AUSTRALIA & NEW ZEALAND
ENERGY AND WATER
OMBUDSMAN NETWORK

17 May 2007

Consumer Policy Inquiry
Productivity Commission
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Dear Commissioners

Thank you for the opportunity to provide a submission to the Productivity Commission's Inquiry into Australia's Consumer Policy Framework. This is a joint submission by the members of the Australia & New Zealand Energy and Water Ombudsman Network (ANZEWON). Our core business is resolving customer disputes about three of the most fundamental necessities of peoples' daily lives: access to electricity, gas and water. Therefore we consider we are well placed to bring to the Inquiry the perspective of these consumers and our observations about the energy and water supply industries.

We note from the Terms of Reference for the Inquiry that a key consideration is the need for consumer policy to be based on evidence from the operation of consumer products markets. The perspective we bring and the substance of our comments are grounded in our experience handling the complaints of Australian and New Zealand energy (and in some cases water) consumers over the past decade. [1]

ANZEWON and its individual ombudsman schemes are contributing to the review of legislation, codes and regulations affecting energy and water consumers, both at the national and state level. For instance, the major policy issue affecting energy consumers and the energy supply industry in Australia at the present time is the evolution of a national regulatory framework for electricity and gas supply, which will eventually replace the current jurisdictional regulatory arrangements. As part of this process, both the Energy & Water Ombudsman NSW (EWON) and the Energy

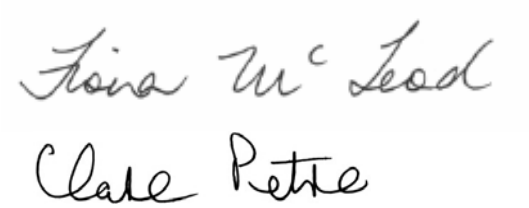
[1] For example, EWOV has handled over 100,000 cases in ten years and EWON has handled over 55,000 cases in nine years.

and Water Ombudsman (Victoria) (EWOV) have made substantial submissions to each of the five working papers released by the Ministerial Council on Energy's Energy Retail Policy Working Group since late 2006.

This submission is organised around the questions which appear in the Issues Paper, although we have not commented on all the questions. We have addressed questions in the order in which they appear in the Issues Paper.

We hope that this submission assists the Commission with its Inquiry.

Yours sincerely



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Response to

The Productivity Commission

Consumer Policy Framework Issues Paper

January 2007

Submitted by the

Australia & New Zealand
Energy and Water Ombudsman Network

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Contents

The rationale for consumer policy

What are the key rationales for government intervention to empower and protect consumers? What should be the balance between seeking to ensure that consumers' decisions properly reflect their preferences (empowerment) and proscribing particular outcomes (protection)?

Governments tend to regulate to protect consumers when a product or service is particularly essential and when other forms of intervention will not achieve the same result. Energy and water are just such essential services. There is an unequal power relationship between energy and water consumers (whether individuals or small businesses) and the corporations that supply them with those utilities that cannot be left entirely to the market. Although it is suggested that the operation of a mature market will lead to the exclusion of exploitative or rogue traders, this is not always so. In any case it is neither fair nor reasonable if consumers have no redress in the meantime.

Further, some abuses are so egregious that it is unacceptable to allow the market merely to force out those unscrupulous providers (many of whom have no long term intent to be in the market anyway). This is not to say that government intervention must always be heavy-handed and prohibitive. It may be that a government intervention that gives more effective levers to the principled operators in an industry, that is to say, a co-regulatory approach, will be sufficient in some circumstances. For instance, the reporting regime which the NSW Independent Pricing and Regulatory Tribunal (IPART) requires of new electricity retail market entrants tends to be more onerous than retailers who have been operating for some time without major incident.[2]

In order to empower consumers to make informed decisions, it is sometimes necessary for government or regulators to conduct information or awareness campaigns around new policy initiatives such as the NSW Government's *Change or Stay – You'll be OK* campaign at the outset of full retail competition for electricity and gas supply in that state in January 2002. Not all consumers will absorb such information and may even fail to remember it when they actually encounter a situation where the information might have been useful (such as when they are door-knocked by an energy marketer). However, the value of such education campaigns can never be underestimated. It is equally important for government and regulators to provide consumers with the practical tools to enable them to make informed decisions. For instance, the Essential Services Commissions of both Victoria and South Australia offer consumers on-line 'energy comparator' tools which compare the energy contract offers of all licensed retailers in those states. Programs and tools such as these should accompany any new policy direction, market practice, or industry change that has the potential to significantly impact the average consumer.

The rollout of advanced metering (ie. metering which enables retailers to charge customers different tariffs for different time bands) is one area of electricity distributors' operations that has a significant impact on consumers but which until

[2] *Electricity Retail Supplier Reporting Manual*, Independent Pricing and Regulatory Tribunal of New South Wales, p4-5

recently has occurred in the absence of any clear national policy. Such metering has the potential to offer consumers considerable benefits if managed properly. For instance, if consumers are able to access easily-understood information via in-house displays that provide real-time information about the cost of electricity, and they are adequately educated and consulted about the technology by their electricity distributor or retailer, this can not only reduce consumers' ongoing costs, but can contribute to the reduction in peak demand for electricity.

However, if distributors undertake the rollout of advanced metering in an ad hoc fashion or in the absence of clear and consistent policy, as some already have, there is a real risk that consumers may be burdened with obsolete technology that they are unable to use to alter their electricity consumption behaviour. EWON and EWOV have already seen a growing number of consumer complaints over the past two years about problems that have arisen due to consumers not being adequately informed about the impact that an advanced meter will have on their current usage patterns or their contractual relationship with their electricity retailer. The Ministerial Council on Energy (MCE) has begun to establish a national policy framework for the rollout of advanced metering (which also has the potential to be used for natural gas and water supply).[3] ANZEWON is supportive of the MCE's moves in this direction, as this is a good example of government intervening not only to bring some consistency to an industry development, but also to empower and protect consumers.

A key theme of this submission is that at a macro level neither consumer protection nor consumer advocacy is adequately resourced or positioned in Australia so that it is difficult to be definitive about what should be the balance. Ideally, they ought to be separate functions if they are each to be effective. ANZEWON members are of the view that there are benefits in having both robust consumer protection and a national consumer advocacy body, as the former prevents, minimises and remedies maladministration and service failures, while the latter can cast a public spotlight on systemic failures and the need for regulatory reform. Clearly each is needed.

Under what conditions are markets most likely to develop responses to the various impediments to the effective participation of consumers? To what extent will the actions of well-informed consumers drive outcomes across markets as a whole?

In general, regulation — or the threat of regulatory intervention — has been effective in developing responses to the various impediments to the effective participation of consumers. Sometimes it has been straight regulation, other times it may be co-regulation or a regulatory underlay to a self-regulatory initiative. ANZEWON members believe, on the basis of having observed customer issues arise in the energy industry and the responses to those issues, that if there is no possibility of imposed regulation, there can be a lack of incentive to deal with impediments to effective consumer participation. Individual companies may move in advance of regulation, but a whole industry sector will generally not move to improve the situation for consumers in advance of at least a threat of regulation, if not regulation itself. Appropriate regulation provides the foundation.

[3] *Smart meters: information paper on the development of an implementation plan for the roll-out of smart meters*, Ministerial Council on Energy, January 2007.

Hardship Programs

A very significant development in the energy industry over recent years has been the development of programs and policies to deal more effectively with consumers who are experiencing financial hardship. Traditionally, energy suppliers (and in particular electricity suppliers) relied on blunt instruments such as disconnection or the threat of disconnection, to induce customer payment. Such policies failed to recognise the need for companies to assist customers in managing their energy usage and the costs of that usage, and were devastating to the individual consumers disconnected from supply. During the late 1990s and early 2000s those retailers that had set up customer hardship programs earned the loyalty and appreciation of customers who needed additional time to pay, and/or advice on how to reduce their household energy use. ANZEWON ombudsmen began a dialogue with energy retailers in light of their observations of these successful provider programs, and pointed to the potential costs to companies of not having adequately resourced hardship programs in place. This has seen many of the larger providers moving in advance of regulation to set up customer hardship programs that have had good results for those consumers seeking flexible payment options.

These companies accept payments at levels which may not be high enough to clear debts in the short term, but which avoid the consumer having their supply disconnected. In some cases the companies offer incentives and debt waivers to encourage regular payment. The companies save on debt collection costs and ensure they have some payments from those customers where otherwise there might have been none. For those consumers receiving a Centrelink benefit, being able to pay their energy bills by way of regular deductions from their benefit (Centrepay) is an effective method of remaining connected to supply and out of debt with their energy retailer. ANZEWON is pleased to note that many retailers have adopted the Centrepay option for those customers who would otherwise be facing hardship in meeting their energy usage costs.

There have been some jurisdictional differences in the approach of retailers to hardship programs. Some companies in Victoria, for example, were resistant to developing their own programs even where many other retailers in the State had done so. A Victorian Parliamentary Inquiry into the Financial Hardship of Energy Consumers, which reported in 2006, found much evidence of the severe effects of disconnection, particularly on vulnerable and low-income customers. This led to the introduction of legislation requiring all energy retailers in that State to have hardship policies and programs. The second tier retailers have recently submitted their policies to the Victorian Essential Services Commission for approval.[4] The outcomes of this government intervention are yet to be evident, but ANZEWON supports such regulation where calls for self-regulation have failed to result in consistent basic levels of service for consumers in areas such as customer hardship management.

To date, New South Wales has not followed a regulatory path though this is possible at some point. The larger energy retailers in New South Wales have developed

[4] *Energy Retailers' Financial Hardship Policies, Draft Decision, March 2007*, Essential Services Commission (of Victoria).

hardship programs in a self-regulatory way. This process has been aided by the active interest of the regulator, who has indicated to retailers that they will intervene if self-regulation does not result in all NSW retailers developing their own hardship programs.

What are the important costs of intervention? How significant are the hidden costs of intervention? How do these compare to the costs of not intervening?

The following example of regulatory intervention in Victoria acknowledges the adverse impacts of disconnections and ensures compensation for consumers who are disconnected from their energy supply unreasonably or in error. The *Wrongful Disconnection Payment* legislative amendments came into effect on 8 December 2004. They resulted in an immediate and significant decrease in disconnections.[5] Wrongful Disconnection Payments ($250 a day or pro rata for each additional day a customer remains disconnected) are only payable where an energy retailer has breached the terms of its contract with their customer. These terms include minimum service standards outlined in the Victorian Essential Services Commission's (VESC's) *Energy Retail Code*. It is clearly arguable that there should have been no extra compliance costs in complying with something that was already a requirement. If there were, it could be suggested that the providers' compliance systems were previously inadequate. In terms of the payments themselves, these are small compared to the turnover of the businesses. The VESC calculates that $132,079.97 was paid in Wrongful Disconnection Payments in 2005-06 across all retailers.[6]

In Queensland the *Electricity Industry Code* provides for a one-off payment of $100 for a wrongful disconnection and in WA the *Code of Conduct for the Supply of Electricity to Small Use Customers* which commenced operation on 31 December 2004 provides that the retailer must pay the eligible customer $50 for each day that the eligible customer was wrongfully disconnected, up to a maximum of $250.

Disconnections are costly for retailers, involving visits to customers' homes, additional calls to and from their call centres, the administrative costs of reminder and warning notices, field visits to disconnect and reconnect. However, the costs are far higher for customers who are disconnected, and can include not only food spoilage and the costs of alternative accommodation, but social, health and psychological costs.

The VESC report cited above notes:

> *Over 70% of the wrongful disconnections 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*

[5] EWOV cases involving disconnections reduced significantly in the six months from January – June 2005 compared with the preceding six months. For example, electricity disconnection billing cases went from 850 in July – December 2004 to 382 from January – June 2005. Gas billing disconnection cases went from 437 to 187 over the same period. (*Resolution* 20, page 13).

[6] *2005-06 Compliance Report for Victorian Energy Retail Businesses* (February 2007) p19

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.[7]

In New South Wales, the regime of operating licences overseen by IPART imposes some compliance costs on those energy and water suppliers licensed by the Tribunal, mainly in the form of the preparation of annual compliance reports. To date IPART has not had to revoke an operator's licence, but in mid 2006 IPART took the step of making an enforceable undertaking against one energy retailer as a result of a number of licence breaches that had received significant negative media coverage and resulted in an upsurge of complaints brought to EWON.[8] The cost of such regulatory intervention should be viewed as insignificant when compared to the potential costs to consumers and the industry of allowing a retailer to continue operating in an unacceptable way, or in relying on enforcement of a civil penalty through the courts.

There is regulation in most jurisdictions to require energy companies to provide accounts to customers at regular intervals based on actual consumption data. This means that retailers must ensure customer meters are read, or that they must attempt to contact customers where access to the meter has not been possible (eg locked gate). There are costs for retailers in being required to deliver regular and accurate customer accounts. However, there can be greater costs to consumers where this requirement does not exist. Consumers often only become aware of a problem with their energy or water service through their bill. For example, they might have a hidden water or gas leak, or might not realise the amount of electricity that a newly installed appliance consumes. If they do not receive a regular and accurate account they will not be aware of the problem and therefore will not have the opportunity to mitigate the problem. Failure to address internal problems with energy or water supply can cost domestic and small business customers large amounts of money.

In summary, it is clear that in the area of essential service provision, overt regulation or the threat of regulation has often been required to ensure that the power asymmetries that exist between individual consumers and their providers are adequately (re)balanced. It has been interesting to see how, once such regulatory or co-regulatory mechanisms are put in place, consumers are often more able to participate equally in the market, manage their affairs, and better afford to maintain what are non-discretionary services.

[7] Ibid, p19-20.
[8] Independent Pricing and Regulatory Tribunal of New South Wales, *Energy distribution and retail licences compliance report for 2005/06: Report to the Minister for Energy*, p37.

Market trends and developments

How have recent market trends changed the requirements for Australia's consumer policy framework? For example, has the growth in e-commerce made it more difficult to enforce regulation, thereby reducing its effectiveness? Or has the Internet empowered a greater proportion of consumers? Has greater product complexity made it more difficult for consumers to participate effectively in markets? What are the impacts of the greater use of product bundling and standard form contracts? What other new developments are likely to have material implications for the policy framework over the next decade?

Internet and E-Commerce

The Internet and email have arguably had a lesser impact on energy and water consumers than those consumers in other industries where goods are regularly traded electronically. Consumers can, however, do such things as open or close a standard energy account, read the policies of a retailer, and lodge an enquiry or complaint via the websites operated by energy retailers.

Product Complexity and Product Bundling

Product complexity, on the other hand, has grown exponentially in very recent years in the provision of electricity and gas. Far from receiving a once- straightforward power bill, customers are now required to navigate a complex terrain of retail and distribution services and requirements. Rather than a flat rate, customers will typically be charged on highly complex tariffs, stepped according to usage and time band. Charges will be separated between network and retail components, fixed and variable components (to say nothing of miscellaneous fees). With an emphasis on sustainability, customers are now being required to interpret billing and metering data and develop the skills to shift usage from peak periods.

Even greater product complexity has faced customers where retail energy markets are competitive (South Australia, New South Wales, Victoria, the Australian Capital Territory and soon Queensland). In these States and Territories, customers have very rapidly been encouraged to reconfigure their thinking about essential services such as electricity and gas (and soon for water in Sydney and the Hunter Valley) in terms of *contestability*. Consumers are receiving door to door marketing visits and telemarketing calls, they are being signed to complex, binding retail contracts, and they have to make pricing comparisons across retail offers that can be both time consuming and complicated.. Customers are being offered other 'bundled' products in addition to their electricity or gas service, e.g. air conditioner, heater, internet service.

It is clear to ANZEWON that the degree of sophistication being required of customers has grown considerably in the last few years. It is also clear that a number of consumers, particularly those with accessibility issues (e.g. customers from diverse cultural and/or linguistic backgrounds, the frail aged, customers with disabilities) are in some instances being left behind.

Unpublished consumer research undertaken by the Victorian Essential Services Commission in conjunction with its work on Energy Choice showed that information was a barrier for those customers who were not making active choices. The research also showed that 50% of those surveyed were unable to name a retailer other than their own.[9] It also showed that lower income and more vulnerable customers were not benefiting from the greater product differentiation in the market. ANZEWON believes that there is a clear need for consumer protection as this trend gains pace, and especially where essential services are bundled with non-essential services. Even where electricity and gas are bundled together, the stakes for consumers become higher as they are potentially at risk of disconnection from two essential services.

Product complexity and differentiation clearly benefits more informed and confident consumers, but leaves behind those consumers whose personal circumstances make them less able to participate in a dynamic and highly competitive market. This creates a regulatory challenge: how to protect those consumers without limiting the benefits of differentiation to those consumers able to participate effectively.

Standard Form Contracts

Standard form contracts are also a potential source of consumer detriment. In the electricity market, there are standard form (deemed) contracts which cover the relationship between distributors, retailers and end-use customers of which most consumers would not even be aware.

In New South Wales, standard form customer connection and supply contracts are written and published by the local distribution and retail suppliers themselves, and often contain waivers of liability for all manner of events. The contracts must include regulated minimum provisions, but distribution and retail suppliers have a free hand to add any other terms and conditions as they see fit. While it is clear that a number of network events (particularly those relating to extreme weather) are beyond the control of the distributor, a number of the waivers contain elements that many consumers may be surprised to read, and that potentially blur the relationship between retailer and distributor. The following extract is an example of some of the restrictions included in a New South Wales customer connection contract (emphasis added):

> **[Retailer A] Standard Form Customer Connection Contract (Feb 05)**
>
> *16.3 Exclusion of liability for supply interruptions, distortions or fluctuation*
>
> *Subject to the above, and as far as the law permits* ***[Retailer A] is not liable for any loss the customer may suffer (including, without limitation, where caused by any negligent or wilful act or omission by [Retailer A])*** *arising from*
>
> *a) any fluctuation or distortion (in voltage magnitude, voltage waveform or frequency) or interruption to the supply (by the customer's retail supplier) of electricity to the customer's premises or from any such supply not being or remaining continuous;*
>
> *b) the customer's retail supplier discontinuing supply of electricity to the customer; or*
> *c) [Retailer A] interrupting the supply of electricity by the customer's retail supplier to the customer's premises.*

[9] Research presented to a stakeholder forum at the VESC, 23 March 2006.

16.4 To the extent that [Retailer A] has any liability to the customer despite the effect of paragraph 16.3, [Retailer A]'s liability (under contract, tort or any other basis), is limited, as far as the law permits, as follows:

a) [Retailer A] is not liable for any indirect, economic, special or consequential losses of any kind suffered by the customer (including corruption of data losses, business interruption losses, loss of profits or any other indirect costs of any kind), and

b) [Retailer A]'s liability for all other losses suffered by the customer is limited to the lesser of:

i. ***The total amount billed to the customer's retail supplier*** *(or to the customer under clause 7.4)* ***for network charges*** *relating to the use of [Retailer A]'s distribution system for the supply of electricity by the customer's retail supplier to the customer's premises)* ***during the year that [Retailer A]'s breach, act or omission (which gives rise to the claim) occurred,*** *or*

ii. $5,000 (GST inclusive, if any), for all claims the customer makes in any one calendar year.

Such exclusion clauses are frequently relied on by distributors to deny claims submitted by customers for compensation for damaged appliances. The denial of the claim can have a significant effect on customers, and the operation of the exclusion clause certainly attempts to limit "the consumer's right to sue the supplier".

In Victoria, on the other hand, there are two regulatory or legislative initiatives which prevent this kind of unfairness. Firstly, there are the guidelines on *Voltage Variation Compensation* which require distributors to give access to compensation to any small retail customer who has experienced property damage as a result of unauthorised voltage variation affecting their electrical installation.[10] The contrast with New South Wales is striking, where there is no regulated requirement for electricity distributors to respond positively to customer claims for such property damage. Since 1998, EWON has made 58 Determinations under clause 6.1 of its *Constitution*. Of these, 57 have related to distributor claim matters. Binding decisions are a last resort for ANZEWON member schemes and take a large toll on the resources of the scheme as well as of the companies involved. In Victoria, the Ombudsman has made no binding decisions relating to distribution claims since the *Voltage Variation Compensation* guidelines were introduced. This is a clear example of a regulatory initiative lowering costs that might otherwise be incurred. We would argue that even the costs to providers are lowered by these clear guidelines because they do not have to put resources into arguing every case from first principles, nor do they incur complaint fees from the jurisdictional ombudsman.

The second Victorian initiative was the unfair contract terms provisions introduced into the *Fair Trading Act 1999* (Victoria). Consumer Affairs Victoria (CAV) commented on these provisions in its 2005-06 Annual Report:

> *Markets work most effectively where consumers are able to exercise genuine choice. The emergence of standard form contracts in our modern economy limits consumers' ability to exercise choice. It is not uncommon to find entire*

[10] Office of the Regulator-General Victoria, *Electricity Guideline No 11: Voltage Variation Compensation, Version 1, April 2001*.

> *industries that have highly similar consumer contracts. This limits consumers' options in choosing a supplier with a 'fairer' contract – consumers often have to accept contract terms on offer, or not purchase the particular good or service.*
>
> *In recent years, many consumer contracts have become biased towards the supplier. This, combined with the prevalence of standard form contracts, means that consumers often find themselves in contracts where they have few rights but many obligations. The unfair contract terms provisions introduced into the* Fair Trading Act 1999 *aim to redress this imbalance. The provisions seek to ensure that contractual rights and obligations are fairly distributed between parties to a contract.*

Some other jurisdictions are examining similar provisions. In late 2006, EWON contributed a submission to the New South Wales Legislative Council Standing Committee on Law and Justice's *Inquiry Into Unfair Terms in Consumer Contracts* in which it supported the adoption of legislation in New South Wales similar to that now present in Victoria and the United Kingdom.[11] EWON noted in their submission that:

> *While consumers now have the ability to choose their energy retailer, each supplier uses similar contracts, and domestic and small business consumers rarely if ever have the power to negotiate the terms of their contract. The terms of the contracts used in NSW have rarely been examined in the courts, as most consumers do not have the economic capacity to run such a case.*

ANZEWON would like to see unfair contract terms provisions introduced on a national basis. At present, contract terms that are arguably unfair are contained in energy market contracts in at least the following ways:

1. *Disconnection of supply*

One of the key enforcement mechanisms granted to suppliers under the terms of energy and water contracts is the ability to disconnect or restrict supply. As energy and water are "essential services", suppliers hold a powerful tool - the ability to take away the service – for persuading consumers to do, or refrain from doing, a particular action. The following list outlines some examples of the events which enable a New South Wales supplier to disconnect a consumer under the terms of its regulated standard form customer supply contract:

> **Supplier A Standard Form Customer Connection Contract (October 2002)**
>
> *We may arrange to disconnect your property if:*
> *• you do not pay on time any amount due to us under this contract for the supply of electricity or connection services arranged by us*
> *• you do not provide the security that we require*
> *• you otherwise fail to comply with the terms of this contract*
> *• a receiver, administrator or liquidator is appointed for any of your assets*

[11] Submission by the Energy & Water Ombudsman NSW to the *New South Wales Legislative Council Standing Committee on Law and Justice: Inquiry Into Unfair Terms in Consumer Contracts*, October 2006.

• you refuse or fail to give an authorised person access to your property in accordance with any rights of access provided for in the Electricity Supply Act
• you obstruct an authorised person in relation to anything in connection with this contract
• you assign your rights under this contract without first obtaining our consent (which may be given or withheld at our discretion) or you vacate your property.

Aside from the consequential costs to customers of the disconnection, suppliers are also able to charge customers disconnection/reconnection fees to recover costs of carrying out the disconnection. These fees, regulated by New South Wales' Independent Pricing and Regulatory Tribunal, tend to range between $50 and $100, and are often a prerequisite for reconnection of supply.

Where disconnections are due to non-payment of bills, the disconnection is unlikely to improve a consumer's ability to pay their bills on time, rather it is likely to lead to essential services being out of reach for many consumers, particularly if administrative charges (eg late fees, disconnection fees) are added to the consumption and service charges. This affects many, mostly low-income, consumers. The most recent publicly available data for New South Wales suggests that 24,056 customers were disconnected for non-payment of electricity arrears in 2005-06.

Importantly, there appears to be no guaranteed compensation (at least equivalent to the regulated disconnection fee) should the retailer or distributor disconnect the customer in error or without due regard to compliance requirements. It is arguable, then, that the contract creates a one-sided advantage for the supplier while providing little redress for a customer.

2. *Contract termination fees*

Many (although not all) energy retailers include a provision in their negotiated supply contract terms that allows them to charge the customer a fee if the customer cancels or terminates the contract before the end of the contract period. For a small retail customer, these fees can be up to $125 GST exclusive for each fuel type (ie electricity and gas are separate fuels under such contracts).[12] ANZEWON is not aware of any suppliers that include a provision in their negotiated supply contracts which requires the supplier to pay the customer any form of early termination fee in the event of the supplier cancelling or terminating the contract early (such as when a meter installed by the customer's network provider makes it impossible for the customer's retailer to continue billing the customer under a flat tariff). This illustrates the power imbalance that can occur with the inclusion of termination fees in contract provisions.

Although many suppliers argue that termination fees are an attempt to recover the reasonable costs of losing the customer, such fees can be a significant proportion of a customer's final bill. A 2006 review by the Victorian Essential Services Commission indicated that in many cases the quantum of the termination fee was well above the

[12] It is worth noting that at the commencement of energy competition in the small retail market in NSW, EWON received many complaints from customers of one retailer that termination fees were in the hundreds or even thousands of dollars.

actual costs incurred by the supplier involved, and in some cases the supplier actually made a significant profit on the termination fees[13]. As a result of the VESC's review, retailers operating in Victoria will face limits on the level of early termination fees that they can charge consumers from 1 May 2007.

[13] Essential Services Commission, *Early Termination Fees Compliance Review: Issues Paper, July 2005*; *Preliminary Findings, March 2006*; and *Draft Decision, July 2006*.

How well is the current framework and suite of measures performing?

Is the current consumer framework fundamentally sound? Does it simply require fine-tuning or are more comprehensive changes required? What measures could be used to assess whether it is delivering for consumers?

ANZEWON believes that more than fine-tuning is needed to achieve a fundamentally sound and nationally consistent consumer policy framework in Australia. In particular, consumer advocacy (empowerment) is under-resourced and under-developed. It is essential for good outcomes in regulatory developments that a strong, informed and representative consumer voice is available for submissions and consultations. Industry generally has the resources to respond. Consumer groups, even where they exist in specialist areas, generally do not. Policy and regulation can suffer as a result. In addition, short time frames to respond to very complex issues can create barriers to responses by consumer representatives because of their limited resources.

Ombudsmen have played a positive role in offering evidence-based and independently researched submissions which draw upon the direct experience of consumers through the cases and complaints that come to ANZEWON members. To complement the independent work of ANZEWON, effective consumer advocacy and research is also required.

In terms of dispute resolution for consumers ANZEWON is confident that its member schemes offer energy and water consumers a fair, free, accessible and independent service. One measure of our success may be the nature of complaints coming to our offices. The reduction in less complex complaints that has occurred as our schemes have evolved indicates that providers are dealing appropriately and productively with these cases themselves. The increase in the number of complex cases handled by our schemes indicates that consumers need and value independent analysis of their complaints in an increasingly complex industry and consumer environment.

Does the current framework focus on the right issues and areas? Are there significant gaps or imbalances in coverage, or particular objectives that are not well catered for? Is there any significant duplication of policy effort?

Sustainability

ANZEWON is a stakeholder in the service delivery of industries that are facing extreme challenges of sustainability and adaptation to changed circumstances: energy and water. We have seen the inter-relationship of these challenges as water shortages have led to reduced power generation in Queensland and the lack of availability of hydro power (due to water shortages) in Victoria and New South Wales which have led to increased reliance on more polluting forms of energy. Because of this, ANZEWON believes that sustainability needs to be an objective within the consumer policy framework.

Prices for consumers are increasing or scheduled to increase as a result of measures to be undertaken at a macro scale to improve sustainability, such as the recent draft IPART decision on electricity prices or the introduction of state-based renewable energy target schemes[14]. Consumer groups are raising warnings about the inequitable impact this could have on poorer groups within society.[15] Nationally, consumers are being urged to conserve water and, at least in some jurisdictions, power.

Sustainability will increase in importance as a goal at all levels of society, from households, through business, to state and national levels. It needs to be an objective of consumer policy as well, because consumer policy needs to take account of how it can be pursued without falling inequitably on some sections of society. Consistency across jurisdictions in the level of funding and types of programs offered to consumers to assist them in conserving water and reducing their energy use is vital as part of this process.

Marketing

A current gap in coverage relates to marketing. Marketing in the energy industry is very active.[16] South Australia, Queensland, New South Wales and Victoria each have a Code of Conduct for energy marketing. The Codes vary slightly between jurisdictions, which has led to the problem of some retailers relying on the wrong Code provisions when marketing to consumers in another state. Energy companies operate across state borders and it would be a benefit to have a single national code that is either specific to energy marketing or which adequately addresses the unique requirements for marketing essential services such as electricity and gas. ANZEWON members will continue to make this point in future submissions to the Ministerial Council on Energy's consultation process over national regulation.

ANZEWON acknowledges that at the macro level marketing appears to be operating effectively. Given the amount of door-knocking and cold-calling in the jurisdictions with full retail competition, the numbers of marketing complaints our schemes receive are a relatively small percentage (though it is important to note that in South Australia and New South Wales the percentage is growing rapidly).[17] We also note that retailers often respond promptly and positively when we bring our concerns to their notice, as the following case study from EIOSA illustrates. Nevertheless, it is important that the significance of the marketing cases received is not underestimated, as they are key indicators of issues in the marketing of energy. The energy market is an immature one and, given that it is based exclusively on customer switching (rather than creating *new* consumers for the product), it is open to misleading and deceptive conduct. In all jurisdictions we have found cases where the marketing has been to customers who

[14] http://www.theage.com.au/news/national/power-and-water-bills-set-to-soar/2007/04/11/1175971180073.html

[15] http://www.theage.com.au/news/national/fear-higher-water-bills-could-hit-poor/2007/04/01/1175366078737.html

[16] In 2005-06 EWON saw a 254% increase in the number of complaints regarding energy marketing. (EWON *Annual Report* 2005-2006, p. 18) The Energy Industry Ombudsman South Australia (EIOSA) reported that for the 2005-06 year 23.87% of its cases related to competition, the largest category after billing. (EIOSA *Annual Report* 2005-2006, p. 18) In Victoria EWOV cases relating to retail competition went up by 73% in 2004-05 and continued at that level for 2005-06 (EWOV 2005 *Annual Report*, p 34 and 2006 *Annual Report*, p.19)

[17] EWOV calculates that it receives about 1 complaint for every 200 customers who switch provider.

were clearly not competent to consent, for example, by virtue of dementia or other health issues, or not being able to speak or fully understand English. We have also found cases in which misleading representations were made, including the frequently reported 'We're from the government' or 'We're taking over the supply of electricity in your area'. The EIOSA case is typical of many we have encountered:

> Ms S contacted EIOSA to register her concern after she received a visit from a sales person representing an electricity retailer who had asked her to sign an "expression of interest". When Ms S asked if the document was a contract, the sales representative emphasized that it was an "expression of interest" only, not a contract. However, on looking through the document Ms S could clearly see that it was a contract as it included details about the cooling-off period. However, the representative continued to argue that it was not a contract and Ms S terminated the contact.
>
> Although Ms S contacted EIOSA she did not want any further dealings with that retailer but agreed to send the document to this office. On examination it was clear that the document was a contract. Because of a concern that this sales approach could be a systemic issue EIOSA raised the matter with the retailer without identifying the customer.
>
> The retailer gave this marketing complaint its highest complaint rating which includes the action of removing a sales representative from the field until the completion of an investigation and potentially requiring re-training before the representative is sent back to the field.
>
> On the completion of the investigation the retailer advised EIOSA that they no longer contracted the sales representative. The retailer also gave an assurance that the terminology "expression of interest" is not included in their marketing training program. A meeting of sales representative active in South Australia was held by the retailer to reinforce this point.
>
> EIOSA was satisfied with the response and actions of the retailer.[18]

A national Marketing Code of Conduct (whether generic or energy-specific) should cover the following minimum requirements:

- full product disclosure
- common marketing hours
- proper identification of the marketer and who they represent
- how a marketer should respond if a customer does not wish to proceed (eg. cease marketing immediately)
- the operation of a no-contact register
- full disclosure of contract terms, including termination fees and cooling-off periods
- the need for informed consent, and
- a prohibition on false and misleading representations.

[18] EIOSA *Annual Report* 2005-2006 p. 36

There are provisions contained in the existing jurisdictional Marketing Codes of Conduct which indicate that energy marketing may require specific considerations that would not be relevant to a generic Code, such as:

- ensuring the customer is aware of their right to an applicable standard form contract and how the terms of such a contract may differ from that being offered by the marketer
- the expected date of commencement of the contract (which might be up to 90 days after the date of signing).

Has the inclusion of new objectives, such as strengthening the position of small businesses in their dealings with larger enterprises, impacted on the effectiveness of the framework? Should consumer policy be further extended to cover small businesses as consumers?

ANZEWON members believe that small businesses should be protected within the consumer policy framework. It is our experience that the owner/operators of many small businesses possess no greater market knowledge or resources than residential consumers when it comes to their dealings with energy and water providers, and may in fact be at greater risk because of a tendency to assume that they will receive advice from a retailer that is tailored to their specific circumstances. It should be noted that small businesses can be operated by people who are themselves vulnerable. The following case study from EWON illustrates this.

> Maria runs a small wholesaling food business so, even though hers is a very small enterprise, it uses a lot of electricity because of industrial refrigerators and cooling rooms. Recently she received a letter from her provider advising her that she was required to be supplied electricity under a market contract rather than the standard form regulated contract. Maria asked the provider why they had not automatically offered her this contract when she opened her account, but did not receive a response. Maria then received a letter advising that unless she signed a contract, she would be charged "mandated" rates, which were significantly higher than the rates she had been paying. Because she had not yet received a response to her query, Maria did not sign a contract. In response, her provider then issued her a bill on the "mandated rates". Maria contacted the provider to dispute this invoice and was advised that because she had not paid the bill by the due date she would have to pay a $3000 security deposit in addition to the $2600 "mandated rates" invoice. She was told that if she did not pay these amounts within one week, her premises would be disconnected. Maria was very upset at this request, as electricity supply was vital for powering her freezers. She managed to pay the amounts under protest, and contacted EWON about the provider's actions. She felt that she shouldn't have to pay the higher "mandated rates" which weren't listed anywhere on the contracts she'd seen, and that she shouldn't have to pay a security deposit in these circumstances.

It is worth noting that most Australian jurisdictional energy legislation defines customers not as residential or business but as small and large retail customers – with the demarcation being set by energy consumption level. (This level varies

considerably across states and territories but the most common level for electricity, for instance, is 160 Megawatt hours per year, equivalent to about $20,000). ANZEWON's experience suggests that while energy consumption can be – and currently is – used as a means of establishing the protections to be made available to a consumer, the equation is not an exact one. It is clear that some of those who contact our schemes would not be considered large businesses under standard definitions[19] but are simply small enterprises with large energy demands (small food handling businesses that use freezers or small workshops with high energy use tools or equipment). Customers in these circumstances, who might otherwise be small owner-run businesses, are not infrequently in positions of significant disadvantage where their level of consumption has disallowed them access to the benefit of consumer protection regulation currently available to those whose consumption falls below the relevant threshold. For this reason ANZEWON considers that consideration should be given to customers with particular vulnerabilities – such as the small businesses listed above or small business owners with language or other difficulties – particularly in terms of access to fundamental protections, notably external dispute resolution and payment/instalment plan options.

Is the balance of responsibility between governments, business and consumers broadly appropriate? Does the framework pay sufficient regard to the costs of intervention for consumers and businesses? Does it promote certainty and clarity for consumers and businesses and is it sufficiently evidence-based? How well has it coped with the changing circumstances identified earlier?

It is difficult to comment on the balance of responsibility between governments, business and consumers in the energy sector because of the variation between states, but ANZEWON makes the following observations:

- Consumer organisations are not adequately resourced to effectively participate in the consumer policy framework. In New South Wales, the Utility Consumers' Advocacy Program (UCAP) operates from the Public Interest Advocacy Centre, and receives its funding from the NSW Government. UCAP regularly raises utility issues it sees as being in the public interest, or on behalf of vulnerable consumers.[20] Victoria has a similar program, the Consumer Utilities Advocacy Centre (CUAC).[21] Organisations such as CUAC and UCAP are advocates for energy consumers at a jurisdictional level but there are few if any equivalents at a national level.

- There have been some effective enforcement interventions by Consumer Affairs Victoria (CAV) and IPART in New South Wales[22]. In two cases in

[19] There are several means to define a business as small or large, e.g. through annual turnover (see s6D of the *Privacy Act 1988* [Cth]) or staff size (the Australian Bureau of Statistics recommends a small business to be one that employs fewer than 20 people: see Small Business in Australia, 2001). The latter appears to be the definition currently most favoured legislatively.
[20] http://www.piac.asn.au/system/ucap.html
[21] http://www.cuac.org.au/index.php
[22] In Victoria TXU and Energy Australia both entered into enforceable undertakings. There is an account of the Energy Australia enforceable undertaking in the Consumer Affairs Victoria 2005 Annual Report at p.11. In NSW Jackgreen entered into an enforceable undertaking with IPART in June 2006.

Victoria and one in New South Wales, providers have entered into enforceable undertakings or agreements with either CAV or IPART as a result of marketing which was non-compliant with licence conditions or led to consumer detriment. ANZEWON sees such enforceable undertakings and agreements as appropriate and effective measures to redress consumer detriment.

- ANZEWON would cite its own member ombudsman schemes as instances where the balance between governments, business and consumers is appropriate. Governments are involved by making membership of an approved dispute resolution scheme a requirement. Providers set up the schemes (with the exception of the statutory scheme in Tasmania) and have ongoing participation in their management and operation through membership of their respective boards. Consumers or consumer representatives also have a role in the management of the schemes, either by equal membership of the board (Victoria and South Australia) or through membership of a Council (New South Wales). The independence of the schemes ensures that complaints are handled in an impartial way – the ombudsman is not an advocate for either the consumer or the provider. Industry has been willing to pay for the operation of the schemes because they recognise the need for independent external dispute resolution for their customers, the efficient handling of complaints they have not been able to resolve themselves, and because of the continual improvement to their internal systems that the ombudsman schemes foster. An example of this support from industry (and other stakeholders) can be seen in independent and external stakeholder surveys undertaken by some of the ombudsman offices:

  EIOSA:

  > *The findings that emerge from the stakeholder interviews were exceptionally positive in their direction, with changes sought representing minor modifications rather than any substantial restructuring of the scheme. Where responses were given in the form of five point rating scales, the majority were 4.0 or greater and there were only two under this point (3.9 and 3.75)…*[23]

  EWON:

  > *There is widespread agreement that EWON has performed very well and to an extremely high standard in its first three years of operation. Indeed, as an evaluator, it is rare to come across such a high degree of consensus in a performance review of this kind. The positive regard in which EWON is held by the majority of scheme members, consumer and community representatives, industry and government stakeholders and customers is a major achievement given the nature of the scheme and the short time it has been in operation.*[24]

  EWOV:

[23] EIOSA *Annual Report* 2005-06 p 20.
[24] Urbis, Keys, Young, *External Review of the Energy & Water Ombudsman NSW (EWON), Final Report*, 2002.

The feedback from stakeholders indicates that EWOV is well regarded by stakeholders in terms of:

- *overall performance*
- *quality and efficiency of staff and operations*
- *outcomes—as the majority of complaints are judged to be resolved in an acceptable manner*
- *raising community awareness*
- *the relationships which it maintains with stakeholders…*[25]

What broad changes to the framework could be made to deliver greater benefits or more cost effective outcomes for the community? In this regard, what can Australia learn from the experience of other countries?

As previously mentioned, ANZEWON believes that the framework needs the following broad changes:

- more adequate resourcing of consumer advocacy, particularly at a national level

- national regulation of energy and water consumer protection - wherever possible to be achieved through generic regulation - but by way of energy or water specific regulation where generic protection is not possible or adequate.

We note a positive model for achieving many consumer policy aims is that of the Committee for Melbourne.[26] The Committee for Melbourne's model for achieving its strategic objectives is a tripartite one: it harnesses the knowledge, resources, experience and ideas of government, business and civil society to work together on intractable problems in a neutral space. This tripartite model reflects an acceptance that no one society sector is responsible for tackling challenging issues, but that industry, government and civil society all have a role and responsibility. Although not primarily concerned with consumer issues, its inclusiveness and lateral thinking about the 'challenges of thinking limiting the success of Melbourne' has meant it has addressed consumer issues in its projects. In particular, its Utility Debt Spiral project is a significant initiative in the utilities area:

> *The Utility Debt Spiral Project (the Melbourne Model in action) is a joint research project initiated by the Committee for Melbourne under the auspices of the UNGC (United Nations Global Compact) Cities Programme.*
>
> *The Project is based on the premise that water, electricity and gas bills can be a significant factor in personal debt spirals and the poverty trap.*
>
> *Applying the Committee for Melbourne-developed Melbourne Model, the Project has harnessed the expertise and involvement of business, government, regulators, and civil society project partners to test this premise, and to*

[25] EWOV, *Resolution 21* (1 July 2005 – 31 December 2005) p 1

[26] http://www.melbourne.org.au/

examine and identify potential means of ameliorating the impact of utility bills as a direct cause of, or exacerbating factor in the debt spiral[27].

One product of this work is particularly relevant. *Supporting Utility Customers in Financial Hardship: Guiding Principles* was launched by Victoria's Minister for Energy, Resources and Victorian Communities on 16 March 2007. This guide to best practice is an authoritative reference drawn up by a voluntary group working together over a considerable period. It is positioned to be influential and authoritative and to produce improved outcomes for low-income and vulnerable consumers without the need for any significant participation by government. However, this model needs the auspices of a respected and high profile organisation such as the Committee for Melbourne.

[27] http://www.melbourne.org.au/120.0.html. The Melbourne Model, as used in the Utility Debt Spiral Project, is the key driver within the UNGC Cities Program, which aims to resolve complex urban issues. This program uses all sector taskforces, based on the Melbourne Model. The international secretariat for the program is in Melbourne, the only United Nations secretariat in Australia. The program is now working with 15 cities across the world, including Berlin, San Francisco, Jinan (China) and Porto Alegre (Brazil).

Policy tools – disadvantaged and vulnerable consumers

What interpretation of the terms vulnerable and disadvantaged should be applied for the purposes of consumer policy? Are the needs of vulnerable and disadvantaged consumers best met through generic approaches that provide scope for discretion in application, or through more targeted mechanisms?

In Victoria, some effort has been made to develop a working definition of hardship, rather than defining vulnerability or disadvantage. There has been some consensus around the definition used by the VESC in reviewing the hardship policies of water businesses and authorities. This definition is specific to utilities:

> *A customer in hardship is someone who is identified either by themselves, the water business, or an independent accredited financial counsellor as having the intention but not the financial capacity to make the required payments within the timeframe set out in the business's payment terms.*[28]

Another approach to hardship is that used in the Committee for Melbourne's 2004 *Utility Debt Spiral Report*, referred to above. In this report, hardship was seen as having a particular meaning that refers to self-reported financial difficulties.[29] One analysis cited in this report was that of J.R. Bray who defined 'hardship' as: being unable to afford heating or meals; having to pawn possessions; or needing assistance from community organisations.[30]

ANZEWON members all find that hardship and affordability issues lie behind a significant number of the cases that come to our services, especially billing and disconnection cases. We welcome the measures that are being taken in a number of jurisdictions to address the cycle of bills, reminders, disconnection and reconnection in which many low-income consumers can be trapped. The possibility of disconnection from the essential services of electricity and gas and restriction of water gives hardship issues in the utility industries a heightened focus that may not be possible through generic regulatory approaches alone. Disconnection and the importance of offering customers experiencing financial hardship opportunities to manage their energy (or water) payments requires a targeted approach, as outlined in our discussion of hardship programs earlier in this submission.

In some instances – and to their credit – such hardship programs have been developed solely by retailers. Nonetheless, a number of jurisdictions have mandated such programs (Victoria) or appear likely soon to do so (New South Wales). ANZEWON supports these developments where they incorporate the following principles:

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[28] ESC *Review of Water Businesses' Hardship Policies (December 2006)* p 3 and 16

[29] *Utility Debt Spiral Study: A joint community, government and business initiative designed to explore the relationship between utility debt and poverty, and to identify social and regulatory frameworks and policies to assist people at risk* Committee for Melbourne, 2004, p 25

[30] Ibid p 30, referring to Bray, J.R. (2001) *Hardship in Australia: An analysis of financial stress indicators in the 1989-99 Australian Bureau of Statistics Household Expenditure Survey*, Occasional Paper No 4, Department of Family and Community Services, Canberra.

- the electricity/gas supply will not be disconnected solely because of a customer's inability to pay for the electricity supply; and

- the electricity/gas supply to premises should only be disconnected as a last resort; and

- there should be equitable access to financial hardship programs and that the policies behind such programs should be transparent and applied consistently.[31]

What are the examples of policies that are very effective in targeting vulnerable and disadvantaged consumers? Are there instances where a desire to protect these groups has imposed significant net costs on the wider community?

Industry-based policies that are particularly effective in targeting vulnerable and disadvantaged consumers are the hardship programs and policies adopted by retailers, either on their own initiative or through the encouragement of regulation. The elements of these hardship programs that make them effective in assisting vulnerable and disadvantaged consumers include:

- the establishment of a specialist team that deals with customers in hardship
- adequate empowerment of that specialist team
- comprehensive training of both the specialist team and customer service representatives who refer customers to the specialist team
- a respectful and non-judgemental approach to customers in hardship
- willingness to work towards achieving engagement with the customer
- active communication about the policy and program to appropriate social advocacy organisations and financial counsellors, as well as to ombudsmen schemes
- realistic and affordable payment plans for the customer regardless of the amount of arrears involved
- incentives to assist customers, eg the company will match the customer's payment after a period of payment; the company will waive all administrative fees on the account after a period of payment, and
- the incorporation of advice about efficient usage of utilities.

From ANZEWON's experience, those energy and water suppliers who adequately resource their customer hardship programs have reported no net costs on the wider community, but have instead found their programs to be good business and sensible investments. One measure of their success has been a reduction in the number of hardship cases brought by customers or their advocates to ANZEWON's member schemes.

In terms of regulatory policy, the Retail Codes that exist in various states contain provisions which are helpful for vulnerable and disadvantaged consumers:

[31] The *Electricity Industry Act* 2000 (Vic) section 45(2) and the *Gas Industry Act* 2001 (Vic) section 48I(2)

- limitations on the amounts that can be taken as security deposits and rules about how such deposits must be handled and returned
- bill review requirements, including requirements about payments during the course of a dispute
- requirements relating to undercharging, including limits on how far back a retailer can go in recovering undercharging
- requirements relating to overcharging and the return of overcharged amounts
- requirements about accepting payments by a variety of methods. New South Wales requires local retailers to operate a payment plan for small residential customers experiencing financial difficulties. As mentioned, Victoria requires retailers to establish a hardship policy for domestic customers, and payment plan requirements also apply in South Australia, Queensland, Western Australia, Tasmania and the ACT, and
- limits on the right to disconnect, for example, after 2 pm or 3 pm on a business day or on a Friday, weekend, public holiday or day before a public holiday.

Regulators also have policies and procedures which are helpful in targeting vulnerable and disadvantaged consumers, including such initiatives as:

- monitoring and reporting publicly on disconnections
- publishing guidelines on financial hardship, and
- running campaigns aimed at hard-to-reach consumer segments about responding to marketing, for example, the *Energy Choice* campaign in Victoria.

Governments also undertake legislative changes that benefit vulnerable and disadvantaged consumers in response to policy issues. The following examples come from Victoria:

- a prohibition on charging late payment fees to small retail customers
- the introduction of the Wrongful Disconnection Payment whereby consumers who have been disconnected other than in accordance with the terms of their contract are compensated ($250 per day or part thereof pro rated)
- the requirement on all licensed utility providers to have a hardship policy as a condition of their licence, and
- a requirement that providers not disconnect a customer who is enrolled in a hardship program and is complying with that program.

The Government of Victoria has made funding available to local retailers to assist with the implementation of hardship programs: for each customer on a standing tariff, $8 has been made available to companies, over two years.[32]

Vulnerable and disadvantaged people, as well as people reliant on fixed incomes, are particularly affected by the payment arrangements for energy and water: they use services and are billed in arrears (usually quarterly) for what they have used, making it particularly difficult to control expenditure and to budget for the cost. An alternative to this approach is the prepayment meters that are in use in Tasmania and beginning to be used elsewhere, for example in South Australia. Increasing numbers of

[32] ESC, *Energy Retail Business, Comparative Performance Report for the 2005-06 Business Year*, p.6

Tasmanian consumers have chosen to pay by this method (currently around 43,000 customers or approx 20% of the customer base). These consumers cite the advantages of prepayment meters as including the ability to pay small regular amounts for their electricity and subsequent freedom from large quarterly bills, and the greater understanding of their electricity consumption provided by the meters. ANZEWON supports payment choices such as prepayment meters being made available to those consumers who might benefit from such alternative payment methods, but emphasises that prepayment meters must be freely chosen by the customer and in no way imposed.

A study of consumer views of prepayment meters by the Tasmanian Council of Social Service[33] found 94% consumer satisfaction with the meters. A higher percentage of customers with prepayment meters were on concessions compared with those with standard meters: 39% compared to 29%, suggesting that the meters are a viable alternative for low-income consumers. ANZEWON remains deeply concerned about the impact of disconnection on individuals and families already struggling to meet a range of daily living needs. There are health and safety issues in disconnection, as well as severe disadvantage for children and other vulnerable people. Prepayment meters are not the answer to disconnection rates across Australian jurisdictions, but may assist some low-income customers by adding to the range of manageable payment options available to them.

[33] *Pre-payment meters in Tasmania: consumer views and issue* A research project carried out for the Tasmanian Council of Social Service by Urbis Keys Young (August 2006)

Generic v industry-specific regulation

How effective are the generic provisions in the TPA and Fair Trading Acts in meeting their intended objectives? What, if any, changes are required to deliver better outcomes?

The *TPA* and *Fair Trading Acts* prohibit

- misleading and unconscionable conduct
- false or misleading representations
- harassment and coercion.

Generic provisions such as these can be applied to many industries, including new industries, and are a sound basis for regulating market behaviour. It is often necessary however, for industry-specific complementary guidelines or codes that deal with the specific nature of conduct in particular markets. Jurisdictional regulations and codes such as the *Marketing Codes of Conduct* that operate in Victoria, New South Wales, South Australia and (from 1 July 2007) Queensland fill the gap between generic legislation and the particular risks to energy consumers posed by their exposure to unscrupulous marketers.

Enforcement of breaches of generic legislation is not always effective. Industry-specific regulation can offer a greater level of scrutiny of market behaviour and early intervention when a market participant breaches a specific rule, code, regulation, licence condition or guideline, as Consumer Affairs Victoria has noted:

> *Objective rules, which are more common in industry-specific regulation, make it easier to gauge the extent of the breach and make prosecution less dependent on proving that the intention or the outcome of the breach would damage consumers. In addition, the regulator is more likely to be able to use its own testing to obtain the evidence necessary to prosecute an offender. It is less reliant on the participation of consumers.*[34]

What principles should guide the choice between generic and industry-specific regulation? How well does the current mix of regulation accord with these principles?

There is a spectrum of consumer protection ranging from protections common to all products and services (for example, full product disclosure) to more specific protections that might apply solely to some products and services. Those specific protections apply because of the special characteristics of those products and services, such as their non-discretionary nature.

As a statement of principle, generic consumer protection, where possible, is to be preferred to industry-specific protection. It can be simpler for both consumers and

[34] Consumer Affairs Victoria, *Choosing between general and industry specific regulation*, Research Paper No. 8, November 2006, p11

industry, and it makes education and information campaigns more straightforward. However, because generic consumer protection does not offer sufficient protection to consumers in the complex and changing competitive energy retail markets, industry-specific regulation has been needed to fill the gap.

Energy and water have such special characteristics as those indicated above, not least because they are essential services not referenced in generic consumer protection legislation. In some cases, where the businesses that provide these services have a monopoly over supply, the consumer is not able to choose their provider or retailer. Another characteristic that sets the energy and water supply industries apart is the devastating impact that disconnection (or restriction in the case of water) of supply can have on consumers. Unlike many other goods and services, a consumer who faces disconnection of supply for credit reasons is unable to obtain supply elsewhere. Critically, loss of supply of energy or water can have immediate and serious impacts uncommon for other services:

- adverse physical, psychological and emotional health impacts
- exposure to unsafe living conditions with the use of candles for lighting and kerosene for heating (especially in proximity to children)
- consequential losses, such as food spoilage
- significant lack of amenity
- impact on parenting ability
- reduced ability to maintain contact with the outside world.

Given the range and profundity of such impacts, ANZEWON members consider that the requirement for industry regulation remains high, regardless of the relative competitiveness of the energy retail market. It is hard to conclude other than that industry-specific regulation will need to be maintained.

A further argument for the need to ensure ongoing industry-specific regulation for energy and water is the complexity of service delivery and business relationships. The energy industry consists of large scale, multi-layered and interconnected infrastructure networks which create complexities (such as the triangular consumer-retailer-distributor relationship) unique to those industries. It is common for EIOSA, EWON and EWOV to receive complaints in which multiple retail and distribution entities are involved and which require close attention to business-to-business rules and market operation rules. It is difficult to imagine a circumstance in which generic regulation would be able to sufficiently well address these complex relationships.

Is industry-specific regulation particularly well suited to some areas? Are there examples where specific regulation has been helpful in putting a particular sector on notice? To what extent has the growth in specific regulation reflected inadequacies in generic regulation or its enforcement?

As already noted, the Victorian legislative amendments to mandate hardship policies for electricity and gas providers are an example of an industry-specific

regulatory/legislative approach. To the extent that it focused on disconnection, a specific characteristic of those industries, it could not have been incorporated in generic legislation. The existence of the Victorian legislation has influenced other jurisdictions to respond more adequately to customer hardship.

Marketing is an area where there is currently both generic provision through the Fair Trading Acts and industry-specific provision through the marketing codes that exist in New South Wales, Victoria and South Australia. ANZEWON members, as stated previously, envisage that there could be a generic approach to marketing, but only if the generic approach included the superior protections currently available through the marketing codes. There is a need for industry-specific regulation where the generic law is less effective than it needs to be.

Another area where industry-specific regulation has provided clear benefit to all parties has been where Victorian consumers have experienced property damage as a direct result of voltage variation (power surges, outages) on the network. Currently such regulation only exists in Victoria but it has been of great value there in resolving issues quickly for consumers and minimising the need for ombudsman intervention.

In New South Wales, where no regulation exists to address this area and where little or no legal precedent is in place, much of the responsibility for seeking redress for customers whose claims have been rejected by their supplier has fallen to EWON, leading to a large number of Ombudsman Determinations – sometimes for as little as $60. This is clearly not an ideal situation, particularly where the time and cost of conducting such investigations often significantly outweigh the compensation sought. It is ANZEWON's view that in areas such as these there is considerable advantage for all parties in the clarity that accompanies an industry-specific regulation.

Enforcement and redress issues

Are the current dispute resolution mechanisms and arbitration processes, including consumer tribunals, readily accessible and effective?

Specialist energy ombudsmen exist in all Australian states (and, for New South Wales and Victoria, water). The oldest ombudsman scheme, EWOV, was established 11 years ago and the most recent, Queensland, is to commence operations in mid-2007. These schemes have been successful because they have adhered to the established benchmarks for industry-based customer dispute resolution: accessibility, independence, fairness, accountability, efficiency and effectiveness.[35] In the years of their operation, ANZEWON schemes have handled hundreds of thousands of consumer contacts and closed in excess of 175,000 files.

Our schemes have been consistently shown to be accessible and effective. Accessibility is achieved by the phone-based nature of the service, the informality of our processes and the fact that the service is free to consumers. Given the nature of the jurisdiction, ANZEWON schemes have put a premium on community outreach and education, particularly as a sizeable proportion of those who contact an energy or water ombudsman are low-income or otherwise vulnerable consumers. Publications are available in major community languages (EWON, for instance, publishes educational and other materials in 17 languages). The schemes also conduct forums and other events across urban, regional and rural areas to promote access to our services and other assistance to consumers.

A large part of the success of the schemes has been our ability to resolve complaints in a fair, reasonable and expeditious way, with the large majority of matters being finalised in a matter of days. We provide significant reporting to industry and other stakeholders as a means of highlighting systemic and topical issues and assisting industry to improve standards of service delivery to customers, and work closely with regulators and policy makers to this end.

[35] Consumer Affairs Division, Department of Industry, Science and Tourism, *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*, 1997.

Self and non-regulatory approaches

What principles and considerations should guide the use of self-regulatory, co-regulatory and non-regulatory options in the consumer policy framework? What are the best examples of effective self-regulation, co-regulation and non-regulatory approaches and why have they worked well in these cases? Is enough use currently made of such measures? If not, where are the main opportunities for further uptake?

Notwithstanding our support for industry-specific regulation in energy and water, ANZEWON believes that there is a place for all types of regulation: self-regulation, co-regulation and non regulatory approaches. We have had some positive experiences with self-regulation, for example, EWOV now provides a complaint-handling service for LPG customers as a result of a self-regulatory code,[36] sign-up to which mandates membership of EWOV. The five LPG retailers that belong to EWOV as a result of their sign-up to the code are the only members of the scheme who are not subject to requirements either in licence conditions or legislation to belong to the scheme. Another example that applies to both Victoria and New South Wales is the development of hardship policies and programs by some retailers in advance of regulatory requirements.

This submission has already cited the work of the Committee for Melbourne, which is an example of a non-regulatory initiative producing positive changes to the benefit of consumers.

Would there be benefits from government support for a consumer advocacy body and would they outweigh the funding and other costs involved? Should such a body's role be limited to advocacy, or should it also be responsible for bringing forward consumer complaints? Do consumer advocacy bodies adequately represent the interests of all consumers? If not, what other means could be used to elicit the views of consumers? Is there a need for greater research into consumer and market behaviour to inform policy development? If so, who should be responsible for carrying out and resourcing such work?

As stated previously, ANZEWON supports government initiatives to create more opportunities for consumer voices to be heard in the regulatory debate. The absence of an effective consumer voice can lead to unsustainable decisions, regulatory gaps, and the revisiting of decisions.

However, such a consumer advocacy body should not double as a dispute resolution or investigation body for resolving consumer complaints. Advocacy and dispute resolution need to be kept separate because dispute resolution needs to be independent and impartial whereas advocacy, by its very nature, takes up positions on behalf of particular groups. The Commission may be interested in the consideration currently being given to the separation of the complaints and advocacy functions of energywatch in the United Kingdom.

[36] http://www.doi.vic.gov.au/Doi/Internet/Energy.nsf/AllDocs/03C0C2FE8460D174CA2570490017B918?OpenDocument. Although the code is self-regulatory there was considerable government involvement in its development.

ANZEWON suggests there is a need for greater research into consumer and market behaviour to inform policy development. The Commission itself has cited research into behavioural economics as giving valuable insights into what kinds of policy initiatives may be effective. There are some centres based within universities that have done valuable work, such as the Communications Law Centre at Victoria University and the Centre for Credit and Consumer Law at Griffith University. There are also some models for funding research such as that of the Consumer Utilities Advocacy Centre in Victoria and the Utility Consumers' Advocacy Program in New South Wales. There would be merit in a more systematic and broad-based approach to research into consumer and market behaviour.

Jurisdictional responsibilities

What are the main areas of duplication, overlap and inconsistency in consumer regulation across jurisdictions (and with New Zealand)? How significant are the costs of this inconsistency, overlap and duplication relative to any benefits provided?

ANZEWON believes that it makes good sense to have consistent consumer protection laws throughout Australia and New Zealand from both a business and a consumer perspective. It is a significant impost on energy retailers trading across states to have to manage different jurisdictional variations and consumer frameworks. It is also unfair for energy consumers if, for example, in one state they have a 10-day cooling-off period and in another state they have a five-day cooling-off period. However, it is important that consumer protection laws adopt the best from the existing consumer protection frameworks rather than 'the lowest common denominator'. ANZEWON has strongly advocated this position in the move to national regulation of the energy market.

Are there areas of regulatory responsibility that could readily be consolidated within one level of government? Are there areas which could be harmonised across jurisdictions? What particular considerations arise in relation to facilitating greater integration with New Zealand and international trade more generally?

This submission has already referred to marketing as an area in which there could be a national, rather than a jurisdictional, approach. Some ANZEWON members have made detailed submissions to the Ministerial Council on Energy's (MCE) consultation process over national regulation of energy which address this question in detail. We have attached a number of these submissions for your consideration.

Regulatory and oversighting bodies

Are the Ministerial Council arrangements working well? If not, what changes are required? Would changes to other policy oversighting arrangements help to deliver better outcomes for consumers?

ANZEWON members have been active participants in the Ministerial Council on Energy (MCE) processes, both through substantial submissions and through participation in the Stakeholder Reference Group. Although the workload has been heavy and the timelines short, it has been important to be involved in a process that has been considering the basic principles of appropriate regulation. We refer the Commission to the attachments to this submission (i.e. various ANZEWON scheme responses to the recent Working Papers of the Retail Policy Working Group of the MCE) for valuable summaries of the jurisdictional differences to many policy issues, especially Working Paper 1 which dealt with issues of relevance to consumers. Consumer policy is often developed in a reactive and piecemeal way. The MCE process has been a proactive and considered process and ANZEWON members are hopeful that the Standing Committee of Officials will take up many of the recommendations that have been made in the recent series of Working Papers. While we have reservations on some individual points, in general the process has included adequate consideration of consumer interests and has looked at jurisdictional variations with a view to best-practice consumer protection.

ANZEWON submission to the Productivity Commission's *Consumer Policy Framework Issues Paper* (January 2007) – Annexure

On page 34 of ANZEWON's submission, reference is made to a number of submissions made by some ANZEWON members to the Ministerial Council on Energy's consultation process over the national regulation of energy. Below are links to these submissions, which are publicly available via the websites of EWON and EWOV:

EWON submissions

National Framework for Energy Distribution and Retail Regulation (January 2006)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 1 (December 2006)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 2 (January 2007)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 3 (February 2007)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 4 (March 2007)

EWOV submissions

National Framework for Energy Distribution and Retail Regulation (January 2007)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 1 (December 2006)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 2 (January 2007)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 3 (February 2007)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Working Paper 4 (March 2007)

Retail Policy Working Group – National Framework for Distribution and Retail Regulation: Supplementary Working Paper (May 2007)