ESSENTIAL SERVICES COMMISSION OF VICTORIA

Draft Energy Retail Code (Version 11) - February 2013

HARMONISATION OF ENERGY RETAIL CODES AND GUIDELINES WITH THE NATIONAL ENERGY CUSTOMER FRAMEWORK

CONSULTATION PAPER

SUBMISSION

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DEFINITIONS

Agent - one who creates a promise and contractual agreement with a Property Owner as developer, to fit hot water income meters to a shared hot water system, and to invoice the third party users of same. The Property Owner has ceased to do the accounts of the shared hot water costs. Elsewise - water meters need to be bought and installed, with an energy account to fuel the mass use heater to be paid, plus creating an account system to spread the actual input costs, perhaps including water, to each user. This has been out-sourced to an agent to do. The Agent is not an individual contractor for they rely on the Principle to host their meters, and are co-dependents and symbyotic in their exclusive dealings together. Principals should pay the fee.

> The common law principles of agency provide that what a person may do himself or herself, he or she may do by an agent (*Christie v Permewan, Wright & Co Ltd* (1904) 1CLR 693 at 700; *Bevan v Webb* [1901] 2 Ch 59 at 77).
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> An agent is a person 'who is able, by virtue of the authority conferred upon him or her, to create or affect legal rights and duties as between another person, who is called a principal, and third parties' (*Petersen v Moloney* (1951) 84 CLR 91 at 94).
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> A principal is responsible for all acts of his or her agent that are within the actual or apparent authority of the agent. (*International Paper Co v Spicer* (1906) 4 CLR 739; *Bacon v Purcell* (1916) 22 CLR 307; *Hawkins v Gaden (1925) 37 CLR 183).*
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> Once appointed, an agent is able to make decisions and enter into agreements on behalf of the principal. A defining feature of the agency power is that contracts entered into within the scope of the agent's authority become binding on the principal and the

principal will be held liable for the acts of his or her agent where they are within the implied authority of an agent.

The implied authority of an agent extends to all acts which are necessary or ordinarily incidental to the exercise of his or her express authority (*Bayley v Wilkins* (1849) 7 CB 886; 137 ER 351).

It does not extend, however, to acts which are outside the ordinary course of his or her business, or which are neither necessary nor incidental to his or her express authority (*Nowrani Pty Ltd v Brown* [1989] 2 Qd R 582).

Distinct from a person acting as an agent, and therefore acting under the authority of a principal, is a person acting as an independent contractor.

An independent contractor is a person who contracts to perform work for another person, but is not employed by that person. An independent contractor undertakes to produce a given result, the agreed payment becoming payable when the contractual conditions have been fulfilled; to be contrasted with a 'servant' or 'employee' (*World Book (Aust) Pty Ltd v FCT* (1992) 27 NSWLR 377).

An independent contractor is not able to affect the legal relations of the principal. Accordingly, an independent contractor who is engaged by a principal to provide a designated service would be considered to be an agent.

Whether an attorney is acting as agent will depend on the authority conferred under a power of attorney, which may be limited by the terms of the grant of the power and in accordance with legislative requirements. The scope of the authority and powers of an attorney will depend upon the type of attorney and the terms of the document creating the relationship.

A principal/agent relationship is usually created by an agreement, the terms of which can be either express or implied and the subsequent ratification by the principal of the agent's acts done on behalf of the principal, by operation of law, pursuant to statute, or by estoppel under the doctrine of apparent (or ostensible) authority.

Once appointed, an agent is able to make decisions and enter into agreements on behalf of a principal. A principal, having acted through their agent, is deemed to have acted in person in that transaction and is bound by that transaction.

PO - A monolithic landlord or a collective of property owners/strata title/community title/owners corporation etc; that has in place a shared hot water supply. Principal to *Agent*.

BHW - bulk hot water.

Other *italics*, seen below, have regulatory meanings.

PASS THROUGH COSTS

Although it is proposed that the price needs to be quickly and easily be found one click from a home page of the *Retailer* (so as to compare the price of the commodity) there seem to be no rigor to do the same for the pass-through charges of the distributor.

There have been many instances where the ability to compare the price of reticulated *electricity* and *natural gas* has been confusing to consumers. In my instance, is that 3 different *Retailers* supply electricity and gas accounts to 3 houses in a row.

Comparing the price is confusing, because there is no regulatory ascertainment relating to the price of the supply charges from the distributor. *Retailers* have the ability to "Mark Up or Down" this price rather than being asked to reveal the proper cost, so as to pass through, unaltered (+GST). There is no tax on water.

I note that there are 4 Distributors in Victoria with there own "Patch", and with several zones within each patch. The Distributors and Retailers know what those costs are, as does the Australian Energy Market Operator, and perhaps others, and it is not unreasonable to fix this distribution cost to each zone, until there is a change in a pass-through determination by the AER.

If the *pass-though* is unaltered, then gas and electricity bills can be properly compared.

If an *Energy Retailer* can make savings in their administration of energy sales, and invoicing to their customer base, then they will properly be able to offer a competitive lower price as compared to other *Energy Retailers* who are not as efficient in such administration. After all, they are actually supposed to be selling energy.

BULK HOT WATER (BHW)

NOT THE SALE GOODS

It is a contrivance to think that water is being sold. The words "hot" or "heated" are puffery. The Commission has had its chance to incorporate the basic tenets of the Australian Consumer Law, and in this case it should do so.

In every case within Australia, *BHW* is unsolicited supply. Landlords and Property Developers have a long history of concealing the truth about *BHW*, and it would be helpful for the Commission to mention them.

The *Retailer* supplies the energy to the collective *PO*, who has a manufactory and inputs it's common water supply, then it is distributed via their plumbing network. It is located on the common area of a multi-unit development. It is the *PO* that "uses up" the energy supplied by the Agent, not the resident or tenant.

The *Retailer* does not "Supply" the hot water, as a good, for it is the *PO* who does this via the common property manufactory, and it is a contrivance to think otherwise.

The *Retailer* is not supplying or selling goods. They do not charge for the *PO*'s town water component for they are not on-selling water. It is only a Service. A billing service with an income meter, that can never measure any form of energy.

ASCERTAINMENT

Under the Sale of Goods Act, ascertainment is needed to allow a buyer to have good title to a good.

If proper ascertainment of any energy does not exists, then they are only selling water. Fair Trading and the ACL use the words "fair" or "its value" to determine equity.

THE VALUABLE CONSIDERATION AND AUTHORITY

It *PO* that derives the benefit of billing services, and not the resident. The *Agent* is doing something that the Principal, collectively, does not wish to do themselves. They both gain.

There is no proof that an individual resident is contracted, or that an individual has given explicit informed consent, to a bargain or contract of supply, with the *Agent*.

It is collective that sought supply, usually, when the property was built, and it should be they, and their successors in time, that pay any supply charge, or any non-consumption charge, not the resident.

It is collective that are the customer to the *Agent*. It is the collective that benefits, not the individual. There is no proof that individual lot owners or residents favour this billing service. Retro-fit, to avoid this system, is usually impossible or prohibitive. The Agent relies on this, and may have had a hand in designing the plumbing.

In all matters of collateral contracts between the Agent and the beneficiary of their billing service (the Principal), it is up to the Agent to approach the Principal to negotiate, or re-negotiate the billing contract, should there be costs.

If the Agent need reveal any unregistered Deed, Lien, Licence, Assignment, Franchise or other encumbrance over real property, that may define the promise with the original development owner, then they need to supply their Authority in written form to the resident/third party at the start of an arrangement.

After all, no one is forcing the *Agent* to do this billing service, and the *Agent* can withdraw, and remove their water meters at any time. Only then can the collective, weight up whether billing services can be done by themselves.

BREACH OF PRIVACY

Some Agents wish to know the name and contact details of the lot owner or landlord. This is a very dangerous path for tenants, for if they do not know about *BHW* and have not given the required explicit informed consent, or they think its junk mail, or fail to pay, then it is likely that the Agent will complain to the owner, and transfer liability to the lot owner of *PO.*

PROFITEERING

It should be noted that the *Agent* gets the energy at a wholesale price, yet there seem to be no regulatory declaration by the *Agent* to reveal the true cost to the third party. This may be profiteering by the *Agent*. The resident is captive for the *Agent* position appears to be entrenched, (but not *em-bedded*) and able to profiteer with a uncontestable cash cow.

DEEMING RATE

There is no proper ascertainment of energy use by legally traceable means. A water meter is not able to ascertain the quality of heat (its temperature) or the quantity of heat (as measured in Mjs).

It could not be the of "Sale of Heat", for no common metering device can measure a quantity of heat. The legislative regulatory deeming does not take into account many deficiencies in building construction and energy losses between the hot water meter, and the end users hot water tap.

OTHERS ABANDONED BY THE COMMISSION

To cover only *Energy Retailers* for his reform is short sighted, for there are many "Metering Service Agencies" that do this type of billing. Many seem to be owned by related entities of Property Developers. This review sees *BHW* as an Essential Services.

The *retailer* of *BHW* is using there uncontestable monopoly power to lay service charges and all manner of non-consumption charges, which may defeat the regulatory conversion factor.

The price of *BHW* supply charges, such as meter reading fees and maintenance of same, is unregulated. There is no mention of these *ancillary* or *other* non-consumption charges regarding *BHW.*

Collateral energy and water contracts for multi- residential buildings is not uncommon, and creates on-selling, or defrayed costs. There may be no choice, but savings are made. Not so *BHW.* No bulk saving is made.

NOMENCLATURE AND LEXICON UNDER NERL AND WHO IS THE CUSTOMER

Previously I have mentioned that the customer, as servant, is the billing Agent of the Principal. The language used in the proposed code needs to match the true state of affairs. The Bulk Hot Water proposals should not call the *consumer* the customer, for this is not the case.

Bulk Hot Water is not a *Customer Retail Service*, and the nomenclature and lexicon regarding the proper title of the parties needs to be considered.

The *NERL* gives particular meaning for *Customer Retail Service* as being for natural gas and electricity only, and it is incorrect to use such naming for a *BHW* consumer, as a *customer*.

Under the NERL the *Customer* (a *gas* or *electricity* consumer only) enters into a *Customer Retail Contract*, whether a default contract or negotiated contract, freely, for one usually, has some choice in retailer.

The resident has no ability to contract to another BHW service provider, for the place they live in, is uncontestable, and is a geographic (site) monopoly. There is no trading hub or market for hot water income meters, as there are for electricity, gas or other utilities. The third party "user pays", and privity does not exist, and proper equity for the user is lost.

There is no cross boarder trade of hot water supply. Such things are jurisdictional (site specific). The *Agents* equity can be found via the *PO* who derive the benefit.

ELECTRIC BULK HOT WATER

The proposal that:

> The *customer's* electricity tariff must be an off-peak tariff if supplied from an off-peak *electric bulk hot water* unit.

A better policy would see the *Agent* hastening to have installed, a *off-peak meter*, or a Pay For *Time of Use* meter with a separate "timer for off-peak". It is being provided to a mass water heater on common property.

GAS BULK HOT WATER NON-CONSUMPTION SUPPLY CHARGES

In Schedule 6

The proposal that:

> 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.

The concept that *Gas BHW* supply charges being pro-rated via each affected *metering installation* (bulk hot water UNIT - an undefined term) to be paid for by the resident, is unfair.

In Schedule 6

The proposal that:

gas bulk hot water tariff = the *standing offer* tariff applicable to the *gas bulk hot water* unit (gas tariff 10/11)

These tariffs have a service to property, supply charges. Energy is supplied to the common property manufactory of the *PO,* who uses up the gas.

In Schedule 6

The proposal that:

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.

This sentence should be deleted from the Code.

It will not convey carbon information. The Agent will provide an invoice that may convey nearly nothing.

The bane of energy consumers for supply charges to be rolled-in with the consumption charge, so that no ascertainment of percentile can be made.

Individual residents will not know their proper share of the Agent's *energy* account's supply charge, or unregulated water meter maintenance or reading fees et al; is fairly proportioned to each resident, if the whole of the supply charge is secretly mingled with a deemed gas consumption charge?

This proposal should have more rigor, because periodic random auditing of the Agent is the only way to be sure, if this proposal is introduced.

The conversion factor was invoked because of this folly, (as used in SA where, pro-rata gas use = pro-rata energy use).

SHARED SUPPLY CHARGE IS UNFAIR

It is very troubling that the shared supply charge fee is not applied to *Electric BHW.*

This will see, via an *electric* powered *BHW*, the resident not paying two supply charges, one for the electricity account to their residence, and part of the shared supply charge.

Yet within *gas* powered *BHW*, no parity or equivallance is made, for user will pay 2 fees. This discrimination follows no natural justice, and deminishes the equity of the third party yet again, without just cause.

UNREGULATED PASS-THROUGH - NON-CONSUMPTION COSTS

These are seen as *ancillary* or *other* charges, in a business to business contract, and are not economically regulated in any "Pass Through" by the *AER* to retail costs. The *AEMO* does not regulate, it only supplies a hub for trading a retail account and passing through energy meter usage.

The *AEMO* allows these *other*, *ancillary* services to be accounted for, with an unregulated meter reading service cost regime, using a trading system paid for by all energy consumers, via their FRC fees. They provide what the energy sector wants, to the total disregard or all others.

Currently, and in the past, it was the *distributors* that owned the hot water meters, then building development owners, and now whole acreage developments, coveted by a related party as *Agent*. *Energy*, hot and cold water and air, central heating, internet, land line phone/ADSL/PABX, cable, satellite, optical fibre, other eco energies and converters, and anything else that can be measured, are being coverted.

The percentile cost of all non-consumption charges to the resident, will become a "secret magic ingredient" as will actual energy use. Any semblance of ascertainment of all costs, on an invoice by the *Agent*, is never achieved.

The only check that consumers have, is to know the invoice details of every other affected resident, at each *Metering Installation*.

Agencies have already, and will, adopt a stance that the other parties detail's are private and confidential and will not give up the details of all affected parties connected to the Bulk Hot Water Unit (VCAT).

The whole concept that an *Agent* can bill multiple times for non-consumption charges is very problematic.

SUMMATION

Some *distributors* are withdrawing from this market and selling their BHW assets to the *retailers*. This has happened in Queensland where Envestra and the Queensland Government having sold their BHW assets and/or customers to Origin Retail Ltd (Sun Retail).

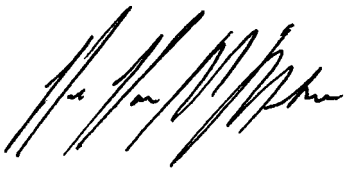
The proposed Code does not resemble any Fair Trading Law, or the Competition and Consumer Laws. The Commission should not pander to the vested interest of the Monolithic Owner such as the Department of Housing, or to lazy *PO*'s.

All non-consumption costs should be bourne by the *PO*, as Principle. If the elevator, car park, gardens, water and common property supply/upkeep costs are bourne by the *PO,* so should other common property, such as hot water supply.

The Promise to the Principle is being fiddled with, and the Third Party is aggrieved, for their equity is diminished yet again.

Thank you for the opportunity, and hope fruitful consideration be made to my submission.

Yours sincerely



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