply address*[151]

Other terms in bold and italics which are not defined in this guideline have the meaning given in the ERC.

Issue

Clause 3.1 defines certain terms used within Guideline 20. Where a defined term has been transferred to the ERC, its definition will be included in the ERC's definition section

Draft Decision

Where a defined term has been transferred to the ERC, its definition will be included in the ERC's definition section

MK Comment

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151 Note, however, that elsewhere in the ERC meter is described quite differently, consistent with the concept of energization. (a) for electricity the device which measures and records the consumption of electrical energy consumed at the ***customer's supply address***; and
(b) for gas, an instrument that measures the quantity of gas passing through it and includes associated equipment attached to the instrument to filter, control or regulate the flow of gas
Therefore according to the proposed changes there will be two classes of so-called customers with customer supply addresses – those who receive energy as most people understand it; and those who receive heated water but are deemed to have a separate energization point because of creative change to the term "meter" now defined for BHW purpose the device which measures and records consumption of bulk hot water consumed at the customer's supply address.
Transfer of these provisions does not make matters clearer or more just. The measures proposed enhance inequity issues. Added to this, not all states do not adopt these novel ways of describing energy meters as water meters posing as gas meters. Mere redefinition of meters for a class of consumers, for the most part living in sub-standard accommodation receiving bulk hot water communally heated does not make the provisions legally or technically sustainable. This should be carefully reconsidered in the light of possible repercussions for retailers as well as for end-consumers of heated water.

SERVICE PIPE

No service pipe as defined in the Gas Distribution System Code exists in the flat or apartment occupied by a renting tenant receiving bulk hot water. A service pipe is

> *A pipe ending at a metering installation or for an unmetered site a gas installation which connects a main or a transmission pipeline to customer's premises as determined by a Distributor*

MK Comment

A hot water flow meter, the instrument used blatantly 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.

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

Awareness of these adopted practices as sanctioned by policy-makers rule-makers and regulators should be widely promoted

SOURCE(S)

Gas Distribution System Code

TRANSMISSION PIPE

There is no gas transmission pipe facilitating the flow of gas that links the single energization point to the apartments of end-users of energy.

The transmission pipe that carries the gas from the master bulk gas meter, where the service pipe ends travels directly to a communal water tank on common property infrastructure.

From that communal tank, supplied with cold water from the mains supply for which the Landlord is legally responsible to the Water Authority, water service pipes transmit the heated water to individual apartments belonging mostly to residential tenants on low to moderate incomes living in sub-standard accommodation.

The transmission mode and the absence of any flow of gas to the apartment has contractual implications.

An end-user of heated water is hardly *"taking supply of energy"* or *"unauthorized use of gas or electricity"* or *"deemed use of energy"* under the deemed provisions of s46 of the GIA.

Under the definitions of the *GIA*

TRANSMIT

***transmit** means convey gas through a transmission pipeline;*

GAS FITTING *(GIA)*

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

That end-user takes supply of a composite water product reticulated from a communal water tank belonging to the landlord in water service pipes.

The hot water flow meter in position, whoever owns the meter is a merely a water-measuring device. It does not measure gas or heat or transmit these commodities. It measures water consumption alone, from which the derivative costs are made based on a formulae attempting to correlate water and gas using a measurement methodology that does not stand up to legal, technical or trade measurement scrutiny.

This should be enough in itself to establish who the correct contractual party is, but, in addition to no possibility of gas or electricity transmission to the apartments of those receiving the communally heated water as a composite product, if the hot water flow meters and the gas meters are read at all, they are read at least two months apart, so calculating how much any given tenant may have used.

Therefore, leaving aside the invalidity of the conversion factor formulae endeavouring to correlate water and gas consumption no one can possibly establish how much energy was supplied or deemed to have been supplied to an individual tenant in any given block of time. For example, by the time the master gas meter is read, if at all, a new tenant may have taken up occupancy with a zero level of actual or estimated consumption.

The principles of overcharging, undercharging and bill smoothing also have implications for these considerations, given the new agreed settlement time-frame of 12 months, which means one meter reading a year. By then a new tenant may be in position, and bills allegedly owed by the outgoing tenant apportioned wrongly, not that the tenant should be billed in the first place or have any contractual responsibility.

Other factors impacted are unreasonable requirements of the wrong parties to provide safe unhindered and convenient access to water meters behind locked doors; or to provide acceptable identification and contact details as individual tenants rather than having these obtained from the Landlord. The Managing Agent or Owners' Corporation details are normally transparently displayed on the buildings that are serviced by bulk hot water services.

Assuming billing agent responsibilities for the Landlord with energy regulator sanction has implications for over-reach of regulatory responsible and direct conflict and overlap with other regulatory schemes. This is unacceptable and indirectly interferes with enshrined and mandated rights under those other schemes that are relied upon by residential tenants in these apartment blocks and flats that have a single energization point to service hot water services by supplying energy to those storage tanks on common property infrastructure.

PART 9 DEFINITIONS AND INTERPRETATION[152]

35. DEFINITIONS

In this Code, including the preamble, unless the context otherwise requires:

acceptable identification *in relation to:*

(a) a ***domestic customer***[153] *includes one or more of the following: a driver's licence, a current passport or other form of photographic identification, a Pensioner*

Concession Card or other current entitlement card issued by the Commonwealth

or a birth certificate;

(b) a ***business customer***[154] *which is a sole trader or partnership, includes one or more of the forms of identification for a* ***domestic customer*** *for each of the individuals*

that conduct the business; and

(c) a ***business customer***[155] *which is a company, includes the company's Australian Company Number or Australian Business Number.*

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152 Accessed from *Energy Retail Code* 12 September 2008 *http://www.esc.vic.gov.au/NR/rdonlyres/638A442B-14B2-45D8-9AFD-041616E521EC/0/October2007EnergyRetailCodeVersion420071018.pdf*

153 Under the BWH provisions to be incorporated into the energy retail code recipients of heated water from communal boiler tanks on common property infrastructure are being deemed domestic customers of energy. They do not receive energy. They receive heated water in water pipes from a distribution system that is not related to the energy supply system. The cost of heated water is included in their rent under mandated rental lease terms. They are being coerced into supplying personal identification under pain of threat of disconnection of heated water. They are entitled to dispute contractual status under these circumstances – those better informed do so. Those who are not aware of their rights or redress recourses are normally readily coerced into forming a contract with an energy retailer under these circumstances.

154 The perceptions of AGL, Origin Energy and TRUenergy concerning the redundant nature of BHW provisions are revealing. They believe this to be the case because pricing for small business customers has been deregulated. This implies that they consider the Landlords to be the business customer for the purpose of energy supplied for heating BHW tanks on common property infrastructure where a single energization point exist. Yet they are directly instructed to hold the end-users of heated water responsible. This has the effect of endeavouring to re-write residential tenancy and general contractual laws.

155 Small business should be better protected. Their position is frequently similar to that of domestic customers. The growth in small business and home businesses is a reflection of desirable business growth, and should not be hampered by making supply of energy unaffordable. If threshold alone is being used, business customers should be included within such a threshold.

additional retail charge *means a charge relating to the sale of* ***energy*** *by a* ***retailer*** *to a* ***customer*** *other than a charge based on the* ***tariff*** *applicable to the* ***customer*** *and which must be calculated in accordance with clause 31 of this Code. To avoid doubt:*

(a) any network charge relating to the supply, but not sale, of ***energy*** *to a* ***customer's supply address***[156] *is not an* ***additional retail charge*** *(whether or not the network charge is bundled in the* ***retailer's tariff****);*

(b) without limiting paragraph (a), any charge the ***retailer*** *may impose as a direct pass through of a distribution tariff, excluded service charge for electricity,*

ancillary reference tariff for gas or other charge imposed on the ***retailer*** *by a* ***distributor*** *for* ***connection*** *to, or use of, the* ***distributor's*** *distribution system is not an* ***additional retail charge;***[157] *and*

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156 Supply address is a technical term synonymous with supply point and connection point. It does not refer to the physical surroundings of an abode occupied by one of several occupants of a multi-tenanted dwelling. It is a term incorrectly used to imply the supply of energy to individual premises, whereas the energy supplied to heat a communal water tank is supplied to one only supply address/supply point – that at the outlet of the only energy meter on common property infrastructure, which then supplies heat to a communal water tank.
For VEnCorp Distributor-Retailer settlement purposes a single supply address/supply point and single billing point exists.
Part 8 Clause 25 of the VERC refers to supply address as if it were a postal address. The correct term is property address. Supply address and supply point are synonymous terms and have a technical meaning in terms of physical connection of energy, where energy can flow to the premises of by conducted in an electrical line.

157 Massive supply charges are being inappropriately applied to end-users of heated water who do not receive energy in the terms described under the *GIA*, Gas Code and proposed energy Laws. These are recipients of heated water in water pipes as discussed elsewhere.
One supply point exists. The Landlord accepts supply and forms an implicit or explicit contract at the outset when he authorizes the fitting of the gas or electricity metering installation. A supply charge applies from the moment that the installation is completed, not when a succession of occupants turn on a water tap containing heated water supplies. Water meter reading fees are being identified by some "because the distributor charges us for these." A water meter is not a suitable instrument through which to gauge, guess or otherwise calculate "deemed gas usage" or "deemed electricity usage."
The Landlord/Owner under other legislation is legally responsible for supply charges, and also for all utility and charges other than for bottled gas that cannot be measured with an instrument designed for the purpose – i.e. a gas or electricity meter in the case of energy costs of associated costs.
For VenCorp Distributor-Retailer purposes a single supply point/supply address/billing point exists, consistent with the legislation and with the Case Code provisions and definitions.
Therefore current BWH provisions to recover proportionate costs from individuals basing this on water meter read, without even the benefit of water meter dial readings, or just explanation to show how a "gas rate" or "electricity rate" is calculated and why is an infringement of the existing rights of individuals.
The provisions should explicit direct retailers to bilk Landlords /Owners or Owners' Corporations. The details of the latter are normal displayed transparently on the outer buildings of multi-tenanted dwellings.

*(c) any amount payable by a **customer** to a **retailer** for the **customer's** breach of their **energy contract,**[158] whether under an **agreed damages term** or otherwise, is not an **additional retail charge**.*

***agreed damages term** means a term or condition of an **energy contract** under which a **customer** and a **retailer** have agreed the amount, or a basis for determining the amount, that will be payable by the **customer** to the **retailer** for the **customer's** breach of their **energy contract**.*

***applicable regulatory instruments** may include (but is not necessarily limited to) one or more of the following:*

(a) for electricity:

1. *the **National Electricity Code**;*
2. *the **Metrology Procedure**;*
3. *the **Electricity Customer Transfer Code**; and*
4. *the **Electricity Customer Metering Code**; and*
5. *(b) for gas:*
6. *the **Gas Distribution System Code**;*
7. *the **Retail Rules**; and*
8. *the **Market and System Operation Rules**;*

or any other regulatory instrument which amends or supplements any of the above.[159]

The new laws should be explicit on this matter to uphold its own expectation of supply and sale of energy as delivered to the premises of any part through a physical connection allowing the flow of that energy into those premises. A flow of energy to the outlet of a meter on common property infrastructure to heat a communal water tank is hardly what is intended by the Law existing and proposed to establish a supply of energy contract and the attending implications for conditions precedent, conditions subsequently; disconnection, credit rating, legal action

158 In the event of regulatory overlap, where an end-consumer of heated water disputes the validity of a deemed contract or requirement to form an explicit contract with an energy supplier because of other protections under tenancy or other schemes, the issue of alleged breach of energy contract by a supplier and all that entails, may legitimately be counter-acted with arguments of breach of implied contract by the supplier, regardless of the licence instructions, codes, guidelines, Ministerial Orders (OIC) or even legislation instructing the supplier to impose contractual status on the wrong parties, in breach of specific requirements under the *Essential Services Act 2001* to avoid regulatory overlap and conflict with other schemes.

159 The *GIA* requires consistency with the Gas Code. In any case, rules may not be inconsistent with the express provisions of the GIA especially with regard to such fundamentals as the term meter and its function in measuring the quantity of gas that passes through it to filter control and regulate the flow of gas. This is a fundamental concept in the distribution sale and supply of gas to premises in order that a proper contractual allocation is made.

assigned meter identifier *means:*

(a) for electricity, the National Meter Identifier assigned to the ***customer's*** *metering installation*[160]*; and*

(b) for gas, the Meter Installation Reference Number assigned to the ***customer's*** *metering installation*[161]*/*[162]

The end user of heated water supplies does not receive energy through a connection, supply point/supply address or transmission pipe to the premises occupied by that party. The energy is supplied to the landlord/Owner on common property infrastructure

160 Metering installation is clearly defined within the *GIA* as a gas metering installation and meter within the *GIA* as an instrument through which gas flows. A water meter is not such an instrument. Ad hoc changes to these fundamental terms has the effect of distorting contractual relationships and definitions and creates conflict and discrepant interpretation. The clear intent of the national law is to adhere to the concept of energy supplied through a connection point as a new supply point or an energized point to a pre-existing energy connection; or when further defined through a transmission pipeline. None of these applies to a water meter. Introducing new terms at this stage will only serve to complicate the picture and make nationalization and harmonization harder to achieve with

161 This is an important distinction. The MIRN related to a gas metering installation and is unique. Additional numbers allocated to hot water flow meters through which no gas passes or can be measured, and reference to this on bills under the column *"gas usage"* provides an inaccurate and misleading impression regardless of the additional use of the term cents/litre of MJ/litre of KW-H/litre. Those terms do not make sense technically and do not denote a proper calculation of gas supply or consumption through an instrument designed for the purpose capable of achieving the function intended.

162 A hot water flow meter is not a metering installation as defined everywhere else but the BHW guidelines endeavouring to re-write contractual, tenancy and trade measurement laws. Dispensing of a concept as central to energy regulation as energization is dangerous and will lead to poor regulatory practice with endless contractual and regulatory overlap debates.

The use of the term *"gas usage"* accompanied by a unique water meter identifying number implies that a gas meter exists. Though clarification of the novel methods used to calculate and apportion consumption and supply charges of energy supplied from a single energization point to a communal water tank is to be contained in the ERC, this does not have the effect of re-writing contractual or tenancy laws.

The vast majority of end-consumers are not aware of how to locate information; many are not computer literate; others are for a variety of reasons unable to access proper support to assist with queries and complaints. Not that complaining about policies, inappropriate allocation of deemed contractual status or stripping of enshrined rights under other regulatory schemes would do much good if regulators and policy-makers are determined to retain rules and provisions that represent regulatory overlap and inappropriately allocate contractual status.

assignment *includes dispose of, declare a trust over or otherwise create an interest in rights under an* ***energy contract***[163].

bank bill rate *in respect of the interest a* ***retailer*** *must pay to a* ***customer*** *on the amount of a* ***refundable advance****, means a daily published rate no less than the pre-tax rate of return the* ***retailer*** *would earn over the period the* ***retailer*** *retains that amount if it were invested in bank bills that have a tenor equal to 90 days.*

best endeavours[164] *in relation to a person, means the person must act in good faith and do what is reasonably necessary in the circumstances.*

billing cycle *means the regular recurrent period in which a* ***customer*** *receives a bill from a* ***retailer***.[165/166]

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163 A concept that deems an energy contract to exist between energy retailer and end-user of heated water simply because energy from a single energization point is fed into a communal boiler tank, both on common property infrastructure belonging to Landlords is fundamentally flawed. As repeated elsewhere, the contract belongs to the Landlord, who has a contract to supply heated water to residential tenants who have no energization point. This snowballs into all over contractual governance issues, disconnection, credit rating and the like.

164 Best endeavours should be seeled out more clearly. It not uncommon for a very first approach to be a coercive threat of disconnection of essential services dignified as "vacant consumption letters" when in fact no contract exists with the end user of utilities. This is particularly so for those receiving heated water who have never heard of a supplier and may for the first time sixe months after moving into premises under the protected terms of residential tenancy leases, not expected to pay at all for the heating component water unless it can be measured with an instrument designed for the purpose, namely a gas or electricity meter, or to have some form on direct energy connection to an occupied flat or apartment. Under these circumstances, the tenancy provisions hold the Landlord contractually obligated for utility costs, both supply, non-energy costs and consumption. There is no supply point/supply address in the premises occupied by end-uses of communally heated water. Supply address does not mean postal address. It is a technical term denoting a physical connection to an energy distribution or transmission system. Water pipes and meters do not form part of such a system. Heated water is transmitted in water pipes without flow of energy through those pipes or the meters that measure water volume.
Therefore it comes as a shock to find a utility company expecting to cut off a hot water supply within 7-10 days when an existing contractual relationship exists under tenancy laws protecting end-consumers form having to meet any energy utility bills that cannot be shown to belong to them through the legally traceable means of a gas or electricity meter.
For BHW arrangements if meter readings take place at all, hot water flow meters which measure only water volume if they exist not gas or heat, these meters are read two months or more before the bulk gas meter. A wild guess is then made as to individual consumption based on algorithm formulae that cannot show legally traceable usage by end users of heated water, which is essentially why the contract for energy supplied belongs to the Landlord. This matter is not a settled matter with regard to future energy laws, but in any case the *Gas Industry Act 201* v34, No. 30 specifically designates a meter as an instrument through which gas passes, and it is implicit within that Act that distribution, sale and supply means supply of gas, not heated water products. It is argued throughout this submission that an end-user of heated water should not be contractually obligated, or expected to meet conditions precedent or subsequent, or to provide access to meters, especially not water meters that cannot measure gas volume, electricity or heat (energy).

business customer[167] *means a* ***customer*** *who is not a* ***domestic customer****.*

business day *means a day other than a Saturday or Sunday or a* ***public holiday****.*

checksum *means:*

(a) for electricity, the National Meter Identifier checksum; and

(b) for gas, the Meter Installation Reference Number checksum.

Commission *means the Essential Services Commission under the Essential Services Commission Act 2001*

concession *means a concession, rebate or grant including, without limitation, those known as or relating to:*

(a) Winter Energy Concession;

(b) Life Support Machines[168]*;*

(c) Group Homes;

(d) Multiple Sclerosis or Associated Conditions;

(e) Service to Property Charge Supply Concession;

(f) Property Transfer Fee Waiver; and

Best endeavours in locating meters on common property infrastructure in the care custody and control of landlords/owners corporations means contacting the OC, whose details are normally transparently displayed on buildings that house multiple tenants or occupants in separate premises.

166 For bulk hot water provisions, water meters, if read at all, are read some two months prior to the single energization meter that heats a communal water tank.
Therefore, leaving aside questions of the technical invalidity of the measurements taken and calculations made by conversion factor algorithm formulae, correlating the two meter readings months or at least weeks apart undertaken by separate parties (if at all), is impossible even if the conversion factor principle were to be accepted. The current methods of calculation will become formally illegal when the national measurement regulations lift remaining utility exemptions. When that occurs, retailers will not be protected by claims that they were instructed under licence or codes to adopt certain practices
In general Rules or Ministerial Orders sanctioning practices or Rule Changes that are hard to challenge through a fair grievance process should be avoided. These matters should be properly clarified within the law. The implications are potentially serious for both end-consumers and energy retailers. The current practices for BHW just do not seem to make any regulatory sense at all.

167 In referring to BHW arrangements the three host retailers have suggested that these are redundant because price deregulation has already occurred for small businesses. This suggests that they believe that the Landlord is the real customer, but they have been instructed instead to bill individual tenants, creating problems with contract, regulatory overlap and trade measurement practices that fail to meet minimum standards to accountability or legal traceability and which will become formally illegal when existing utility exemptions are lifted.

(g) Utility Relief Grant Scheme.

***connect** means:*

(a) for electricity, the making and maintaining of contact between the electrical systems of two persons allowing the supply of electricity between those systems;

and

*(b) for gas, the joining of a **natural gas installation** to a distribution system **supply point** to allow the flow of gas.*[169]

***cooling-off period** in respect of an **energy contract** means any period within which the **customer** has a right to cancel the **energy contract**.*

***customer** means a person other than:*

*(a) for electricity, a **retailer**; and*

*(b) for gas, a participant or market participant as defined in the **Market and System Operation Rules**,*

*who buys or proposes to buy energy from a **retailer**.*[170]

***date of receipt** in relation to a notice given by a **retailer** means:*

*(a) if the **retailer** hands the notice to the **customer**, the date the **retailer** does so;*

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168 There are numerous medical conditions that require ongoing access to heated water and energy. The list is too restricted. Since the BHW provisions do exist and since disconnection of heated water supplies is currently being allowed.
I mention some for which ongoing heated water supplies are crucial: diabetic conditions; poor healing ulcers; peripheral vascular disease; skin infections or other conditions requiring wound care; vulnerability. to infection; immunological conditions.
The right of energy retailers to threaten or effect disconnection of heated water is extensively questioned throughout this and companion submissions. The BHW provisions impose unjust contractual status and unjust disconnection processes that are inconsistent with every other definition or intent with regard to disconnection.
Apart from access to heated water supplies, many of these conditions require access to energy so that water may be heated; equipment other than life support machinery can be activated.

169 No such connection takes place for those receiving heated water centrally heated in a communal boiler tank belonging to a Landlord, and where a single energization point exists responsible for heating the Landlord's boiler tank. Heated water is reticulated in water pipes to each residential tenant's apartment or flat. If there is no physical connection with a national gas installation allowing the flow of gas, no supply takes place.

170 A residential customer receiving bulk hot water centrally heated in the landlord's boiler tank on common property infrastructure served by a single energization point associated with the heating of the boiler tank water does not buy, propose to buy or receive unauthorized energy supplies. That party receives a composite water product – from the Landlord, the cost of which is incorporated into a mandated standard term lease.

*(b) if the **retailer** leaves the notice at the **customer's supply address**, the date the **retailer** does so; or*[171]

*(c) if the **retailer** gives the notice by post, a date two **business days** after the date the **retailer** posts the notice.*

***deemed** in respect of an **energy contract** means an **energy contract** deemed to apply between a **customer** and a **retailer** under the **Electricity Act** or the **Gas Act** and **deemed contract** has a corresponding meaning.*[172]

***deemed customer** means a person who is **deemed** to have an **energy contract**.*[173]

***disconnect** means:*

(a) for electricity, the disconnection of contact between the electrical systems of two persons preventing the supply of electricity between those systems; and

*(b) for gas, the separation of a **natural gas installation** from a distribution system to prevent the flow of gas.*

***distributor** means a person who holds, or in the case of electricity only is exempt from holding, a distribution licence under the **Electricity Act** or the **Gas Act**.*

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171 As a matter of policy, retailers are leaving *"vacant consumption letters"* in the letter boxes of recipients of heated water who are renting tenants in multi-tenanted dwellings with a single energization point to heat boiler tanks. These are often distributed months after a new tenant takes up residence. It is unclear how information is obtained that a new tenant receiving heated water has taken up occupancy, and how this rests with privacy provisions. The letters are normally addressed to "The Occupier." Many would consider this to be irrelevant junk mail and discard unopened. Others may open and find contents intimidating containing threat of disconnection of heated water supplies that they believe to be an intrinsic part of their tenancy leases.

172 An energy contract cannot be deemed to exist in the absence of any connection or transmission pipe or electrical line facilitating the flow of energy to those premises. Hot water supplies are reticulated in water pipes and form an intrinsic part of residential tenancy leases in the absence of a physical connection with a gas or electrical supply connection. The GIA is clear that supply and sale of gas means through a metering installation wherein meter is defined as a gas meter not a water meter. For bulk hot water arrangements, the single gas meter supplies energy to a single connection on common property used to heat a communal water tank. The landlord has the water distributed in a water pipe. No energy is transmitted to individual apartments. The coining of the term delivery of gas bulk hot water' and "delivery of electric bulk hot water" does not denote energy supply or a contract deemed or otherwise.

173 With policy-maker and regulator sanction those receiving a heated water product – a composite product – are being deemed to be contractually obligated to energy suppliers against all the rules of fundamental contractual laws, tenancy laws and proper trade measurement practice. As a consequence residential tenants are being prevented fro the quiet enjoyment promised under their lease terms and the right to agree to pay only once for heated water – within the rent as a mandated right under those provisions. Again – the issue of regulatory overlap. The deemed provisions were put in place with energization points in mind not water products. They were not intended to be exploited and distorted as they have been.

domestic customer *means a* ***customer*** *who purchases* ***energy*** *principally for personal, household or domestic use at the relevant* ***supply address.***[174]

door-to-door agreement *means a contact sales agreement under and to which Division 2 of Part 4 of the* ***FT Act*** *applies.*

dual fuel contract *means an* ***energy contract*** *for the sale of electricity and for the sale of gas by a* ***retailer*** *to a* ***customer****, or two* ***energy contracts*** *between the same* ***customer*** *and the same* ***retailer,*** *one an* ***electricity contract*** *and one a* ***gas contract****, under which* ***billing cycles*** *for electricity and gas are synchronized. The* ***dual fuel contract*** *may also oblige the* ***retailer*** *to* ***connect*** *the* ***customer's supply address*** *or to otherwise procure the supply of electricity or of gas or of both electricity and gas.*

Electricity Act *means the Electricity Industry Act 2000.*

electricity contract *means a contract for the sale of electricity by a* ***retailer*** *to a* ***customer****. The* ***electricity contract*** *may also oblige the* ***retailer*** *to* ***connect*** *the* ***customer's supply address*** *or to otherwise procure the supply of electricity.*

Electricity Customer Metering Code *means the industry code of that name certified by the* ***Commission****.*

Electricity Customer Transfer Code *means the industry code of that name certified by the* ***Commission****.*

energisation contract *means an* ***electricity contract*** *under which, or in connection with, the* ***customer's supply address***[175] *must be* ***connected*** *and all that is required to effect the* ***connection*** *is the insertion of a fuse or the operation of switching equipment which results in there being a non-zero voltage beyond the point of supply.*

energy *means electricity or gas or both electricity and gas.*[176]

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174 Again supply address is a technical term meaning gas supply point, or an electrical connection. It is not intended to apply to the physical surroundings in which an occupant lives as a postal term. The supply address/connection point for the meter that supplies energy for heating a communal water tank is the only supply point that there is. It is the owners' Corporation or Landlord's postal address to which the bills should be directed. The Law should clarify this distinction,

175 Supply address and supply point are technical terms denoting connection. Neither refers to the physical surroundings of an occupant. It is not a postal term but a term denoting energy supply through a physical connection. The only supply address/supply point is the single energy connection used to heat communal water in a storage tank reticulated in water pipes. The use of the term supply address to create the impression of a contractual relationship is misplaced.

176 It does not mean heated water communally heated in a boiler tank belonging to a Landlord. The energy is supplied the landlord. The Landlord arranges reticulation of the heated water as a composite product through water pipes leading to individual apartments. The distribution systems for energy and for water are quite different. An end-user of heated water in these circumstances is not receiving energy at all, nor is that user taking unauthorised supply of energy. Therefore threat

energy contract *means an* ***electricity contract*** *or a* ***gas contract*** *and may include a* ***dual fuel contract****.*

evergreen contract *means an* ***energy contract,*** *other than a* ***fixed term contract,*** *which includes a* ***maturity date****.*

explicit informed consent *has the same meaning as in the relevant* ***retailer's*** *retail licence.*[177]

fixed term contract *means an* ***energy contract*** *the term of which continues for a fixed, certain or definite period including, in the case of a* ***deemed contract,***[178] *any fixed, certain or definite period under or contemplated by the* ***Electricity Act*** *or the* ***Gas Act****.*

force majeure breach *means a breach by a* ***retailer*** *or a* ***customer*** *of their* ***energy contract*** *which, but for clause 18, the* ***retailer*** *or the* ***customer*** *would commit arising only through a* ***force majeure event****.*

force majeure event *means an event outside the reasonable control of a* ***retailer*** *or a* ***customer***

franchise customer *in relation to the period ending on:*

a) for electricity, 31 December 2000; and

(b) for gas, 31 August 2001,

means a franchise customer within the meaning of:

(c) for electricity, the Electricity Industry Act 1993 immediately before 1 January 2001; and

(d) for gas, the Gas Industry Act 1994 immediately before 1 September 2001.

FRC date *means the date on which there ceases to be in effect an Order made under section 35 of the* ***Gas Act*** *(i.e., the date from which all* ***customers*** *will be able to choose their gas* ***retailer****).*

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of disconnection of heated water by anyone as a lever through which to secure an explicit contract is unacceptable

177 Those who are considered, justly or otherwise as deemed customers have an equal right to informed consent as others. Those receiving bulk hot water where water meters are effectively posing as gas meters because of redefinition of the term "meter" for BHW purposes will remain confused, aggrieved and subjected to unfair practices as a result of the BHW provisions and contractual imposition, where they are already paying for heated water under the terms of mandated standard tenancy leases.

178 The same arguments apply here as to the inappropriate application of deemed contracts on those receiving heated water as composite products paid for under mandated residential lease terms where water is centrally heated in a communal water tank belonging to the landlord.

FT Act means the *Fair Trading Act* 1999.

Gas Act means the *Gas Industry Act* 2001.

gas contract *means a contract for the sale of gas by a* ***retailer*** *to a* ***customer***.[179] *The* ***gas contract*** *may also oblige the* ***retailer*** *to* ***connect*** *the* ***customer's supply address*** *or to otherwise procure the supply of gas.*

Gas Distribution System Code means the code of that name certified by the ***Commission***.[180]

gazetted tariff *at any time means a* ***tariff*** *determined by a* ***retailer*** *and published by the* ***retailer*** *in the Government Gazette and at that time effective under:*

(a) for electricity, section 35 of the ***Electricity Act***; and

(b) for gas, section 42 of the ***Gas Act***.

A ***gazetted tariff*** *corresponds with a* ***tariff*** *applicable to a* ***customer*** *under an* ***energy contract*** *if it is the* ***tariff*** *that a* ***retailer*** *would be required to offer to the* ***customer*** *if the* ***customer*** *at that time made a request for a* ***standing offer*** *in respect of the relevant* ***supply address***.

gazetted term or condition *at any time means a term or condition determined by a* ***retailer*** *and approved by the* ***Commission*** *and published by the* ***retailer*** *in the Government Gazette and at that time effective under:*

(a) for electricity, section 35 of the ***Electricity Act***.

(b) for gas, section 42 of the ***Gas Act***.

goods *has the meaning set out in clause 10 of appendix 2.*

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179 Residential tenants as recipients of heated water supplies communally heated do not purchase gas or have deemed contracts for gas supply. They receive composite water products that are heated by arrangement between landlord and energy supplier to supply gas to a single energization point to heat a boiler tank on common property infrastructure. The heated water is reticulated in water pipes. It is the landlord who has an implicit or explicit contract for the sale of gas

180 The GIA mentions consistency between the Gas Code and other provisions. In particular the term meter and metering installation in every other place barring the BHW provisions refers to an energy meter. These are energy laws not water laws. Water is supplied to the Landlord/Owner at the mains by the Water Authority. It is transmitted in water pipes to a storage tank. The tank is heated by a single energiztion point on common property. It is reticulated in water pipes through which no energy flows to individual apartments. Those apartments are not supply addresses/supply points. Supply address is not a postal term when used in an energy context. It means a connection associated with a gas or electric meter.

guideline *means a guideline published by the* ***Commission****.*

"Illegal consumption"

This is referred to within the VERC as follows:

late payment fee *means an amount payable by a* ***customer*** *to a* ***retailer*** *in connection with the* ***customer*** *having breached the* ***customer's*** *obligation to pay an amount due on or before the pay by date on the* ***retailer's*** *initial bill.*

30. ILLEGAL CONSUMPTION

(a) Despite clause 6.2, if a ***retailer*** *has undercharged or not charged a* ***customer*** *as a result of the* ***customer's*** *fraud or consumption of electricity intentionally otherwise than in accordance with applicable law or codes, the* ***retailer*** *may estimate the consumption for which the* ***customer*** *has not paid and take debt recovery action for all of the unpaid amount.*

MK Comment

In relation to recipients of heated water supplies provided under the terms mandated within residential tenancy laws, it would be preposterous for anyone to suggest that illegal or unauthorized supply of gas or electricity is being taken. Supply of gas or electricity must be supplied though a physical connection point or gas transmission pipe or electrical line allowing the flow of energy to the premises in question for distribution, sale or supply or energy to occur.

The implications for residential tenants in these circumstances are serious if inaccurate presumptions are made as to illegal supply of energy where a single enegization point on common property infrastructure receives energy. For VENCorp Distributor-Retailer purposes this supply point/supply address is a single supply popint for billing and supply purposes. The legislation upholds this, as the *Gas (Residual Provisions) Act 1994* as well as the *Gas Distribution System Code* in relation to supply address and supply point and billing are unambiguous. If a supply point was a single supply point as at 1 July 1997 which is the case for most older buildings with bulk hot water systems supplied by a single energization point on common property infrastructure, it remains so. The current arrangements are in defiance of laws, the Gas Code and all other provisions within the current and proposed regulatory framework.

There are implications for credit rating, and reciprocal legal action if damages to reputation or credit rating result from misinterpretation as to who takes supply, who takes illegal or unauthorized supply and who can be disconnection. The law needs to make this crystal clear. The same comments apply to disconnection processes discussed in more detail elsewhere.

Residential tenants need to be able to implicitly rely on the sacred and enshrined provisions that protect them. Failure to take into account those provisions under residential tenancies, owners' corporation, trade measurement and other provisions, including under the unwritten laws, the rules of natural and social justice is failure to recognize existing rights of individuals.

The *Essential Services Act 2001*, s15 specifically disallows regulatory overlap and conflict with other schemes. It is outrageous that any perception is held of unauthorized supply of energy win referring to heated water supplies provided under mandated lease terms to individual occupants of multi-tenanted dwellings, where the energy is supplied to the Landlord/Owner at a single supply point for the purposes of heating a communal water tank.

Policies and regulations that fail to take these matters into account and ascertain the unjust consumer detriments need to repeatedly and supported with reference to existing and proposed provisions, definitions and concepts of distribution supply and sale of energy. and over again. There are economic and non-economic implications. I particular draw these issues to the attention of the MCE RPWG and the NPWG.

last resort event *in respect of a* ***retailer*** *means when:*

(a) the ***retailer's*** *retail licence is suspended or revoked; or*

(b) the right of the ***retailer*** *to acquire:*

- *for electricity, electricity from the wholesale electricity market; and*
- *for gas, gas from a wholesale gas market or a producer, is suspended or terminated, whichever first occurs.*

local retailer *has the same meaning :*

(a) for electricity, as made under Order-in-Council S11 dated 11.1.02 in accordance with section 35 of the ***Electricity Act****; and*

(b) for gas, as made under Order-in-Council S197 dated 29.10.02 in accordance with section 42 of the ***Gas Act****.*

market contract *means an* ***energy contract*** *between a* ***customer*** *and a* ***retailer*** *which is not a* ***deemed contract*** *nor an* ***energy contract*** *arising from the acceptance of a* ***standing offer****.*

Market and System Operation Rules *means the rules referred to in Division 1 of Part 4 of the* ***Gas Act***

maturity date *in respect of an* ***energy contract*** *means a date included in the* ***energy contract*** *on which a fixed, certain or definite period ends:*

*(a) before which, if the **customer** terminates the **energy contract,**[181] the **retailer** may have a right to impose an early termination fee; and*

*(b) after which, if the **customer** terminates the **energy contract**, the **retailer** has no right to impose an early termination fee.*

***meter** in respect of a **customer** means:*[182]

*(a) for electricity, the device which measures and records the consumption of electrical energy consumed at the **customer's supply address**; and*

(b) for gas, an instrument that measures the quantity of gas passing through it and includes associated equipment attached to the instrument to filter, control or regulate the flow of gas.

Intended additional definition of "*meter"*

"a device which measures and records consumption of bulk hot water consumed a the customer's supply address[183]

***Metrology Procedure** means the Victorian Electricity Supply Industry Metrology Procedure published under the **National Electricity Code**.*

***National Electricity Code** means the Code approved in accordance with section 6(1) of the National Electricity (Victoria) Law applicable in Victoria as a result of the operation of section 6 of the National Electricity (Victoria) Act 1997.*

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181 Since deemed contractual status is currently imposed on residential tenants as recipients of heated water that is communally heated they apparently have no right of termination. On the other hand there are entitled to deny the existence of any contract at all because of their protections under conflicting regulatory schemes – notably residential tenancy provisions, but also on the basis of the calculation methods used which go towards contractual matters. Therefore a stalemate position can arise leading to expensive complaints handling, debate, angst and possible litigation. Yet the retailers are required to impose contractual status unilaterally. Under unfair contract terms such terms may be legitimately voided. They provide a supplier purporting to have contractual rights to disconnect or terminate a contract with no reciprocal rights for the recipient. In any case the recipient receives heated water not energy.

182 This is consistent with the Gas Code, and the meaning in the *Gas Industry Act 2001*, definitions. The new definition of *"meter"* in relation to BHW arrangements is consistent with neither the Code nor the *GIA*. This new definition regards a meters as "a device which measures and records the consumption of bulk hot water consumed at the customer's supply address.

183 This is a distortion of the term meter used in the GAI and the Gas Code and referred to as a connection point within the Template Law. See comments elsewhere. These are energy laws and regulations not water laws. An energy supplier supplies either gas or electricity at a physical connection point to premises where such a point exists'; or alternatively through a gas transmission pipe or an el4ctrical line.

natural gas installation *means any gas equipment*[184] *located at a* ***customer's supply address*** *downstream of the* ***supply point*** *that is not part of a distribution system.*

non-contact sales agreement *means a non-contact sales agreement under and to which Division 3 of Part 4 of the* ***FT Act*** *applies.*

public holiday *means a public holiday appointed under the Public Holidays Act 1993.*

reasonable assurance *in relation to a* ***customer's*** *willingness to pay means a fair and reasonable expectation, based on all the circumstances leading to, and which are anticipated to follow, the assurance that the* ***customer*** *will pay.*[185]

reconnect *means to connect following a disconnection.*[186]

refundable advance *means an amount of money or other arrangement acceptable to a* ***retailer*** *as security against a* ***customer*** *defaulting on a final bill.*

related contract or instrument *in relation to an* ***energy contract*** *means any other contract or instrument that is collateral or related to the* ***energy contract****.*

relevant customer *means a person, or a member of a class of persons, to whom an Order under:*

(a) for electricity, section 36 of the ***Electricity Act****; and*

(b) for gas, section 43 of the ***Gas Act****,*[187] *applies.*

relevant date *in respect of an* ***energy contract*** *means:*

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184 No such gas installation exists at the so-called customer's supply address – the tenant's apartment for those receiving communally heated water from a single boiler tank fed by a single energization point on the common property infrastructure of landlords or owners' corporations. These bulk gas points (or electricity points) are considered to be single supply points for VenCorp distributor-retailer settlement purposes.

185 A customer who refuses to pay on the basis of dispute over whether a contract exists at all, and who is the subject o coercion to form an explicit contract despite his protected contractual provisions under standard mandated residential tenancy provisions, should not be penalised. The whole question of properly defining who the relevant customer is for bulk energy supplied to communally heated water tanks belonging to landlords needs to be re-visited and re-defined

186 Disconnection means

187 Such a Ministerial Order does exist dated 29 October 2002. It simply defines relevant customer as one who consumes no more than 10,000 GJ of gas per annum. This applies to some 1.6 Victorians, with only approx 10-0 receiving more than quantity of gas. The definition is not restricted to natural persons. This is also consistent with the general interpretation within the ERC
To isolate a particularly vulnerable class of end-consumer of the composite product heated water (as opposed to energy gas or electricity) to be treated differently to all other consumers of gas, and to penalize that class of consumers such that the definition of meter that applies to them is discrepant to all other definitions of energization points; and to strip those consumers of their enshrined residential tenancy rights under legislation, is to perpetuate an injustice.

*(a) the date on which the **customer** and the **retailer** agree to enter into the **energy contract**; or*

*(b) if the **customer's explicit informed consent** is required under clause 22.1(b)*

*before the **energy contract** can commence to be effective, the date on which the **explicit informed consent** is given.*

***responsible** in respect of a **retailer** and a **supply address**[188] means the **retailer** is responsible for the **energy** supplied at the **supply address** for the purposes of settlement of a relevant wholesale **energy** market under **applicable regulatory instruments**.*

***retailer** means a person who holds a retail licence under the **Electricity Act** or under the **Gas Act**.[189]*

***Retail Rules** means the relevant retail gas market rules (as defined in Division 2 of Part 4 of the **Gas Act**) applicable to the **customer's supply point**.[190]*

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188 As shown below within the ERC definitions and reflected also in the Gas Code, the term supply address is not a postal term. When used in an energy context it is synonymous with supply point/connection point and has the technical meaning of an energy supply connection that facilitates the flow of energy. For VENCorp Distributor-Retailer settlement purposes, there is a single supply point/supply address for those points that serve to heat communal water tanks on multi-tenanted dwellings.
This is consistent with existing legislation which holds that a supply point in existence prior to 1 July 1997 (which refers to the vast majority of older buildings with bulk hot water systems), a single supply and billing point exists and this is reflected in the settlement provisions. It is therefore inappropriate to regard the premises occupied my tenants or other occupiers as *"supply points"* or "supply address" for the purposes of receiving energy.
For energy used to heat communal water tanks, the energy is received at a single supply point/address on common property infrastructure. It is transmitted in a gas transmission pipe or an electrical line to a communal water tank also on common property infrastructure in the care custody and control of a Landlord/Owner or Owners' Corporation. The energy is supplied to those parties. A deemed or explicit contract exists between supplier and Landlord from the moment that an agreement is made to fit the energy infrastructure, not at the time that a succession of occupants turn on their water taps in individual premises. A clear distinction within the Rules and Law needs to be made between premises and supply address, as they are not interchangeable terms.

189 Retailers are licenced to sell gas or electricity. Heated water supplies are not energy. Use of hot water flow meters to measure gas or electricity consumption represent a distortion of the energy provisions. Threatening to disconnect water supplies because of ownership of meters, or to in any way disadvantage an end-consumer of heated water products that are reticulated in water pipes to individual apartments, where that water is communally heated in a water storage tank to which energy is supplied from a single supply point/address point is unacceptable. The entire meaning of distribution sale and supply of energy has become entirely distorted through the BHW provisions. The contractual, trade measurement and calculation methods are discussed in some detail elsewhere.

190 Again the use of customer supply point is in debate. There is no energy supply point for those receiving BHW communally heated.

second tier electricity customer *means, in respect of the relevant* ***supply address,*** *the* ***customer*** *who purchases electricity otherwise than directly and in its entirety from the* ***retailer*** *that is the* ***local retailer*** *in respect of that* ***supply address.***[191]

standing offer means an offer made by a ***retailer*** as contemplated by:

(a) for electricity, section 35 of the ***Electricity Act***; and

(b) for gas, section 42 of the ***Gas Act***.

supply address[192] *includes:*

(a) for electricity, the relevant market connection point (as defined in the ***National Electricity Code****) in respect of that supply address; and*

(b) for gas, the point where gas leaves the distribution system before being supplied to a ***customer,***[193] *whether or not it passes through facilities owned or operated by another person after that point and before being so supplied.*[194]

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191 The terms premises and supply address are both used interchangeably within the VERC as if they both mean a postal address. Premises is the accommodation and postal address. If energy is directly supplied to premises a physical connection must exist at a gas supply point/supply address, or through a gas transmission pipe; for energy this is normally an electricity point or an electric line. If no such supply occurs the premises are not the subject of energy supplied. Heated water is reticulated in water pipes through which no energy flows or can be transmitted. For BWH arrangements, the supply is at the outlet of the meter on common property, regarded within the existing legislation and VENCorp rules as a single supply and billing point.
The street address is the premises. The supply point/supply address is the outlet of the meter where the connection is. The proper contractual party is the landlord/Owner. This should be unambiguously spelled out within the Law. Creative re-interpretation of the fundamental terminology relating to distribution, supply and sale of energy has been the consequence of excessive leeway at jurisdictional level.

192 Neither supply point nor supply address are terms that apply to a residential tenant's apartment where no energization point exists and no energization meter associated with such premises. The energization point for BHW is a single one and for VENCorp Distributor-Retailer purposes is a single point. In buildings where the gas metering installation was installed prior to 1 July 1997, the legislation provides this as a single billing point. Regarding tenants' addresses as supply point is to distort all of the fundamental meanings within energy laws and rules and their original intend and the practices adopted for charging represent regulatory overlap and interference with landlord-tenant contracts. The laws did not intend energy supplies to be billing agents for landlords so that heated water could be charged for twice. How could this have been intended to prevent "*price shock to end-consumers"*

193 The gas leaves the distribution system at the double custody changeover point at the outlet of the meter, in the case of supply points serving to heat communal water storage units, on common property infrastructure. That is the connection point and the Landlord/Owner receives that ene4rgy under a deemed or explicit contract, not the recipient of heated water conveyed in a water pipe through which there is not flow of energy.

194 Therefore, again, the supply point/address is the double custody change-over point from distributor-retailer-landlord where it relates to the single energization point used for the heating of a communal water tank from which water is reticulated to individual apartments without any flow of energy being effected in the delivery of that heated water. In the absence of a flow of energy to such premises, no supply of energy takes place

supply point[195] *means the point where gas or electricity leaves the distribution system before being supplied to the customer, whether or not it passes through facilities owned or operated by another person after that point and before being so supplied.*

tariff *means a price for the supply or sale of* ***energy***.[196]

telephone marketing agreement *means a telephone marketing agreement under and to which Division 2A of Part 4 of the* ***FT Act*** *applies*

transfer *in respect of a* ***customer*** *and two* ***retailers****, means that* ***responsibility*** *for the relevant* ***supply address*** *of the* ***customer*** *has transferred from one of the* ***retailers*** *to the other.*

writing *includes any mode of representing or reproducing words, figures, drawings or symbols in visible form.*

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195 This term is synonymous with supply address. Supply address does not have the meaning of a postal address in energy terms. It denotes a physical connection with the distribution or transmission system permitting the flow of gas to the premises deemed to be receiving that energy. Heated water is transmitted in water pipes that do not allow the flow of energy to the premises they supply.
No gas passes through the hot water flow meters that measure water volume in communally heated water tanks. These devices measure water volume only. There is no supply point or supply address in the apartments and flats of those receiving heated water heated in such a way. Therefore there is no customer. The relevant customer is the Landlord/Owner or Owners' Corporation – refer to analysis of *Gas Industry Act 2001* elsewhere, and other definitions

196 The tariff principles adopted for BHW arrangements, imposing contractual status on end users of heated water not supplied at any connection point or through any energy transmission pipeline or electrical line, are relying on reading hot water flow meters deemed to be suitable instrument through which to formulate derived costs through conversion factor formulae. This is discussed in some detail elsewhere, also with reference to the instruments used, the policy parameters of the National Measurement Institute; best practice principles; the implications for suppliers in the future for using trade measurement practices that fail to use instruments designed for the purpose (Part V 18R National measurement Act 1960); the intent and letter of the proposed NECF.
The Law needs to take control of these anomalies and put the debate to rest without stripping end-users of their existing enshrined rights under other regulatory schemes. The whole rationale of the derived formulae and contractual allocation is the primary subject of this submission.
From the supplier viewpoint, distributors and retailers need to be clear about what is right and proper , and that they must abide by all laws and provisions not those that are just energy-related. If they are given confusing and conflicting instructions that may leave them vulnerable to private litigation, civil penalty or other sanctions and expense this leaves them vulnerable at the same time as stripping end-consumers of utilities of existing enshrined rights under other regulatory schemes.

36. INTERPRETATION

36.1 Connection, disconnection and reconnection

*A **retailer** is not in a position to **connect**, **disconnect** or **reconnect** the electrical system or **natural gas installation** at a **customer's supply address** to a **distributor's** distribution system. In this Code unless the context otherwise requires, a reference in a term or condition to a **retailer**:*

*(a) having a right or not having a right to **disconnect** a **customer** is to be construed as a reference to the **retailer** having a right or not having a right to procure the **distributor** to **disconnect;**[197] or*

*(b) being obliged to **connect**, **disconnect** or **reconnect** a **customer** is to be construed as a reference to the **retailer** being obliged to use its **best endeavours**[198] to procure the **distributor** to **connect**, **disconnect** or **reconnect**, the electrical system or **natural gas installation** at the **customer's supply address** to the **distributor's** distribution system.[199]*

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197 It surely cannot be the role of a distributor or any other provider of energy of middlemen involved in energy provision to disconnect heated water supplies in the absence of any evidence of flow of energy to the premises deemed to be receiving energy. The BHW provisions have facilitated threat of disconnection of heated water supplies to individual apartments that is reticulated in water pipes in the complete absence of a supply point (connection), transmission pipe or flow of energy.

198 Best endeavours in one supplier's perception may not be the same for another. The process needs to be spelled out As things stand some retailers are using threat of disconnection of heated water services (or of actual energy) as a first line strategy in endeavouring to coerce an explicit contract. Where this relates tor receipt of heated water in water pipes that facilitate no flow of energy; and where there is an absence of any connection point or gas transmission pipe; or electrical line to the residential premises of a customer deemed to be contractually obligated, this has serious implications and could lead to unwarranted disconnection of heated water supplies, which are already factored into the rent and an intrinsic part of residential tenancy leases arrangements under mandated legislative provisions unless legally traceable methods are used to ascertain consumption of any utility other than bottled gas. Hot water flow meters do not fulfil such a function. Meter is clearly defined within the GAI and the Gas Code. Other provisions should not be inconsistent with either.

The Law should take charge of clarifying this matter without disadvantaging end-consumers relying of their enshrined rights. This has implications for both economic and non-economic arenas in the deliberative processes before the Law is finalized.

199 A water meter and associated pipes reticulated the composite product heated water is not part of the defined gas distribution system under all provisions. Retailers are using threat of disconnection of hot water supplies through which to coerce explicit contracts with end-users of heated water. The cost and supply of heated water is covered under mandated Residential Tenancy provisions.

PART 4 DISCONNECTION

13. GROUNDS FOR DISCONNECTION

13.1 Non-payment of a bill[200]

*A **retailer** may only **disconnect** the **supply address** of a **customer**, being a **customer** who fails to pay the **retailer** by the relevant pay by date an amount billed in respect of*

*that **supply address**, if:*

*(a) the failure does not relate to an instalment under the **customer's** first instalment plan with the **retailer**;*

*(b) the **retailer** has given the **customer**:*

1. *a reminder notice not less than 14 **business days** from the date of dispatch of the bill. The reminder notice must include a new pay by date which is not less than 20 **business days** from the date of dispatch of the bill. No reminder notice is required if the **customer** is on a shortened collection cycle under clause 9.1; and*

2. *a **disconnection** warning:*

*(A) if the **customer** is on a shortened collection cycle under clause 9.1, not less than 16 **business days** from the date of dispatch of the bill.*

*The **disconnection** warning must include a new pay by date which is not less than 20 **business days** from the date of dispatch of the bill; or (B) otherwise, not less than 22 **business days** from the date of dispatch of the bill. The **disconnection** warning must include a new pay by date which is not less than 28 **business days** from the date of dispatch of the bill;*

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[200] Retailers who been instructed under licences or codes or other provisions to consider as a customer of gas or electricity a residential tenant who receives bulk hot water, that is water from a communal tank that is supplied to a Landlord by a water authority, heated by a single energization point on common property infrastructure by direct arrangement with a Landlord, and then reticulated to individual apartments; are assuming an entitlement to disconnect hot water services using the provisions of 13.1

*(c) the **retailer** has included in the **disconnection** warning:*

- *if the **customer** is a **domestic customer** and has a **dual fuel contract**:*

*(A) a statement that the **retailer** may **disconnect** the **customer's** gas on a day no sooner than seven **business days** after the **date of receipt** of the **disconnection**[201] warning and the **customer's** electricity on a day no sooner than 22 **business days** after the **date of receipt** of the **disconnection** warning; and*

*(B) a statement that **disconnection** of the **customer's** gas may result in a variation of the **tariffs** and terms and conditions of the **dual fuel contract** as provided for in the **dual fuel contract**. If no variation is provided for in the **dual fuel contract** and neither does the **dual fuel contract** provide that there is to be no variation, the **tariffs** and terms and conditions of the **dual fuel contract** are to be varied such that on and from then:*

[201] The meaning of the term disconnection within the energy rules seems to have become distorted. Disconnection in the Gas Code means disconnection or decommissioning of energy not water. Retailers who do not supply energy at all to individual apartments are threatening disconnection of heated water services that are an integral part of their rental lease agreements under mandated lease provisions. They receive no energy to their individual premises when that energy is used to heat communal water tanks "bulk hot water." They receive a composite water product in water pipes through which no energy passes. They are being inappropriately left at risk of losing hot water supplies. The proper contractual party is the Landlord/Owner or Owners' Corporation. This should be reflected in the law and in the rules. Regulatory overlap is in any case disallowed under the rules. No energy consumption can be shown to be received in a legally traceably way.

13.2 Domestic customers without sufficient income

*Despite clause 13.1, a **retailer** must not **disconnect** a **domestic customer** if the failure to pay the **retailer's** bill occurs through lack of sufficient income of the **customer** until the **retailer** has also complied with clause 11.2, using its **best endeavours** to contact the **customer** in person or by telephone, and the **customer** has not accepted an instalment plan within five **business days** of the **retailer's** offer.*

13.3 Denying access to the meter[202]

*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*[203] *has:*

- *used its **best endeavours,***[204] *including by way of contacting the **customer** in person or by telephone, to give the **customer** an opportunity to offer reasonable access arrangements;*

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202 Residential tenants generally who are required to provide access to meters that are behind locked doors in the care custody and control of Landlords are unfairly excepted to provide such access under pain of possible threat of disconnection or actual disconnection. In most cases meters are referred to as energization points. For the BHW arrangements meters have been creatively re-defined to represent devices which measure hot water consumption, not consumption of energy. Site specific meter readings were rejected as too expensive and inconvenient to retailers, yet threats of disconnection because of alleged denial of access to meters is used to force tenants beyond their capacity to cooperate into a situation that is threatening and unreasonable.
It is usual practice to seek an energy key by direct arrangement with an OC. The details of such a body are normally transparently displayed on the walls of building housing multiple residential-tenants.
Whether the meters are hot water flow meters measuring water volume, or energy meters measuring gas or electricity, in blocks of apartments and flats and onus should be on the retailer to make contact with OCs to secure key access. Normally energy meters in these circumstances are readily accessible. Hot water flow meters on the other hand generally reside in a boiler room behind locked doors. The provision within the NECF and within the ERC is unreasonable in relation to the requirement for residential tenants to provide access to those meters. Normally the landlord does not permit this or provide key access, and normally meter reading dates are not known to end-consumers. A far more efficient arrangement is to seek energy keys from Landlord's representatives.

203 Is a relevant meter reader a reader of hot water flow meters; gas bulk meters; or both? These are normally read about two months apart for BHW purposes. The term meter has been given a whole new meaning and does not imply an energization point. The heated water is a composite product that retailers are not licenced to sell. Its cost in terms of supply and consumption is already included in the mandated residential lease terms.

204 Best endeavours can be interpreted in many ways. Even if residential tenants have to accept the unreasonable contractual obligation to arrange access to meters, they usually cannot meet demands in time through landlord's or their agents. It would be far more efficient to provide for Landlord-retailers contact or Landlord representative to provide energy keys.

- *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.*

13.4 Refusal to provide acceptable identification or refundable advance[205]

*A **retailer** may **disconnect** a **customer** if the **customer** refuses when required to provide **acceptable identification** (if the **customer** is a new **customer**[206] of the **retailer**) or a **refundable advance** but only if:*

*(a) the **retailer** has given the **customer** a **disconnection** warning including a statement that the **retailer** may **disconnect** the **customer** on a day no sooner than 10 **business days** after the **date of receipt** of the notice; and*

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[205] The refusal to provide acceptable identification or refundable advance in a situation of dispute existence of any contract or necessity to form one raises significant issues of legal and technical interpretation; social and moral obligation to supply; regulations that may be seen to be insensitive to broader regulatory requirements, including the requirement to avoid regulatory overlap with other schemes.
These considerations may place innocent parties at risk of losing a good reputation on the basis of unilaterally imposed obligations that would not stand up to legal or technical scrutiny yet can have adverse outcomes if a consumer stands up for his rights. The BHW provisions highlight these points. Though this section regarding disconnection and reconnection is not targeted for repeal or change within the Rules it is a crucial consideration in terms of the BHW arrangements.

[206] The BWH charging philosophies presume new customer status when it is ultimately discovered by a retailer through unexplained means that may have privacy implications that a tenant has taken up residence in a multi-tenanted dwelling using communally heated water supplies that are part of mandated lease arrangements under tenancy provisions. It follows therefore that procedures will be assumed to be in order if a retailer threatens or effects disconnection of heated water. Nowhere in the rules or proposed NECF is disconnection or contract referred to in this way.
In fact a significant gap in the NECF TOR is omission of proper definition and discussion of disconnection and decommissioning.
These concepts as described under the *Gas Distribution System Code* and elsewhere within the *Energy Retail Code* (VECC) are entirely incompatible with the interpretations being placed on options to disconnect for refusal to supply identification or ability to provide access to water meters behind locked doors.

*(b) the **customer** has continued not to provide the **acceptable identification** or the **refundable advance**.*

13.5 A customer's right to request disconnection

*On request, a **retailer** must **disconnect** a **customer** and, if requested, finalise the **customer's** account in accordance with the **customer's** request.*

14. NO DISCONNECTION

*Despite clause 13, a **retailer** must not **disconnect** a **customer**:*

(a) for non-payment of a bill[207]*l*

1. *where the amount payable is less than any amount approved by the **Commission** for this purpose in a relevant **guideline**;*
2. *if the **customer** has made a complaint directly related to the non-payment of the bill, to the Energy and Water Ombudsman Victoria or another external dispute resolution body and the complaint remains unresolved;*
3. *if the **customer** has formally applied for a Utility Relief Grant and a decision on the application has not been made; or • if the only charge the **customer** has not paid is a charge not for the supply or sale of **energy**;*

[207] Since imposition of contractual status on residential tenants receiving a composite water product – heated water from a communally heated water supply on common property infrastructure is likely to be a subject of irresolvable dispute between suppliers of energy and residential tenants aware of their rights and some of the fundamentals of contractual and tenancy laws; but since also the existing BHW provisions sanction the imposition of such status, the implications for inappropriate disconnection of heated water supplies or of inappropriate perceptions of defaulting customers, where in fact they are already paying for heated water under legitimate tenancy provisions that are mandated, this raises a number of legal, technical, and social obligation issues that are not addressed at all within the existing Energy retail Code or perhaps the proposed NECF.
Again the issue of regulatory overlap and conflict with and appropriate calculation and charging methods that show legal traceability are central issues that have received no attention for decades, with arrangements in place being allegedly adopted to *"prevent consumer price shock."*

*(i) the timeframe for **disconnecting** the **customer's** electricity is the timeframe stated in the **disconnection** warning;*

*(ii) the supply and sale of electricity otherwise continues at the **tariff**, and on the terms and conditions, that would apply if the **customer** were party to a **deemed contract** under section 37 of the **Electricity Act**; and*

*(iii) the supply and sale of gas otherwise continues at the **tariff**, and on the terms and conditions, that would apply if the **customer** were party to a **deemed contract** under section 44 of the **Gas Act**;*

- *in any other case, 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 **disconnection** warning; and*

- *a telephone number for payment assistance enquiries; and (d) the **customer** has called the telephone number referred to in paragraph (c) and the **retailer** has responded to the **customer's** enquiry and has provided advice on financial assistance;*

*(e) the **customer** is a **domestic customer** and has a **dual fuel contract** with the **retailer** and the **customer's** electricity is to be **disconnected**, the **retailer** has given the **customer** a further **disconnection** warning no less than six **business days** before the electricity is **disconnected**; and*

*(f) the **customer** is on a shortened collection cycle under clause 9.1 and the **retailer** has contacted the **customer** in person or by telephone to advise of the imminent **disconnection**,*

*and, before **disconnection**, the **customer**:*

*(1) does not provide a **reasonable assurance** to the **retailer** that the **customer** is willing to pay the **retailer's** bills[208]; or*

(2) does so, but then:

*does not pay the **retailer** the amount payable by the pay by date on the relevant **disconnection** warning. This does not apply if the **retailer** and the **customer** have agreed to a new payment arrangement;*

- *does not agree to a new payment arrangement within five **business days** after the **date of receipt** of the **disconnection** warning; or*
- *does not make payments under such a new payment arrangement.*

*To avoid doubt, if the **customer** does not agree to such a new payment arrangement or does not so make payments under such a new payment arrangement, the **retailer** may **disconnect** the **customer** without again having to observe this clause 13.1.*

(b) if:

*for electricity, the **customer's supply address** is registered by the relevant **distributor** as a life support machine **supply address**; or*

*for gas, the **customer's supply address** is registered by the **retailer** or a **distributor** as a medical exemption **supply address**. A **retailer** must register a **supply address** as a medical exemption **supply address** if a **customer** requests registration and provides a current medical certificate certifying that a person residing at the **supply address** has a medical condition which requires continued supply of gas; or*

*(c) unless otherwise requested by the **customer**:*

- *after 2 pm (for a **domestic customer**) or 3 pm (for a **business customer**) on a weekday; or*
- *on a Friday, on a weekend, on a **public holiday** or on the day before a **public holiday**.*

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[208] The seemingly irresolvable conflict between the BWH contractual arrangements in place and the provisions of other regulatory schemes make it unreasonable to expect a residential customer who is a renting tenant receiving communally heated water products (rather than energy) to accept liability for a product already paid for and included with his rent under mandated rental provisions. A unilateral perception by policy-makers, regulators and retailers that such a person is an energy customer refusing to pay has serious implications for the rights of consumers and is inconsistent with the requirement for regulators to avoid regulatory overlap

15. RECONNECTION

15.1 Customer's right of reconnection

*If a **retailer** has **disconnected** a **customer** as a result of:*

*(a) non-payment of a bill, and within 10 **business days** of **disconnection** either:*

6. *the **customer** pays the bill or agrees to a payment arrangement; or*
7. *being eligible for a Utility Relief Grant, the **customer** applies for such a grant;*

*(b) the **customer's**[209] **meter** not being accessible, and within 10 **business days** of **disconnection** the **customer** provides access or makes available reasonable access arrangements;*

*(c) the **customer** obtaining supply otherwise than in accordance with applicable laws and codes, and within 10 **business days** of **disconnection** that ceases and the **customer** pays for the supply so obtained or agrees to a payment arrangement; or (d) the **customer** refusing to provide **acceptable identification** or a **refundable advance**, and within 10 **business days** of **disconnection** the **customer** provides it, on request, but subject to other applicable laws and codes and the **customer** paying any **reconnection** charge, the **retailer** must **reconnect** the **customer**.*

15.2 Time for reconnection

*(a) If a **customer** makes a request for **reconnection** under clause 15.1:*

- *before 3 pm on a **business day**, the **retailer** must **reconnect** the **customer** on the day of the request; or*
- *after 3 pm on a **business day**, the **retailer** must **reconnect** the **customer** on the next **business day** or, if the request also is made before 9 pm and the **customer** pays any applicable additional after hours **reconnection** charge,*

*on the day requested by the **customer**.*

*A **retailer** and a **customer** may agree that later times are to apply to the **retailer**.*

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209 Customer is defined in the GAI as one who is the subject of supply and sale of energy, not heated water. Relevant customer is the term used in the deemed provisions. The relevant customer is the Landlord. This term is broadly defined on the basis of consumption threshold for gas of no more than 10,000 GJ per annum, and is not restricted to a natural person. The central issue is when a whether a supply connection is effected or energized that can be directly connected to the premises deemed to be receiving energy supplies, through the facilitation of flow of energy directly from the distribution or transmission system to those premises. Users of communally heated hot water receive a composite water product in water pipes through which no energy flows to the individual premises of occupants in multi-tenanted apartment blocks received heated water in this way.

*(b) Despite clause 36.1, the obligation of a **retailer** to **reconnect** a **customer** under clause 15.2(a) is absolute. If **reconnection** does not occur by the relevant time, it is not sufficient to discharge the **retailer's** obligation that the **retailer** may have used **best endeavours** to procure the relevant **distributor** to **reconnect** the electrical system or **natural gas installation** at the **customer's supply address** to the **distributor's** distribution system.*

SELECTED ENERGY PROTECTION CONCERNS

I have previously cited and referred to the analysis by Gavin Dufty of the philosophies of the ESC apparently startlingly similar to those of the AEMC, the new Energy Rule Maker, in relation to Universal Service Obligations (USOs).

Dufty also deals with the hairy issue of shifting responsibility from corporations and government to consumers; or from corporations to government, a process that he refers to as *"gaming"* though that term is also used the context of this submission in referring to misuse of market power[210] Though Dufty's paper is focused on energy regulation, many of the principles can be applied to other arenas.

In his 2004 analysis of the Essential Services Commission's philosophies and approaches, Gavin Dufty, now Manager Social Policy and Research St Vincent de Paul Society said[211]

> *In all of these models the ESC[212] is proposing to withdraw from the traditional basic protections delivered via universal service. In lieu of a universal safety net offered via universal service obligations the ESC proposes to protect customers where the market is failing through the establishment of "residual markets[213]".*
>
> *This residual market would be subsidized by the Government supposedly using monies currently allocated to fund energy concessions designed to increase affordability of energy services for low income households.*

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210 See for example the views and concerns expressed in the 2007 Annual Report of Jackgreen, a Tier 2 Retailer. *"It is clear to Blind Freddy that gaming has occurred; the question is who caused it and who is benefitting from it?"*

211 Dufty, G (2004)."*Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments."* VCOSS Congress Paper 2004

211 Tamblyn, John (2003) Powerpoint presentation World Forum on Energy Regulation, Rome September *"Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition?"* John Tamblyn (then) Chairperson Essential Services Commission Victoria.
Refer also to John Tamblyn's similar paper Tambylyn, J (2004 *"The Right to Service in an Evolving Utility Market,"* PowerPoint presentation at National Consumer Congress 15-16 March 2004 Melbourne

212 Essential Services Commission, *Review of the effectiveness of retail competition and the consumer safety net for electricity and gas,* Issues paper, December 2003,p18

213 Residual markets occur when various customers who are directly excluded from mainstream market offers are provided a residual service; this is usually a minimalist type service.

As observed by Mr. Dufty, The model proposed

> *".....creates the opportunity for private companies to 'game'[214] the subsidies created to address market failure. This could occur through company's retreating from providing services to all but the most profitable customers.*

The proposals made

> *".....not only shifts the target groups for the concessions, but also serves to reduce minimum protections to all Victorians. ".....seeks to erode the current framework of regulated price caps and defined minimum service standards.*

In an ABC interview in November 2007, the Chairperson of VCOSS spoke of the effect of electricity price rises on families, especially those on low fixed incomes[215]

> *The peak social welfare body in Victoria says the rising cost of utilities will hit low income families hard. Electricity prices in the state will rise by up to 17 per cent from January, and gas prices will be up to 7 per cent higher. The Victorian Government says the drought has reduced hydro-electricity generation, pushing up energy production costs. Cath Smith from the Victorian Council of Social Service (VCOSS) says that could see household power bills increase by as much as $200. Water bills are also set to double over the next five years.*
>
> *Ms Smith says the higher prices will make life even harder for households that are already struggling. "$160 to $200 a year is going to be a really big push for a lot of families, particularly because the week when that bill arrives, potentially that's an extra $60 or $80 on your peak winter bill," she said. "That's a lot of money for people to find. "For people on pensions, together with the water price, that's pretty much a full week of pension, basic pension, just to cover the increases in your utility bills."*

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214 Gaming refers to the ability of companies to increase profit by shifting additional costs or low profitability/high risk customers onto third parties, such as government.

215 VCOSS says power hike will hurt families found at *http://www.abc.net.au/news/stories/2007/11/30/2106621.htm*
It is yet to be spelled out how this will be compensated and whether those not receiving benefits but on similarly low incomes will far. Again the question of "blood awful services" that did not work will be the concern, as expressed in 2000 by the Senate Select Committee

In its submission to the Composite Paper MCE Retail Policy Working Group, VCOSS made the following observations and recommendations.

Whilst it is not the brief of the Productivity Commission to address such specifics, there are concerns that these are similar recommendations may not be taken into account in designing adequate energy protection for consumers.

Without the detail, and with little more than a recommendation to appoint a national *"energy ombudsman"* and make greater use of ADR services (which appears to include these schemes though none of them mediates, advocates or arbitrates, or holds face to face meetings between disputing parties), it is really difficult for the public to have any confidence that consumer protection, especially for energy will be adequately addressed.

Therefore this small selection of concerns is raised in this arena to raise public awareness of some of the gaps that need to be clarified.

Extracts from VCOSS submission to Composite Paper, Retail Policy Working Group July 2007[216]

With a view to further work towards the new regulatory framework, we note these additional matters of concern:

- *Any assessment of credit risk that relies on historical information about debt should be restricted to information about utility debts only.*
- *Hardship programs should be mandatory for all retailers to ensure that consumers who experience bill payment difficulty, irrespective of the nature of their contract, can retain supply and are offered appropriate flexible arrangements to pay bills with continuing regard to their capacity to pay*
    - *Late payment fees, currently banned in Victoria, should be prohibited under the new framework as they are regressive in nature and impact disproportionately on low income households. Late payment should be regarded an indicator of potential financial stress and a precursor to offering hardship options.*
- *All standing offer contracts for electricity and gas supply must include Centrepay as an accepted payment method.*

216 VCOSS (2007) Submission to MCE Retail Policy Working Group found at *http://www.vcoss.org.au/documents/VCOSS%20docs/Submissions/2007/SUB_070730_RPWG%20Composite%20Paper_VCOSS.pdf*

- *Prepayment meters are currently proscribed in Victoria. VCOSS remains fundamentally opposed to their introduction because they are hugely detrimental to low income and disadvantaged households, and the only benefit they do offer those consumers (ability to pay for energy use via small, frequent instalments) can be readily and more appropriately delivered by other methods (such as bill smoothing). However if prepayment meters are allowed for in the national market, the following must be guaranteed by the regulatory framework:*

- *they must be optional —consumers must never be compelled to prepay;*

- *explicit informed consent must be obtained before a customer is signed to this option; and*

- *all standing offer contract terms must be delivered, including consumer protections such as disconnection proscriptions, payment flexibility, and the principle that no-one should be disconnected simply due to incapacity to pay.*

As well as responding to the detail of issues under consideration, we make the following observations about the national energy markets:

- *The objective of economic efficiency in the long term interests of consumers must be aligned with social and environmental objectives.*

- *Contestable markets for energy are still immature. Reviews of the effectiveness of retail competition have offered highly qualified reports and indicate significant areas of failure.*

- *Consistency between jurisdictions and/or a national regime for regulation is desirable, but only so long as consumer protections are guaranteed.*

- *Retail market contracts should provide for robust consumer protections including provision for comprehensive hardship programs and proscriptions on disconnection.*

- *Retail marketing arrangements should have regard to plain language and consistent product disclosure, explicit informed consent and appropriate cooling-off periods.*

The ESC Retailer Compliance Report 2006/2007 advised as follows[217]

Extract 2005-06 COMPLIANCE REPORT FOR VICTORIAN ENERGY RETAIL BUSINESSES FEBRUARY 2007

4.3.1 Cases not involving the Commission

Wrongful disconnection cases can be identified by the retailer, the customer or EWOV. In 2005-06 a total of 143 wrongful disconnection cases resulted in compensation payments to customers. The payments ranged from $26 per customer to approximately $19,000 per customer.

Over 70% of the instances of wrongful disconnection detected by the retailer were due to incorrect account details or errors made by staff, resulting in the retailers requesting the distributors to disconnect the wrong address. Customers appeared mostly to complain of wrongful disconnection when accounts were paid but the disconnection order was not cancelled, disconnection at incorrect addresses and delays in reconnecting once a payment arrangement had been agreed.

The key reasons for the complaints to EWOV were retailer failure to use best endeavours to contact customers or to advise customers of the availability of financial counselling, concessions and the Utility Relief Grant Scheme and inadequate assessment of the customer's capacity to pay.

4.3.2 Cases involving the Commission

The Commission becomes involved in wrongful disconnection cases where a customer has made a complaint to EWOV, who is not able to reach resolution with the retailer. Clause 6.4 of the OP enables EWOV to seek guidance from the Commission on any questions of interpretation of the ERC or retailers' terms and conditions of supply relating to WDP. This guidance is provided by Commission staff.

[217] ESC Retailer Compliance Report, p26 4.3.2 found at *http://www.esc.vic.gov.au/NR/rdonlyres/949F62FF-B891-4543-939A-00435469E079/0/EnergyRetailBusinessesComplianceReport200606.pdf*

If EWOV is unable to resolve a claim for the wrongful disconnection compensation payment, to the satisfaction of both parties, the claim is referred to the Commission for a decision in accordance with clause 7 of the OP. This formal decision is made by a Commissioner who has been delegated this function.

In 2005-06 EWOV referred 12 cases for interpretative guidance. Commission staff would investigate the complaint and offer a view as to whether WDP had occurred. It was found that these cases were subsequently referred for a formal decision if either the customer or the retailer disagreed with the Commission staff's guidance. This process was recognised as being inefficient and from 1 January 2006, EWOV was advised that written opinions on a specific case would not be provided without a formal referral for a decision. Guidance under clause 6.4 therefore would be confined to broad interpretation of the regulatory obligations.

This reduced the duplication in EWOV referrals for the remainder of the financial year.

In the 2005-06 period, 17 cases were referred for a formal decision. For 6 cases the Commission ruled that the retailer had fulfilled the terms and conditions of the written contract, and for the remaining 12 it was decided that the contracts had been breached, particularly in regard to three basic requirements under clauses 11.1, 11.2 and 13.2 of the ERC. These clauses in general set out the obligations requiring:

- *Adequate assessment of a customer's capacity to pay.*
- *Providing the customer with advice on financial counselling, concessions including the Utility Relief Scheme and energy efficiency information.*
- *Using best endeavours to contact the customer.*

It was often the failure of the retailer to comply with specific steps in the disconnection process which resulted in a decision that wrongful disconnection had occurred. These steps included not providing energy efficiency advice or not making sufficient efforts to contact customers in financial hardship prior to disconnection, in accordance with the obligations set out in the ERC.

Contributing to this was failure by some retailers to record all actions and conversations with customers during the disconnection process. Some retailers asserted that the requirements are clearly set out in the call centre scripting. This was found not to be sufficient and that retailers need to ensure that evidentiary documentation of the actions is maintained. All retailers met the regulatory requirements to make the compensation payments promptly.

The ESC Retailer Compliance Report 2006/22077 advised as follows[218]

"4.3.2 Cases requiring Commission involvement

The Commission becomes involved in wrongful disconnection cases where a customer has made a complaint to EWOV, which despite EWOV's efforts, is not able to be resolved with the retailer. Clause 6.4 of the Procedure enables EWOV to seek guidance from the Commission on any questions of interpretation of the ERC or retailers' terms and conditions of supply relating to WDP."

"If EWOV is unable to resolve a claim for the wrongful disconnection compensation payment the claim is referred to the Commission for a decision in accordance with clause 7 of the Procedure. This formal decision is made by a Commissioner who has been delegated this function.

In 2006-07, 14 cases were referred to the Commission for a formal decision. In one case, the Commission was unable to decide whether the retailer had breached its contract with its customer because the Commission could not determine whether it was Origin Energy or the customer who was at fault regarding the electricity disconnection. However, it was noted that the retailer had already provided some compensation to the customer.

In the remaining 13 cases, it was decided that the contracts had been breached, particularly in regard to three basic requirements under clauses 11.1, 11.2 and 13.2 of the ERC. These clauses in general set out the obligations requiring:

- *Adequate assessment of a customer's capacity to pay.*
- *Providing the customer with advice on financial counselling, concessions including the Utility Relief Scheme and energy efficiency information.*
- *Using best endeavours to contact the customer.*

[218] ESC Retailer Compliance Report, p26 4.3.2

The Commission notes that it was often the failure of the retailer to comply with all of the specific steps in the disconnection process which resulted in a decision that wrongful disconnection had occurred. These steps included not providing energy efficiency advice or not making sufficient efforts to contact customers in financial hardship prior to disconnection, in accordance with the obligations set out in the ERC.

Some retailers have indicated that they are compliant with clause 11.2 of the ERC as they have placed information on assistance available on bills, reminders and on disconnection notices. The Commission considered that this was an insufficient means of advising the customer of the assistance available, as any assistance needs to be expressly communicated to the customer.

Other retailers did not comply with sections 46 of the Gas Industry Act 2001 and 39 of the Electricity Industry Act 2000. These sections provide that if a relevant customer commences to take supply of gas or electricity at premises from the relevant licensee without having entered into a supply and sale contract with a licensee, there is deemed, on the commencement of that supply, to be a contract between that licensee and that person.

*Section 5.1 of the **ESC 2007 Retailer Compliance Report** it was reported as follows:*

As outlined in Chapter 3, market conduct, billing and information provision issues were the primary causes of retailer non-compliance. The potential consumer detriment arising out of these issues can be significant as consumers may:

- *make purchasing decisions based on misleading or inaccurate information;*
- *not be able to readily access the information most applicable to their situation,*
- *enter long-term contracts that ultimately may not meet their energy needs,*
- *be placed in financial hardship due to a retailer seeking to recoup undercharging without offering payment arrangements or delaying repayment of overcharged amounts.*

The Commission is particularly concerned about ensuring that consumers are able to access, in a timely and easy fashion, all necessary information to enable them to make informed choices in the competitive retail energy market in

Victoria.

*Under **Section 5.2 of the ESC 2007 Retailer Compliance Report***

5.2 Interactions with EWOV and CAV

The Commission received a number of referrals and requests for regulatory interpretation from EWOV during the 2006-07 financial year. In addition, the Commission and EWOV continued to meet monthly to discuss emerging industry issues. These meetings provide opportunities for analysis of EWOV complaint data and discussion of broad industry issues.

The Commission also consulted with CAV, in accordance with the existing MOU, on a number of occasions during the 2006-07 financial year to address market conduct and contractual issues.

*Under **Section 5.4** of the ESC 2007 Retailer Compliance Report it was reported as follows*

5.4 Issues for 2007-08

The Commission's compliance monitoring activities for the 2006-07 financial year highlighted a number of ongoing matters that it proposes to address with the relevant retailers over the next twelve months. These compliance matters include:

- *Ensuring that all retailers are complying with the provisions of Guideline 19, in particular the provision of Product Information Statements to customers;*
- *Ensuring that the retailers monitor their external sales channels compliance with all applicable provisions of the Marketing Code;*
- *Ensuring that all retailers comply with the Commission's Final Decision Early Termination Fees Compliance Review (December 2006) when calculating and applying early termination fees;*
- *Ensuring that the retailers' processes for obtaining a customer's explicit informed consent are in accordance with the obligations under the ERC;*
- *Continuing to work with CAV in relation to the fairness of energy contract terms.*

The commonest complaints for both electricity and gas received by EWOV during the year 2006/7, as reported in the 2007 Annual Report was identified as competition issues – the process of switching retailer.

The breakdown is shown below[219]

Cases by industry:

- *11,909 electricity cases (down 6%)*
- *3,888 gas cases (up 10%)*
- *429 dual fuel cases (up 45%)*
- *1,484 water cases (up 14%)*

EWOV received a total 18,280 cases in 2006/07 - 4,109 enquiries and 14,171 complaints. Overall, cases were up 3% from 17,763 in 2005/06.

Taking residential populations into account, the parts of Victoria with the highest rates of residential cases to EWOV were City of Melbourne, Loddon Shire, Pyrenees Shire, Moorabool Shire and Rural City of Swan Hill.

The most common issues were billing (39%), retail competition (21%) and credit (18%).

5,184 complaints were received for full investigation. 5,316 complaints were fully investigated and closed.

Redress to customers included 173 written apologies, 1,016 payment plans negotiated, and $1,740,406 in billing adjustments, fee waivers, debt reductions and other payments.

Electricity

EWOV's annual report 2006/07 reported 11,909 electricity cases overall, down 6% with 19% enquiries and 81% complaints.

The most common complaint was the process of switching retailer.

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219 Found at *http://www.ewov.com.au/html/Annual%20Reports/Annual%20Report%202007.htm*

Amongst electricity retail cases alone, there were 10,240 electricity retail cases, up 24 cases, with 16% enquiries and 84% complaints – with the most common complaint being the process of switching retailers. *Complaints about distribution were most commonly about unplanned outage.*
GAS *2006/07 gas cases* *3,888* ***gas cases overall****, up 10%* *19% enquiries and 81% complaints* *Most commonly — the process of switching retailer* *3,456* ***natural gas retail cases****, up 12%* *16% enquiries and 84% complaints* *Most commonly — the process of switching retailer* *129* ***natural gas distribution cases****, down 37%* *14% enquiries and 86% complaints* *Most commonly — new connections/installations* *149* ***LPG (retailer specific) cases****, up 67%* *42% enquiries and 58% complaints* *Most commonly — fees & charges*

To illustrate:

In 2006/07, customers contacting us (EWOV) registered their dissatisfaction with the following practices:

- *door-to-door sales to non-account holders, to the elderly and to people with limited English*
- *marketing directed at people who — according to the person phoning us on their behalf — didn't have the capacity to provide explicit informed consent to a market contract*
- *people being asked to sign a document, unaware that it was a contract*
- *people being told, or coming to believe, 'things would stay the same' if they agreed to a new contract*
- *sales representatives saying, or implying, they were 'from the government' or had some government connection, or that the energy retailer they represented was 'taking over' in the area*
- *sales representatives saying 'nothing will change except your bill' or 'the supplier will stay the same' — statements which, while they had some truth, took advantage of the average*
- *customer's lack of understanding of the relationship and differences between energy retailers and distributors*
- *sales representatives wearing fluorescent work vests — for some customers this created the impression that they were linesmen, not salespeople, and inferred there may be a need to switch, not a choice*
- *people agreeing to receive further information, and then receiving a 'new customer' welcome letter*
- *delays in receiving important contract information, or in replying to customers' phone calls or letters.*

As appropriate, we (EWOV) provided reports on these issues to the energy retailers concerned, and to the ESC, Consumer Affairs Victoria (CAV), the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER), by way of a Market Conduct Reporting Protocol.

CONCLUSIONS AND RECOMMENDATIONS

Some general concluding comments (primarily targeted for VESC, but two other States follow similar processes , South Australia and Queensland)

Part 2 set the scene, covered the BWH matters in a covering letter to the VESC as a submission to their current regulatory review from a registered stakeholder who was apparently not eligible to be part of any of the consultative processes restricted to nominated working party groups. Motivation to be sent o be publicly participating by written submission has driven these lengthy offerings. In the interests of transparency open and prompt publication is sought.

This part has focused primarily on the limited range of issues covered by the VESC's proposal to simplify the Bulk Hot Water Charging Guideline by repeal it and transfer the majority of its provisions and those provisions also thitherto contained within the deliberative documents that led to his ratification in December 2005 and adoption on 1 March 2006.

Part 2B is more extensive in dealing with issues of contract with particular focus on the MCE SCO Table of Recommendations and correlation between existing definitions and provisions, highlighting certain anomalies that need to be corrected.

Meanwhile, certain immediate observations and recommendations are pertinent to conclude this sub-section as Component Part 2A.

Mere transfer from deliberative documents and guidelines of these provisions and revision to Appendices 1 and 2 (the conversion factor calculation formulae) will not help to validate these provisions from a contractual, legal or technical standpoint.

Attempts by policy-makers and regulators to re-write contractual, tenancy, owners' corporation, trade measurement and other consumer protections in the written and unwritten law by adopting codes and guidelines, or alternatively Orders in Council will not serve to make the fundamental reasoning behind these guidelines more valid, legally or technically sound, or the requirement to avoid regulatory overlap with other schemes and other provisions within the written and unwritten laws, including the rules of natural and social justice or in line with community expectation

As a consequence the provisions will not be seen as meeting best practice regulation that will meet policy or regulatory benchmarking standards in line with community expectation and expediency in meeting the overall objectives of enhancing market operations and consumer protections. In a climate where economic allocative efficiency and pragmatic solutions appear to be eroding the balance that should be obtained in an effective and confident market that addresses the needs and expectations of all stakeholders, this is not only regrettable but stands to compromise standards generally

Adoption of practices that are of lowest common denominator practice, or because of "usual practice" does not constitute best practice modelling. Beware of adopting practice simply on the basis of majority rules principles. The BHW practices do not represent best practice. The appear to defy the most fundamental principles of acceptable applicable of contractual law principles trade measurement practice; avoidance of regulatory overlap; provisions that represent overlap and conflict within and beyond energy provisions. They need to be scrutinized and revised.

The Law needs to better clarify these matters. It is a common misconception that those receiving bulk hot water are *"embedded consumers of energy."* They are not. They receive heated water supplies in water pipes not through any energy network that may have changes ownership and responsibility between distributor and end-consumer

Holding end-consumers of heated water products responsible contractually is not an acceptable, fair or just outcome for all of the arguments presented. The existing and proposed provisions do not meet best practice contractually or in terms of trade measurement practice; they represent instead clear regulatory overlap with other schemes; trade measurement practices that do not stand up to scrutiny and that will soon become formally illegal when remaining utility restrictions are lifted.

Because of the policy change-over and more direct control over the BHW provisions by the DPI, perhaps there is a case to make any Memoranda of Understanding within the CAV as a prescribed agency with a regulatory as well as a consumer protection role and those government agencies and regulators involved in policy design and regulatory implementation

Though it should not be necessary to resurrect issues already aired and taken up with the ESC and EWOV, it would seem that nothing much has changed and that regulatory overlap with other schemes current and proposed remain an issue despite the intervention of the CAV during 2007; the consequent meeting between CAV, EWOV and ESC to discuss these matters; and the prior adoption of a revised Memorandum of Understanding with the ESC, who had handed over policy provision for the BHW provisions to the DPI a matter of months after he Memorandum was formalized; and reminders provided to the ESC about their obligations under their own enactment, the *Essential Services Commission Act 2001*, ss15-16

The provisions were allegedly undertaken for consumer protection to prevent end-consumers from price shock. That goal was not achieved. Rents continue to go rise and what appear to be collusive arrangements between Landlords and energy suppliers, sanctioned by public policies.

Consumers may perhaps be forgiven for feeling betrayed by perceived erosion of protections and compromised access to already enshrined protections under other schemes and the unwritten laws.

Those who do understand their rights and what they are apparently required to relinquish without explanation or Parliamentary sanction may also feel coerced and intimidated by practices that appear to be both implicitly and explicitly condoned. There are no provisions for disconnection of hot water services by licenced retailers or anyone else in circumstances described (BHW provision). Energy providers are licenced to sell gas or electricity not composite water products. Disconnection means disconnection from energy not composite water products.

It has been my sustained contention that despite efforts to enhance transparency and achieve consistency and harmonization, the proposed provisions contain many drawbacks that deserve further scrutiny, leaving aside the debate about contractual and trade measurement arrangements now under DPI control. Central to the concerns are the inability of the arrangements to show legally traceable measurements that can be used to allocate responsibility to end-users of heated water products

The BHW provisions were allegedly adopted for consumer protection to prevent end-consumers from price shock. That goal was not achieved. Rents continue to go up. Consumers feel betrayed by eroding protections. They are being coerced and intimidated by practices that appear to be both implicitly and explicitly condoned. There are no provisions for disconnection of hot water services by licenced retailers or anyone else in circumstances described (BHW provision). Energy providers are licenced to sell gas or electricity not composite water products. Disconnection means disconnection from gas or electricity supply.

There is no energy transmission network involved at all. No supply point, energization point, connection point, gas transmission pipeline or electrical line is involved in transporting heated water supplies to end-users in their individual apartments. These end-consumers of composite water products from which the heating component can neither be separated no calculated through legally traceable means are being held contractually liable; threatened with disconnection of water services, and sometimes pursued for perceived overdue of energy bills that should be submitted to Landlords or Owners' Corporation.

A single supply point/supply address energization point exists on common property infrastructure supplying gas or electricity to a single water storage tank owned and operated by a Landlord/Owner supplying heated water to multiple tenants in multi-tenanted dwellings.

The Landlord/Owner takes supply of energy when he authorizes gas or electricity metering installation and that installation is in place. The proper contractual party needs to be clearly identified within the Law. The intent of current and proposed laws is to clarify what constitutes distribution sale and supply of energy using traditional concepts of connection points as a physical connection allowing the flow of energy to the premises deemed to be receiving that energy.

Hot water flow meters do not represent suitable instruments through which that can be achieved. They measures water volume only not gas, electricity or heat. Gas meters measure gas volume expressed in megajoules (MJ), not heat (energy) Bills are expressed in energy. Electricity is measured in KW-h. Water is measured in litres.

There is no correlation between the distribution and transmission systems for energy and water. There are economic and non-economic implications for the current methods used. Regulatory overlap and conflict between regulatory schemes is specifically disallowed under s15 of the Essential Services Commission Act 2001 and the MOU between CAV and VESC. This ahs made no impact on the policies adopted, now under the control of the Department of Primary Industries Victoria (DPI). The two other states are South Australia and Queensland. The original goals of *"preventing price shock to end consumers"* and achieving were not met. Landlords continue to raise rents. They are the correct contractual parties.

The Law needs to clarify this further so that expensive debate, complaints handling and potential litigation or civil penalties are avoided.

Comment and Recommendations Specific issues

Comment Unjustifiable Deemed Status (recipients of BHW; jurisdictional policies three States, Victoria, South Australia, Queensland – usual practice does not make for best practice)

This is a central theme throughout this and related submissions.

The issue is extensively discussed, especially in sub-sections 2A and 2B of a component submission intended for a number of arenas.

The issues raised the facts and philosophies driving them are not new to most of the target arenas.

The are reproduced for further reinforcement and a plea for urgent attention to the anomalies and perceived injustices that appear to have arisen because of the BWH provisions in place deeming end-users of heated water products, reticulated in water service pipes, in the absence of any energization point under whosoever's ownership; embedded or otherwise; there no energization or connection or supply point exists in the individual apartments of residential or other occupies of multi-tenanted dwellings utilizing hot water services communally heated in hot water service tanks.

Most of these facilities are in private rental stock of sub-standard-quality housing for the most part those of fixed low incomes and often other conditions of vulnerability and disadvantage not related to hardship.

This sub-class of consumers have long been targets for inappropriate threat of disconnection of essential services – not normally energy, but heated water supplies, of which the heating component cannot possibly be measured through legally traceable means.

I will refrain from repeating all arguments in support, save to say that these are not individuals who use unauthorized or illegal supplies of energy. They rely implicitly on the enshrined protections under residential tenancy laws to take possession of rented premises, enjoy peaceful tenancy with fear of threat or intimidation involving loss of essential utilities; and specifically relying on their right to be free from any contractual responsibility for heated water supplies that cannot be measured through legally traceable means using an instrument designed for the purpose and capable of measuring gas or electricity consumption.

Hot water flow meters, though designed to withstand heat, cannot measure gas volume, electricity, heat, ambience, heating value or any other energy attribute. For that matter gas meters can only measure gas volume not any of the other attributes.

Site specific reading of any meters was not considered necessary, convenient or cost-effective by industry providers of energy.

In any case their arrangements are with private landlords, and sometimes corporate entities for the provision of gas or electricity through a single energization point on common property infrastructure used to heat static water storage tanks of varying capacity.

The heated water is purchased under contractual obligation to the Water Authority by the Landlord. It is supplied to the mains water outlet, thence carried in water pipes to a water storage tank. The Landlord either implicitly or explicitly also purchases gas or electricity at the outlet of the mains on common property infrastructure. Those commodities are transported in transmission pipes to a communally heated water tank on common property infrastructure belonging to Landlords.

The heated water is thence transported in water pipes, not any part of the energy distribution service or system, and not facilitating either flow of gas or transmission of energy; to individual apartments, normally occupied by low-income renting tenants

Those tenants implicitly rely on enshrined protections under tenancy laws that hold the Landlord responsible contractually for any costs for any utility other than g=bottle gas that cannot be measured through legally traceable means, using an instrument designed for the purpose. Hot water flow meters, though designed to withstand heat, are not such instruments. They measure water volume, not gas, electricity or heat. They also cannot measure ambience, heating value, temperature or affect regulator control any more than can a gas meter which simply measures gas volume.

These recipients of heated water from which the heating component cannot be separated or measured, and who receive the heated water as a composite product reticulated in water pipes are being unfairly held contractually liable for deemed usage of gas or electricity, impliedly either unauthorized or plain illegally, though their individual apartments have no supply points or transmission pipes to show any energy transmission, embedded or otherwise.

Effectively these individuals, mostly private renting tenants, are being considered to be breaching laws by accepting unauthorized supplies of energy that they do not receive; being threatened with disconnection of heated water merely because some energy suppliers own the water meters that calculate water volume usage, if they are read at all; may be facing credit damage because of perceived dues for consumption and supply charges pertaining to alleged energy use, where the proper contractual party is the landlord or delegate under multiple provisions.

This is the theme argument relating to deemed contracts illustrating unjust imposition of deemed contractual status. The arguments are supported throughout the submission with legal, technical, contractual and regulatory overlap and conflict considerations. The explicit provisions of s15 of the *Essential Services Act 2001* prohibits regulatory overlap and conflict with other regulatory schemes current and proposed.

This is the repeated and sustained argument present.

Recommendation – deemed contracts

The Law should specifically exempts from deemed status the category of end-consumer of utilities, namely heated water products as a composite product reticulated in water pipes not gas or electricity transmission equipment to individual residential apartments and flats.

Other related arguments regard unjust demands for personal identification and contact details and the unjust requirement to provide safe convenient and unhindered access to water meters behind locked doors in the care custody and control of Landlords or their agents/representatives are presented. The original aim or preventing price shock to end-consumers and greater transparency was not achieved as discussed elsewhere.

This submissions reinforces all other oral and written submissions to a range of arenas, including but not limited to MCE arenas multiple; Essential Services Commission Victoria; Department of Primary Industries Victoria; Consumer Affairs Victoria; Australian Energy Regulator; Australian Consumer and Competition Commission; National Measurement Institute; Productivity Commission; community organizations and representatives; various Ministers, with the aim or raising public awareness and attention to perceived anomalies and injustices.

Conclusions - Disconnection issues in brief

I repeat that Disconnection in the Energy Retail Code refers to disconnection of gas as follows:

(b) for gas

The separation of a natural gas installation from a distribution system to prevent the flow of gas

Under the approved VENCorp Gas Market Retail Rules (VGMRR) dated the definition of *decommission* in relation to a *distribution supply point*, is to take action to preclude gas being supplied at that *distribution supply point* (e. g. by plugging or removing the *meter* relating to that *distribution supply point*).

All of these terms and the intent of the legislation and entire regulatory framework did not intend hot water flow meters that measure water volume and not gas or electricity to be treated as supply points, or the apartments of innocent end-users without energization points to be regarded as supply addresses.

The Landlord commences to take supply at the outlet of the meter on common property infrastructure from the moment he agrees to accept delivery of gas to a street address and the infrastructure is in place.

Recommendations - Disconnection

The NECF Law should provide for explicit exclusion of deemed status of consumers of composite heated water products where no energization point exists; where no evidence exists that transmission pipes of any description can be identified in the individual apartments of residential tenants of other occupiers of flats and apartments using bulk hot water systems (storage tanks heated by single energization points)

This is a fundamental matter of contractual governance. It should not rest with jurisdictional control, more so because discrepant interpretations have resulted from the current looseness of wording; perceived misinterpretation of the intent of the deemed provisions; regulatory overlap creep; material consumer detriment; expensive complaints handling, dispute and potential civil litigation; conflict in particular with the intent and spirit of trade measurement laws, and potential to have in place practices that will soon become formally illegal when remaining utility exemptions are lifted.

Conclusions: Supply charges

Retailers are applying massive supply charges and meter reading charges even for water meter reading, though site specific reading was rejected as an option because of cost and inconvenience. Bundled charges will make billing practices and accountability less transparent

Even if readings do occur of both water meters and bulk gas meters (energization points), retailers are incorporating higher fees for water meter reading fees because they claim distributors are charging these. Yet for settlement purposes only a single supply and billing point apply.

The most vulnerable individuals in the community, not restricted to hardship issues, are being threatened with access to heated water supplies and/or energy as a penalty for allegedly having deemed contractual status an impliedly taking unauthorized supply of energy. This is simply not the case. They are taking up occupancy in rented apartments with an implicit belief in their enshrined rights under tenancy and other provisions. Their heated water costs are factored into their rental leases under mandated provisions. They are facing the stresses of threatened disconnection of essential services, being hot water supplies because of flawed interpretations of the deemed provisions on contractual, technical and regulatory overlap grounds.

It does not seem acceptable for policy-makers and regulators to either implicitly or explicitly through policy provisions uphold requirements, including under retailer licence provisions that directly contrive the provisions of the *Essential Services Act* s15 and s16; the provisions of the MOU with the CAV that surely could not have been spuriously undertaken; or that consumers be left in continuing detriment, so say nothing of retailers in continuing confusion about what they should do to resurrect compromised consumer confidence. Compromised consumer confidence is compromised consumer protection

The BHW arrangements current and proposed have enormous implications for all parties involved. Despite licence provisions and transfer to the VERC the fundamental reasoning behind these provisions needs to be carefully considered in the light of how this may affect the integrity of the market, consumer confidence; conflict with energy providers either upstream or downstream

The implications of ignoring the requirement to avoid regulatory overlap current and proposed are serious as are unjust imposition of contractual status on the wrong parties and will have detrimental impacts on end-consumers and on their enshrined rights. They may also place energy providers at risk as discussed and despite instructions to adopt practices that are appear to be legally and technically unsound.

In particular the NECF is urged to explicitly exclude from the application of *"deemed status"* those end-consumers of heated water products who cannot in all fairness be seen to be receiving unauthorized or illegal supplies of energy, justifying disconnection of either heated water services or of energy to communally heat that water supplied by the Landlord, the cost of which is already included in the rents paid by residential tenants under mandated residential tenancy leases.

In addition, it should be clearly provided for in current and proposed Laws and Rules that Landlords be made accountable contractually for supply and consumption costs of energy supplied to a single energization point on common property infrastructure, used to heat water in hot water services (water storage tanks) which is then reticulated to individual apartments.

The Law under tenancy provisions already expects Landlords to pay for these costs in the absence of dedicated energization points and evidence of transmission pipes effecting the flow of gas or transmission of electricity to individual apartments and flats. What they receive is a composite water product in water service pipes from which the heating component cannot be separated. The cost of this composite utility is already factored into the rents being paid. The arrangements have had no impact on curtailing rent hikes twice a year as permitted under residential tenancy provisions, so tenants are paying twice for the same commodity.

Conclusions: VERC 3.3 Denied Access to Meters (see also NECF TOR)

The expectations that residential tenants provide safe convenient and unhindered to any meters behind locked doors is unreasonable and unjust. Most landlords do not allow residential tenants access to such meters. This mainly applies to water meters being used to all intents and purposes as substitute energy supply points. These are the meters that generally reside with the boiler tank behind a locked door. If the current methods are to be perpetuated regardless of regulatory overlap, contractual and technical matters, it is far more sensible for energy providers to have energy key access through the Landlord of OC. The contact details of the latter are usually transparently available on the outside of buildings housing multiple residential tenants using bulk hot water provisions, and those for which energy meters are for some reason also behind locked doors.

Jurisdictions, and in this case the VERC, as well as the NECF are urged to exclude from provisions the perception of denied access to meters behind locked doors where this applies to residential tenants generally; and more particularly those who have been unjustly imposed with contractual status for consumption and supply charges for energy that is in fact being supplied to Landlord or delegate on common property infrastructure to a single energization point.

In most cases the only meters that may be inaccessible are hot water flow meters that do not measure gas volume or electricity supply; or heat (energy) but rather water volume only. Neither do they provide data on ambience, heating value; regulator accuracy; or any other service quality standards. Not even gas meters measure these factors, especially heat (energy).

Hot water flow meters are no more than water meters able to withstand heat.

Gas meters can measure gas volume only, not heat (energy. Bills are expressed in energy.

These gas meters are often referred to as Master Gas Meters for no particular reason, since for BHW there is only one gas mater to measure the quantity of gas that passes through it and its associated metering equipment to filter control and regulate the flow of gas that passes through it and that equipment

There is no subsidiary gas meter, and in any case supply points and ancillary supply points are taken as one. The occupant's apartment address in multi-tenanted dwellings receiving BHW communally heated have no energization points; supply or connection points; transmission pipes, embedded or otherwise, delivering gas or electricity in any transmission pipe. The gas is delivered in a transmission pipe to a communal boiler tank on common property infrastructure. From there heated water, from which the heat cannot either be calculated or separated, is delivered as a composite product in water pipes to individual apartments.

Allegations of denied access to meters, which throughout the remainder of energy provisions and proposed promises implies a gas or electricity meter not a for water flow meter.

Therefore it is inappropriate to allege denial of access to meters when this is the case.

Recommendations – denial of access to meters (BHW exclusions) and residential tenants generally

It should be explicitly stated within the Law and Rules that those receiving BHW from communal water tanks centrally heated are Landlord responsibility for consumption and supply charges, as is already provided for in residential tenancy laws, and that any interpretation of denial of access to meters is misguided. In these cases it is access to hot water flow meters that is sought. These are rarely if every read, but ownership by retailers encourages them to believe that there is a contractual relationship with end-users of the heated water. The current provisions in three jurisdictions encourage this misguided belief.

As to residential tenants generally, this is not the first submission emphasizing that this class of end-consumer of utilities cannot reasonably be expected to provide access to meters in the care custody and control of landlords. It is or should be usual practice to seek energy keys from the Owners' Corporation or Managing Agent or Landlord. The contact details for the first two groups are normally displayed transparently on the buildings that are occupied by multiple tenants or other occupiers. The OC laws are in place for a good reason. They use and legitimacy should be respected by other jurisdictions.

Comment: VESC 3.4 Refusal to provide acceptable ID or refundable advance

Under the Victorian provisions disconnection is allowable after 10 business days notice is provided of intent to disconnect energy, and if the customer continues to refuse identification.

The Victorian recommendation (as opposed to the NECF TOR) is supported that connection take place then disconnection if no acceptable identification is provided, except in the case of those receiving heated water

This is on the basis of all of the arguments presented to show that the end user of heated water is not the relevant customer, despite interpretations of provisions and incorporation of the BHW provisions into the VERC. This provision in the first place represents gross regulatory overlap with other schemes and interferes with the enshrined contractual rights of residential tenants under the mandated terms of their tenancy leases.

The landlord is the proper contractual party. From the moment the Landlord authorizes an energy installation, and that installation is in place, he commences to take supply. A supply charge applies from that moment, long before any occupancy by a transient population of residential tenants in individual apartments who may turn on a hot water tap.

Those with BWH systems are generally living in older sub-standard private rental stock. They receive heated water supplies but no direct energy and no legally traceable methods can be utilized to show their consumption of energy. receipt of a composite water product through water service pipes does not represent receipt of energy authorized or unauthorized.

Conclusions Refusal to provide acceptable ID or refundable advance

(conditions precedent and subsequent)

These tenants normally have separately provided dual fuel contracts where they have the choice of provider and individual gas or electricity meters. These are generally located centrally in the care park of a block of flats and readily accessible gas or electricity meters, with possibly a few exceptions where there re locked gates and security doors in the higher end of the market.

It is these tenants who are being threatened with disconnection of their hot water supplies by energy providers acting as billing agents for Landlords, with regulator sanction, where the Landlords are already legally responsible for both consumption and all supply or associated costs in these circumstances.

In some circumstances the threats of disconnection may be considered to be unconscionable and causing material detriment. In the case of heated water, there are some circumstances where access to heated water is not a matter of life support, but is required for medical reasons that have not been identified within the law. It would be expected that an energy law needs to consider water products in this area of protection, but continuity of heated water supplies is being threatened for those receiving bulk hot water without energization points or transmission pipes facilitating gas flow or electricity transmission pipes to their apartments. Therefore the threat of disconnection of their heated water, or indeed energy is inappropriate.

In some cases, individuals require continuity of heated water because of medical conditions that may include poor healing of wounds, as in the case of peripheral vascular disease, diabetic complications, persistent infection, compromised immunological status that may be caused by prescribed medication (such as chemo9therapy) or other reasons.

In other cases the unjustified threat of continuity of essential services may in particularly vulnerable individuals, notably those with low thresholds for stress, past suicide attempts or psychiatric history, precipitate serious risk to health and life, including further suicide attempts as in the case of the case study cited

It the mere existence of water meters, and regardless of ownership considerations, that can only measure water volume, not gas, electricity or heat, can be used as levers through which continuity of hot water supplies can be threatened in circumstances where not energy, but heated water supplies are being supplied through a communal water tank, this is unacceptable conduct and unacceptable regulation, no matter how pragmatic it may be to use derived costs. The costs, whatever they are, belong squarely with the Landlord or Owners' Corporation. As discussed at length and justified by legal, contractual, technical, regulatory overlap and other arguments throughout this and other similar submissions to a number of arenas.

Recommendations: Refusal to provide acceptable ID or refundable advance (conditions precedent and subsequent)

The Law should explicitly exclude from deemed status and therefore obligation to provide acceptable ID or refundable advance from those who receive bulk hot water supplies as part of their mandated lease arrangements under tenancy laws. This class of consumers have no energization point, supply point or transmission pipe that facilitate the flow of gas or electricity to each apartments. Though they do receive heated water products, the cost of this is covered within the existing terms of mandated lease provisions.

Energy laws need to recognize existing residential tenancy rights and all other rights of individuals. There is in any case a mandated requirement to avoid regulatory overlap with other schemes present and future under s15 of the *Essential Services Commission Act 2001* (v 30 No 62 of 2001, up to 1 July 2008) and the Memorandum of Understanding between CAV and VESC dated 18 October 2007

Energy is an essential service. Water is an essential commodity. Care should be taken to ensure that responsible best practice regulation and compliance enforcement does not put these commodities at risk in terms of continuity of supply.

Conclusions: Billing matters; Derived formulae (Attn MCE NPWG)

The proposal to include on bills certain information may not go far enough to informing the public. Few will know how to access further information. Many will not have the skills to do so by accessing the Energy retail Code. Even then, the information will be minimal since all explanatory notes about how calculations are made will become more obscure and inaccessible upon the repeal of Appendices 1 and 2

The proposed inclusion on billing includes under 4.2 of the ERC a requirement to indicate on a bill whether the bill is based on a meter reading or is a wholly an estimated bill. In the case of BHW the original deliberative documents that led to their adoption, it had been claimed that site specific reading of meters was too expensive and inconvenient for retailers to adopt despite providing more transparency, and notwithstanding in the first place that water meters are not supply points or ancillary energy point (which in any case are taken as one within the legislation and elsewhere) or suitable devices through which individual energy consumption can be measured.

The proposed provisions may not meet the general requirement for a minimum number of meter reads under bill smoothing arrangements (5.3 VESC RR DD) and Meter Reading (NECF TOR)

Bill smoothing, overcharging and undercharging issues are impacted impact by the issues raised

This is claimed on the basis that meter readings may not be undertaken at all, of either water volume or gas volume, and that if these occur they do not occur regularly, yet bills for the alleged heating *"hot water consumption"* by individual tenants imply that at least water volume is precisely calculated if not gas; the proposed provisions for billing do not meet the requirement for a minimum number of meter reads of either satellite hot water meters on common property infrastructure of Landlords or OCs (which measure water volume only not gas or heat) or of the single bulk energization point on common property of Landlords or OCs (which supply point measures gas volume only not heat, meaning energy, and not hot water consumption.

In addition, if bill smoothing in proposed jurisdictional provisions relies on a 9-month period; and 12-months within the proposed NECF TOR, this means that those on low fixed incomes will be disadvantaged by have to find funds for which they have had no chance to budget. In addition, if estimates of water consumption (upon which gas or electricity consumption is based through conversion factor formulae) is based on estimated or actual consumption of previous tenants in the same apartment, this cannot be a fair way of calculate costs. Residential tenants are a transient population. In any given period a single apartment can house anything from one to several parties using variable quantities of water. Under the current imprecise and infrequent calculation proposals, leaving aside contractual debate and calculation methods, this produces equity and legal traceability issues based solely on the billing cycle and bill smoothing arrangements proposed

Though information relating to how often water meters and gas meters will be read, and information on brief calculation details is implied within the ERC very few end-users residing in sub-standing buildings still using communal bulk hot water systems will ever know of or be directed to the ERC to check how things are done. In addition, if the explanations for calculation methods and formulae are to be concealed, it is less likely that transparency of any description will be achievable. This is unacceptable.

These matters also have implications for transparency ; informed consent about practices adopted, even if a “deemed status” imposition is adopted or explicit contracts obtained with or without coercive threat of disconnection of heated water

Overcharging is a common feature. There was no mandate to read meters at all. The hot water flow meters that measure water volume only not gas or heat (energy) seem to be in place for looks and as levers through which disconnection of heated water can be threatened by way of securing an explicit market contract between retailer and end-user of composite heated water products reticulated in water pipes.

During 2004-2005 many concerns had been expressed about overcharging of supply charges and also about transparency by DOI who had previous oversight. Specific Orders in Council also reflected the same concerns in 2003.

Only one supply point/supply address/connection point exists for energization – at the outlet of the meter on common property infrastructure of Landlords. For VenCorp Distributor-Retailer purposes only a single supply and billing point exists for all BHW supply points supplying energy to a communal water tank from which heated water as a composite products is reticulated to various apartments and flats.

Individual tenants are being charges massive supply charges either explicitly identified or as rolled over bundled charges. Only one supply charge should apply – applicable to the Landlord. The Landlord under conflicting regulatory schemes, notably residential tenancies and OC provisions is the proper contractual party also for consumption charges of the energy supplied to the single supply point on common property infrastructure.

Recommendations: Billing Matters, Derived Formulae (attn MCE NPWG)

At the very least, the bills should explain that water meters are being used to calculate derived costs for deemed gas usage. Currently bills do not achieve that. The Recommendations made will not solve all issues regarding information consent and understanding that the hot water flow meters can only calculate water volume not gas or heat provided individually.

The Law should state that only one supply charge should apply – and be billed to the Landlord as recipient of energy on common property infrastructure to a single energization point that for Distributor-Retailer purposes represents a single supply point/supply address and billing address, consistent with current legislation and VENCorp settlement practices.

The manner in which supply charges are being calculated for BHW should be further examined.

Tenants in rented accommodation with BHW systems be freed under the Law from badgering under deemed provisions to form explicit contracts where the proper contractual party is the Landlord.

The 12-month settlement period should be reviewed. Twelve or six month settlement periods both seem too long. Bills should be issued every three months, at least for those on low incomes to help with budgeting. The public is accustomed to quarterly bills. Those who are particularly vulnerable with poor budgeting skills will find the 12-month settlement period impossible to manage. The consequence will be exchanging economies in more regulator billing for the expense of dealing with overdue bills and hardship policies.

Recommendations: MCE arenas (NECF; RPWG; NPWG; ERIG)

I urge The NECF to consider further clarifying the contractual governance model bearing in mind the issues raised, especially with regard tor recipients of heated water supplies (BHW) and those in embedded situations (similar but technically different – no energization for those receiving BHW and no transmission of energy to premises deemed to be receiving energy)

Better protection for consumers is required, especially within the energy industries to reconsider the position with regard to avoidance regulatory overlap and best practice trade measurement practice. These considerations will also be of interest to the National measurement Institute

I urge the NECF to consider explicitly requiring policy-makers and regulators to avoid regulatory overlap with other schemes and with the protections under the common laws, including the rules of natural and social justice and contractual matters (with particular emphasis on residential tenancy provisions). This is already an explicit but ignored provision under s15 of the *Essential Services Commission Act 2001* and the terms of the MOU dated 18 October 2007 between CAV and VESC

I urge the NECF to explicitly allocate contractual responsibility to Landlords and owners who are receiving energy to heat communally heated water tanks in multi-tenanted apartment blocks, with energy provided to a single connection point on common property infrastructure

I urge the NECF to explicitly exempt residential tenants from obligations that already rest with Landlords, particularly with regard to access to meters behind locked doors. Currently demands are made for access to water meters, allegedly under the ownership of retailers seeking to impose deemed contractual status on end-users of water communal heated and reticulated in water pipes to individual apartments. The implications for conditions precedent and conditions subsequent are obvious. Disconnection is being threatened by retailers of hot water supplies in endeavours to enforce a contractual relationship, apparently with policy-maker and regulator sanction.

I urge the NPWG to consider more explicitly covering disconnection procedures within the Law with particular regard to practices that endorse inappropriate disconnection of hot water services to occupants of multi-tenanted dwellings receiving reticulated heated water rather than energy to their individual premises.

The contractual party should be the Landlord or Owners, consistent with other regulatory schemes and common sense. The Landlord or Owners are supplied with energy to a single energization point on common property infrastructure considered under current legislation and by VENCorp for Distributor-Retailer settlement purposes to be a single supply point/supply address, and a single billing point. Supply and consumption charges are Landlord/Owner responsibility. This should be explicitly stated and any calculation formulae or method adopted by jurisdictions need to reflect this. The use of water meters as devices to effect such calculations would become redundant if a single reading of the bulk hot water gas or electricity meter were read and charges applied to the landlord/Owner.

I urge the NPWG to consider the implications of adopting, or implicitly sanctioning policies that cannot show legally traceable means of measuring energy consumption. This mainly applies to methods relying on deriving costs through theoretical reading of hot water flow meters that measure water volume, not gas, electricity or heating values. They measure water volume only and are the primary instruments used for calculating energy consumption against the spirit and intent of trade measurement provisions. The practices will soon become formally illegal with high penalties and are inconsistent with the entire energy framework other than BHW arrangements, and with community expectations.

Recommendations: National Measurement Institute

Parts 2A and 2B of this submission were intended to call attention to some of the trade measurement anomalies that are giving rise to consumer detriment,; poor trade measurement practice and contradiction of the spirit and intent of trade measurement laws

Perhaps this need to be taken into account if any tightening of wording is envisaged under the current provisions and once remaining utility exemptions are lifted as is the intent. This has already happened for some utilities.

It cannot be acceptable practice for a water meter to be used as an instrument through which derived costs for energy supply can be made. In any case the current practice endorsed by policy and regulatory sanction involve measuring the volume of water consumed (if site-specific reading is taken at all) in order to make a guestimate based on a consumption rate of megajoules of gas per litre or kilowatt-hr per litre. The bills are to be expressed in both cents/litre (for water volume measured), and megajoules per litre. The readings for the water meters and gas meters are taken by different meter readers some two months apart, if any reading takes place. Otherwise a mere guess is made based on the total storage capacity of a water storage tank.

Energy suppliers are deeming end-users of heated water products contractually liable for guestimated energy based on a derived fixed rate conversion factor formulae. In addition, either explicit or bundled costs to cover "water meter reading fees" supply charges, network charges and the like are making for crippling bills for end-users of heated water who are already protected under residential tenancy laws, such that the Landlord is legally liable for all charges for utilities that cannot be measured with an instrument fir and designed for the purposes. Water meters cannot achieve that. They measure water volume not gas or electricity. Gas meters measure gas volume. Bills are expressed in energy. No measurement can be made of heat, heating value, pressure, ambience, regulator accuracy or anything else that may contribute towards guaranteeing water quality in terms of pressure and heat

There appear to be no rules or monitoring in place to ensure that the water meters relied upon are delivering what they should. No monitored records seem to be maintained about hot water flow meter replacement. These instruments are often owned by energy retailers, seeking to establish a contractual relationship for the sale and supply of energy based on their ownership of the meters and instructions from the policy-makers and regulators to apply charges in a certain way based on derived formulae.

For goods there is better monitoring and enforcement. Preston market produce sellers were recently issued with high infringement fines for delivering goods that were mismatched in weight to the alleged weight on the scales. However, if one is deemed to be an "energy customer" it seems that any sort of approximation is acceptable – as long as instructions from the policy-maker or regulator give the practice a blessing.

The submission outlines what the National Energy Consumer Framework considers a customer service connection to require. These are:

The Victorian Energy Retail Code and Gas Distribution System Code (Gas Code) now consistently show the meaning o connection as follows:

> *Connection (b) for gas*
>
> *the joining of a **natural gas installation** to a distribution system **supply point** to allow the flow of gas" (VERC and Gas Code). Therefore supply has a parallel meaning in the context of s46 of the GIA.*

The NECF contractual governance model under 1.25 of the Table of Recommendations provides clear definitions of what constitutes a customer distribution service, thus establishing a contractual obligation to the retailer in the distributor-retailer-customer.

In terms of calculating gas or electricity consumption by individuals in multi-tenanted dwellings with a single communally heated hot water system (storage tank) energized by a single energy connection point on common property infrastructure, the proposed additional definition for meter for "the delivery for gas hot watery" or "delivery of electric hot water" (BHW provisions VESC Guideline 20(1) about to be repeated and placed within the Energy retail Code) the following definition of meter is used:

> *"a device which measures and records the consumption of bulk hot water consumed at the customer's supply address"*

A hot water flow meter is designed to withstand heat but not to measure gas or electricity consumption. These are energy laws and regulations, not water industry provisions

As noted in the opening statements, the NECF contractual governance model under 1.25 of the Table of Recommendations provides clear definitions of what constitutes a customer distribution service, thus establishing a contractual obligation to the retailer in the distributor-retailer-customer

1.25 of the NECF TOR in defining customer distribution services includes these parameters

14. *the connection of the premises to the distribution network to allow the flow of energy between the network and the premises*[220]

- *where a physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energisation' of the connection);*

- *maintaining the capability of the network to allow the flow of energy between the network and the premises through the connection; and services relating to the "delivery of energy to the customer's premises."*[221]

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220 There is no energy connection to the premises of end-users of heated water supplied with that water in water pipes from a communal water storage tank. The connection is associated with supply of water not energy. The energy connection is a single supply point that for billing purposes in VenCorp Distributor-Retailer settlement arrangements and consistent with current legislation, is also a single billing point – the outlet of a gas or electricity meter on common property infrastructure

221 Water pipes do not delivery energy even when delivering heated water supplies from a communal water tank to individual flats and apartments. The water certainly must be heated. The delivery of energy occurs at the outlet of the gas meter or electricity meter on common property infrastructure. From there the gas is reticulated in gas transmission pipes to a communal water tank on common property infrastructure. Likewise, electricity is delivered through electric lines to the same destination – not the individual apartment or flat hat is occupied by a renting tenant or some other party; but to the water storage tank owned by the Landlord/Owner on common property infrastructure. Thereafter transmission of the composite water product occurs in a delivery system that has nothing to do with delivery of energy.

The nature, scope and content of initial customer connection services are being dealt with concurrently, as part of the distribution connection & planning requirements work stream of the Network Policy Working Group (NPWG).

Best practice trade measurement practice goes beyond using accurate trade measurement instruments. It is about proper accountability and legal traceability for goods and services that are measurable.

Whilst it may well be that energy suppliers are being permitted to adopt certain practices and that part of the issue needs to be addressed at regulatory level, it is also a fact that at least for energy the Essential Services Commission is requirement under its own enactment *Essential Services Commission Act 2001* s15 to avoid conflict and overlap with other schemes. The existing provisions, now under the policy control of the Department of Primary Industries, appear to represent such conflicts, including with the spirit and intent of trade measurement laws.

My aim is to raise awareness amongst all agencies and entities responsible for policies and regulations, including legislation that will enable the adoption of the highest standards of regulatory and business practices that will help to give the community as a whole confidence in the integrity of the systems of governments and quasi-government operation, and in the commercial marketplace as a whole.

Competition goals cannot possibly be met without confidence in the systems of government operation and business practice. Compromised consumer confidence is compromised consumer protection.

Please bear these principles in mind in any policy of legislative reform measures envisaged.

Recommendations: CAV, AER, ACCC and other parties re MOU arrangements

I urge all those working together behind the scenes to achieve proper protection for consumers, especially within the energy industries to reconsider the position with regard to avoidance regulatory overlap and best practice trade measurement practice. These considerations will also be of interest to the National measurement Institute.

It is recommended the issue of strengthening of MOUs between prescribed bodies should be considered by the CAV, ACC, AER and by the Productivity Commission in its current Review of Regulatory Benchmarking Stage 2.

It is recommended that the CAV directly take on board the consumer policy issues raised within this submission, bearing in mind the moves to nationalization and the advanced stage of negotiations over the National Energy Consumer Framework.

The ACCC, AER and CAV have a reciprocal Memorandum of Understanding covering inter-agency cooperation.

The CAV has the option to refer enforcement matters to the ACCC. Compliance enforcement is not the only issue.

In this case jurisdictional policy-makers and regulators admit to providing under licence instruction, codes, and guidelines, directives to undertake practices that unmistakably represent regulatory overlap with other schemes and make enshrine consumer rights inaccessible or at best expensive, stressful and time-consuming exercises.

Nevertheless it is the contention of this submission also that unacceptable market conduct has resulted as a result of adopting those policies.

Retailers and distributors are required to adopt all laws and provisions, not simply those that are energy-specific. Policy and regulatory instructions that create confusion, debate and risk of infringing on other laws may need to be revisited as to their appropriateness.

There are sound reasons why recourse through s55 of the *Residential Tenancies Act 1997* is not an ideal or suitable option as a quick-fix pragmatic solution that fails to address fundamental regulatory flaws; regulatory overlap or unacceptable market conduct

I repeat here that there is a moral and social obligation on statutory and quasi-government agencies to adopt regulation that is consistent with community expectation; that does not represent regulatory overlap to at all times strive to adopt benchmarked regulatory principles and best practice; and to provide a credible, responsible regulatory framework.

I list below the reasons why the s55 RTA option is a barely adequate solution, if at all

The CAV has often relied on existing provisions under s55 of the *Residential Tenancies Act 1997*[222] as a retrospective, expensive and ineffective means of redressing unfair terms that are essentially part of regulatory design within energy provisions. These reservations are discussed shortly in this section.

[222] And equivalent tenancy provisions in other jurisdictions

The view of the TUV is that these matters are not ideally dealt with on a piecemeal basis through VCAT under s55 of the *RTA*, though they have had great success in achieving cost-recovery alone if a matter of reimbursement is brought against the Landlord. VCAT is not well-equipped otherwise to deal with third parties in landlord-tenant disputes, and other issues of conduct and flawed policies cannot be addressed through that recourse, which in any case creates unnecessary burdens on end-consumers, particularly those who may be inarticulate, vulnerable or disadvantaged and intimidated by legal proceedings, even if represented by third parties.

The cost of filing fees often offsets the cost of recovery and tenants have to form a contract, accept other unacceptable contractual obligations (such as provision of safe unhindered and convenient access to water meters); and pay upfront, waiting 28 days before exercising an option to reclaim utility costs that properly belong to the landlord. If the Landlord disputes any charges, the onus and contractual obligation unfairly rests with the tenant.

Many inarticulate, vulnerable and disadvantaged end-consumers of utilities are intimated by tribunal or court involvement even with third party involvement to assist with the protracted and often time-consuming and expensive process. The filing fees in cases such as this are likely to outweigh the costs recovered that should have been Landlord responsibility in the first place if policy-makers and regulators recognized the requirement to avoid regulatory overlap.

The issue of avoidance of regulatory overlap current and proposed is already covered under s15 of *Essential Services Commission Act 2001.*

The Memorandum of Understanding dated 18 October 2007 between the CAV and the Essential Services Commission which reinforces their pre-existing obligation under an Act or Parliament to avoid regulatory overlap present and future. These obligations may benefit from further reinforcement, especially since the BHW arrangements are about to be reinforced by transfer to the Energy retail Code.

The CAV had become involved in this matter in the first place because of the regulatory overlap considerations that had been brought to their attention in the course of lodgment of a complaint concerning both policies and market conduct involving coercive demands for an explicit contract to be formed under pain of disconnection of heated water services that were an intrinsic part of the tenancy lease, in the absence of either a gas or eelect5icity meter through which energy consumption could be measured through legally traceable means.

The tenant was receiving heated water not energy at all. No bills had been issued. The threats of disconnection were considered to be an appropriate means through which an explicit contract could be formed.

The deemed provisions of the *Gas Industry Act 2001*, under s46 had been distorted to unilaterally impose contractual status on an end-user of heated water products where the relevant contractual party was the Landlord or Owners' Corporation. This is extensively discussed in legal and technical terms throughout Parts 2A and 2B of this submission.

The case remained unresolved after 18 fruitless months of inadequate intervention by the complaints scheme EWOV, whose jurisdictional limitations and limited understanding of the legal and technical complexities hampered the case management of the matter as a complaint. In addition, despite the involvement of the VESC during 2007 at the time of policy intervention of the CAV; and despite re-involvement of the VESC for five months during 2008, the matter remains unresolved and contested.

In any case the central issues were about policies in place that appeared to be facilitating unacceptable market conduct. The matter was closed after 18 months even after the VESC had become involved.

In this case, the end-user of utilities was a particularly inarticulate , vulnerable and disadvantaged end-consumer of utilities in sub-standard and poorly maintained private rental accommodation experienced direct material detriment because or his reaction to coercive letters of threat dignified as *"vacant consumption letters."* The essence of the threat was that disconnection of hot water services would be effected if the tenant did not sign an explicit contract with the supplier of energy, who in fact supplied the energy to the Landlord on common property infrastructure to a single energization point hating a communal boiler tank.

Even after the supplier had been alerted to the vulnerabilities of the end-user with a long psychiatric history and a history of suicide attempts, the process of *"disconnection warnings"* continued whilst a complaint remained open before EWOV. Far from being an administrative error, the supplier had persisted with stating intent to disconnect hot water services after due process was followed on the basis that the Tenant, through a representative, refused to provide identification details.

The matter remains contested though EWOV's books were closed after 18 months.

This is a tip of the iceberg case. The provisions impact on some 26,000 Victorian consumers of energy. Some of these live in public housing where the arrangements are different for billing. Because of high subsidies, tenants in such accommodation are charged a service fee which covers many other service facilities in such premises.

For the rest of the community, the arrangements have done absolutely nothing to stem *"consumer price shock."* Landlords continue to raise rents twice a year, and get away for the most part with their obligations because energy policies have allowed energy suppliers to act as billing agents recovering costs from innocent tenants instead of billing the Landlords direct.

The matter is compounded because of policies in place.

All of this makes resolution of such matters troublesome and often irresolvable, causing market unrest; expensive complaints handling; expensive government enquiry or enquiry with independent regulators; and the possibility of private litigation.

The trade measurement considerations are not inconsequential. They have been extensively discussed within this submission. Practices in place will become formally illegal when existing utility restrictions are lifted. These matters have been on a back burner for years unaddressed. Proper attention to them is long overdue at all levels. Common practice does not make for acceptable or best practice or regulation benchmarking. Consumers should expect, indeed demand far more in their protection and in the interests of improved regulation.

Recommendations:

For all of these reason proactive policy responses are sought from the CAV and other consumer protection bodies to deal with the matter from a policy perspective, fighting for the fundamental community expectation that no regulatory overall or conflict with other schemes occurs.

Any outcome less than that would represent failure of community expectation; result in market outcomes that are unsatisfactory, and compromised consumer confidence to say nothing of marketplace uncertainty in a climate of regulatory uncertainty during major structural reform.

Not all issues that deserve attention are hardship cases, though it is often the case that recipients of communally heated water (BHW) in sub-standard residential accommodation are also disadvantaged because of low fixed incomes. They cannot afford additional costs when they are struggling in the first placed with their essential needs and rental costs. This submission is targeted at a number of agencies in the hope that a note of responsiveness will be triggered in the light of the community detriments.

The technical information may extend beyond the requirements of the CAV, but are provided in the context of submissions to energy-specific arenas state and federal, and also because of the numerous regulatory and consumer protection issues raised. A better understanding of the technicalities may aid responsiveness and more clearly help to enunciate the issues involved which point to unfair contract provisions that are sanctioned at policy and regulatory level.

Therefore please see this as an opportunity to re-examine the issues and the consumer protection issues, as well as regulatory reform possibilities that would provide more equitable and just outcomes. There is no point in Unfair Contracts provisions unless they become accessible to the community at large through responsible regulation and improved market conduct.

Recommendations: Productivity Commission

I urge the Productivity Commission to consider these matters in the context of best practice policy and regulatory practice within Government agencies, Independent Regulators and other relevant entities fulfilling a public role

The input of the Productivity Commission in recommending to all Governments the necessity to consider other regulatory schemes and avoid overlap and conflict with those schemes and with the provisions of the unwritten laws, including the rules of natural and social justice

It is recommended the issue of strengthening of MOUs between prescribed bodies should be considered by the CAV, ACCC, AER and by the Productivity Commission in its current Review of Regulatory Benchmarking Stage 2.

I urge the Productivity Commission to view these matters as examples of flawed regulations that have not taken into account impacts on the community at large in adopting practices that infringe on their enshrine rights under other regulatory schemes and that also adopt practices that do not reflect best practice, particular with regard to trade measurement and calculation methods in deriving costs for energy and applying contractual models that appear to be legally and technically unsound and unsustainable

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.

Madeleine Kingston

Prepared and collated by Madeleine Kingston
September 2008

Recommendations: General consultative principles

Update website facilities to ensure that each time any change occurs to online material of interest to registered stakeholders occurs an individual email alert is sent to interested parties. This is standard practice with most agencies or entities so that an instant alert is obtainable when changes are made

Provide timely notice of future consultative processes.

Provide options for registered stakeholders to provide written material for consideration by Working Party Groups at each stage of deliberation

Publish Working Paper outcomes for further public input

Publish online all Issues Papers in a timely manner

Publish online all Consultants Reports in a timely manner

Make available all previous Codes, Guidelines and Deliberative Documents in archives

Adhere to the principles of consistency with legislation current and proposed[223]

Adhere to principles of avoidance of regulatory overlap with other schemes and the provisions within the unwritten laws, including the rules of natural and social justice[224]

[223] The BWH provisions, definitions and interpretations are inconsistent with the express and implied provisions of the GIA and EIA with regard to the proper application of the terms distribute energy, supply and sale of energy, disconnection; meter; connection; transmission

[224] The BHW provisions not only conflict with all other energy provisions current and proposed, but represent regulatory overlap with other schemes as disallowed under the ESC Act 2001 and conflict with the unwritten laws. In addition they do not reflect either best practice calculation, trade measurement or adherence to community expectation under the rules of natural and social justice in deeming contractually obligated those who do not receive any energy in the manner outlined within the law and the Gas Code. Therefore transfer to the Energy retail Code of existing BHW provisions will directly clash with other energy provisions existing and proposed and create conflict over discrepant interpretations

COVER LETER WITH PART 2

17 September 2008

Miss Wendy Heath
Review of Regulatory Instruments
Essential Services Commission
Level 2, 35 Spring Street
Melbourne 3000

ESC Review of Regulatory Instruments – Draft Decision – August 2008

Dear Ms Heath

Thank you for the opportunity of responding to the Essential Services Commission Regulatory Review of Instruments.

I present the material in various components, originally prepared as part of a larger multi-part submission for other arenas. I have retained the numbering that applied originally (Part 2), and have subdivided the material further.

Part 2 deals with a more general range of issues and places the regulatory exercise in some context.

Aside from looking at some of the general governance models adopted both by the ESC in this Review and by the Ministerial Council on Energy Standing Committee of Officials' National Energy Consumer Framework's Table of Recommendations and some concerns about consultative processes generally this component is of a more philosophical nature. It looks at the extent to which competition in Victoria may have been incompletely assessed, providing a collation of opinion.

I have presented strong views about the existing bulk hot water provisions which predominates my analysis of the contractual governance model adopted by the National Energy Consumer Framework (NECF) and the Draft Decision of the Commission to transfer from deliberative documents and the BHW Charging Guideline into the *Energy Retail Code*, whilst retaining the contractual rationale that was in place at the time of their adoption on 1 March 2006 after deliberations during 2004 and 2005.

I understand that the DPI has taken over policy provision for most components of these arrangements, whilst the ESC will retain control over what is shown on bills.

The presumption seems to have been made that by transferring from guidelines and deliberative documents to the *Energy Retail Code* (Victoria) regulator instructions to energy providers, including retailers under licence provisions, to impose contractual status on the wrong parties, using trade measurement practices that cannot show legally traceable consumption or contractual status, the provisions will become valid and legally and technically sustainable.

Imminent nationalization has presented an opportunity to target both jurisdictional and national arenas during a time of regulatory uncertainty and change and focus most energies on contractual matters that have had adverse outcomes for consumers who are imposed with deemed contractual status for BWH arrangements that properly belong to Landlords/Owners.

I have extensively discussed this by responding to a vast number of components from the National Energy Framework Table of Contents, but all of those comments are pertinent to the decision made jointly by the DPI and ESC to endeavour to consolidate on the arrangements by transferring large components to the Energy Retail Code (VESC).

Since the adoption of this Guideline 1 March 2006, 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/Owner or representative.
- Use water meters to effectively pose as gas meters using practices that could be construed as misleading.
- 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. These include:

1. **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.

   For this reason though a response to the VESC's proposal to repeal the BHW Charging Guideline VESC 20(10) and transfer most components to the Energy Retail Code, the bulk of the discussion about contractual arrangements and interpretations takes place in the form of a detailed response to many components of the National Consumer Energy Framework Table of Recommendations currently under consideration.

   Because of imminent changes it is impossible to separate the issues adequately, so this component of the submission is targeted at more than one arena

2. **Minimum requirements on bills and implications for transfer of billing provisions** from the BHW Guideline to the ERC;

3. The unfair requirement of residential tenants to provide safe unhindered and convenient access to meters under Clause 13.3 of the VERC (also reflected in the NECF template.

4. **The unreasonable demand to obtain acceptable identification and contact details**, by way of forcing under pain of disconnection of heated water products (not energy), an explicit contract with a retailer from end-users of a composite water product from which the heating component cannot be separated or measured in a legally traceable way; and where the end-user residential tenant is already paying for heated water under mandated residential tenancy terms.

5. **The requirement for the existing and proposed Laws, Rules and all other provisions to avoid regulatory overlap and conflict with other schemes**, as is already required under s15 of the *Essential Services Commission Act 2001* and the Memorandum of Understanding dated 18 October 2007 between CAV and ESCV.

6. The implications of existing trade measurement and calculation practices, particularly in the light of national provisions and philosophical commitment at national level to uphold the principles of legally traceable provision and consumption of goods and services.

   The trade measurement considerations and calculation methodologies also have significant impact on contractual matters.

Therefore, whilst matters are not quite settled within the national framework, and during an unsettling time for all with major regulatory change and uncertainty, it may be a good time to more thoroughly air and resolve issues that have been on the backburner for a good number of years as a *"too-hard-basket"* topic – bulk hot water arrangements, and proper allocation of the correct contractual parties

The question of regulatory overlap with other schemes, combined with technical definitions and trade measurement practices used to calculate deemed consumption of energy and apportion both consumption and supply costs on residential tenants in these circumstances instead of Landlords or Owners' Corporations is discussed in detail as the central theme.

The proposed NECF template requires provision of acceptable identification at the outset. I support the Victorian proposal that connection occurs first and identification issues pursued later.

However, in the circumstances where regulatory overlap exists and a residential tenant has no requirement under other laws to honour an additional contractual relationship to the one with the Landlord/Owner under mandated lease provisions, the requirement to provide any identification in order to formalize a contract with the energy provider is unreasonable to begin with. The contractual party should be the Landlord or Owner. These practices in turn have enormous implications for the following:

- Assessment of who the contractual party should be and how customer or relevant customer is properly interpreted;
- How soon consumer protections can be restored such that they can once again readily access their fundamental contractual, tenancy and other rights without threat or fear of disconnection of hot water services and without having to accept unjust unilaterally imposed contractual status without having to accept formal contractual liability for costs and meter access arrangements
- Whether the entire energy regulation framework and trade measurement framework can be seen to be compatible with the bulk hot water pricing charging and trade measurement provisions

In Victoria the Department of Primary Industries (DPI) is responsible for policies for bulk hot water provisions, a term that has distorted the whole concept of energization and the obligations and rights of energy suppliers, using legally and technical unsustainable policy provisions that defy all reasonable principles of best practice, proper trade measurement, contractual law.

Currently the contractual rationale deems end-users of heated water contractually responsible for the delivery of energy to centrally heated water in blocks of rented apartments and flats, reside in deliberative documents of no legal weight.

Following direct challenge legal and technical to these flawed policies, taken up initially with the industry-specific complaints scheme Energy and Water Ombudsman (Victoria) Ltd, the Essential Services Commission as current Victorian jurisdictional regulator, and ultimately the Department of Primary Industries (DPI), it has been proposed that the existing bulk hot water pricing and charging provisions, be formally incorporated into the Energy Retail Code.

Conclusions

The Bulk Hot Water Pricing and Charging arrangements, appear to fall far short of acceptable business and trade practices, and of the fundamental principles embraced by the NMI on the requirement to show legally traceable trade measurement in the manner in which *"energization"* is being interpreted within existing policies and consequently by energy retailers and other providers, by referring to a composite water product – using water meters posing as gas meters, where the water is centrally heated from a single energization point on common property infrastructure on the property of Landlords and Owners' Corporations.

With regard to billing matters, for which apparently VESC still has control, I comment in some detail later on the implications of the proposed changes within the VESC Draft Decision.

It is my contention that despite efforts to enhance transparency and achieve consistency and harmonization, the proposed provisions contain many drawbacks that deserve further scrutiny, leaving aside the debate about contractual and trade measurement arrangements now under DPI control. Central to the concerns are the inability of the arrangements to show legally traceable measurements that can be used to allocate responsibility to end-users of heated water products.

The proposed inclusion on billing includes under 4.2 of the ERC a requirement to indicate on a bill whether the bill is based on a meter reading or is a wholly an estimated bill. In the case of BHW the original deliberative documents that led to their adoption, it had been claimed that site specific reading of meters was too expensive and inconvenient for retailers to adopt despite providing more transparency, and notwithstanding in the first place that water meters are not supply points or ancillary energy point (which in any case are taken as one within the legislation and elsewhere) or suitable devices through which individual energy consumption can be measured.

The proposed provisions may not meet the general requirement for a minimum number of meter reads under bill smoothing arrangements (5.3 VESC RR DD) and Meter Reading (NECF TOR).

This is claimed on the basis that meter readings may not be undertaken at all, of either water volume or gas volume, and that if these occur they do not occur regularly, yet bills for the allegedly monitored and calculated heating component of *"hot water consumption"* by individual tenants imply that at least water volume is precisely calculated if not gas; the proposed provisions for billing do not meet the requirement for a minimum number of meter reads of either satellite hot water meters on common property infrastructure of Landlords or OCs (which measure water volume only not gas or heat) or of the single bulk energization point on common property of Landlords or OCs (which supply point measures gas volume only not heat, meaning energy, and not hot water consumption.

These matters also have implications for transparency; informed consent about practices adopted, even if a *"deemed status"* imposition is adopted or explicit contracts obtained with or without coercive threat of disconnection of heated water.

In addition, if bill smoothing in proposed jurisdictional provisions relies on a 9-month period; and 12-months within the proposed NECF TOR, this means that those on low fixed incomes will be disadvantaged by having to find funds for which they have had no chance to budget. In addition, if estimates of water consumption (upon which gas or electricity consumption is based through conversion factor formulae) is based on estimated or actual consumption of previous tenants in the same apartment, this cannot be a fair way of calculate costs. Residential tenants are a transient population. In any given period a single apartment can house anything from one to several parties using variable quantities of water. Under the current imprecise and infrequent calculation proposals, leaving aside contractual debate and calculation methods, this produces inequity and legal traceability issues based solely on the billing cycle and bill smoothing arrangements proposed.

Though information relating to how often water meters and gas meters will be read, and information on brief calculation details is implied within the ERC very few end-users residing in sub-standing buildings still using communal bulk hot water systems will ever know of or be directed to the ERC to check how things are done. In addition, if the explanations for calculation methods and formulae are to be concealed, it is less likely that transparency of any description will be achievable. This is unacceptable.

Recommendations

The VESC and DPI are urged to reconsider the implications of retaining the vast majority of the existing provisions within the Bulk Hot Water Charging Guideline VESC 20(1) 2005 (effective 1 March 2006) by repeal the Guideline and transferring these to the *Energy Retail Code* (VERC).

The bills, if they are to be submitted to end-users as tenants receiving heated water at all, should clearly show how often the meters will be read, and also that the reading is based on calculation of water volume consumption through which conversion factor calculations are used to guestimate deemed gas usage.

VERC 3.3 Denied Access to Meters (see also NECF TOR)

The expectations that residential tenants provide safe convenient and unhindered access to any meters behind locked doors is unreasonable and unjust. This has been raised by community organizations, including the tenants Union Victoria in various submissions including to the MCE RPWG Working Papers.

Most landlords do not allow residential tenants access to such meters. This mainly applies to water meters being used to all intents and purposes as substitute energy supply points. These are the meters that generally reside with the boiler tank behind a locked door.

If the current methods are to be perpetuated regardless of regulatory overlap, contractual and technical matters, it is far more sensible for energy providers to have energy key access through the Landlord or Owners' Corporation. The contact details of the latter are usually transparently available on the outside of buildings housing multiple residential tenants using bulk hot water provisions, and those for which energy meters are for some reason also behind locked doors.

VESC 3.4 Refusal to provide acceptable ID or refundable advance

Under the Victorian provisions disconnection is allowable after 10 business days notice is provided of intent to disconnect energy, and if the customer continues to refuse identification.

The Victorian recommendation (as opposed to the NECF TOR) is supported that connection take place then disconnection if no acceptable identification is provided, except in the case of those receiving heated water that is communally heated with a single energization point serving a communal water tank on the common property infrastructure of Landlords. The tenants receive a composite water product not energy. The water is reticulated in water pipes to their apartments. They are covered for the cost of supply of the heating component of the water, from which the former cannot be separated or measured in a legally traceable way.

Under mandated tenancy lease provisions, tenants take up tenancy in the secure knowledge that they are protected under tenancy laws and that it is Landlord is responsible for payment of all utility costs other than bottled gas that cannot be measured in such a way with an instrument designed for the purpose. Hot water flow meters are not energization points. They measure water volume not heat and cannot possibly calculate individual consumption of the heating component of a composite product. Not even the gas meters can measure heat. They measure gas volume only not energy (heat). Bills are expressed in energy. If they are read at all, the two groups of meters hot water flow meters, and gas meters, are read, at least two months apart, though site specific reading was not mandated. Despite this high water meter fees are imposed and supply charges to individuals. No water dial reading is available, so no checking is possible.

The contractual arguments presented are not only impacted by regulatory overlap considerations, but also the trade measurement and calculation methods used, and the range of technical definitions within the current laws.

The new law uses the term energization which has a particular meaning, as does disconnection. Neither refers to water products or measurement of water.

This is on the basis of all of the arguments presented to show that the end user of heated water is not the relevant customer, despite interpretations of provisions and incorporation of the BHW provisions into the VERC. This provision in the first place represents gross regulatory overlap with other schemes and interferes with the enshrined contractual rights of residential tenants under the mandated terms of their tenancy leases.

Retailers and distributors need to feel secure that the instructions that they are given are not producing the intended or unintended outcome of expecting them to choose which laws they are expected to uphold; to undertake practices that fall short of best practice, including trade measurement practices; and will not in the future because of breach of trade measurement provisions leave them open to criminal charges and penalties; and that the disconnection processes that they undertake will not also leave them vulnerable to private litigation and/or criminal charges

In the light of the goals of the MCE SCO to achieve proper consultation and move to nationalization in a considered staggered way to take into account jurisdictional differences whilst balancing the need to achieve harmonization, consistency and optimal governance levels, it is prudent for consultative initiatives at all levels to be undertaken in a considered way with adequate time being provided at each consultative stage.

Since, Victoria is aiming to *"lead to way"* to other States at different stage of competitive progression, it is crucial that robust consultation is effected and that all deliberative documents and consultative inputs are transparently reported online.

It is also important that good examples are set and that practices soon to become formally illegal, that are causing detriment to consumers and confusion and uncertainty to providers of energy are not retained and consolidated but rather reviewed with the aim of re-assessing contractual matters. The BHW guidelines do not stand up well to scrutiny on a number of grounds thoroughly discussed in the accompanying documentation, notably under Parts 2A and 2B.

Yours sincerely

Madeleine Kingston

Madeleine Kingston

SOME BURNING EVALUATION PRINCIPLES
CONVERTING THEORY INTO PRACTICE[225]

The following principles may assist with general evaluative and record-keeping best practice principles – for all policy, regulatory and other entities working in the public policy arena

Recommendations: General evaluative principles

1. What was the evaluand *{Funnell and Lenne 1989}* at several levels, mega, macro and micro, since different stakeholders will have different concerns at each of these levels *{Owen (1999:27}.*

2. In choosing design and methods, were any cautions used against replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}.*

3. What external threats were identified and considered before the data gathering exercise was undertaken?

4. What comparisons were used?

5. What were the boundaries and objectives?

6. Was an evaluability assessment undertaken to more precisely determine the objectives of the intervention, the different possible ways in which the item could be evaluated and the cost and benefits of different evaluation designs[226]

7. What were the implied or explicit criteria used to judge the value of the intervention?

8. Which evaluation design was employed was employed, since a decision on this issue would impact on the data-gathering measures?

9. Was the evaluative design in this case case-control, formative, summative, a combination of process (formative) and summative; cost-utility or audit? Will assessment of the data gathered be contracted out to an informed researcher or research team with recent professional development updates and grasp of the extraordinary complexities in the evaluative process?[227]

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[225] How many of these principles were adopted in the various evaluative processes undertaken by those guiding or undertaking major or minor policy reform in various State, Commonwealth or advisory arenas

[226] Wholly (1977) *"Evaluability assessment"* in L Rutman (ed.) Evaluation Research Methods: A Basic Guide, Beverly Hills, CA: Sage
Wholey JK (1983), "*Evaluation and Effective Public Management",* Boston: Little, Brown c/f Ovretveit Evaluating Health Interventions. Open University Press. McGraw-Hill (reprinted 2005), Ch 2 p 41

[227] Patton, M. Q. (2002) "*Qualitative Research & Evaluation Method"* Sage Publications

10. How was the needs assessment conceptualized?

11. Was the program design clarifiable?

12. How was the formative evaluation undertaken?

13. What are or were the Program Implementation process evaluation parameters?

14. What measures will be in place for evaluating the "settled program" (or policy change proposed)?

15. How were short term impacts by conceptualized and identified for the proposed changes?

16. What definitive outcomes are sought and how will these outcomes be determined by follow-up?

17. Was/will there be time to activate the evaluation's theory of action by conceptualizing the causal linkages?[228] Whilst not ideal, if no theory of action was formulated, perhaps it is not too late to partially form a theory of action plan.

18. Was there be room or time in the data-gathering exercise to probe deeper into the answers provided by the people whose lives will be affected by any decision the Government may make to deregulate within the energy industry? The skilled questioner knows how to enter another's experience?[229]

19. As Eyler (1979) said *What are figures worth if they do no good to men's bodies or souls?*[230]

20. What was be done do assess the intended impacts of the studies undertaken.

21. Before the data-gathering exercise was undertaken, and considering the time constraints were these factors considered: feasibility, predictive value; simulations; front-end; evaluability assessment?

22. What processes will be undertaken to ensure added-value components to the evaluation?

23. How will the agencies/entities utilize case study example in augmenting the existing relatively generic study undertaken addressing standard demographics over a large sample without sub-segmentation of more vulnerable groups (such as residential tenants or regional consumers) with more in-depth evaluation?

24. How carefully will the agencies/entities in their parallel Review/Inquiry review in tandem program documentation, especially where there is overlap; or examine complaints and incident databases; form a linkage unit for common issues.

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228 Patton, M. E. "*The Program's Theory of Action*" in *Utilization Focussed Evaluation*, Sage, Thousand Oaks, 1997, pp 215-238

229 From Halcom's *Epistemological Parables* c/f ibid *Qualitative Research and Evaluation Methods,* Ch 7 *Qualitative Interviewing*

230 c/f Ovretveit (1997) *"Evaluating Health Interventions".* Open University Press. McGraw-Hill (reprinted 2005), Ch 1

25. To what extent have the following evaluative process been undertaken[231] by both bodies, and all Commonwealth and State bodies including the MCE and COAG Teams, policy advisers and policy-makers regulators:

- Strongly conceptualized parameters
- Descriptive
- Comparative
- Constructively skeptical
- Positioned from the bottom up
- Collaborative

- Does all of the government, quasi-government, regulators and others a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?"[232]
- How will the success of the policy changes ultimately effected be monitored and re-evaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?
- What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?
- Generic protections such as those afforded by trade practices and fair trading provisions are currently insufficient and not quite as accessible as is often purported.
- Within an industry that represents an essential service and where large numbers of vulnerable and disadvantaged consumers (not just on financial grounds) are under-represented how will the Government ensure that the rights of specific stakeholder groups are not further compromised?
- How accessible will Rule Changing be?
- How will the success of the policy changes ultimately effected by monitored and re-evaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?
- In choosing design and methods, what will be done about replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}.*

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231 Centre for Health Program Evaluation, Melbourne University

232 Funnell S, Program Logic (1997): *"An Adaptable Tool for Designing and Evaluating Programs"* in Evaluation News and Comment, V6(1), pp 5-17

- What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?
- How accessible will Rule Changing be?
- Perhaps the agencies and entities would consider seeking specialist evaluation input with further evaluation of data when making major regulatory reform decisions
- Does Government have a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?"[233]

Evaluation is a sophisticated and scientific professional challenge. It is not just a trade, though compromises often make it so. Professional evaluators are humble people. They make no pretenses. Regardless of reputation or status, they are never too humble to ask for collaborative input and peer opinion and suggestion. Evaluation is a continuing process and does not start and end with data gathering. They recognize the challenges of best practice data gathering and evaluation and do not pretend to have all the answers.

For instance, check out the University of Alabama's EVALUTALK facility. American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]. This group is the cutting edge of evaluative practice. The rest of the world respects the results this group achieves.

One such evaluator could be Bob Williams a highly respected NZ evaluator with an international reputation and particular expertise in public policy evaluation. He is a frequent visitor to Australia, and is a fairly well known figure in Australasian evaluation, through evaluations, his work within the Australasian Evaluation Society (AES) (which merged with Evaluation News and Comment under Bob Williams' supervision) and his contributors to the two Internet discussions groups Evalutalk and Govteval. He has vas experience of Governmental evaluations.

On the online Evaluator's Forum, EVALUTALK, Bob Williams responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen as craftspeople with a pride in their work and the outcomes of their findings long after the consultative process is over.

Williams' specialty is evaluation, strategy development, facilitating large-group processes and systemic organizational change projects. He has his own website under his name. Reviews books for Journal Management Learning, writes for Australasian Evaluation Society's Journal. He wrote the entries on *"systems" "systems thinking" "quality"* and planning Encyclopaedia of Evaluation {Sage 2008) and co-written with Patricia Rogers in *"Handbook of Evaluation" {Sage 2006}.*

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[233] Funnell, S, (1997) *"Program Logic: An Adaptable Tool for Designing and Evaluating Programs"* in Evaluation news and Comment, V6(1), pp 5-17

There is a great deal of valuable consultative evaluation advice out there for the asking. Lay policymakers are not normally trained in this area.

Bob Williams, has commented as follows on EVALUTALK:

> *"The Ministry of Education here in New Zealand has been doing something very interesting for the past four or five years. The policymakers along with teachers university researchers and others have been developing a series of "best evidence syntheses". The concept of "best evidence" is fairly comprehensive with a set of agreed criteria for what constitutes "best" and "evidence". As each synthesis is developed it is opened up for discussion with practitioners and academics - and placed on the Ministry of Education's website. I was involved in some of the early discussions (as a facilitator rather than evaluator) and was impressed by both the method and the content of the syntheses. What I found most impressive was that the policymakers were brave include evidence that challenged some of the assumptions that have dominated education policymaking in the past few decades (e. g. the extent to which socio-economic status effects student performance)."*
>
> *"The 2006 edition of the World Education Yearbook describes the BES Programme "as the most comprehensive approach to evidence" and goes on to say: "What is distinctive about the New Zealand approach is its willingness to consider all forms of research evidence regardless of methodological paradigms and ideological rectitude and its concern in finding...effective appropriate e and locally powerful examples of 'what works."*

Bob Williams suggests that before data gathering is undertaken the underlying assumptions must be made, followed by identification of the environment and environmental factors that will affect the way in which the intervention and its underlying assumptions will interact and thus behave.

A recent dialogue between evaluators on that Discussion List produced a useful list of criteria that would cover the processes that should ideally be undertaken. Though the inputs came from a number of Discussion List members, I cite below how Bob Williams[234] a respected New Zealand evaluator with an international reputation summarized as follows inputs from various evaluators participating on the Discussion List [235]:

Position the evaluation – that is, locate the evaluation effectively in its context, in the broader systems.

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234 http://www.eval.org

235 Bob Williams, Discussion List Member Evalutalk

MK Comment:

This is impossible to achieve without a comprehensive informed SWOT analysis that goes well beyond background reading of other components of the internal energy market –a highly specialized exercise, especially in an immature market. Prior to undertaking the survey mentioned to ascertain market awareness, what steps were taken to mount a strengths and weakness analysis (SWOT).

If undertaken, where can the results be located? This type of exercise is normally undertaken prior to the gathering of data so that the survey data is meaningful, is robust to address a range of relevant factors; and not simply narrowly focused on data-gathering that may yield compromised results if the goals and parameters that could have been initially identified in a SWOT analysis were not clearly identified and addressed in the study design.

1. *Clarify the purpose and possibilities, etc (design phase – why do it)*
2. *Plan the evaluation (design phase) (what do we want to know)*
3. *Data Gathering (how will we find out what we want to know)*
4. *Making meaning from the data (e.g. analysis; synthesis; interpretation (how can we get people to be interested in the evaluation processes/results*
5. *Using the results (shaping practice) (what would we like to see happen as a result of the evaluation and what methods promote that?)*

Stanley Capella on the University of Alabama Online Evaluation Discussion Group EVALUTALK has whether evaluators should push for program decisions based on evaluation, or is this an advocate's role.

Bob Williams a New Zealand Evaluator on the same discussion group has responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen as craftspeople with a pride in their work and the outcomes of their findings. As suggested by *Ovretveit*[236]

> *"Design is always balancing trade-off." "Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives." These parameters cannot be decided "without some consideration of possible designs and the answers they could give" (since) planning is an interaction between the possible design and the questions and purposes."*
>
> *"Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention."*
>
> *"Randomized experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable comparisons. There is not a staggering number of opportunities for its use*[237]
>
> *"Politicians often do not examine in detail the cost and consequences of proposed new policies, or of current policies."* [238]

In discussing better informed political decisions *Ovretreit* noted, for example, the lack of prospective evaluation or of even small scale testing of internal market reforms in Sweden, Finland and the UK. Whilst he did not infer that all new policies should be evaluated or that the results of an evaluation should be the only basis on which politicians decide whether to start, expand or discontinue health policies, just that politicians could sometimes save public money or put it to better use if they made more use of evaluation and of the *"evaluation attitude."*[239]

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236 Ovretreit (1997) *Evaluating Health Interventions.* Open University Press. McGraw-Hill (reprinted 2005), Ch 6

237 Webb et all 1966 c/f Ovretveit Evaluating Health Interventions, *"Evaluation Purpose Theory and Perspectives"* Ch 2, p31

238 Ibid, Ovretveit Ch 2, p 27

239 Ibid, Ch 2, p27

Ovretreit[240] embraces six evaluation design types: descriptive (type 1); audit (type 2) outcome (type); comparative (type 4); randomized controlled experimental (type 5) and intervention to a service (type 6) Each of these six broad designs can and have been successfully used in a variety of interventions targeted at examining policies and organizational interventions, depending on which of the four evaluation perspectives have been selected: quasi-experimental; economic; developmental or managerial.[241]

In recent years there has been increasing pressure on all scientists to communicate their work more widely and in more accessible ways. For evaluators, communication is not just a question of improving the public image of evaluation, but an integral part of their role and one of the phases of an evaluation. It is one of the things they are paid to do. Here we consider evaluators' responsibility for communicating their findings and the different ways in which they can do so.

The following is an abstract from Edmund Chatto's 1995 Research Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme.[242] The paper

> *"……addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained.*
>
> *The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations. This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development."*

Daniel L Shufflebaum's Program Evaluations Metaevaluation Checklist is worth looking at.[243]

Michael Scriven's Key Evaluation Checklist is a useful resource[244]. Scriven's Checklist poses some challenging questions that are touched on here in good spirit:

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240 Ibid Ovretveit , Ch 3 *Evaluating Health Interventions Six Designs*

241 Ibid Ovretveit's Ch 3 Model Evaluating Health Interventions, p73

242 Chattoe, E. (1995) *"Can Sociologists and Economists Communicate?"* Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Department of Sociology, University of Surrey, Guildford, GU2 5XH (plus an impressive array of reference on Consumer Behaviour)

243 Shufflebeam, D. L. (1999) *"Program Evaluations Metaevaluation Checklist",* based on The Program Evaluation Standards (University of Michigan)

244 Michael Sciven's *Key Evaluation Checklist* <www.evaluation.wmich.edu>

Can you use control or comparison groups to determine causation of supposed effects/outcomes?

If there is to be a control group, can you randomly allocate subjects to it? How will you control differential attrition, cross-group contamination, and other threats to internal validity.

If you can't control these, what's the decision-rule for aborting the study? Can you single or double-blind the study.

If a sample is to be used, how will it be selected; and if stratified, how stratified?

If none of these apply, how will you determine causation (the effects of the evaluand)

If judges are to be involved, what reliability and bias controls will you need (for credibility as well as validity)?

How will you search for side effects and side impacts, an essential element in almost all evaluations

Identify, as soon as possible, other investigative procedures for which you'll need expertise, time, and staff in this evaluation, plus reporting techniques and their justification

Is a literature review warranted to brush up on these techniques?

Texts such as *Schiffman and Kaunk's* Consumer Behaviour[245] may provide some useful insights during the evaluative process.

As previously mentioned, The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols o Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

[245] Schiffman, Leon G and Kanuk, Leslie Lazar Consumer Behaviour. (1994) Prentice-Hall International Editions

> *"Logic models can be described as frameworks for thinking about (including evaluating a program in terms of its impact*
>
> *Stakeholders processes inputs etc. Typically these run from inputs through activities/processes to outputs/products outcomes/results and impact including beneficiaries"*[246]

In response to Fred Nichols comments, Sharon Stone on the same EVALUTALK, comments on the assumptions that include program theory and external conditions (meaning factors not included that could affect positively or negatively the hypothesized chain of outputs, outcomes.

Stone[247] poses two questions:

> *"Are these just "logical chains" – or are these cause the effect"*
>
> *Either way – are things really that simple – or do we need to pay more attention to those 'external' factors" – and how they are identified as external*

Patton (1980)[248] has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.

Patton claims:

> *"One reason why evaluation can be confusing is that there are so many types of evaluation. Case- control, formative, summative, process, impact, outcome, cost-utility, audit evaluations."*[249]

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246 Fred Nichols, Senior Consultant, Distance Consulting on EVALUTALK, American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]; on behalf of; nickols@att.net

247 Sharon Stone, Evaluator, on EVALUTALK, University of Alabama September 2007

248 Patton (1980) *"Qualitative Evaluation Methods",* London Sage, c/f Evaluation Purpose and Theory in Evaluating Health Interventions

249 See Patton, M. Q. (1997) Utilisation Focused Evaluation. The new Century text 3rd edn.

Funnel (1996) has some views on Australian practices in performance measurement. Her 1996 article in the Evaluation Journal of Australasia[250] provides broad-brush review of the state of evaluation for management in the public service.

Funnell provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as 'managerial accountability p452).

As well *Funnell* explores the impact of cutbacks on the conduct of evaluations, the levels of evaluation expertise available and on evaluation independence and rigor. Her arguments on the impact of market-based policies imply there could be both benefits and dangers.

Hawe and Degeling (1990)[251] have some ideas of survey methods and questionnaire design. These authors describe random, systematic, convenience and snowballing sampling and look at questionnaire layout and presentation; the need for piloting and some simpler basic description analysis of quantitative and qualitative data. Fore more sophisticated analysis such as may be warranted before any decision is made by the Government to deregulate in the energy industry may warrant the employment of a highly trained researcher, recently trained.

These authors examine a) the types of items; (b) questionnaire layout and presentation; (c) the need for piloting (this is often overlooked by evaluators undertaking small-scale evaluations; d) maximizing response rates.

Note their comments on the analysis of quantitative and qualitative data. These comments describe simple, basic descriptive analysis. For more sophisticated analysis evaluators should employ a trained researcher.

Funnel (1997)[252] has discussed program logic as a tool for designing and evaluating programs. This is simply a theory about the causal linkages amongst the various components of a program, its resources and activities, its outputs, its short-term impacts and long-term outcomes. It is a testable theory, and must be made explicit as a first step to testing its validity.

The process by which this is achieved is program analysis. This is a job for an expert in evaluation where major government policy is being reexamined.

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250 Funnell S (1996): *"Reflections on Australian practices in performance measurement",* 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

251 Hawe, P., Degeling D., & Hall, J (1990) Evaluating Health Promotion, Ch 7 Survey Methods and Questionnaire Design, Sydney, McLennan & Petty

252 Funnel S (1997) *"Program Logic: An adaptable tool for designing and Evaluating Programs"* in *Evaluation News and Comment* v.6(1) 1997 pp 5-17. Sue Funnell is Director of Performance Improvement Pty Ltd and chair of the AES Awards Committee.

As *Funnell*[253] points out, the many models of program theory

> *…. "date back to the 1970s and include amongst others Bennett's hierarchy of evidence for program evaluation within the context of agricultural extension programs and evaluability assessment techniques developed by Wholey and others."*

A typical program logic matrix may include a grid that includes ultimate and intermediate outcomes, and immediate impacts, with success criteria being measurable and specific in accordance with the SMART principles.

One theme in the responses (TO EVALUTALK) as summarized by Johnny Morrell), is that

> *".....logic models can be seen as constructions that can be used to test key elements of a program's functioning.*[254]
>
> *Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms.*
>
> *To me, this gets at the notion that while there is a useful distinction between "design" and "logic model", the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.*
>
> *From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference. But the distinction is not clean.*
>
> *Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms. To me, this gets at the notion that while there is a useful distinction between "design" and "logic model", the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.*

253 Ibid Funnell Program Logic, p5

254 American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU] as summarised by Johnny Morrell, PhD, Senior Policy Analyst, Member American Evaluation Association EVALUTALK Discussion Group

> *From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference.*
>
> *But the distinction is not any given logic model is never anything more than a work in progress that has to be updated on a regular basis. With this approach, logic models (and the evaluation plans they drive), can be updated as the consequences of program action evolve.*[255]
>
> *The major point in this category is that "design" means a lot more than a logic for looking at data. According to this view, "design" includes procedures for gathering data, schedules for doing evaluation tasks, and so on*

Johnny Morrell calls this:

> *"an evaluation plan and reserve the term 'design' for the logical structure of knowing if observations have meaning."*[256]

There is a consensus amongst EVALUTALK members that:

> *"the use of logic models (may be seen as) a consensus building tool. The notion is that logic models come from collaborative cross- functional input from various evaluator and stakeholder groups. Thus, the act of building a logic model works toward common vision and agreed upon expectations."*

Swedish evaluator *John Ovretreit (1987, reprinted 2005)*[257] has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.

Rossi's' evaluation theory[258] is about whether the intentions of the program were effected by delivery to the targeted recipients.

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255 Johnny Morrell on EVALUTALK, American Evaluation Association

256 Ibid Johnny Morrell

257 Ovretreit (1997) Evaluating Health Interventions. Open University Press. McGraw-Hill (reprinted 2005)

258 Rossi, P., Freeman and Lipsey, M. (1995) *"Monitoring Program Process and performance: Evaluation: A Systematic Approach"* (6th edition) Sage, pp 191-232

This task is typically undertaken by independent evaluators and can be a stand-alone evaluation if the only questions addressed focus on operational implementation, service delivery and other matters. This form of evaluation is often carried out in conjunction with an impact evaluation to determine what services the program provides to complement findings about what impact those services have.

One example of a combined process and summation evaluation is shown in the study reported by *Waller, A. E et al (1993)*[259]

In that study, the summative component was inbuilt into the original program design. The findings were inclusive and relatively useless primarily because of flaws in conceptual assumptions made. However there were lessons to be learned in designing other similar studies, so the pilot study was not entirely wasted.

Rossi examines outputs and outcomes as distinct components of an evaluative program, with the former referring to products or services delivered to program participants (which can be substituted for end-consumers) and with outcomes relating to the results of those program activities (or policy changes).

Program monitoring can be integrated into a program's routine information collection and reporting, when it is referred to as MIS, or management information system. In such a system data relating to program process and service utilization is obtained, compiled and periodically summarized for review.

The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols of Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

Patton (1980)[260] has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.

Patton claims:

> *"One reason why evaluation can be confusing is that there are so many types of evaluation. Case control, formative, summative, process, impact, outcome, cost-utility, audit evaluations."*[261]

259 Waller, A. E, Clarke, J. A., Langley, J. D. (1993). An Evaluation of a Program to Reduce Home Hot Water Temperatures. *Australian Journal of Public Health (17(2), 116-23.*

260 Patton (1980) Evaluation Purpose and Theory

261 See Patton, M. Q. (1997) *"Utilisation Focused Evaluation."* The New Century Text 3rd edn.

Funnel (1996) has some views on Australian practices in performance measurement. His 1996 article in the Evaluation Journal of Australasia[262] provides broad-brush review of the state of evaluation for management in the public service.

Funnell provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as 'managerial accountability p452)'.

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As suggested by *Ovretveit*[264]

> *"Design is always balancing trade-off." "Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives." These parameters cannot be decided "without some consideration of possible designs and the answers they could give" (since) planning is an interaction between the possible design and the questions and purposes."*
>
> *"Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention."*
>
> *"Randomised experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable comparisons. There is not a staggering number of opportunities for its use*[265]

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262 Funnell S (1996): *"Reflections on Australian practices in performance measurement",* 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

263 Ovretreit (1997) *Evaluating Health Interventions.* Open University Press. McGraw-Hill (reprinted 2005)

264 Ibid Ovretreit (1997) (reprinted 2005), Ch 6

265 Webb et all 1966 c/f Ovretveit *Evaluating Health Interventions, Evaluation Purpose Theory* and perspectives Ch 2, p31

Of quality assurance *Davey and Dissinger* said

> *"Quality assurance (QA) and evaluation are complementary functions which collect data for the purpose of decision- making. At the process level, quality assurances provides both a system of management and also a framework for consistent ser4vice delivery with supporting administrative procedure. When implemented appropriately QA methods provide rapid feedback on services and client satisfaction, and a means to continuously upgrade organizational performance.*
>
> *Despite client feedback being part of QA, it lacks the depth provided by evaluation in determining individual client outcomes from a person centered plan for service delivery.*[266]

[266] Davey, R. V. and Dissinger, M (1999) *"Quality Assurance and Evaluation: essential complementary roles in the performance monitoring of human service organisations."* Paper presented at Australasian Evaluation Society Conference, Melbourne 1999, p 534-550

Bill Fear[267]/[268] recently wrote to EVALUTALK, the American Evaluation Association Discussion Group on the topic of self-efficacy. His insights are topical so I quote them below:

> *Why do policy makers make such bad policy most of the time? Why is good policy so badly implemented most of the time? Why don't policy makers listen to honest evaluations and act on the findings? And so on.*
>
> *Could we actually bring about meaningful changes by giving people the tools to think things through and act accordingly? Does empowerment actually mean anything? (Well, yes, but it seems to lack substance as a term in its own right.)*
>
> *Does anybody ask these questions? Or is everybody just concerned with the latest methodology which will always be historic not least because it can only be applied to the past (there is an argument there).*
>
> *I digress. The point is, to my mind at least, the importance of self-efficacy in the field of evaluation has been overlooked at our expense.*

The Companion Wallis Consulting Retailer and Consumer Surveys identified fairly well matched perceptions according to the summary comparative findings. Awareness levels amongst consumers besides knowing of the ability to choose, as clearly extremely low. Energy is a low engagement commodity/service, active marketing is necessary with product differentiation and attractive offers including a range of convenience options or discount packages.

Comment:

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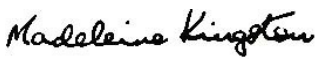
267 Bill Fear Online contribution to EVALUTALK, the American Evaluation Association Discussion Group April 2008

268 Bill Fear, BA (Education) MSc (Social Science Research Methods), PhD (Cognitive Psychology). Member UK Evaluation Society. He sits on the UKES council, and the American Evaluation Association. He has excellent research and evaluation experience, as well as solid grounding in PRINCE project management. He has attended top level training programs in the US with both Michael Scriven and Michael Patton. Recent experience include working for the Office for National Statistics where he led a large index rebasing project, and helped set up the development of both a banking and insurance index for the corporate sector. He is currently running the Investing in Change project (a Wales Funders Forum project). This project is using an evaluation framework to explore funding of the voluntary sector from a funders perspective. A recent achievement in this includes building a partnership with the Directory of Social Change to deliver a Funding Guide for Wales. He presents workshops on the emerging findings of this project to a wide range of policy makers. He is frequently asked to comment on evaluation methodology and proposals

Evaluation and analysis factors impacting on market failure. Interpretations that switching conduct is predictive of real outcomes in an unstable market are yet to be substantiated. Much discussion on the Productivity Commission site and in responses to AEMC and other consultative processes has focused on behavioural economics and the value of superficial evaluation of switching conduct. I will not repeat those arguments here, save to say that the data relied upon does not appear to robustly embrace these principles.

Prepared and collated by



Madeleine Kingston

APPENDIX A

EXCEPTS FROM RESIDENTIAL TENANCIES ACT 1997 (VICTORIA)

http://www.austlii.edu.au/au/legis/vic/consol_act/rta1997207/s26.html

Residential Tenancies Act 1997 - SECT 26
Tenancy agreements to be in standard form

26. Tenancy agreements to be in standard form

(1) If a tenancy agreement is in writing, it must be in the prescribed standard form.

(2) A landlord or tenant must not prepare or authorise the preparation of a tenancy agreement in writing in a form that is not in the prescribed standard form.

Penalty: 5 penalty units.

(3) A failure to comply with this section does not make the tenancy agreement illegal, invalid or unenforceable.

Residential Tenancies Act 1997 - SECT 27
Invalid terms

27. Invalid terms

(1) A term of a tenancy agreement is invalid if it purports to exclude, restrict or modify or purports to have the effect of excluding, restricting or modifying-

(a) the application to that tenancy agreement of all or any of the provisions of this Act; or

(b) the exercise of a right conferred by this Act.

(2) A term referred to in subsection (1) includes a term that is not set out in the tenancy agreement but is incorporated in it by another term of the tenancy agreement.

(3) A provision in a written tenancy agreement or any other agreement that requires a party to a written tenancy agreement to bear any fees, costs or charges incurred by the other party in connection with the preparation of the tenancy agreement is invalid.

Residential Tenancies Act 1997 - SECT 28
Harsh and unconscionable terms

28. Harsh and unconscionable terms

(1) A tenant may apply to the Tribunal for an order declaring invalid or varying a term of the tenancy agreement.

(2) On an application under subsection (1), the Tribunal may by order declare invalid or vary a term of the tenancy agreement if it is satisfied that the term is harsh or unconscionable or is such that a court exercising its equitable jurisdiction would grant relief.

(3) An order under this section has effect according to its terms.

Residential Tenancies Act 1997 - SECT 29
Copy of agreement to be made available to tenant

29. Copy of agreement to be made available to tenant

(1) A landlord must not give a tenant-

(a) a proposed tenancy agreement; or

(b) any other document which contains terms that are proposed to form part of the tenancy agreement-

to sign unless the landlord has given the tenant a copy of that proposed agreement or other document for the tenant's own use. Penalty: 5 penalty units.

(2) If a tenancy agreement or any terms of it are in writing signed by the tenant, the landlord must give the tenant a copy of the agreement or those terms signed by the tenant

and the landlord within 14 days after the agreement is entered into or the terms are agreed.

Penalty: 5 penalty units.

Residential Tenancies Act 1997 - SECT 52
Tenant's liability for various utility charges

52. Tenant's liability for various utility charges

A tenant is liable for-

(a) all charges in respect of the supply or use of electricity, gas or oil in respect of the tenant's occupation of rented premises that are separately metered except-

(i) the installation costs and charges in respect of the initial connection of the service to the rented premises; and

(ii) the supply or hire of gas bottles;

(b) the cost of all water supplied to the rented premises during the tenant's occupancy if the cost is based solely on the amount of water supplied and the premises are separately metered;

(c) that part of the charge that is based on the amount of water supplied to the premises during the tenant's occupation if the cost of water supplied is only partly based on the amount of water supplied to the premises and the premises are separately metered;

(d) all sewerage disposal charges in respect of separately metered rented premises imposed during the tenant's occupation of the rented premises by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(e) all charges in respect of the use of bottled gas at the rented premises in respect of the tenant's occupation of the rented premises.

Residential Tenancies Act 1997 - SECT 53
Landlord's liability for various utility charges

53. Landlord's liability for various utility charges

(1) A landlord is liable for-

(a) the installation costs and charges in respect of the initial connection to rented premises of any electricity, water, gas, bottled gas or oil supply service;

(b) all charges in respect of the supply or use of electricity, gas (except bottled gas) or oil by the tenant at rented premises that are not separately metered;

(c) all charges arising from a water supply service to separately metered rented premises that are not based on the amount of water supplied to the premises;

(d) all costs and charges related to a water supply service to and water supplied to rented premises that are not separately metered;

(e) all sewerage disposal charges in respect of rented premises that are not separately metered imposed by the holder of a water and sewerage licence issued under Division 1 of Part 2 of the Water Industry Act 1994;

(f) all charges related to the supply of sewerage services or the supply or use of drainage services to or at the rented premises;

(g) all charges related to the supply or hire of gas bottles to the rented premises.

(2) A landlord may agree to take over liability for any cost or charge for which the tenant is liable under section 52.

(3) An agreement under subsection (2) must be in writing and be signed by the landlord.

Residential Tenancies Act 1997 - SECT 54
Landlord's liability for charges for supply to non-complying appliances

54. Landlord's liability for charges for supply to non-complying appliances

(1) A landlord is liable to pay for the cost of water supplied to or used at the rented premises for as long as the landlord is in breach of section 69 or of any law requiring the use of water efficient appliances for the premises.

(2) Subsection (1) applies despite anything to the contrary in section 52 of this Act and Part 13 of the Water Act 1989.

Residential Tenancies Act 1997 - SECT 55
Reimbursement

55. Reimbursement

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

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

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

Residential Tenancies Act 1997 - SECT 56
Landlord must not seek overpayment for utility charge

56. Landlord must not seek overpayment for utility charge

(1) The landlord of separately metered rented premises must not seek payment or reimbursement for a cost or charge under section 55 that is more than the amount that the relevant supplier of the utility would have charged the tenant.

Penalty: 10 penalty units.

(2) If the relevant supplier of the u

Residential Tenancies Act 1997 - SECT 57
Director of Housing may impose service charge

57. Director of Housing may impose service charge

(1) The Director of Housing may impose a service charge on a tenant in rented premises let by the Director of Housing for any water, central heating, laundry or utility services or facilities made available to the tenant.

(2) Subsection (1) only applies if it is not possible or practicable to accurately measure the use by the tenant of that service or facility.

(3) A service charge may be increased by an amount or decreased in line with changes in the cost of providing the services or facilities.

(4) This section applies despite anything to the contrary in any tenancy agreement.

(5) In this section Director of Housing includes any incorporated body that receives financial assistance from the Director of Housing for the purposes of providing non-profit housing.

Residential Tenancies Act 1997 - SECT 58
Indemnity for taxes and rates

58. Indemnity for taxes and rates

(1) A landlord under a tenancy agreement must indemnify the tenant for any amount or taxes payable under an Act for those rented premises.

(2) Subsection (1) does not apply to-

(a) rates or taxes based solely on the amount of a substance or service that is supplied to the premises; or

(b) a fixed term tenancy agreement for a period exceeding 1 year.

Division 5-General duties of tenants and landlords

Residential Tenancies Act 1997 - SECT 66
Landlord must give tenant certain information

66. Landlord must give tenant certain information

(1) The landlord must on or before the occupation day give the tenant a written statement in a form approved by the Director setting out in summary form the rights and duties of a landlord and tenant under a tenancy agreement.

Penalty: 5 penalty units.

(2) If there is no agent acting for the landlord, the landlord must on or before the occupation day give the tenant-

(a) written notice of the landlord's full name and address for the service of documents; and

(b) an emergency telephone number to be used in the case of the need for urgent repairs.

Penalty: 5 penalty units.

(3) If there is an agent acting for the landlord, the landlord must on or before the occupation day give the tenant-

(a) written notice of the agent's full name and address for service of documents and the agent's telephone number and facsimile number; and

(b) a written statement setting out-

(i) whether or not the agent can authorise urgent repairs; and

(ii) if the agent can authorise urgent repairs, the maximum amount for repairs which the agent can authorise; and

(iii) the agent's telephone number or facsimile number for urgent repairs.
Penalty: 5 penalty units.

(4) A landlord must give the tenant notice in writing of any change in the information set out in subsection (2) or (3) before the end of 7 days after the change.

Penalty: 5 penalty units.

(5) In this section occupation day means a day that is the agreed day on which the tenant is to enter into occupation of the premises.

Residential Tenancies Act 1997 - SECT 67
Quiet enjoyment

67. Quiet enjoyment

A landlord must take all reasonable steps to ensure that the tenant has quiet enjoyment of the rented premises during the tenancy agreement.

Residential Tenancies Act 1997 - SECT 68
Landlord's duty to maintain premises

68. Landlord's duty to maintain premises

(1) A landlord must ensure that the rented premises are maintained in good repair.

(2) A landlord is not in breach of the duty to maintain the rented premises in good repair if-

(a) damage to the rented premises is caused by the tenant's failure to ensure that care was taken to avoid damaging the premises; and

(b) the landlord has given the tenant a notice under section 78 requiring the tenant to repair the damage.

(3) If a landlord owns or controls rented premises and the common areas relating to those rented premises, the landlord must take reasonable steps to ensure that the common areas are maintained in good repair

Residential Tenancies Act 1997 - SECT 69

Landlord must ensure replacement water appliances have A rating

69. Landlord must ensure replacement water appliances have A rating
A landlord must ensure that if an appliance, fitting or fixture provided by the landlord is replaced, the replacement has at least an A rating.