

**Productivity Commission's Review of
Australia's Consumer Policy Framework
Draft Report**

**Open submission
subdr242part4**

**Industry-specific regulation and
associated complaints mechanisms,
redress, enforcement**

**Includes aspects of 4.1 4.2, 4.3, 4.5, 5.1,
5.2, 5.3, 5.4, 6.1, 6.2, 7.1, 8, 9.1, 9.2,
10.2, 11.1, 11.3**

MADELEINE KINGSTON

APRIL 2008

**Contact details to be retained on submission please Enquiries about this
submission may be directed to: Madeleine Kingston**

(03) 9017-3127

Or email mkin2711@bigpond.net.au

PREAMBLE CHAPTER 4 SUBDR242

SELECTED DISCUSSION OF IMPACTS OF ACCOUNTABILITY OF GOVERNMENT AGENCIES AND COMPLAINTS SCHEMES ON CONSUMER PROTECTION – REDRESS OPTIONS

Executive Summary and Chapters 1 and 2 and 3¹ PC subdr242 already published are each intended to represent stand-alone sections addressing more extended discussion on the over-riding objectives. This Chapter follows on each of those components.

The Executive Summary dealt briefly with the Productivity Commission's various recommendations and introduced some new issues where gaps were believed to exist. It also briefly addressed issues of agency governance, leadership and the principles of promoting effective markets that are safe fair and sustainable for all. The concluding pages address issues of federalism and anti-federalism and any possible impacts on the formulation of a truly effective consumer policy framework.

Chapter 2 focused on further discussion of the overarching objectives, and relationship of National Competition Policy, and the public interest test. It is my considered view the fundamental principles of NCP have become blurred, inaccessible and distorted.

Chapter 3 focused on aspects of regulatory reform and reservations about a policy that is committed to excessive reduction of regulation without due care to ensure that consumer protections do not become further diluted and inaccessible.

Chapter 4 expands on earlier chapters. The plan is to again seek the Commission's indulgence with a late supplementary submission, fully understanding that it may be quite difficult to consider the content in detail at this stage. However, it may be of some help to have it available as a public document.

The same disclaimers apply as before. The material has been prepared in honesty and in good faith with disclaimers about any inadvertent factual inaccuracies. I hope any criticisms and identification of weaknesses will be accepted in the spirit intended from a concerned private citizen. Specifically I do not intend to offend any one party, group, agency or body in expressing strong personal views as a private citizen in a forum designed to elicit frank discussion and stakeholder input. For example, refutation of opinions of others; opinions of poor governance and leadership or skills and the like are simply personal opinions, not intended to be damaging or accusatory or to offend. So I ask that my views will be accepted in good faith and not be taken personally, despite being strongly expressed. Where I support the views of others, it is because of my genuine beliefs. Where I criticize views or policies or recommendations it is because in good faith or rather the spirit of "*acting honestly*" and "*without malice*," I am exercising a right to have a view and to politely express it in any arena. If I give offence to the PC, forgive me. If I give offence to others, please forgive me. I am happy to invite enquiries from interested stakeholders by phone or email, details provided on front sheet.

Madeline Kingston

¹ Submission 242DR in several parts found at
http://www.pc.gov.au/inquiry/consumer/submissions?8995_result_page=3

ANNOTATED CONTENTS

CHAPTER 4 SELECTED DISCUSSION OF IMPACTS OF ACCOUNTABILITY OF GOVERNMENT AGENCIES AND COMPLAINTS SCHEMES ON CONSUMER PROTECTION

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Examination of selected impediments to effective consumer protection and productivity – the internal machinations of government communications and policy and self-run complaints schemes

Addresses DR 5.3 and Chapter 9 of the Productivity Commission’s Draft Report. However, there will be some overlap with other recommendations, including 5.5, 6.2, 6.2, 7.1, missing provisions under Chapter 8 – defective services, 10 Enforcement; 11 Empowerment

Discussion of general issues of government accountability as impacting on consumer protection issues and seamless redress options –gaps in the Productivity Commission’s Draft Report.

Discussion of accountability of industry-specific complaints schemes IS-CS, misleadingly referred to as ADR schemes and also as ombudsmen, but apparently escaping proper accountability allegedly on the basis of their legal identity structure and varying perceptions of the degree to which policy-makers and regulators have ultimate responsibility for accountability in complaints management, as identified in specific enactments. Mentions inadequacy of certain MOU² arrangements in detailing tiers of accountability.

Suggests extended role for State and Commonwealth statutory Ombudsmen with complaints scheme oversight

² See for example the MOU between the Essential Services Commission Victoria (ESC) and the Energy and Water Ombudsman Victoria (EWOV) dated 21 April 2008 which fails to spell out what should happen if the parties disagree, though this cannot be used as an excuse to escape accountability under other provisions, such as specific enactments (e.g. s26 *Gas Industry Act 2001*). Similar reservations could be expressed about the revised MOU between the CAV and ESC dated 18 October 2008 Legislation should be very specific about how disputes between such parties should be resolved and where “*the buck stops.*” Commonwealth provisions require a Minister to be not only accountable to Parliament for his own actions but also for the operations of his own Department(s). Similar provisions should be explicit in State and territory provisions, but more detail should be transparently available as to processes for redress and accountability

Refers again to Peter Kell's views about half-baked self-regulation (NCC 2005) as further discussed in my Part 2 sub (subdr242part2)

Refers to performance improvement as embraced by the overall goals of the Annual Review of Government Service Provision to

“Inform parliaments governments service providers and the clients of services — the wider community — about overall performance and reforms in service provision so as to promote ongoing performance improvement.”

Overview of selected impediments to effective consumer protection and productivity – the internal machinations of government communications and policy.

Discusses regulatory corruption, broadly defined, where regulation may be directly contributing to consumer detriment through miscalculation of the requirement to ensure there is no “real or imagined” conflict with existing enshrined rights. Black letter law needs to ensure that such regulations are disallowed and at that all times best practice and the intent and spirit of the law is incorporated into policy and regulatory provisions

Reference to these COAG initiatives is to correlate existing state and commonwealth policy initiatives, their service performance parameters and policy provisions to specific parameters within the current Review of Australia's Consumer Policy Framework on the brink of being finalized with a Final Report that will have far-reaching implications for confidence and consumer protection

Deals with eroded consumer protections that are further compromised by certain regulations³ Refers to Peter Kell's observation that

“that in most cases, self-regulation is no more flexible than the black letter law and, in many cases, considerably less flexible”⁴ (pp7-8)

³ The particular example chosen here is the bulk hot water pricing and charging provisions authored by the Essential Services Commission Victoria (ESC) during the time that John Tamblyn was Chairperson, and effective from 1 March 2006. In that time some 26,000 Victorian's have been unjustly held individually contractually responsible for bulk energy that cannot be measured by an instrument designed for the purpose as defined in the legislation (a meter through which gas (or electricity) passes to filter control and regulate the flow of gas through that meter and its associated metering installation. Water meters have been allowed by regulators to pose as gas or electricity meters; the wrong contractual party is held liable for charges and supply costs where the Owners Corporation is the correct contractual party; and multiple consumer rights have been eroded and made inaccessible by these regulatory policies that have caused widespread detriment in Victoria and in other states and has led to MOU of 18 October 2007 with the peak Victorian consumer protection body, these regulations have not been altered

⁴ Kell, Peter (2006) *“Consumers, Risk and Regulation.”* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006

Refers to the views of *Whiteford (1998)* and *Bradbury and Jantti (1999)* as discussed by David Adams regarding welfare outcomes

“Tempered with an appreciation of weaknesses of the analytical frameworks producing those outcomes” (Bradbury and Jantti 1999:210)

David Adams⁵ cites *Whiteford’s (1998)*⁶ reference to *Bradbury and Jantti’s* work (199:210) on the analysis of whether Australia is more or less unequal than other countries.

He points out *Whiteford’s* view (*cross-referenced to Bradbury and Jantii*)⁷ that. Adams goes on to observe that this debate is more than just about methodology

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⁵ Adams, David (2001). Sir George Murray Essay Competition Winner *“Poverty – A Precarious Public Policy Idea.”* Australian Journal of Public Administration 69(4) 89-98 National Council of the Institute of Public Administration. Published by Blackwell-Synergy also found at <http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%2854+KB%29&doi=10.1111%2F1467-8500.00305>

⁶ Whiteford, P (1998) *“Is Australia Particularly Unequal? Traditional and New Views”* in P Smyth and B Cass eds 1998 *“Contesting the Australian Way, Cambridge University Press, Cambridge”*

⁷ Bradbury B & M M Jantii (1999) *“Child Poverty Across Industrialised Nations”*, Innocenti Occasional Papers, Economic and Social Policy Series UNICEF c/f References ibid Adams, D (2002) in referring to Ibid Whitford, P (1998) *“Is Australia Particularly Unequal”*

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⁸ Rudd, Kevin (2008). *“Towards a Productivity Revolution: A New Agenda of Micro-Economic Reform for Australia.”* Address by the Australian Prime Minister Kevin Rudd at the “*New Agenda for Prosperity*” Conference at Melbourne University 27 March 2008

⁹ Banks, Gary (2008) *“Riding the Third Wave: Some Challenges in National Reform”* Presented at the 2008 Economic Conference entitled the “*New Agenda for Prosperity*” held at the Faculty of Economics and Commerce, Melbourne institute for Applied Economic and Social Research. :*The point of raising these recent speeches on Productivity goals is to express concerns about how these micro and macro-economic reform agendas might impact on consumer protection generally and specifically*

¹⁰ Kell, Peter (2006) *“Consumers, Risk and Regulation.”* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006

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¹¹ VCOSS (2007) Submission to MCE Retail Policy Working Group found at http://www.vcoass.org.au/documents/VCOSS%20docs/Submissions/2007/SUB_070730_RPWG%20Composite%20Paper_VCOSS.pdf

¹² ESC Retailer Compliance Report, p26 4.3.2 found at <http://www.esc.vic.gov.au/NR/rdonlyres/949F62FF-B891-4543-939A-00435469E079/0/EnergyRetailBusinessesComplianceReport200606.pdf>

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¹³ DPI Annual Report 2006/2007 Part 1 page 17 found at [http://www.dpi.vic.gov.au/dpi/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3070a6e7b500a364ca2573af001641a0/\\$FILE/06_07_Annual_Report_Part1.pdf](http://www.dpi.vic.gov.au/dpi/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3070a6e7b500a364ca2573af001641a0/$FILE/06_07_Annual_Report_Part1.pdf)

¹⁴ Essential Services Commission website found at <http://www.esc.vic.gov.au/public/>

¹⁵ EWOV (2006) Submission to Review of Essential Services Act 2001, p4 [http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/\\$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf)

¹⁶ VCOSS Submission to Review of ESC Act, 10 July 2007 p2

¹⁷ Western Australian Council of Social Service (2007) to the Productivity Commissions Review of Australia's Consumer Policy Framework May (republished as SUB243DR

ESC 2006-2007 COMPLIANCE REPORT FOR VICTORIAN ENERGY RETAIL BUSINESS FEBRUARY 2007

View directly online

<http://www.esc.vic.gov.au/NR/rdonlyres/949F62FF-B891-4543-939A-00435469E079/0/EnergyRetailBusinessesComplianceReport200606.pdf>

RECOMMENDATIONS FROM KILDONIAN CHILD AND FAMILY SERVICES (KILDONIAN UNITINGCARE) FROM THEIR MAY 2007 SUBMISSION TO THE PC'S ISSUES PAPER¹⁸

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Reinforcement of findings and recommendations

See comments in body of text re compromised consumer outcomes for systemic issues. Financial hardship cases belong to a slightly more privileged group with outcomes, but Andrea Sharam¹⁹ found for energy that where EWOV negotiated outcomes with suppliers, the debtors ended up in ongoing spiraling debt with the conciliatory outcomes achieved.

Kildonian has had good success with their negotiated models with water authorities.

¹⁸ Kildonian UnitingCare (2007) Submission to Productivity Commission's issues paper, Consumer Policy Framework, p4. See appendices A and B

¹⁹ Sharam A (2004) "*Power Markets and Exclusions*" Financial and Consumer Rights Council, Melbourne. Found at <http://www.vcross.org.au/images/reports/Full%20Report.pdf>

SELECTED ISSUES COMPROMISED INDUSTRY SPECIFIC COMPLAINTS REDRESS 81

Discusses the need for identification of how specified consumer protections should operate, esp. in the arena of essential services, with energy being one of these. The example of flawed regulatory policy is related to energy can be extrapolated to other areas as the illustration is to show that lack of awareness of other obligations to upheld enshrined consumer rights elsewhere in the written and unwritten law can impact on the formulation of flawed policies actively contributing to detriment

Detailed discussion of possible extended role of statutory State and Commonwealth Ombudsman

Cites from Peter Shergold in August 2007 speech, referred to by Chris Field in his own speech the following month²⁰

“The Westminster system as the APS values make explicit requirements for public servants to be responsive to elected government”

Cites again from David Adams on accountability issues, viz:

Specific governmental responsibilities, resource allocation and ministerial accountability. The paradoxes of tiers of accountability.

Successes of CAV in obtaining leave to appear a High Court successful in clearly establishing that company employees can be held personally liable for their misleading and deceptive conduct as reported in Annual Report 2006/2007, p4.²¹ **83**

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Reiteration and support for the findings and recommendations dated 3 April 2008²².

²⁰ Dr. Peter Shergold, Secretary, Department of Primary Minister and Cabinet till February 2008, *“At Least Every Three Decades – Acknowledging the Beneficial Role of the Commonwealth Ombudsman”* 30th Anniversary of the Commonwealth Ombudsman, c/f Field, C (2007, concluding remarks)

²¹ Consumer Affairs Victoria 2006/2007 Annual Report, p8
Found at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/\\$file/cav_annualreport_2007_contents.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/$file/cav_annualreport_2007_contents.pdf)

²² Joint Submission, Consumer Utilities Advocacy Centre (CUAC) and Consumer Action Law Center (CALV) (2008) Response to ESC Review of Regulatory Instruments found at <http://www.esc.vic.gov.au/NR/rdonlyres/D9F18B40-BEAC-4113-AD2F-5FEC62157B85/0/CUACCALCandSVdP.pdf>

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Views of Peter Kell re co-regulatory measures **122-123**

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Ability to identify a legal need; ability to obtain assistance, advice and support (*including legal representation*);

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²³ Nottage, Luke (Prof) (2008) Submission to Productivity Commission’s Draft Report SUBDR114

²⁴ Views of Peter Mair. (2008) Submission to Productivity Commission’s Draft Report SUBDR112

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²⁵ Graeme Samuel commenced as Chairman of the ACCC in July 2003. His professional career has spanned the fields of law, investment banking and, since the early 1990s, a number of roles in the public service relating to sport, the arts, health, business affairs and competition policy. Graeme was President of the National Competition Council and the Australian Chamber of Commerce and Industry, Commissioner of the Australian Football League, Chairman of the Melbourne & Olympic Parks Trust, the Inner & Eastern Health Care Network and Opera Australia, and a Board member of Docklands Authority and Thakral Holdings Limited. Graeme holds a Bachelor of Laws from Melbourne University and a Master of Laws from Monash University. In 1998 he was appointed an Officer in the General Division of the Order of Australia.

²⁶ Dept of Industry, Science & Tourism, (1997) *Benchmarks for Industry-based Customer Dispute Resolution Schemes* August

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The objects of the Memorandum are

2 Objectives and purpose of this memorandum

This memorandum seeks to:

- (a) *ensure that the regulatory and decision making processes of the parties in relation to regulated industries are closely integrated and better informed*
- (b) *avoid overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries*
- (c) *provide for sharing information between the parties in the context of their respective roles in relation to regulated industries; and*
- (d) *promote the adoption of a best practice approach to regulation*

I particularly refer to object (b) referred to above in relation to avoiding overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries.

The bulk hot water pricing arrangements example harmful and conflicting regulation causing ongoing consumer detriment of side scale and seen to be driving systemic unacceptable market conduct

²⁷ EWOV (2006) Submission to Review of Essential Services Act 2001
[http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/\\$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf)

²⁸ Memorandum of Understanding between CAV and ESC 18 October 2007
Found at between ESC and CAV Found at
http://www.esc.vic.gov.au/NR/rdonlyres/5CF8C62C-0314-4FD3-B792-FA8E6520769F/0/MOU_CAV_Oct07.pdf

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²⁹ Consumer Affairs Victoria About Us
<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE++Consumer+Affairs+Victoria>

³⁰ Energy Action Group (2004) “*Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*” Found at
<http://www.chronicillness.org.au/utliltease/downloads/Enery%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc>

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Summarizing the central theme of this submission – improved accountability by government departments in completing the framework for effective consumer policy development

This submission has mainly addressed redress and enforcement issues with the focus on government accountability, the complexities of ADR service delivery. It demonstrates that several bodies believed to be delivering these services are not in fact offering mediation at all, or impartial face-to-face facilitation of pre-court options between parties. Nor do they advocate, arbitrate or have equivalent training to professional ADR providers or those with levels of professional development and training best suited to such provision.

Beyond that I have endeavoured to demonstrate my view that the level of effectiveness, efficiency, fairness, impartiality and proper handling of complaints through the energy complaints scheme EWOV, consistent with mandated benchmarks under the *Gas Industry Act 2001* (Victoria) are not being consistently met and that perceptions of public bias on the basis of legal posturing and legal stancing and other conduct detailed as a case study appear to be compromising proper access to justice in complaints handling and redress

Finally, the issue of accountability for complaints schemes and proper compliance enforcement are addressed, as well as further comment on advocacy issues

Part 5, (subdr242part5) addresses in more detail some technicalities and legalities concerning a particular example of harmful unjust and inappropriate energy regulation that continues to strip bulk energy users of their existing enshrined rights under multiple provisions, and despite the specific provisions with the revised MOU between the CAV and ESC dated 18 October 2007 providing for avoidance of

“overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries” (Objects MOU 2(b))

EXECUTIVE SUMMARY

Examination of selected impediments to effective consumer protection and productivity – the internal machinations of government communications and policy and self-run complaints schemes

The primary goal of this submission is to more minutely examine issues relating to access to remedies as discussed under the DR 5.3 and Chapter 9 of the Productivity Commission’s Draft Report. However, there will be some overlap with other recommendations, including 5.5, 6.1, 6.2, 7.1, missing provisions under Chapter 8 – defective services.

Before examining in detail industry-specific complaints schemes³¹ as one of the primary remedy access, I seek to discuss more generally the issue of government accountability.

It appears to be popular perception that industry-specific complaints schemes set up by policy-makers and regulators under specific enactments are virtually “untouchable” in terms of accountability beyond at local level up to the level of their own Boards, composed normally exclusively of industry scheme members.

In addition, though internal IS-EDR³² Merits Scheme processes exist to internally challenge decisions made concerning the conduct of scheme members; and though matters relating to complaints handling can be directed to the Constitutional Boards of these Schemes, given that they are self-funded and managed, and such boards have a membership exclusive to scheme participants (notwithstanding some consumer organization representation on Council or Committees), there is insufficient protection or freedom from perceptions of bias. The issue of public perception of bias is specifically mentioned in the *Gas Industry Act 2001*.

Clearer parameters need to be identified to allow for tiered accountability at regulator and policy-maker level so that all players involved do not become game-players in the “*accountability-shuffle*,” with overt hand-balling of issues between statutory authorities and failure of any one statutory authority to take direct responsible action in a timely and accountable way.

³¹ Misleadingly referred to as Alternative Dispute Resolution schemes and also misleading called “Ombudsman,” implying a greater level of operational parameters, service delivery and independence that is actually offered by industry-specific self-run schemes created under specific enactments as “separate legal entities” but, despite popular perception, no less accountable through regulatory provisions

³² The Term IS-EDR stands for industry-specific external dispute resolution, but should not be taken to imply alternative dispute, which includes at the minimum impartial mediation – a service not offered by these schemes. There are no face-to-face meetings between disputing parties; no mediation, advocacy or arbitration and jurisdiction is limited and excludes policy and tariff matters. Binding powers, rarely used or obtainable, are limited, and can only be exercised if the scheme member consents, and binding only unilaterally. To over-state the operational powers and effective resolution of most complex complaints through these means is to confer powers and perceptions that are misplaced. The responsible statutory regulator needs to take more direct responsibility for the operation of these schemes and to be seen to be visibly fair and reasonable in addressing concerns about the conduct of complaints handling by those schemes.

These issues need to be addressed not only in terms of government best practice parameters, but also in order to achieve optimal consumer protection outcomes.

This is what I would like to see happen:

If existing structures, funding, and, for example parameters of the Victorian energy complaints scheme remain intact but accountable to a national energy ombudsman, as proposed under 5.3 of the Productivity Commission’s Draft Report, little is likely to change.

Recommendation

Separation from regulator control, more independence, better accountability, re-examination of jurisdiction, improved staff professional development

Recommendation

Extended powers of statutory ombudsman to facilitate investigation and enquiry poor management by so-called “ombudsman” as industry-funded run and managed by industry participants

As discussed in more detail later, many current impediments to accessing seamless redress from

“Complaints Handling” to

Conciliation (excludes Magistrates Court, Dispute Settlement Centre Victoria and State Ombudsman)

Mediation (if offered at all, which is rare for non-court ADR providers of all descriptions);

To **determinations/directions** (where offered at all, limited to TIO and Banking and Financial Services Ombudsman; and to Accident and Compensation Commission where there is no arguable case); to

Arbitration (limited to Magistrates Court, VCAT (not exactly an ADR service through them as court-based) and to the Financial Industry Complaints Service³³ and to Victorian Small Business Commissioner

Supreme or County Courts where indicated

³³ This may indicate no more than a binding agreement, binding the scheme member only not the complainant

Detail provided later of the Jurisdiction, Constitution, mandated Commonwealth Benchmarks for Industry-Specific Complaints handling under the *Gas Industry Act 2001* (note the term ADR is not utilized and in my view would be inappropriate, with the same strong reservation about the use of the term Ombudsman for such schemes.

It is no accident that the Productivity Commission has recommended that energy consumer protection revert to the Commonwealth Government. Concerns about the adequacy of protection under current provisions, including gaps in compliance enforcement have been expressed over a number of years. However there are many concerns also about the new rule making arrangements under the AEMC.

There are many tiers of overlap, with regulators and funders, perhaps understandably defensive about the programs either set up or funded by them, so accountability needs to be redefined.

I also raise the issue of whether statutory State and Commonwealth Ombudsman should have extended powers of direct intervention where concerns arise about the performance of industry-specific complaints schemes.

Since these schemes are so closely associated with regulators, there is frequently a reluctance amongst those regulators to enquire at all about performance parameters, often preferring to direct even serious complaints about perceived bias as demonstrated for example by “*legal posturing*” and “*legal stancing*” inappropriate threat of premature closure of a file if legal advice was sought and even failure to investigate at all conduct issues.³⁴ Thus market power imbalances are enhanced.

The principles of such matters need urgent addressing, since these imbalances and public perceptions of bias have widespread impacts on consumer confidence, which in turn spells compromised consumer protection.

The Victorian Attorney-General’s Justice Statement³⁵ allows for seamless redress for aggrieved parties, but the practicalities and politics are such that poorly defined redress structures, reluctance of regulatory bodies to take direct and responsible control for the external oversight of the industry-specific schemes set up by them, and optimal outcomes in equality, fairness, accessibility and effectiveness have become little more than theory concepts that are not matched in practice with proper access to justice.

³⁴ Please refer to the speech by Dr. Peter Shergold, Secretary, Department of Primary Minister and Cabinet till February 2008, “*At Least Every Three Decades – Acknowledging the Beneficial Role of the Commonwealth Ombudsman*” 30th Anniversary of the Commonwealth Ombudsman, c/f Field, C (2007)

³⁵ Department of Justice, Victoria (2004) *New Directions for the Victorian Justice System 2004-2014: Attorney-General’s Justice Statement* May p9

My concerns are not simply theoretical. I refer, for example to a well-substantiated particular complaint to the energy-specific complaints scheme EWOV involving serious misconduct by an energy supplier that has remained unaddressed with regard to the conduct issues for over fourteen months, with an accountability football game being played between the scheme and several responsible statutory authorities.³⁶

The structure of the complaints scheme as a company limited by guarantee without share portfolio, and poorly structured Memoranda of Understanding have been used as pretexts to escape direct statutory responsibility. Yet the scheme was set up under specific statutory enactments and is therefore under direct regulatory control. Defensiveness of the regulatory guidelines seen to have driven the misconduct is not sufficient excuse to ignore the conduct issues.

The history of poor accountability in relation to this particular scheme has been documented previously and I have alluded to published outcomes, with particular reference to the disturbing report of the Energy Action Group (EAG) as far back as 2004, and to other concerns about poor outcomes.

The matter was complicated by regulatory flaws that have been seen to be driving unacceptable conduct, as briefly referred to in Part 3 of this multi-part submission (sub242part3).

In that case study there were many jurisdictional issues that complicated the picture. But the conduct issues remain unaddressed. The detriment to the particular Complainant in this instances has been ongoing and entirely unacceptable. He had been unjustly and unacceptably coercively threatened with disconnection of “*hot water services*” as a lever to coerce an explicit contract with the supplier where the proper contract under common law and other provisions, including Owners Corporation provisions lay with that body. Misleading and deceptive conduct were also components of the complex complaint.

The further deidentified details of this case will be shown within this submission to illustrate concerns about poor accountability at all levels, and to express concerns not only about unaddressed supplier conduct issues but the impact of accountability shuffles between policy-makers and regulators unwilling to give any credibility to compliance enforcement issues or indeed to reconsidering harmful regulations that are blatantly contravening existing enshrined consumer rights³⁷

³⁶ Full details of this case study were provided to the Productivity Commission as privileged material, including exchanges with the various bodies involved and the actual letters of threat issued by the bulk energy supplier, one during the course of an unresolved complaint. That the breaches occurred are undeniable. Yet nothing has been done to responsibly investigate this matter and take an action such that visible, accountable and effective enforcement principles are seen to be delivered

³⁷ The Bulk Hot Water Provisions are a classic example of inappropriate regulation that have endeavoured to strip end-consumers of bulk energy of their existing rights under multiple written and unwritten laws; to re-write contract law and ignore the intent and spirit of trade measurement provisions. These detriments have remained ignored for decades allegedly to prevent consumer price shock, where in fact the proper contract lies with the Owners Corporation

I begin therefore with discussing a significant gap in the Productivity Commission's Draft Report – that of standards for government service provision as these may impact on consumer protection, redress processes and accountability generally.

Thus, I have not lost sight of the fact that this submission is directed to the Productivity Commission's Review of Australia's Consumer Policy Framework. The digressions are purposeful since I believe they have both direct and indirect impacts on consumer policy rationales, if not seen to be directly associated with the specific range of recommendations made by the Commission.

It is not possible discuss any policy inquiry or review without reference to the Review of Government Service Provision³⁸. This is an annual review, as is the annual regulatory burden review. The Review was initiated by the Prime Minister, Premiers and Chief Ministers at the Premiers' Conference in July 1993. It operates under the auspices of the Council of Australian Governments.

My reasons for including reference to these COAG initiatives is to correlate existing state and commonwealth policy initiatives, their service performance parameters and policy provisions to specific parameters within the current Review of Australia's Consumer Policy Framework on the brink of being finalized with a Final Report that will have far-reaching implications for confidence and consumer protection.

So far are these protections eroded, and so long-over-due is the current enquiry, that the public perhaps may be forgiven for the enormous store that individuals, community organizations and the Australian community at large may have laid on outcomes and implications for future protection.

Once black letter law is enshrined it is burdensome and expensive to undo provisions if this ever occurs. The risks of enshrining in black letter law ("the framework") provisions that may from the outset be compromising consumer protection are not the specific topic of this overview and component submission to the Productivity Commission's current Consumer Policy Review.

As pointed out previously (subdr242Part2) Peter Kell has observed that³⁹

My observation is that in most cases, self-regulation is no more flexible than the black letter law and, in many cases, considerably less flexible."

I repeat that we need a rigorous debate around consumer protection in Australia. We need to look at whether our regulations and regulators are meeting their objectives in today's market environment. But we won't get there if we start from the wrong premise."

³⁸ Productivity Commission Secretariat Review of Government Service Provision
<http://www.pc.gov.au/gsp>

³⁹ Kell, Peter (2006) "*Consumers, Risk and Regulation.*" Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006

However, as mentioned in Submission 2, (subdr242part2; Regulatory Reform Issues) the weaknesses are significant and caution needs to be exercised in deeming current provisions adequate, mostly meeting need, with gaps fixable by greater use of existing mechanisms and co-regulatory practices.⁴⁰ Kell goes further, suggesting that:

If this area was looked at, I would like to see an honest, empirical assessment of some of the key propositions used to support self-regulation such as its alleged flexibility, market friendliness in the face of changing market conditions, and ability to be more attuned to the way that industry is changing.

The starting point of the Productivity Commission's recommendation is a sensible one. It is an assessment of the effectiveness of current mechanisms. To understand effectiveness because we are always looking for improvements because we are always analysing current problems to overlook some of the successes.

At the 2005 NCC Peter Kell discussed the Productivity Commission's Draft Report on the Review of National Competition Policy. The report had called for review of consumer protection law and policy in Australia. Peter Kell questions the rationale for heavier reliance on "*half-baked self-regulation.*"⁴¹

He quotes directly from that Report a component of which is reproduced below and cited from his own speech and referring to the recommendation to the Australian Government, in consultation with States and Territory to establish the review that is the current subject of consultation and on the brink of being finalized.

The Australian Government, in consultation with the States and Territories, should establish a national review into consumer protection policy and administration in Australia. The review should particularly focus on: the effectiveness of existing measures in protecting consumers in the more competitive market environment; mechanisms for coordinating policy development and application across jurisdiction, and for avoiding regulatory duplication; the scope for self-regulatory and co-regulatory approaches; and ways to resolve any tensions between the administrative and advocacy roles of consumer affair bodies.

⁴⁰ Ibid Kell, Peter (2005) "*Keeping the Bastards Honest – Forty Years on Maintaining a Strong Australian Consumer Movement is needed More than Ever.*" NCC Speech 2005
Found at http://www.ncc2008.com/Past_papers/NCC2005/peterkelltranscript2005.pdf

⁴¹ Ibid Kell, Peter (2005) NCC Speech (March)

A premature decision for example to exclude the Victorian template for Unfair Contract legislation instead of adopting this for other States may have unforeseen repercussions. Many have commented on this and the proposal that seems to be set to dilute rather than enhance consumer protection.

There is a strong case for mandating for removal of such legislation and policy provision (including codes and guidelines under regulator control, State or Federal as may be actually actively contributing to consumer detriment, leaving government authorities open to litigation risk, and adding to the overall cost of goods and service provision for all Australians is a decision that is one-sided.

My goal is to demonstrate that unacceptable outcomes are not all about whether providers of goods and services comply with best practice and proper regulatory provision.

The objectives of the Annual Review of Government Service Provision undertaken by the Productivity Commission include these provisions:

- *develop agreed national performance indicators for government services (which are published in the annual Report on Government Services; and*
- *analyse service provision reforms*

The review normally covers all major types of reform, including those involving the separation of policy development from service provision. Case studies of particular reforms could be provided where appropriate.

Though this annual review does not consider specific policy issues, but rather

it aims to assemble indicators of performance given the existing policy framework of governments. The performance measures established are to assist each Government in the formulation of its own policy objectives and priorities.

It also aims to

inform parliaments governments service providers and the clients of services — the wider community — about overall performance and reforms in service provision so as to promote ongoing performance improvement.

David Adams⁴² cites *Whiteford's (1998)*⁴³ reference to *Bradbury and Jantii's* work (1999:210) on the analysis of whether Australia is more or less unequal than other countries.

He points out *Whiteford's* view (*cross referenced to Bradbury and Jantii*)⁴⁴ that

“... *Strong recommendations about welfare outcomes should be tempered with an appreciation of weaknesses of the analytical frameworks producing those outcomes*”

Adams goes on to observe that this debate is more than just about methodology since:

“...*if the new view is correct [that Australia has become more unequal] then Australian institutions are remarkably ineffective at reducing inequality and may well deserve radical change. If the new view is wrong then the unmaking of Australian institutions and attempts to recast them in the American mode will remarkably increase inequalities (Bradbury and Jantii 1999:213) c/f Adams (2002)*”

Adams views in this award-winning essay are mostly about poverty. But it is also about how institutions behave and how policies are developed.

The 2008 GSP Review has been completed. However, in the light of the Review of Australia's Consumer Policy Framework it is crucial for provision to be made with the Consumer Policy Final Recommendations that those regulations which themselves either actually compromise (current provisions) or have the potentially compromise consumer protection, and broader productivity goals need to be removed or avoided.

⁴² Adams, David (2001). Sir George Murray Essay Competition Winner “*Poverty – A Precarious Public Policy Idea.*” Australian Journal of Public Administration 69(4) 89-98 National Council of the Institute of Public Administration. Published by Blackwell-Synergy also found at <http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%2854+KB%29&doi=10.1111%2F1467-8500.00305>

⁴³ Whiteford, P (1998) “*Is Australia Particularly Unequal? Traditional and New Views*” in P Smyth and B Cass eds 1998 “Contesting the Australian Way, Cambridge University Press, Cambridge”

⁴⁴ Bradbury B & M M Jantii (1999) “*Child Poverty Across Industrialised Nations,*” Innocenti Occasional Papers, Economic and Social Policy Series UNICEF c/f References ibid Adams, D (2002) in referring to Ibid Whitford, P (1998) “*Is Australia Particularly Unequal*”

In addition, where policy-makers separate policy development from service provision, such as may be the case with the roles of the Department of Primary Industries (Victoria) and Essential Services Commission (Victoria) provision with the Consumer Policy Framework should be careful to ensure that both policy and service arms do not recommend or adopt policies and practices that directly or indirectly compromise the enshrined rights of consumers under multiple provisions that are not necessarily industry-specific. These provisions need to be spelled out directly within the new Australian Consumer Policy Framework.

Well-designed consumer policy is also about whether the regulators and policy-makers themselves are operating within best practice parameters, such that risk mitigation is not just a popular phrase included in policy and mission statements, but a real, active, dynamic part of strategic policy planning that is monitored, updated and included at every point in regulatory and policy service-delivery.

Ultimately, policy-makers and regulators must take direct responsibility for accountability of the schemes and providers of goods and services that are created by the instruments under their control.

This refers particularly to complaints schemes more honestly described as industry-specific complaints schemes than “alternative dispute resolution services” or “ombudsman.” Both terms imply something other than that delivered by industry-specific complaints schemes

Madeleine Kingston

Madeleine Kingston

DISCUSSION OF SELECTED IMPACTS ASPECTS OF COHESION, SERVICE PROVISION AND REGULATION

Addressing regulatory burden and harmful regulation issues with associated complaints scheme considerations

I expand on material already published as Parts 1 2 and 3 Sub242DR to the Productivity Commission's Draft Report⁴⁵

The issues raised here cut across several recommendations including **4.1; 4.2; 4.3; 4.5; 5.1; 5.2,5.3;5.4, 6.1; 6.2, 7.1;. 8 (missing clause defective services); 9; 10; 11;**

Many components of this Part 4 submission (242DR) may perhaps be seen as better directed to the Annual Review of Government Service Provision (the Review GSP), for which the 2008 Report was published in January.

I include the broader perspectives as having a very real impact on the current Consumer Policy Review. There is always another year or another opportunity for submissions to the Steering Committee for the Review of Government Service Provision for those who are aware of its existence, motivated to participate and have expertise, interest, time energy, funding or resources in some other context.

There may not always be an opportunity to influence consumer policy provisions, and once recommendations are cast in stone, accepted by the Government and enshrined in black letter law, it may be too late for regret or recrimination because time opportunity or careful consideration *"missed the boat."*

On the other side of the coin is the risk of indefinite prevarication. That concept has motivated State Governments to go ahead with their own agendas, formulate policies even entrenched positions and get ready for the constitutional debate alluded to in previous submissions. So the game-playing begins. It is called *"accountability shuffle."* There are many experienced players.⁴⁶

It certainly will not end with formalized recommendations from the Productivity Commission with the current Review whilst they move on to greener and perhaps more rewarding pastures in examining service provision and broad policy parameters in providing advice to the Australian Government.

Repeated inclusion in previous submissions of passing mention of the federalism and anti-federalism debate and impacts on the current Consumer Policy considerations in this review have not been either accidental or misplaced, though many may believe these peripheral concerns to be extraneous to the consumer policy framework parameters.

⁴⁵ Submission by Madeleine Kingston to Productivity Commission's Draft Report Review of Australia's Consumer Policy Framework subdr242 Parts 1-3

http://www.pc.gov.au/inquiry/consumer/submissions?8995_result_page=3

⁴⁶ Peter Mair's submission to the Productivity Commission's Draft Report SUB112 15 January 2008

Various State authorities have taken advantage of confusion, delay and uncertainty over constitutional and other considerations associated with federalism issues to forge ahead with either well-considered and appropriate, or alternatively poorly-considered policy decisions that may take decades to undo.

First I refer to the address by the Prime Minister Kevin Rudd to the Australian Melbourne Institute's Conference in late March 2008.⁴⁷ Speaking of the new agenda of micro-economic reform for Australia, Mr. Rudd has made the following observations:

The Government had breathtakingly favourable fiscal and economic conditions, like no other Australian government has had.

Yet it failed to seize those opportunities.

Or even, it seems, to grasp them.

The result of inadequate and poorly targeted investment in skills formation, in innovative capacity, in infrastructure, and in budget management now manifests itself in the skills shortages, infrastructure bottlenecks, and inflation challenge that Australian workers and businesses now well understand.

Productivity is, in the long term, the key to building a more internationally competitive economy – one that can produce more output from its existing resource base; one that can grow faster without fuelling inflation and consequently, driving up interest rates.

The need for action on the productivity agenda is clearly underscored by the long downward slide in productivity growth since the late 1990s:

⁴⁷ Rudd, Kevin (2008). *“Towards a Productivity Revolution: A New Agenda of Micro-Economic Reform for Australia.”* Address by the Australian Prime Minister Kevin Rudd at the *“New Agenda for Prosperity”* Conference at Melbourne University 27 March 2008

The Victorian Department of the Premier and Cabinet⁴⁸ commits to working with relevant Departments to ensure that Victorian concerns and issues are addressed in a timely and appropriate manner. I provide an extract from the Victorian DPC Guidelines and Procedures published online in the context of Commonwealth State Agreements.

Commonwealth and State Agreements

The constitutional and fiscal structures prevailing in Australia necessitate the creation, maintenance and regular review of intergovernmental agreements between the Victorian and Commonwealth Governments. These agreements extend across a broad range of areas including counter-terrorism, healthcare, housing, disability, education and transport.

Intergovernmental agreements include financial agreements, cooperative regulatory schemes, draft model legislation, memoranda of understanding, joint ventures and fee-for-service arrangements. Some agreements involve only Victoria and the Commonwealth, others one or more of the other States and Territories. Some agreements arise out of the Council of Australian Governments (COAG) and Ministerial Council processes - others have less formal origins and relate to areas or topics of common interest between the parties.

In general Departments hold lead responsibility for intergovernmental agreements that relate to their portfolios. However depending upon the size (financial) or nature of any particular agreement

DPC will adopt a variety of roles as circumstances dictate. In areas where an agreement cuts across a number of portfolios or a whole of Victorian Government approach is required.

DPC will adopt a leading role. At all times DPC works in close consultation with the relevant Departments to ensure that Victorian concerns and issues are addressed in a timely and appropriate manner.

⁴⁸ Website Department of Premier and Cabinet, Victoria

I now refer to the Speech delivered by the Chairman of the Productivity Commission at a recent address, a matter of weeks ago, to the 2008 Melbourne Institute of Economic and Social Outlook Conference.⁴⁹ Mr. Banks begins his speech with reference to the National Reform Agenda, quoting from the COAG agenda (2006) as follows:

The National Reform Agenda is aimed at further raising living standards and improving services by lifting the nation's productivity and workforce participation over the next decade. (COAG 2006)

Mr. Banks' has raised in a timely way the issues of monetary and fiscal policies which he says have been

".....crucial in restoring the basis for stable progress. But the reforms that impacted more directly on the behaviour of businesses, workers and consumers were arguably most influential in the productivity fuelled growth of the 1990s.

Mr. Banks has referred to unilateral reductions in import protection and barriers to foreign capital as the triggering factors in the microeconomic reform process.

However, of more significance to the current Consumer Protection Review is the observation by the speaker, Gary Banks as Chairperson for the Productivity Commission. He has referred to "*policy-related domestic impediments*" to the performance of (Australian firms) in these words

Reforms to the conduct of monetary and fiscal policy have been crucial in restoring the basis for stable progress. But the reforms that impacted more directly on the behaviour of businesses, workers and consumers were arguably most influential in the productivity fuelled growth of the 1990s.

⁴⁹ Banks, Gary (2008) "*Riding the Third Wave: Some Challenges in National Reform*" Presented at the 2008 Economic Conference entitled the "*New Agenda for Prosperity*" held at the Faculty of Economics and Commerce, Melbourne institute for Applied Economic and Social research. :Prime Minister Kevin Rudd also addressed the same Conference on the topic of "*Towards a Productivity Revolution: A New Agenda of Micro-Economic Reform for Australia.*"
The point of raising these recent speeches on Productivity goals is to express concerns about how these micro and macro-economic reform agendas might impact on consumer protection generally and specifically

The microeconomic reform process essentially began with (unilateral) reductions in import protection and barriers to foreign capital.

But the consequent competitive pressures on Australian firms soon shifted attention to the policy related domestic impediments to their performance. From this, a second wave of ‘behind the border’ reforms began in the late 1980s, focussed on improving the efficiency of public utility services and the flexibility of labour markets. This culminated in the National Competition Policy in the 1990s, with recognition that the imperative of forging a national market required a more coordinated approach to promoting competition across jurisdictions.

The NCP was a landmark reform initiative, involving an unprecedented degree of cooperation across our federation over a decade. It brought substantial benefits which are still being felt. But any tendency toward complacency (or reform fatigue) at the conclusion of the NCP process, has been overtaken by the realisation that Australia faces some major further challenges to its hard won prosperity in the years ahead, not least the ageing of our population.

A ‘third wave’ of national reform has accordingly been agreed to by COAG. While partly directed at completing unfinished business from the earlier reform programs, the new National Reform Agenda (NRA) pushes the boundaries of national reform to encompass the drivers of workforce participation and productivity. Its emphasis on human capital development is a natural and necessary extension of Australia’s reform efforts, going to the heart of what is required to meet the challenges of an ageing population. But while the potential gains are great, the challenges facing policy in a number of key areas are also substantial and will require sustained effort.

Adam’s tantalizing essay refers to the Mexican standoff in the dialogue between State and Commonwealth over the poverty issue and proper provision for the “*inarticulate, vulnerable and disadvantaged*”.

How they will fare when market contracts without the regulated standing offer for energy, and now that 17% energy price hikes have already been established, is left to be seen. Whether the CSO arrangements envisaged will go far enough or be any better than previous “bloody awful services” is left to be seen.

Mexican Standoff: (according to David Adams (2002, p92)

State to Commonwealth: Your low rates and highly targeted income support payments cause poverty

Commonwealth to State: Your pricing policies on your inefficient state services mean people can't afford access to them that cause poverty

Adams asks about whether new Governance and delivery systems need to be re-defined. He says (p96)

Some of the old institutional boundaries are no longer appropriate and many never worked well anyway. The simple idea of the Commonwealth being responsible for income support and the state for a mix of universal and targeted welfare support (for example, housing health concessions) needs to be revised.

In our new joined-up integrated and partnership world these old settings don't seem so sensible.

Adams holds that the track record is not good for getting the institutions to work together (p96). He points out to the possible need and renewed debate about institution design, referring to the work of *Kuhnle (2000)*.⁵⁰

He also holds the view that COAG and ministerial councils are “*creatures of government for government*”. He believes that:

“Broader forums and structured arrangements are needed to focus effort. Despite being a rather exclusive and tightly managed club

COAG still represents the most obvious forum within which the states and territories and the Commonwealth could canvass a national approach. However a truly national forum where the policy community clans can meet with other partners (such as business and local government) would be a good way of testing the new settlement.

⁵⁰ Kuhnle, S (2000) ed (2000) “*Survival of the European Welfare State*”, Routledge, London c/f Adams, D (2002) Sir George Murray Essay Competition Winner “*Poverty – A Precarious Public Policy Idea.*” Nat Council of the institute of Public Administration, p96

Whilst still on the topic of Mexican standoffs and turf wars, I quote from Peter's Kell's 2005 National Consumer Congress speech⁵¹, during which he analysed the Productivity Commission's Draft Report on the Review of National Competition Policy.

Finally, it would be very disappointing, as I said earlier, if any national review was to be used as a vehicle for cynical and unproductive turf wars between different agencies. There are few things more depressing for consumer activists than seeing reform agendas hijacked by agency self-interest, so we have got to make sure that does not happen.

Earlier in the same talk, Peter Kell cited directly from the PC's Review of National Competition Policy.

The Australian Government, in consultation with the States and Territories, should establish a national review into consumer protection policy and administration in Australia. The review should particularly focus on: the effectiveness of existing measures in protecting consumers in the more competitive market environment; mechanisms for coordinating policy development and application across jurisdiction, and for avoiding regulatory duplication; the scope for self-regulatory and co-regulatory approaches; and ways to resolve any tensions between the administrative and advocacy roles of consumer affair bodies.

At a broader level there is some concern about how principal objectives are described in the last annual report given reference to "*capturing the benefits of competition for consumers.*" One would hope that no enshrined consumer rights will be sacrificed in an endeavour to capture such benefits.

⁵¹ Ibid Kell, Peter (2005) "*Keeping the Bastards Honest...*" National Consumer Congress March
Found at http://www.ncc2008.com/Past_papers/NCC2005/peterkelltranscript2005.pdf

Welfarist approaches to public policy

A crucial component of Adams' George Murray Essay 2001, (published 2002), though with the focus on poverty, he asks some challenging questions about inter-governmental structures and communications and focuses on the issues of federalism and anti-federalism, in such a way as to make his essay absolutely pertinent to almost every arena where a "*joined-up*" government is envisaged.

The Lens Approach (*David Adams (2002:95)*)

Therefore these insights are as relevant for instance to the Consumer Policy Framework recommendations. Here's an extract from that essay regarding the "*lens*" approach in evaluating policy parameters based on governments' past issues and bad experiences

Lens Approach (according to Adams (2002, p95)

Seeing like a State (p96 Adams (2002)

What is it that we are talking about (agreeing the meaning)?

What do we understand to be the causes and consequences?

What are the outcomes we have in mind?

What levers do we have to make a difference?

Who else should we work with?

What does the public expect us to do?

What works?

What is the cost and risk?

Is there a minister who should be accountable?

Of particular relevance to the Consumer Policy Framework, still relying on Adams' work and views is his analysis of the reasoning often undertaken in considering reform measures. He says:

Most present their empirical evidence and then focus on either macro solutions or community empowerment or structural reform of the welfare state) or a suite of micro level program solutions (e.g. dental health, concessions, etc.

Macro solutions are seen as too complex and risky by most governments whereas micro solutions are seen as important but partial and difficult to justify one over another. The policy terrain of government tends increasingly to be exploring the middle ground.

Adams refers to the tendency to embrace universal rather than inherently “welfarist” approaches. Adams tackles various concepts about engaging the public, whether they are prepared to pay more taxes to tackle, for example child poverty? He refers to some evidence to support this (*e.g. Australian Social Monitor 2001; c/f Adams p07*).⁵² Adams talks of “*deliberative democracy*” techniques for engaging these issues, referring to the Canadian Policy Research Networks 2001 (*Adams (2002), p97*).

⁵² Australian Social Monitor (2001) “*The Budget, the Election and the Voter*” 4(1) June, Melbourne Institute of Applied Economics and Social Research Melbourne c/f Adams, D (200s) “*Poverty – A Precarious Public Policy Idea*” National Council of the institute of Public Administration, p97

In speaking about poverty as a precarious public policy idea and of issues of public accountability and leadership, David Adams, Department of Premier and Cabinet, Victoria, speaks of⁵³

“Good ideas tend to be simple to understand; resonate with people’s experiences of live; have leadership and a policy community around them; fit into program and resource structures of governments and seem capable of solving immediate problems.

The idea of eradicating poverty has lost these features. For example for the past 20 years poverty ideas have been knocked off their perch by economic reform ideas. Not only are there these competing economic ideas (which are claimed to be a solution to poverty) there is also a raft of new social capital ideas making claims on policy resources. The idea of poverty has been obfuscated such that we can’t agree what it means any more or how to measure it or who is responsible for tackling it. Which of course means no one can be held accountable. Having some national goals and agreeing some basic language and targets would be a good start (to going forward) and “making the idea influential again.

⁵³ Adams, D (2002) Sir George Murray Essay Competition Winner *“Poverty – A Precarious Public Policy Idea.”* Nat Council of the Institute of Public Administration, summary, p89 Found at <http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%2854+KB%29&doi=10.1111%2F1467-8500.00305>

David Adams Department of Cabinet and Premier Victoria; Visiting Fellow ANU Professor David Adams is a graduate of the Universities of Tasmania, Sheffield and Melbourne. He has previously been a Departmental Deputy Secretary in Tasmania (Health) and Victoria (Premier and Cabinet and the Department for Victorian Communities). He has been instrumental in Victorian policy initiatives captured in the *“Growing Victoria Together”* and the *“Fairer Victoria”* programs.

His major fields of research concern the locality drivers of innovation. He has published extensively in public policy and management focusing on local governance and its links to innovation and wellbeing. In the AIRC his work focuses on the Tasmanian Community Assets survey and is based in the North and North West of the State. He is a Director of Northern Tasmania Development and a Director of the OECD-linked PASCAL Observatory on social capital, place management and learning regions

David Adams⁵⁴ refers to early hopes almost three decades ago as follows:

In the 1980s, the Council of Australian Governments (COAG) held out some hope for a truly national approach to key national issues. Poverty never made it onto the agenda. The closest were some attempts to reconfigure community services but these faded away and the ministerial council (Community Services and Income Security) never picked up the challenge.

As each of the various components of my submissions to the Productivity Commission's Draft Report are intended to stand-alone if need be I again begin by emphasizing the findings of SSC in 2000 as a reminder to all concerned with upholding adequate levels of consumer protection. The SCC had found the following

Lack of understanding of NCP policies;

A predominance of narrow economic interpretation of the policy rather than wider consideration of the externalities

A lack of certainty between States and Territories as differing interpretations of the policy and public interest test, result in different applications of the same conduct;

Lack of transparency of reviews; and

Lack of appeal mechanisms

⁵⁴ Ibid Adams, D (2002) p92

Referring again to the 2002 Senate Select Committee findings more fully discussed in subdr242part2, during its extensive examination of public concerns about the application of competition policy, reform agendas and community impacts, I deal with a few of these concerns briefly. Besides these findings I reiterate concerns that:

“The Senate Select Committee had found that social services were not shown to improve during NCP. The SSC took seriously the suggestions in many submissions that some aspects of NCP and its administration would appear to be in conflict with the principles of good health community and social welfare service provision. That Committee’s findings in terms of competition policy and its impacts are further discussed elsewhere.

Whilst the Senate Select Committee did not seek to duplicate the work done by the Productivity Commission and the Committee confirmed that there were overall benefits to the community of national competition policy it found that those benefits had not been distributed equitably across the country. Whilst larger business and many residents in metropolitan areas or larger provincial areas made gains residents from smaller towns did not benefit from NCP.”

I hope the goals for productivity identified will remember to consider the findings of the Senate Select Committee as far back as 2000 (see subdr242part2)

“An unintended consequence of changes to the way social welfare services are funded would appear to be these additional administrative costs. Further it is evident that narrow cost/benefit analysis is not capable of examining many of the social factors involved the application of NCP in the social welfare sector.”

I repeat that all regulatory reform needs to be considered in the context of corporate social responsibility and the public interest test. That includes any reform measures that either enhance or have the potential to hamper access to justice, or any regulatory measure that may, in the interests of lightening the burden on the courts for example, impose obligatory conciliatory demands on the public, and particular those most affected by the power imbalances that exist – the *“inarticulate, vulnerable and disadvantaged.”*

I repeat the findings of the Senate Select Committee’s 2000⁵⁵ enquiry effective management of hardship policies as implemented by the government or contract out had not been adequately addressed by shifting of financial responsibility to

“bloody awful agencies which ought to be defunded”

⁵⁵ Ibid SCC (2000) *“Riding the Waves of Change”*

In previous submissions I have addressed in some detail by citing the findings of others, and especially in relation to energy matters, that competition policies, and their interpretation have not always brought positive outcomes for consumers, and this was particularly of concern in the area of essential services and financial services.

Written some two years after the Senate Select Committee Inquiry of 2000, David Adam's essay comments as follows on the welfare state:⁵⁶

"Then we discovered the crisis of the welfare state. In public administration we also discovered public sector reform, markets, competition, and public choice reasoning as a new focus

Now there is relative silence. Tim Costello keeps a lonely vigil in the media but as Horne (2001) notes there is generally a lack of political leadership on social issues in Australia

There is really no public debate on Australian poverty anymore. There are plenty of seminars and workshops and an occasional conference. There is also a lot of research. Most debates involve the same people. Mostly our researchers and a small number of community sector opinion leaders. In particular, church-based organizations flying the flag, but many of those are struggling with their identity (Lyons 2001), and with the legacy of contracting where the price paid does not equal the cost of service

There is an occasional feature article in the media, usually triggered by another report on poverty, most recently the Uniting Care Report (Leveratt) and the St Vincent de Paul Report (July 2001)"

Adams comments that:

"without leaders and a public profile and a simple set of key themes to promulgate the chances of recognition meaning and understanding and the propensity for action is more limited"

⁵⁶ Adams, David (2001). Sir George Murray Essay Competition Winner *"Poverty – A Precarious Public Policy Idea."* Australian Journal of Public Administration 69(4) 89-98 National Council of the Institute of Public Administration. Published by Blackwell-Synergy also found at <http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%2854+KB%29&doi=10.1111%2F1467-8500.00305>

This is an indictment. Social policy depends on superlative leadership. Adams refers to the *“trickle-down theory.”* This is described as one where the assumption is made that

Greater productivity creates wealth and that the distribution of increased wealth would ultimately benefit all Australians.”

He further claims that redistribution is not a term that is associated with the legacy of the 1980s and 1990s. Worse still, he says that social justice was seen as a *“failed legacy of the 1970s.”*

So we are back to discussing Universal Service Obligations and whether there is a role for these at all in considering corporate social responsibility. Public presentations by economic regulators at home and abroad gain mileage from such titles, whilst the consumer policy framework is forced to consider options that may take us all back to those *“bloody awful services”* that the SCC found unproductive and damaging to the social fabric of the Australian society and any real commitment fairness and justness principles.

Whereas I believe that it is the responsibility of the community as a whole to support those who are more disadvantaged for whatever reason, the distribution equation is about making sure that private investors and corporations gain maximum profits whilst shifting these corporate social responsibility to the government or contracted services that may repeat past history. Adams as referred to popular buzz words like *“the poverty trap,”* *“disincentives to work”* and to philosophies that believe that

“productive economies with high employment are the solution and that welfare payments lead to dependency.” (p4)

Before launching into discussion about regulatory matters and complaints mechanisms seen to be deficient on a number of counts, and repeating skepticism that reliance on a combination of generic law and existing industry-specific complaints schemes somewhat revamped, I refer again to the work of David Adams. Though the topic is poverty as a precarious public policy idea, many of the philosophies are as applicable to other arenas.

David Adams in the abstract to his award-winning essay said:⁵⁷ discusses the

“rebuilding of a cohesive epistemic community with an outcomes focus.”

Under this heading, (p95) Adams speaks of a poverty community in terms of fragmented clans. The same principles may be applied to other arenas of service provision. He identifies:

The Research Clan

The Third Sector Clan

The Government Clan, divided into Commonwealth and State clans

The Commentator’s Clan (basically divided into the media clan and the academic clan)

On the fringes of membership are the social entrepreneur’s clan (only recently organized as a clan in Sydney some 12 months back) and

the new Social Theorist’s clan (place management and community building clan meetings

Other clans such as the philanthropic clan and the local government clan tend to move in and out of the policy community

Rarely do the clans meet together except for ‘networking; at the occasional Social Policy Research Centre or COSS conference

There is an umbrella clan called the National Coalition Against Poverty, but it mainly constituted by the Third Sector clan. There is no common plan uniting the clans and no forum for them to meet. Meeting to think about the future would seem a sensible idea. I can’t remember the last time representatives of the clans met to discuss poverty, but I suspect it was many years ago

⁵⁷ Adams, David (2001). Sir George Murray Essay Competition Winner *“Poverty – A Precarious Public Policy Idea.”* Australian Journal of Public Administration 69(4) 89-98 National Council of the Institute of Public Administration., p95
also found at
<http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%2854+KB%29&doi=10.1111%2F1467-8500.00305>

He recommends canvassing:

*A suite of outcomes and targets that would be useful” in terms of
“the sort of Australia we want to see in 5-10 years and what our respective
contributions might be to get there.*

I call particular attention and wholeheartedly support the summary of concerns made by the Department of Consumer and Employment Protection WA in his submission to the PC Draft Report (248).⁵⁸

In summary, DOCEP acknowledges the need for reforms to the existing Australian consumer policy framework and supports many of the Productivity Commission’s 28 individual recommendations. In some cases, DOCEP believes the recommendations do not go far enough and that further change is warranted. DOCEP also has significant concerns about the impact which some of those recommendations would have on the effective administration of consumer policy in Australia.

DOCEP is also concerned that in criticising delays in the development of reforms to the existing Australian consumer policy framework through the Ministerial Council on Consumer Affairs, the Productivity Commission has ignored the role that the previous Commonwealth Government played in frustrating the attempts of States and Territories to achieve reform.

For example, the previous Commonwealth Government refused requests by the Western Australian Government for national regulation of finance brokers and property investment advisers and effectively blocked attempts to introduce national unfair contract terms legislation.

DOCEP supports the introduction of new national generic consumer law based on the consumer protection provisions of the Trade Practices Act but notes this Act has been left behind in terms of world best practice, with very limited amendment in the last decade. DOCEP believes that the content of new national law should be open to full debate with a view to establishing a best practice regime.

⁵⁸ Department of Consumer and Employment Protection WA (2008) Submission to Productivity Commission’s Draft Report Sub 248 4 April 2008

DOCEP supports the transfer of credit and finance broking regulation to ASIC, although DOCEP believes this should be accompanied by the transfer of regulation of debt collectors to ASIC and the introduction of national regulation of property investment advisers by ASIC. Transfer of functions to ASIC, while supported, would also need to be accompanied by service delivery guarantees to ensure that services to Western Australian consumers and businesses would not be diminished.

DOCEP is very concerned about proposals to make the ACCC the sole regulator of generic consumer law (including product safety), while leaving the States/Territories to administer industry specific law. DOCEP believes that the ACCC has not demonstrated a capacity to provide the same levels of service delivery at a local level as State and Territory consumer agencies. Contrary to the Productivity Commission's view, DOCEP believes that the proposed split in responsibilities between the ACCC and State and Territory consumer agencies will confuse business and consumers, because many issues raised under industry specific legislation also involve generic legislation, and will significantly increase the overall national costs of regulation.

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Half-baked self-regulation (phrase coined by Peter Kell⁵⁹)

He questioned then whether in fact a review along those lines was indicated and put in his plea to be spared from half-baked self-regulation as already cited from the 2005 NCC speech.

The following year at the 2006 National Consumer Congress Peter Kell's published speech tackled the issue of consumers, risk and regulation⁶⁰. I cite it again here since that very concept is the focus of this fourth component of my submission to the PC, perhaps more narrowly focused on selected topics.

Again I feel the need to reinforce the views expressed by Peter Kell from that speech⁶¹:

“From ACA’s perspective reducing regulatory burdens whilst still ensuring good market outcomes is an important objective. Consumers don’t benefit from poorly directed regulation or complicated rules that aren’t enforced. Reducing regulation that unnecessarily restricts market competition will also generate better outcomes for consumers.

For example there seems to be a notion that there is a wealth of self-regulatory initiatives that are not currently being given sufficient attention in this area. I am not so sure about that and I would like to put in a plea that we all be spared from more half-baked self-regulation. There are of course other players who would see such a review as a golden opportunity to wind back consumer protection.

⁵⁹ Ibid Kell, Peter (2005) NCC 2005

⁶⁰ Kell, Peter (2006) *“Consumers, Risk and Regulation.”* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006

⁶¹ Kell, Peter (2005) *“Keeping the Bastards Honest – Forty years on Maintaining a Strong Australian Consumer Movement is needed More than Ever.”* Speech at 2005 National Consumer Congress

Found at http://www.ncc2008.com/Past_papers/NCC2005/peterkelltranscript2005.pdf

Prior to joining Choice, Peter Kell was Executive Director of Consumer Protection and NSW Regional Commissioner, at the Australian Securities and Investments Commission (ASIC). Peter joined ASIC in 1998 when it was given significantly expanded consumer protection jurisdiction, and was responsible for ASIC's approach to consumer protection regulation in the financial services sector. Peter's area developed and implemented successful regulatory campaigns in areas such as mortgage broking and financial planning, built ASIC's widely recognized consumer education and financial literacy programmes, and developed policy and approval standards for consumer dispute resolution schemes. Peter was also responsible for establishing ASIC's Consumer Advisory Panel.

At times this seems to be based on the idea that if we somehow develop more competitive markets then consumer protection should be stripped back. That sort of notion which is partly there in the Productivity Commission discussion is problematic for several reasons. I will mention three. One is that there seems to be at times in discussions around the outcomes of competition policy a premature celebration of competition in some markets before it has actually really arrived or had an impact.

The second reason why I think that that is an inappropriate approach comes from some of the work that Louise Sylvan has been doing. We should not be thinking of competition and consumer protection as somehow at odds with each other but rather we ought to be looking at the opportunity for integrating them and seeing them as complementary objectives in much of the regulatory arena.

Finally I think the notion that more competition means we can in some simplistic sense wind back consumer protection is based on a one dimensional and unproductive understanding of consumer behaviour. That is what I will return to a little later in my talk.

Having pointed out some risks I think it would be unfortunate if we let those risks stop us from seeking to improve consumer protection through such a review. I believe we can achieve a better and more coherent approach to regulation in this area and we have reached a stage in consumer protection regulation in Australia when a big picture examination could and should provide some important opportunities to rethink some of our current structures and approaches. There are a range of challenges we face and market developments that have arisen that warrant some fresh thinking.

If we are going to come up with any of the radically different approaches that are suggested in the program then such a review would provide an important vehicle for discussion and debate. Now I certainly do not want to suggest that I have all the answers in advance about what such a review should cover or what the outcome like to raise a few issues that I think should be considered in such a review and some of the things frankly that should be avoided.

A third area suggested by the Productivity Commission is the scope for self-regulatory and co-regulatory approaches. Well, okay, this is worthy of examination, if only to confirm the generally limited use of such regulatory mechanisms in consumer protection. There have been some successful examples but they are more the exception than the rule. The dispute resolution schemes, in some sectors, are some of the more promising examples, but they tend to work most effectively when they are incorporated into a broader statutory framework.

If this area was looked at, I would like to see an honest, empirical assessment of some of the key propositions used to support self-regulation such as its alleged flexibility, market friendliness in the face of changing market conditions, and ability to be more attuned to the way that industry is changing. My observation is that in most cases, self-regulation is no more flexible than the black letter law and, in many cases, considerably less flexible.

Another area that is dealt with, frankly, in a fairly desultory way in the Productivity Commission report is the role of consumer organisations. The Productivity Commission gives this subject a rather odd little break out box, and after outlining the significance of consumer organisations countering industry arguments and policy debates, they weakly concluded that any case for supporting consumer organisations is a very questionable one. I would expect that any such review would take a far more rigorous and thoughtful approach to that issue.

FURTHER SELECTED ENERGY PROTECTION CONCERNS

I have previously cited and referred to the analysis by Gavin Dufty of the philosophies of the ESC apparently startlingly similar to those of the AEMC, the new Energy Rule Maker, in relation to Universal Service Obligations (USOs).

Dufty also deals with the hairy issue of shifting responsibility from corporations and government to consumers; or from corporations to government, a process that he refers to as “gaming” though that term is also used in the context of this submission in referring to misuse of market power⁶². Though Dufty’s paper is focused on energy regulation, many of the principles can be applied to other arenas.

In his 2004 analysis of the Essential Services Commission’s philosophies and approaches, Gavin Dufty, now Manager Social Policy and Research St Vincent de Paul Society said⁶³

In all of these models the ESC⁶⁴ is proposing to withdraw from the traditional basic protections delivered via universal service. In lieu of a universal safety net offered via universal service obligations the ESC proposes to protect customers where the market is failing through the establishment of “residual markets”⁶⁵.

This residual market would be subsidized by the Government supposedly using monies currently allocated to fund energy concessions designed to increase affordability of energy services for low income households.

⁶² See for example the views and concerns expressed in the 2007 Annual Report of Jackgreen, a Tier 2 Retailer. *“It is clear to Blind Freddy that gaming has occurred; the question is who caused it and who is benefitting from it?”*

⁶³ Dufty, G (2004). *“Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments.”* VCOSS Congress Paper 2004

⁶³ Tamblyn, John (2003) Powerpoint presentation World Forum on Energy Regulation, Rome September *“Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition?”* John Tamblyn (then) Chairperson Essential Services Commission Victoria. Refer also to John Tamblyn’s similar paper Tambylyn, J (2004) *“The Right to Service in an Evolving Utility Market,”* Powerpoint presentation at National Consumer Congress 15-16 March 2004 Melbourne

⁶⁴ Essential Services Commission, *Review of the effectiveness of retail competition and the consumer safety net for electricity and gas*, Issues paper, December 2003, p18

⁶⁵ Residual markets occur when various customers who are directly excluded from mainstream market offers are provided a residual service; this is usually a minimalist type service.

As observed by Mr. Dufty, The model proposed

“.....creates the opportunity for private companies to ‘game’⁶⁶ the subsidies created to address market failure. This could occur through company’s retreating from providing services to all but the most profitable customers.

The proposals made

“.....not only shifts the target groups for the concessions, but also serves to reduce minimum protections to all Victorians. “.....seeks to erode the current framework of regulated price caps and defined minimum service standards.

In an ABC interview in November 2007, the Chairperson of VCOSS spoke of the effect of electricity price rises on families, especially those on low fixed incomes⁶⁷

The peak social welfare body in Victoria says the rising cost of utilities will hit low income families hard. Electricity prices in the state will rise by up to 17 per cent from January, and gas prices will be up to 7 per cent higher. The Victorian Government says the drought has reduced hydro-electricity generation, pushing up energy production costs. Cath Smith from the Victorian Council of Social Service (VCOSS) says that could see household power bills increase by as much as \$200. Water bills are also set to double over the next five years.

Ms Smith says the higher prices will make life even harder for households that are already struggling. "\$160 to \$200 a year is going to be a really big push for a lot of families, particularly because the week when that bill arrives, potentially that's an extra \$60 or \$80 on your peak winter bill," she said. "That's a lot of money for people to find. "For people on pensions, together with the water price, that's pretty much a full week of pension, basic pension, just to cover the increases in your utility bills.”

⁶⁶ Gaming refers to the ability of companies to increase profit by shifting additional costs or low profitability/high risk customers onto third parties, such as government.

⁶⁷ VCOSS says power hike will hurt families found at <http://www.abc.net.au/news/stories/2007/11/30/2106621.htm>
It is yet to be spelled out how this will be compensated and whether those not receiving benefits but on similarly low incomes will far. Again the question of “blood awful services” that did not work will be the concern, as expressed in 2000 by the Senate Select Committee

In its submission to the Composite Paper MCE Retail Policy Working Group, VCOSS made the following observations and recommendations.

Whilst it is not the brief of the Productivity Commission to address such specifics, there are concerns that these are similar recommendations may not be taken into account in designing adequate energy protection for consumers.

Without the detail, and with little more than a recommendation to appoint a national “*energy ombudsman*” and make greater use of ADR services (which appears to include these schemes though none of them mediates, advocates or arbitrates, or holds face to face meetings between disputing parties), it is really difficult for the public to have any confidence that consumer protection, especially for energy will be adequately addressed.

Therefore this small selection of concerns is raised in this arena to raise public awareness of some of the gaps that need to be clarified.

Extracts from VCOSS submission to Composite Paper, Retail Policy Working Group July 2007⁶⁸

With a view to further work towards the new regulatory framework, we note these additional matters of concern:

- *Any assessment of credit risk that relies on historical information about debt should be restricted to information about utility debts only.*
- *Hardship programs should be mandatory for all retailers to ensure that consumers who experience bill payment difficulty, irrespective of the nature of their contract, can retain supply and are offered appropriate flexible arrangements to pay bills with continuing regard to their capacity to pay*
- *Late payment fees, currently banned in Victoria, should be prohibited under the new framework as they are regressive in nature and impact disproportionately on low income households. Late payment should be regarded an indicator of potential financial stress and a precursor to offering hardship options.*
- *All standing offer contracts for electricity and gas supply must include Centrepay as an accepted payment method.*

⁶⁸ VCOSS (2007) Submission to MCE Retail Policy Working Group found at http://www.vcooss.org.au/documents/VCOSS%20docs/Submissions/2007/SUB_070730_RPWG%20Composite%20Paper_VCOSS.pdf

- *Prepayment meters are currently proscribed in Victoria. VCOSS remains fundamentally opposed to their introduction because they are hugely detrimental to low income and disadvantaged households, and the only benefit they do offer those consumers (ability to pay for energy use via small, frequent instalments) can be readily and more appropriately delivered by other methods (such as bill smoothing). However if prepayment meters are allowed for in the national market, the following must be guaranteed by the regulatory framework:*
- *they must be optional —consumers must never be compelled to prepay;*
- *explicit informed consent must be obtained before a customer is signed to this option; and*
- *all standing offer contract terms must be delivered, including consumer protections such as disconnection proscriptions, payment flexibility, and the principle that no-one should be disconnected simply due to incapacity to pay.*

As well as responding to the detail of issues under consideration, we make the following observations about the national energy markets:

- *The objective of economic efficiency in the long term interests of consumers must be aligned with social and environmental objectives.*
- *Contestable markets for energy are still immature. Reviews of the effectiveness of retail competition have offered highly qualified reports and indicate significant areas of failure.*
- *Consistency between jurisdictions and/or a national regime for regulation is desirable, but only so long as consumer protections are guaranteed.*
- *Retail market contracts should provide for robust consumer protections including provision for comprehensive hardship programs and proscriptions on disconnection.*
- *Retail marketing arrangements should have regard to plain language and consistent product disclosure, explicit informed consent and appropriate cooling-off periods.*

The ESC Retailer Compliance Report 2006/2007 advised as follows⁶⁹

Extract 2005-06 COMPLIANCE REPORT FOR VICTORIAN ENERGY RETAIL BUSINESSES FEBRUARY 2007

4.3.1 Cases not involving the Commission

Wrongful disconnection cases can be identified by the retailer, the customer or EWOV. In 2005-06 a total of 143 wrongful disconnection cases resulted in compensation payments to customers. The payments ranged from \$26 per customer to approximately \$19,000 per customer.

Over 70% of the instances of wrongful disconnection detected by the retailer were due to incorrect account details or errors made by staff, resulting in the retailers requesting the distributors to disconnect the wrong address. Customers appeared mostly to complain of wrongful disconnection when accounts were paid but the disconnection order was not cancelled, disconnection at incorrect addresses and delays in reconnecting once a payment arrangement had been agreed.

The key reasons for the complaints to EWOV were retailer failure to use best endeavours to contact customers or to advise customers of the availability of financial counselling, concessions and the Utility Relief Grant Scheme and inadequate assessment of the customer's capacity to pay.

4.3.2 Cases involving the Commission

The Commission becomes involved in wrongful disconnection cases where a customer has made a complaint to EWOV, who is not able to reach resolution with the retailer. Clause 6.4 of the OP enables EWOV to seek guidance from the Commission on any questions of interpretation of the ERC or retailers' terms and conditions of supply relating to WDP. This guidance is provided by Commission staff.

⁶⁹ ESC Retailer Compliance Report, p26 4.3.2 found at <http://www.esc.vic.gov.au/NR/rdonlyres/949F62FF-B891-4543-939A-00435469E079/0/EnergyRetailBusinessesComplianceReport200606.pdf>

If EWOV is unable to resolve a claim for the wrongful disconnection compensation payment, to the satisfaction of both parties, the claim is referred to the Commission for a decision in accordance with clause 7 of the OP. This formal decision is made by a Commissioner who has been delegated this function.

In 2005-06 EWOV referred 12 cases for interpretative guidance. Commission staff would investigate the complaint and offer a view as to whether WDP had occurred. It was found that these cases were subsequently referred for a formal decision if either the customer or the retailer disagreed with the Commission staff's guidance. This process was recognised as being inefficient and from 1 January 2006, EWOV was advised that written opinions on a specific case would not be provided without a formal referral for a decision. Guidance under clause 6.4 therefore would be confined to broad interpretation of the regulatory obligations.

This reduced the duplication in EWOV referrals for the remainder of the financial year.

In the 2005-06 period, 17 cases were referred for a formal decision. For 6 cases the Commission ruled that the retailer had fulfilled the terms and conditions of the written contract, and for the remaining 12 it was decided that the contracts had been breached, particularly in regard to three basic requirements under clauses 11.1, 11.2 and 13.2 of the ERC. These clauses in general set out the obligations requiring:

- Adequate assessment of a customer's capacity to pay.*
- Providing the customer with advice on financial counselling, concessions including the Utility Relief Scheme and energy efficiency information.*
- Using best endeavours to contact the customer.*

It was often the failure of the retailer to comply with specific steps in the disconnection process which resulted in a decision that wrongful disconnection had occurred. These steps included not providing energy efficiency advice or not making sufficient efforts to contact customers in financial hardship prior to disconnection, in accordance with the obligations set out in the ERC.

Contributing to this was failure by some retailers to record all actions and conversations with customers during the disconnection process. Some retailers asserted that the requirements are clearly set out in the call centre scripting. This was found not to be sufficient and that retailers need to ensure that evidentiary documentation of the actions is maintained. All retailers met the regulatory requirements to make the compensation payments promptly.

The ESC Retailer Compliance Report 2006/22077 advised as follows⁷⁰

“4.3.2 Cases requiring Commission involvement

The Commission becomes involved in wrongful disconnection cases where a customer has made a complaint to EWOV, which despite EWOV’s efforts, is not able to be resolved with the retailer. Clause 6.4 of the Procedure enables EWOV to seek guidance from the Commission on any questions of interpretation of the ERC or retailers’ terms and conditions of supply relating to WDP.”

“If EWOV is unable to resolve a claim for the wrongful disconnection compensation payment the claim is referred to the Commission for a decision in accordance with clause 7 of the Procedure. This formal decision is made by a Commissioner who has been delegated this function.

In 2006-07, 14 cases were referred to the Commission for a formal decision. In one case, the Commission was unable to decide whether the retailer had breached its contract with its customer because the Commission could not determine whether it was Origin Energy or the customer who was at fault regarding the electricity disconnection. However, it was noted that the retailer had already provided some compensation to the customer.

In the remaining 13 cases, it was decided that the contracts had been breached, particularly in regard to three basic requirements under clauses 11.1, 11.2 and 13.2 of the ERC. These clauses in general set out the obligations requiring:

- Adequate assessment of a customer’s capacity to pay.*
- Providing the customer with advice on financial counselling, concessions including the Utility Relief Scheme and energy efficiency information.*
- Using best endeavours to contact the customer.*

The Commission notes that it was often the failure of the retailer to comply with all of the specific steps in the disconnection process which resulted in a decision that wrongful disconnection had occurred. These steps included not providing energy efficiency advice or not making sufficient efforts to contact customers in financial hardship prior to disconnection, in accordance with the obligations set out in the ERC.

⁷⁰ ESC Retailer Compliance Report, p26 4.3.2

Some retailers have indicated that they are compliant with clause 11.2 of the ERC as they have placed information on assistance available on bills, reminders and on disconnection notices. The Commission considered that this was an insufficient means of advising the customer of the assistance available, as any assistance needs to be expressly communicated to the customer.

Other retailers did not comply with sections 46 of the Gas Industry Act 2001 and 39 of the Electricity Industry Act 2000. These sections provide that if a relevant customer commences to take supply of gas or electricity at premises from the relevant licensee without having entered into a supply and sale contract with a licensee, there is deemed, on the commencement of that supply, to be a contract between that licensee and that person.

*Section 5.1 of the **ESC 2007 Retailer Compliance Report** it was reported as follows:*

As outlined in Chapter 3, market conduct, billing and information provision issues were the primary causes of retailer non-compliance. The potential consumer detriment arising out of these issues can be significant as consumers may:

- make purchasing decisions based on misleading or inaccurate information;*
- not be able to readily access the information most applicable to their situation,*
- enter long-term contracts that ultimately may not meet their energy needs,*
- be placed in financial hardship due to a retailer seeking to recoup undercharging without offering payment arrangements or delaying repayment of overcharged amounts.*

The Commission is particularly concerned about ensuring that consumers are able to access, in a timely and easy fashion, all necessary information to enable them to make informed choices in the competitive retail energy market in Victoria.

Under Section 5.2 of the ESC 2007 Retailer Compliance Report

5.2 Interactions with EWOV and CAV

The Commission received a number of referrals and requests for regulatory interpretation from EWOV during the 2006-07 financial year. In addition, the Commission and EWOV continued to meet monthly to discuss emerging industry issues. These meetings provide opportunities for analysis of EWOV complaint data and discussion of broad industry issues.

The Commission also consulted with CAV, in accordance with the existing MOU, on a number of occasions during the 2006-07 financial year to address market conduct and contractual issues.

Under Section 5.4 of the ESC 2007 Retailer Compliance Report it was reported as follows

5.4 Issues for 2007-08

The Commission's compliance monitoring activities for the 2006-07 financial year highlighted a number of ongoing matters that it proposes to address with the relevant retailers over the next twelve months. These compliance matters include:

- Ensuring that all retailers are complying with the provisions of Guideline 19, in particular the provision of Product Information Statements to customers;*
- Ensuring that the retailers monitor their external sales channels compliance with all applicable provisions of the Marketing Code;*

- Ensuring that all retailers comply with the Commission's Final Decision Early Termination Fees Compliance Review (December 2006) when calculating and applying early termination fees;*
- Ensuring that the retailers' processes for obtaining a customer's explicit informed consent are in accordance with the obligations under the ERC;*
- Continuing to work with CAV in relation to the fairness of energy contract terms.*

The commonest complaints for both electricity and gas received by EWOV during the year 2006/7, as reported in the 2007 Annual Report was identified as competition issues – the process of switching retailer.

The breakdown is shown below⁷¹

Cases by industry:

- *11,909 electricity cases (down 6%)*
- *3,888 gas cases (up 10%)*
- *429 dual fuel cases (up 45%)*
- *1,484 water cases (up 14%)*

EWOV received a total 18,280 cases in 2006/07 - 4,109 enquiries and 14,171 complaints. Overall, cases were up 3% from 17,763 in 2005/06.

Taking residential populations into account, the parts of Victoria with the highest rates of residential cases to EWOV were City of Melbourne, Loddon Shire, Pyrenees Shire, Moorabool Shire and Rural City of Swan Hill.

The most common issues were billing (39%), retail competition (21%) and credit (18%).

5,184 complaints were received for full investigation. 5,316 complaints were fully investigated and closed.

Redress to customers included 173 written apologies, 1,016 payment plans negotiated, and \$1,740,406 in billing adjustments, fee waivers, debt reductions and other payments.

Electricity

EWOV's annual report 2006/07 reported 11,909 electricity cases overall, down 6% with 19% enquiries and 81% complaints.

The most common complaint was the process of switching retailer.

Amongst electricity retail cases alone, there were 10,240 electricity retail cases, up 24 cases, with 16% enquiries and 84% complaints – with the most common complaint being the process of switching retailers.

Complaints about distribution were most commonly about unplanned outage.

⁷¹

Found at

<http://www.ewov.com.au/html/Annual%20Reports/Annual%20Report%202007.htm>

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GAS

2006/07 gas cases

3,888 gas cases overall, up 10%

19% enquiries and 81% complaints

Most commonly — the process of switching retailer

3,456 natural gas retail cases, up 12%

16% enquiries and 84% complaints

Most commonly — the process of switching retailer

129 natural gas distribution cases, down 37%

14% enquiries and 86% complaints

Most commonly — new connections/installations

149 LPG (retailer specific) cases, up 67%

42% enquiries and 58% complaints

Most commonly — fees & charges

To illustrate:

In 2006/07, customers contacting us (EWOV) registered their dissatisfaction with the following practices:

- door-to-door sales to non-account holders, to the elderly and to people with limited English*
- marketing directed at people who — according to the person phoning us on their behalf — didn't have the capacity to provide explicit informed consent to a market contract*
- people being asked to sign a document, unaware that it was a contract*

- *people being told, or coming to believe, 'things would stay the same' if they agreed to a new contract*
- *sales representatives saying, or implying, they were 'from the government' or had some government connection, or that the energy retailer they represented was 'taking over' in the area*
- *sales representatives saying 'nothing will change except your bill' or 'the supplier will stay the same' — statements which, while they had some truth, took advantage of the average*
- *customer's lack of understanding of the relationship and differences between energy retailers and distributors*
- *sales representatives wearing fluorescent work vests — for some customers this created the impression that they were linesmen, not salespeople, and inferred there may be a need to switch, not a choice*
- *people agreeing to receive further information, and then receiving a 'new customer' welcome letter*
- *delays in receiving important contract information, or in replying to customers' phone calls or letters.*

As appropriate, we (EWOV) provided reports on these issues to the energy retailers concerned, and to the ESC, Consumer Affairs Victoria (CAV), the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER), by way of a Market Conduct Reporting Protocol.

On page 8 of its Second Draft Report, the Australian Energy Market Commission (AEMC) had commented as follows on existing range of consumer protections, implying that these would be retained, presumably to allay concerns about the implications of imminent total deregulation, including the remaining safety net. Now energy providers are seeking at State level⁷² to have these some or all or these protections removed, with reliance on generic provisions alone. These words were used:

The competitive retail energy sector in Victoria is supported by a sound consumer protection framework that is made up of energy specific regulation covering a wide variety of issues including obligations on retailers to disclose detailed energy offer information to customers as well as general consumer protection laws that prohibit amongst other things misleading, deceptive and unconscionable conduct. There are also detailed codes and laws regulating and direct marketing techniques favoured by energy retailers

It is of great concern to the public how uncomfortable EWOV was with the use made of its data by the AEMC to reach the following conclusion⁷³:

“In sum there is no evidence before the Commission to suggest that misleading, deceptive or coercive marketing practices among retailers are a widespread or systemic problem in Victoria. The relatively low level of complaints to EWOV, particularly in relation to the marketing conduct of retailers, and the high level of satisfaction among customers with the switching process, suggest that retailer marketing has been pro-competitive and has assisted in the development of effective competition.”⁷⁴

⁷² Refer to 2008 ESC Review of Regulatory Instruments found at <http://www.esc.vic.gov.au/public/Energy/Consultations/Energy%20regulatory%20instruments%20review/Submissions.htm?docName=Review%20of%20energy%20regulatory%20instruments>

⁷³ Refer to discussion on the issue of complaints statistics and interpretation of EWOV data p1-4 Response to AEMC Review of the Effectiveness of Competition on the Electricity and Gas retail Markets in Victoria First Draft Report

⁷⁴ AEMC Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria – First Draft Report p 81 c/f EWOV Response 12 November 2007 to AEMC Retail Review First Draft Report, p2

I reproduce here verbatim the comments by EWOV, starting with the conclusion to the discussion on the use made of data⁷⁵:

“EWOV is somewhat uncomfortable with the use made of its data to reach this conclusion.”

“In summary, EWOV suggests it is incorrect to simply compare EWOV complaint numbers with switching rates. Marketing and transfer issues are most often systemic in nature. For various reasons, some consumers do not complain to EWOV. The marketing and transfer cases received by EWOV should be viewed as indicative of dissatisfaction by a broader group of consumers than just those who have complained to EWOV.

In the confidential appendix to this submission (Appendix 2), EWOV has, to some extent, taken issue with the AEMC’s finding that marketing abuses are spread across retailers.

Our experience is that some retailers have markedly more marketing and transfer issues than others.

EWOV’s view is that in finding marketing to be pro-competitive and in finding no evidence of widespread misleading, deceptive and coercive marketing, the AEMC has arguably been selective in its use of the data presented.”

These conclusions were supported

The AEMC appears to have given little weight to the information provided by EWOV about the issues involved in marketing and transfer cases, and the systemic nature of them.”⁷⁶

⁷⁵ Ibid EWOV Response 12 November, p2

⁷⁶ EWOV defines a systemic issue as (1) an issue, (2) a problem, or (3) a change in the policy or practice of an energy or water company, which affects – or has the potential to affect – a number of customers. c/f Response by EWOV to AEMC First Draft Report Retail Competition Review, Citation 2, page 2,

Appendices 1 and 2 of our first submission were intended to document the kind of marketing cases received, as was the summary of issues raised on pages 6 to 8. EWOV stated in relation to one of the marketing reports that 54 of the 81 cases (66%) registered to that retailer raised potential compliance issues. (Note that we say ‘potential’ compliance issues because EWOV is not in a position to conclude a law or code has definitely been reached; that is a role for the regulators). Even if only half of those cases did in fact raise systemic or compliance issues, that suggests a worrying level of unsatisfactory marketing practices. Furthermore, it is necessary to bear in mind that a single complaint is indicative of other people who had a similar experience but did not complain.

“There is considerable research on the percentage of consumers who have a complaint but did not complain. The Society of Consumer Affairs professionals (SOCAP) Consumer Culture Survey for 2005 found that only 27% of dissatisfied consumers complain. Wildes⁷⁷ and Seo⁷⁸ (2001)⁷⁹ found that 68% of subjects with a complaint about restaurant service said nothing about the problem and did not patronize the restaurant again. A survey by the Technical Assistance Research Program (TARP) in 1979 found that up to 95% of people with complaints in fact did not complain⁸⁰

The AEMC is correct in its comments about the rate of cases relating to the retailing of energy at page 80 of the Draft Report. However, EWOV is not convinced that sufficient regard has been paid to the apparent seriousness of the complaints. For example, in 2006/07 a potential systemic or compliance issue was identified by conciliation staff in 43% of marketing cases. Further customers raised the issue of transfer without consent in 447 cases.

⁷⁷ Wildes V, and Seo W. (2001) “*Customers Vote with Their Forks: Consumer Complaining Behavior in the Restaurant Industry*” International Journal of Hospitality & Tourism Administration Vol2(2) ISSN 1525-648- 22 June 2001

⁷⁸ Won Seo, PhD Candidate, School of Hotel Restaurant and Institutional Management, Penn State University

⁷⁹ Vivienne J. Wildes, PhD Candidate, School of Hotel Restaurant and Institutional Management, Penn State University

⁸⁰ Consumer complaint handling in America: A final report Washington D. C. cited in promoting Consumer Complaints in the financial sector, a keynote address by Jane Goodman-Delahunty at ASIC’s Stakeholder Forum “Capitalising on Complaints: insights into handling financial sector complaints November 2001. In this address Professor Goodman-Delahunty says (at p5_ “*numerous surveys have highlighted the fact that the majority of dissatisfied consumers never complain.*” c/f EWOV Response to AEMC Retail Competition Review First Draft Report, on p2 of that submission, 12 November 2007

It is true this is a small proportion of switches but transfer without explicit informed consent is systemic in nature and the 447 cases are indicative of more customers who were transferred without their consent but did not take the issue further. This issue of transfer without explicit informed consent goes to the heart of energy retail competition. Explicit informed consent is vital to effective competition from a consumer point of view the AEMC itself said in the Issues Paper, at p19.

In this contest, EWOV is puzzled by AEMC's reasoning on p97 of the Draft Report – when it argues that reliance by customers on information supplied by the sales representative “suggests that the direct marketing efforts of retailers is an efficient method for encouraging switching which has enhanced competitive outcomes from the perspective of both retailers and customers.’ Certainly it is a good outcome for retailers. However, it is hard to see that switching – when it is on the basis of partial or incorrect or misleading information – is good for customers.

EWOV also notes the reference to awareness levels in footnote 149 on p 80 of the Draft Report. This is a comparison of consumer awareness rates of EWOV (as shown by the AEMC's own surveying⁸¹) and those of the TIO and therefore there would be more marketing conduct complaints if people were, in fact, unhappy about marketing practices in the energy sector. However, the unknown factor is how many people were unhappy but did not, for whatever reason, complain. Current estimates suggest that only about 30% of people suffering detriment actually complain about it to the company and an even smaller percentage take the complaint further.

In that context, the small survey by the Footscray Community Legal Service seems at the very least indicative.⁸² It showed high levels of dissatisfaction with the experience of switching. The tables about reasons for declining a new contract offer highlight two main reasons: inadequate and confusing information and aggressive sales pressure. Problems with information provision are common in the marketing cases EWOV receives. In particular, we find that customers who agreed merely to receive information find they have been switched. In other cases, customers are told they can only have detailed information if they do switch, and then if they don't like what they read they can opt out during the cooling-off period. We see this too commonly for it just to be one or two 'rogue' salespeople.

⁸¹ EWOV noted on page 3 of their response to AEMC's First Draft Report that the awareness rates found in the AEMC's consumer survey are lower than those obtained in surveys commissioned by EWOV, details of which were provided as Appendix 5 of EWOV's submission on the issues Paper. EWOV believes the 70% of respondents who answered they would go to the retailer in the AEMC's consumer survey in fact gave the right answer and that the question is not a good indicator of awareness of EWOV.

⁸² Footscray Community Legal Centre Inc submission c/f p3, citation 6 EWOV Submission to AEMC Retail Competition Review First Draft report of October 2007

As mentioned above in EWOV's Response dated 12 November 2007 to AEMC's First Draft Report, the Wildes and Seo study (2001) produced some interesting results about consumer complaints behaviour and statistics. The study in question examined how gender, age, family status and household income relate to ten common customer complaints: rudeness, lack of product knowledge, slow service, uncleanliness, inattention, forgetfulness, incorrect billing; rushed service, and overly-friendly service (in the context of restaurant dining).

Secondly the study examined the manner in which customers express their complaints: verbal, written, walk away and not return.

The findings in this and numerous other studies are consistent in demonstrating a pattern in customer complaining behaviour. In this study it was shown that documented complaints are under-represented (a gross understatement); yet these detailed criticisms are far more prevalent than those customers who choose not to express their dissatisfaction with the service.

This study and others have shown that those who complain are members of upscale socioeconomic groups. In the context of restaurant dining this may not have the same detrimental impact on consumers as those who receive essential services. The general finding is worrying since those who most need assistance are the ones least likely to complain

That finding is worrying, since the ones who most need assistance.

Goods Service providers need to be more concerned about those who walk away. There is no knowing what damage they may do to reputation that remains uncorrected. Some consumers become angry; others express themselves more calmly but assertively, with the aim of correcting unacceptable conduct, goods or service; the third group walk away but never patronize the service again.⁸³

It has been said that

“Both political and consumer behaviour can be motivated by either enhancing the public good or satisfying egocentric needs.”

⁸³ Whilst on the subject of consumer behaviour and the politics of consumption or the consumption of politics, refer to the findings of Shah et al in *The Annals of the American Academy of Political and Social Science* 2007; 11; 6, wherein amongst many other themes, consumer and citizen responses to the market is discussed. Thom's view is discussed in terms of understanding the economy of consumption as “carnavalesque”, following Bakhtin arguing for muckraking scholarship that criticizes actual functioning of the market system.

Note muckraking uncovered many abuses of power in both government and private industry at the turn of the century, helping to save lives and unmask corruption. The term derives from Theodore Roosevelt (1906) in his attack upon allegedly biased and sweeping charges of corruption in politics and business. It has its roots in *Pilgrims Progress* – “raking up the muck.”)

*Shah et al (2007)*⁸⁴ have asked some challenging questions about the role of the state and corporate interests in the politics of consumption, and have boldly asked whether scholarly attention and activist agendas should be focused on the state corporation over the citizen-consumer, given the centrality and power of the former, and how citizen-consumers and social movements influence nation states and corporations.

Shah et al (2007) mention the work of Hilton (2003)⁸⁵, who

“...further explores the shape of civil society regulatory systems and citizen/consumer rights. Operating in a different register he considers how consumption itself particularly consumer protection regimes became a political project that was central to the post–World War II state.

Hilton engages in a comparative historical analysis of consumer protection initiatives that emerged in the East and the West during the latter half of the twentieth century. His survey covers the unique constellations of protection activities that developed to maintain consumer confidence and economic vitality which included government policy citizen initiatives and consumer media. In the process Hilton illuminates a broader landscape of consumer protection that has transcended national boundaries to provide numerous consumer benefits; however this optimism is tempered by a corresponding shift in the conceptions of consumer protection as focused on consumer choice which disadvantages less affluent citizens.”

Returning to the here and now and the numerous questions that have been asked about the validity of the interpretative stances adopted by the AEMC in the conclusions expressed in its First Draft Report. Since the AEMC findings have been so heavily relied upon by the Productivity Commission to support findings that competition in the gas and retail markets in Victoria has been successful, and has therefore recommended removal of the safety net default option so effect total price deregulation (PC DR 5.4), these further facts are pertinent.

⁸⁴ Shah, D. V. et al (2007) *The Politics of Consumption/The Consumption of Politics* The Annals of the American Academy of Political and Social Science 2007; 611; 6 Introduction to Conference of the title name organized by the University of Wisconsin October 2006. Key themes citizen-consumers; competitive consumption; civic engagement; lifestyle politics; materialism; political branding; socially conscious consumption; taste cultures

⁸⁵ Hilton, M. 2003. *“Consumerism in twentieth-century Britain: The search for a historical movement.”* Cambridge: Cambridge University Press.

In its July 2007 response to the AEMC Issues Paper on Retail Competition, CUAC⁸⁶ had observed that the April 2007 Resolution Report had

“Highlighted the high number of marketing complaints in its case load, singling out as a trend the number of complaints it had received in relation to marketing to non-account holders, the elderly and people with limited English.

The most effective marketing strategy for retailers is without doubt door-knocking, demonstrating that there remains a significant degree of customer inertia in the marketplace –consumers are not actively seeking to change retailers, but will consider so doing when approached.

Marketing continues to be a significant source of problems in this market – EWOV’s latest Resolution Report in April 2007 highlighted the high number of marketing complaints in its case load, singling out as a trend the number of complaints it had received in relation to marketing to non-account holders, the elderly and people with limited English.

Concerns in relation to marketing have also been repeated in recent research by the Footscray Community Legal Centre and Financial and Consumer Rights Council (FCRC). The Footscray research found that of 39 respondents who had switched, 27 reported dissatisfaction with their decision, and many believed they had been misled by the sales representative of the retailer’s promise of cheaper bills.

FCRC’s research found that consumers were concerned by the way in which they were pressured by marketing agents:

The overall experience across the focus groups was that participants were not happy with the way they had been approached. They felt that the door to door sales people were very pushy and were difficult to deal with. The focus groups overall expressed that the constant telephone calls were intrusive and inconvenient.¹

There is clearly enough evidence of ongoing anti-competitive and misleading behaviour to demonstrate the need for robust consumer protection to provide some assurance that consumers enter into contracts with their explicit informed consent, understanding the tariff, terms and conditions attached to that product.

It also clearly demonstrates ongoing information asymmetries, a demand-side weakness in the market that undermines competition.

⁸⁶ CUAC Response of 10 July 2007 to AEMC Review of Effectiveness of Competition in Electricity and Gas retail markets Victoria Issues Paper June 2007, p4 and 5

Victorian consumer groups previously proposed that the Commission collect information about contractual terms and conditions, as we were concerned that there existed instances of anti-competitive behaviour, and the Review timelines provided no opportunity to collect that information ourselves. We would again recommend that the Commission undertake that research as part of this Review, as we believe that it would demonstrate the inconsistency of products in this market.”

The AEMC has chosen to see that retail competition has been effective because of “*increased market activity*” and interpretations of customer switching behaviour that may not hold up to scrutiny if more robust data could be obtained and in-depth analysis achieved to ascertain the issues that have led to non-participation by consumers or dissonance. There is a dearth of convincing robust evidence, if any at all that is supportive of such an opinion.

CALC⁸⁷ has already put forward that:

“Competition policy is not an end of itself but rather is one of several means to achieve market outcomes which satisfy consumer needs and are in the best interests of the community as a whole.”

CUAC had commented that⁸⁸

“Consumers’ lack of understanding of the market and a concomitant lack of bargaining power continue to undermine effective competition”⁸⁹

The fundamentals of behavioural economic, as eloquently discussed in numerous submissions, including those to the Productivity Commission⁹⁰

⁸⁷ AEMC Victorian Retail Competition Review Response to Issues Paper, Consumer Action Law Centre. 28 June 2007

⁸⁸ CUAC Response dated 10 July to AEMC Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria

⁹⁰ AEMC Retail Competition Review – CUAC Response to Issues Paper, 10 July 2007 p6
For example Dr. Caroll O’Donnell Sub001; Dr. Michelle Sharpe; Sub005; Dr Leslie Cannold Sub006; John Firbank013, 002; Hank Spier Sub019; Deborah Cope Sub106; PIRAC Economics; CHOCIE ACA joint SUB108

Victorian consumer groups previously proposed that the Commission collect information on contractual conditions. I disagree with the opinion that protection regulation for vulnerable consumers that distorts economic efficiency may not be warranted.

In some cases the social effects of market power go beyond those on economic distribution and efficiency (economics).

The data relied upon may not be as robust as one would hope. Predictions of switching behaviour based on that data and out of the context of robust behavioural economic theory and practice may not deliver all expectations.

In analyzing the consumer survey data relied upon, Gavin Dufty Manager Policy and Research at St Vincent de Paul and market performance measures says in his November submission to the current AEMC Retail Review:

“When this expectation failure rate (between 18% -24% of the total market) is considered in conjunction with those that have not actively participated in the market (40%), an overall market performance measure can be ascertained. Such a market performance measure indicates that over 50% (58-4%) of customers in the Victorian energy market believe is has either failed their expectations of there are not actively participating.”

“.....Such a market performance measure indicates that over 50% (58-64%) of customers in the Victorian energy market believe is has either failed their expectations of there are not actively participating.”

On behalf of St Vincent de Paul Society, Gavin Dufty’s November 2007 Submission to the AEMC Retail Review First Draft Report, has commented on the pitfalls of snapshot assessment of the market, and has urgent consideration of changing population trends.

Despite any interpretations made of the recent survey undertaken by Wallis Consulting that included 1000 Victorian consumers to test market awareness; the Retailer Survey that provided perceptions of retailers with scanty factual detail of market structure; recent turnover and market failure; and any other data relied upon

CRA International was forced to rely on mostly historical data and web searchers. Retailers were not forthcoming in disclosure in order to assist with a more robust assessment of actual data so the CRA Report posted on the AEMC website on 8 November had no choice but to rely on wide margin estimates.

The issues of corporate social responsibility which has raised many community concerns, do not seem to have been addressed in the AEMC’s assessment.

The Total Environment Centre (TEC) has suggested that⁹¹:

⁹¹ c/f Total Environment Centre online Environmental and Social Objectives for the NEM

“The National Electricity Market's capacity to meet fundamental economic social and environmental objectives is in question. This is because the NEM favours spiralling consumption and polluting fossil fuel electricity generation to the exclusion of energy savings and renewable energy.”

Gavin Duffy of St Vincent de Paul National Council has expressed concerns about a policy framework does not guarantee basic social and environmental protection⁹²

“It would be a fundamental failure if the policy framework does not guarantee basic social and environmental protection.”

There is cause for consternation indeed if there is validity concern expressed by Ric Brazzale, Director Business Council for Sustainable Energy (BCSE).⁹³⁹⁴

“energy market developments (may) occur in a manner that does not also support emission reductions”

In its May submission to the Victorian Department of Primary Industries, the BCSE through Director Ric Brazzale made a strong point about the dubious merit of restricting the issuing of VEET certifications to the residential sector and possibly small business thus missing.

“The huge opportunity of the broader commercial sector, which has similar potential for cost effective greenhouse abatement from energy efficiency improvements via a tradeable certificates scheme such as VEET.”

⁹² Ibid TEC as for 18

⁹³ c/f Total Environment Centre online “Australia to Dump Environment and Social Goals in Power http://www.tec.org.au/index.php?option=com_content&task=view&id=561&Itemid=316

⁹⁴ Business Council for Sustainable Energy Submission to Victorian Energy Efficiency Target Scheme, via Department of Primary Industries 18 May 2007, cover letter, p1

The Total Environment Centre (TEC) had suggested that:

“The states and territories are now in the process of handing their environmental and social laws and regulations to the new national bodies that have no mandate to consider the impact of the NEM's greenhouse emissions or the protection of vulnerable consumers”⁹⁵

In their Power for the People Declaration the TEC⁹⁶ has made a number of concrete suggestions to call on MPs to amend the Australian Energy Market Agreement, which include the following:

People Declaration calls on MPs to amend the Australian Energy Markets Agreement, the National Electricity Law and the National Gas Law by:

- * requiring regulators to consider the environment and sustainable development when making decisions*
- * requiring regulators to consider social impacts, with particular reference to preventing negative impacts for low income and disadvantaged consumers*
- * requiring the industry to implement cost effective demand management and energy efficiency to help consumers save energy wherever this is cheaper than investing in more infrastructure.*

As cited in the Select Senate Committee's Report (2000), Ch 5 Socio-Economic Impacts of Competition⁹⁷

“The ACF also made a number of concerns in relation to the restructuring of Victoria's energy sector:

Victoria's energy sector provides another example of how investors in the (now-privatized) distribution and retail sectors benefited from policies which, at the same time, deliberately perpetuated a trading position which contravenes the competitive neutrality principle.

⁹⁵ Total Environment Centre online Environmental and Social Objectives for the NEM available at <http://www.tec.org.au/index>

⁹⁶ Ibid TEC online Australia Dump Environmental and Social Goals in Power Shake Up

⁹⁷ Senate Select Committee (2000) *“Riding the Waves of Change”* A Report of the Senate Select Committee Ch 5 *The Socio-economic consequences of national competition policy*. found at http://www.aph.gov.au/Senate/Committee/ncp_cte/report/c05.doc

Restructuring and sale of Victoria's generating, distribution and retailing networks for electricity was characterized by the following:

A broad-scale write-off of historic debt, providing electricity with an uncompetitive edge over other competing forms of energy services (gas, solar, co-generation, demand management services, etc.)

Regions with high distribution costs (transmission costs) have been cross-subsidized (i. e. "equalised") by other regions via rural electricity subsidies. While energy subsidies may be appropriate in rural regions, the competitively neutral approach would be to subsidize generic energy expenditure, rather than providing electricity service providers with an unfair competitive edge. Hence specialist local power supply services, most of which involve reduced greenhouse emissions and lower unit distribution costs, are priced out of the market."

Dr. S. Dovers of the Australian National University is quoted as saying⁹⁸

" ..there is simply the bothersome nature of change.....Most significantly of all is the fact that seriously pursuing sustainability will involve addressing deep, structural inconsistencies between human and natural systems. The problem attribute of systemic causes is a supremely difficult one: the roots of unsustainability are embedded firmly in our systems of production and consumption and patterns of governance and settlement."

During the financial year 2006/2007, CUAC provided from grant funds a grant of \$4025 to the Tenants Union Victoria (TUV) for

"research into the impact of exempt networks on residential tenants for input to the ESC Review of licencing of small scale networks."

There appears to be a general perception amongst policy-makers and regulators that in seeking to secure competitive market contracts it may be permissible to omit to mention any front-end or back-end penalty to consumer detriment that switching choices may herald. This was one issue discussed at the recent Public Meeting auspices by the AEMC Retail Competition Review on 4 September 2007 chaired by John Tamblyn.

⁹⁸ Ibid Senate Select Committee Report 2000 Ch 5 web address as above under citation 22

I quote from the DPI Annual Report for 2006/2007⁹⁹

Better energy markets

Energy market reform is a shared responsibility among the Commonwealth, state and territory governments through the Council of Australian Governments (COAG). Through DPI, Victoria has led the development of new national arrangements for the electricity and gas markets. The principal objectives are to capture the benefits of competition for consumers and encourage efficient investment in Australia's energy infrastructure. In 2006–07, DPI supported the establishment and early operation of the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER), the national bodies responsible for regulating and making rules about the operation of national energy markets in Australia.

The Essential Services Commission Victoria (ESC) claims that¹⁰⁰

Services such as energy, water and transport are among the most important contributors to the social and economic wellbeing of all Victorians. The Commission protects the community's interests by delivering regulatory arrangements for the continuing oversight of Victoria's essential services sector.

⁹⁹ DPI Annual Report 2006/2007 Part 1 page 17 found at [http://www.dpi.vic.gov.au/dpi/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3070a6e7b500a364ca2573af001641a0/\\$FILE/06_07_Annual_Report_Part1.pdf](http://www.dpi.vic.gov.au/dpi/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3070a6e7b500a364ca2573af001641a0/$FILE/06_07_Annual_Report_Part1.pdf)

¹⁰⁰ Essential Services Commission website found at <http://www.esc.vic.gov.au/public/>

Finally I cite EWOV's publicly stated views about wrongful disconnection and ESC's role in determining when this should be undertaken by retailers¹⁰¹

Regulation about disconnection

In the section of the Issues Paper relating to the ESC's licensing role, the following question is asked:

...should the Commission be making decisions about when it is appropriate for retailers to disconnect supply to customers?

EWOV's view is that it is appropriate for the ESC, through its regulatory framework, to be making these decisions.

From EWOV's perspective, it is of great assistance to have practical regulatory guidance in relation to the disconnection of electricity and natural gas. This is provided through the ESC's Energy Retail Code and Operating Procedure: Compensation for Wrongful

Disconnection. These documents provide a level of certainty – for industry, consumers and EWOV.

I again refute any perception that the current consumer protection system is working reasonably well, or any suggestion that cursory tweaking may bring desirable outcomes.

Particularly in the arena of energy at any rate within Victoria, complaints handling, compliance enforcement commitment has been so diluted as to bring into question whether a public enquiry may be justified on several grounds. None of the responsible regulatory or complaints handling agencies have taken a responsible and accountable action in matters specifically brought to their attention.

Flawed policies that have occasioned unacceptable consumer detriments remain in place unaddressed.

One of these may be deferring final decisions about how specified consumer protections should operate, especially in the arena of essential services, with energy being one of these.

Though my focus as an example of policy gaps is often on energy, this does not mean that the same concerns cannot be extrapolated for other arenas.

¹⁰¹ EWOV (2006) Submission to Review of Essential Services Act 2001, p4
[http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/\\$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf)

Meanwhile, energy suppliers are seeking to eliminate all industry-specific protections and revert to reliance on generic. They are actively participating on the local forums (*see for example the current Victorian initiatives for reduction of unnecessary regulatory burden*).

Naturally self-interest requires that all specific protections for marketing, confidentiality, informed consent and the like are in the way and energy providers would love to see them all gone secure in knowing that compliance enforcement and access to remedies through current generic provisions is highly compromised, and for most Australians inaccessible.

Though energy suppliers appear not to recognize the range of contractual and trade measurement practices, issues of contract, proper definition of small customers and their rights and protections, including water temperature and maintenance issues appear to have been left unaddressed for far too long.

The existing provisions for embedded end-consumers, and especially those living in sub-standard rented accommodation with archaic communal hot water services that are not even providing water quality, including adequately heated water without meters that can measure energy consumption, provide good examples of inadequate consumer protection for those who the most vulnerable.

If it were not already bad enough that existing flawed guidelines have failed to allow for consumer protection or to embrace the fundamentals of contractual law provisions, trade measurement provisions, residential tenancy and body corporate provisions; the provisions of common law, water industry provisions and finally the rules of natural and social justice, newly creative and novel “demand response solutions” have been adopted by NEM Metrology provisions during the past two months that perpetuate and complicate matters by refusing to recognize that rules, regulations and even legislative provisions under one enactment cannot simply over-rule the provisions of other enactments that have already enshrined specified consumer protections. Yet that is precisely what is occurring.

What will be done specifically about this infringement of consumer rights, and how will these protections be swiftly restored? Besides these issues, maintenance issues, health risks associated with hot water services, liability and contractual issues are also discussed in this submission, though time constraints preclude thorough examination of each of the issues raised.

An appendix deals with pertinent definitions and contractual issues in table form as well as reference to current bulk hot water tariffs and the creative descriptions and interpretations used by energy retailers seeing themselves as supplying hot water services rather than energy. Energy retailers are licenced only for the latter. Even if contractors or affiliates not carrying their names are licenced to supply hot water services, these third parties would be acting upon instruction after discussion with body corporate entities in the case of apartment blocks where there are embedded customers, and there are complex contractual and fair trading considerations that may not have been taken into account. In a climate of policy change this may be an appropriate time for these issues to be fully addressed.

Perhaps the attention of the Retail Policy Working Group can be alerted to issues more pertinent to their working parameters. Nevertheless there may be some overlap.

Retrofitting of existing homes appears to have been included on the agenda, but there are considerations that will impact on residential apartments occupied by fixed low income tenants who cannot afford rent increases if landlords are not supported with capital grants and other incentives to attend to such matters.

As previously mentioned in Victoria there are some **2,100 gas bulk hot water systems** and some **200+ electric bulk hot water systems** that need urgent review, proper identification of contractual and maintenance liability, and requirement for carefully structured policies that take into account all legal liabilities and consumer right, states are also affected by similar arrangements.

I again refer to and endorse wholeheartedly the arguments presented to the Review of the ESC Act by the VCOSS¹⁰²

Primary emphasis on consumers

We do not agree with the suggestion that the primary emphasis on consumer interests in itself increases the risk of over-emphasising short term consumer benefits at the expense of long-term security.^{103 [1]} Clearly consumer interests are served by an appropriate balance of both considerations. The Commission's current objectives promote the pursuit and achievement of this balance by asserting as its primary objective the long term interests of consumers, and addressing in its facilitating objectives both a range of key elements of this objective (efficiency, incentives for investment, financial viability and so on), and some key imperatives to guide consideration of allocative efficiencies where appropriate (giving regard to relevant health, safety, environmental and social legislation, ensuring consumers benefit from competition, and so on).

On the other hand, the proposed new objective, with its primary emphasis on "efficient investment in, and efficient operation and use of, resources,"^{104 [2]} has a number of key shortcomings: it confuses the means with the end; it emphasises some elements of addressing the long term interests of consumers and omits others; and it considers but does not protect those interests. It also explicitly excludes matters of allocative efficiency that sometimes must be considered. Managing this delicate balance is complex but necessary, and VCOSS believes that the Commission's good performance reflects, among other things, the efficacy of its multifaceted objective in facilitating this task.

¹⁰² VCOSS Submission to Review of ESC Act, 10 July 2007 p2

¹⁰³ ESC (2006) "*Review of the Essential Services Commission Act 2001, Final Report, 2006*", p. 7 c/f

VCOSS Response to Review of ESC Act 10 July 2007, p2

¹⁰⁴ Ibid p 8 c/f VCOSS Response to review of ESC Act 10 July 2007, p 2

Conflicting or complementary objectives?

We do not agree with the characterisation of the facilitating objectives and price determination considerations as “conflicting.”³ Rather they are complementary and appropriately recognise that the regulation of essential services is complex and requires addressing a number of imperatives that all impact each other. As noted above, the Commission’s good performance is, in our view, largely attributable to its successfully balancing the demands of these complementary objectives, thus securing the long-term viability of regulated industries without neglecting consumers’ needs for equitable affordable access to essential services.

I support all of the recommendations made by the Western Australian Council of Social Services¹⁰⁵ in its 27page submission to the Productivity Commission’s Issues Paper in May 2007, republished as SUB243DR

RECCOMENDATION 1 WACOSS Response to PC Issues Paper

Recognition by the Commission that Energy and water services are essential and that the risks of market failure are so detrimental to consumers that industry-specific consumer regulation is required.

RECOMMENDATION 2 WACOSS Response to PC Issues Paper

Recognition by the Commission that people experiencing financial hardship and other types of vulnerability are disproportionately, negatively affected by the failure of essential service markets, when compared to other consumers.

RECOMENDATION 3 WACOSS Response to PC Issues Paper

Information provision to consumers, whilst important in informing choices, must be provided within context of comprehensive industry-specific consumer protection.

¹⁰⁵ Western Australian Council of Social Service (2007) to the Productivity Commissions Review of Australia’s Consumer Policy Framework May (republished as SUB243DR

RECOMENDATION 4 WACOSS Response to PC Issues Paper

That it be acknowledged that people facing different types of disadvantage and vulnerability face significant barriers to the effective use of information to inform choices.

Given this fact, it should also be acknowledged that reliance on information provision as a primary consumer protection mechanism is inappropriate in essential service markets.

RECOMENDATION 5

That additional regulatory protection be available in essential service markets undergoing a process of implementing, or experiencing increased levels of competition.

This regulatory protection should exist in addition to, and be complementary to already existing industry-specific and generalist consumer protections.

RECOMMENDATION 6

That it be recognised that increased levels of competition may not result in increased, effective levels of consumer participation and protection and that competition may not be an appropriate mechanism to achieve such goals.

RECOMMENDATION 6

That it be recognised that increased levels of competition may not result in increased, effective levels of consumer participation and protection and that competition may not be an appropriate mechanism to achieve such goals.

RECOMMENDATION 7

Industry-specific consumer protection regulation is required for smaller-users of essential services and should be targeted at these consumers.

RECOMMENDATION 8

Within industry-specific consumer protection regulation, there should be specific and mandatory protections for people facing financial hardship and other types of social vulnerability.

RECOMMENDATION 9

Acknowledgement by the Commission that industry-specific consumer protections targeted at people facing hardship create significant benefit to the general community and prevent detriment that would otherwise exist.

RECOMMENDATION 19

That the Commission acknowledge that industry-specific consumer protection has the capacity to compliment more generalist consumer protection and that more generalist forms of consumer protection may not be appropriate in addressing the types of problems most commonly experienced by essential service consumers.

RECOMMENDATION 20

WACOSS supports the role of independent advocacy both generalist and industry-specific consumer protection. Independent advocacy may possess the capacity to approach matters systemically in a way that other mechanisms may not and are protected from industry and regulatory capture.

RECOMMENDATION 21

WACOSS recommends that industries be given price signals by independent dispute resolution schemes. Such schemes encourage processes of engagement for involved parties and provide industry with impetus to improve in cases where market contestability is low.

RECOMMENDATION 22

WACOSS recommends that non-regulatory approaches such as customer charters and other types of market information provision not take the place of appropriate, enforceable consumer protection regulation.

RECOMMENDATION 23

That the Commission acknowledge the limited utility of non-regulatory types of consumer protection in regards to essential service markets – especially in relation to people experiencing financial and other types of vulnerability.

Additionally, the Productivity Commission stated itself in its review of National Competition Policy in 2005 that,

“Reliable, affordable and sustainable energy services are critical to Australia’s economic and social wellbeing ... they are essential for supporting basic quality of life.”⁸

The Serious Impact of Disconnection or Restriction of Essential Services

Within the context of essentiality, the effects of disconnection or the restriction of access to essential services exist upon a spectrum of severity. These effects are typically proportionate to the amount of time spent disconnected, and shown by the range of behaviours people display under during a period of disconnection⁹. In all cases, however, consumers experiencing disconnection absorb significant financial and social costs as a result of their inability to access essential services.

Financial costs to consumers with restricted or no access to essential services may include buying take-out food because of an inability to refrigerate, spending additional funds on alternative accommodation (including transport to alternative accommodation) and the ‘flow-on’ effects on household finances of entering into unsuitable repayment arrangements with the utility. Psycho-social effects may include absences from work or education (10% of all respondents in one study)¹⁰ and significant feelings of isolation and shame.

Meanwhile, what is relevant, and perhaps a little beyond what has been considered in the current consumer policy framework recommendations so far is how the effectiveness and efficiency of government services in Australia may impact adversely on consumer protection.

Compromised consumer confidence is compromised consumer protection, so the argument, though seemingly circular is not altogether out of place. Various stakeholders have put enormous efforts into addressing concerns about the gaps in recommendations by the Productivity Commission's Draft recommendations. Many have openly expressed concerns that although this extremely important policy review welcomed long overdue and welcomed, the recommendations so far do not go far enough. I join others in expressing such concerns.

An over-focus on "*unburdening of unnecessary regulation*" in the interests of "*competitive efficiency*" without identifying carefully what is in place for good reasons, and what might be in place for more obscure and challengeable reasons, is perhaps not balancing the equation as it should be balanced.

The point here is that there are some regulations that just must go in consumer protection¹⁰⁶, and not simply because this will make it easier on goods and service providers or enhance "*competition goals*" narrowly defined, as has been criticized by the Senate Select Committee of 2000 in revisiting National Competition policies. Again, I reiterate that the devil is in the detail, and the detail is not only unclear and unspecified in the specifics of the Productivity Commission's Draft Report recommendations, but some of the general recommendations to date may be seen by many to be actually potentially diluting instead of enhancing consumer protection.

This cannot be the Commission's intent so no offence intended here. So once again with reservation and caution, I support the stated goals of the Commission to enhance consumer protection, and along with other stakeholders, wait with bated breath for final recommendations. There may be some areas that would best serve public interest to remain open and subject to further enquiry and review before finalized.

¹⁰⁶ At the risk of over-kill, for example the bizarre bulk hot water charging provisions unjustly imposed on end consumers of bulk energy discussed in so many ways in so many formal and informal submissions to the Productivity Commission and other arenas that have actively stripped consumers of their enshrined rights and are improperly and unjustly imposing contractual obligation on the wrong parties instead of Owners Corporation, to say nothing of violating the spirit and intent of national trade measurement provisions and policies and which were adopted for the express purpose of making collusive arrangements between policy-makers, regulators and energy providers, licenced or unlicenced to mislead the public, and unjustly improperly hold them contractually liable in the full knowledge that the methodologies adopted would become both invalid and illegal when utility exemptions were lifted. This was all done under the unacceptable pretext of "*preventing price shock*" to end-users of bulk-energy where the proper contractual obligation lay elsewhere.

I quote from Kildonian Child and Family Services (Kildonian UnitingCare) from their May 2007 Submission to the PC's Issues Paper¹⁰⁷

Consumer protections are needed to reduce consumer detriment. Consumer Affairs Victoria (CAV) Consumer Detriment in Victoria: a survey of its nature, costs and implications estimates that in 2005- 2006 consumer detriment cost Victoria \$3.15 billion and is slightly higher in impact than figures from the United Kingdom. CAV includes physical harm, monetary loss, time loss and loss of satisfaction in describing consumer detriment. Consumer detriment is a loss suffered by consumers as a result of an adverse market transaction and includes the consumers loss in seeking redress. Consumer detriment does not only affect consumers the industry's reputation may also suffer through adverse word of mouth.

In a competitive market both consumers and business depend on each other through the exchange of supply and demand. Market failure occurs both through business practices and through consumers difficulties in exercising choice. In order to achieve a balance government needs to intervene to level the playing field to avoid market failure. Market failure results in higher prices and reduced choice. Stronger consumer protections are required to address market failure and provide redress to consumers.

Recommendations:

Review existing consumer and small business protections and strengthen the current system by addressing the gaps as proposed in Appendix B.

APPENDIX B

Gaps in Existing Consumer Protection addressed

Current Consumer protections at commonwealth and state level work well¹⁰⁸. A report by the OECD³⁴ found that Australia compared favourably to European countries. There are some gaps in the current system may be addressed by the following:

¹⁰⁷ Kildonian UnitingCare (2007) Submission to Productivity Commission's issues paper, Consumer Policy Framework, p4. See appendices A and B

¹⁰⁸ There is divided opinion of this perception and [perhaps it does depend heavily of client groups with financial hardship cases receiving possibly a slightly better outcome where the issues relate to such hardship and effective hardship policies. Complex systemic cases are poorly resources and addressed in my opinion and outcomes far from even barely satisfactory. No policy tools can work without effective enforcement commitment and political will, which in my view is the largest stumbling block

- *Strengthening of Trade Practices Act to reverse onus of proof on product safety and products affecting health. The legislation will require the trader to prove that their product is safe and within acceptable standards. This process could reduce the cost of redress and enforcement and raise consumer confidence in the market.*
- *Easy to follow comparators available at point of sale and websites, with compulsory risk disclosure within all markets that sell complex goods and services. Currently comparators are used in the energy and financial markets. In addition, star ratings are used for appliances to determine energy efficiency comparisons. To our knowledge compulsory risk disclosure is not used with comparators. Risk disclosure could greatly strengthen service and product comparisons.*
- *Introduction of regular nation wide reviews of state fair trading acts and benchmarking of consumer protections. Benchmarking would include Australia wide adoption of unfair terms in consumer contracts as per the Victorian Fair Trading Act (1999) and uniform cooling off periods in all contracts. The proposed fair trading act is to be administered by state or territory jurisdictions.¹⁰⁹*
- *State and Federal jurisdictions to work under a centralised complaints and referral system similar to the proposed system in the United Kingdom. Centralised complaints could enhance consumer access and reduce inefficiencies in existing systems. The centralised system would handle some complaints, refer other complaints to appropriate bodies and gather information on systemic issues to inform government of policy, and regulatory and legislative gaps.*
- *The Kildonan model utilised to inform financial markets and essential services*
- *Fund consumer advocacy for prevention of consumer detriment. Consumer advocates can inform consumers about their rights, assists consumers to lodge complaints, access alternative dispute resolution schemes, and conduct research and policy development from the consumer's perspective. Consumer advocacy is under-funded in Australia.*
- *Inadequate funding reduces the effectiveness of advocacy services through reduced access due to waiting lists. Research and policy development needs to be funded to address systemic issues. Increased funding to financial counsellors, community consumer workers and specialist law centres ie Consumer Action Law Centre and Micah Law Centre.*

¹⁰⁹ I vigorously support the proposal to retain the Victorian Unfair Contracts legislation and apply to all States and Territories

SELECTED ISSUES COMPROMISED INDUSTRY SPECIFIC COMPLAINTS REDRESS

As mentioned in Submission (Chapters 2 and 3 as discrete components of inter-related submissions to the Productivity Commission's Draft Report, it is my considered view that the fundamental principles National Competition Policy have become blurred, inaccessible and distorted.

In particular I referred in considerable detail in Chapter 2 with further references in Chapter 3 to the findings of the Senate Select Committee's (SSC)¹¹⁰ important findings in 2000, which advisers, politicians, policy-makers, and regulators would do well to heed and re-consider in the light of current regulatory reform programs:

There are a number of issues that may benefit from examination regarding accountability, beyond the arguments presented by Peter Mair in his January 2008 submission to the Productivity Commission's Draft Report.¹¹¹

Accountability Issues

I have gone further in this component of the submission to suggest that the powers of the State Ombudsman need to be extended through legislation and appropriately resourced, especially where policy-makers regulators are either unable or unwilling to accept direct responsibility for industry-specific complaints schemes set up under their own jurisdictions and where things go wrong.

I cite directly from the same speech by Peter Shergold in August 2007¹¹² as was chosen by Chris Field in his concluding remarks in his own presentation to the Western Australian Chapter of Administrative Law the following month¹¹³

"The existence of the Ombudsman acts as a powerful reminder to public servants that they have an obligation to ensure that their actions are not infected with administrative error beyond legal authority lack proper appropriation deny natural justice breach parliamentary convention or undermine public service values. It is a heavy responsibility to bear. Beyond that the informed evaluation of the Ombudsman helps to drive higher administrative performance.

¹¹⁰ SCC 2000 "*Riding the Waves of Change*" A Report of the Senate Select Committee Ch 5 the Socio-economic consequences of national competition policy. 2000 found at http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc

¹¹¹ Submission by Peter Mair Sub112DR to Productivity Commission's Draft Report January 2008
¹¹² Dr. Peter Shergold, Secretary, Department of Primary Minister and Cabinet till February 2008, "*At Least Every Three Decades – Acknowledging the Beneficial Role of the Commonwealth Ombudsman*" 30th Anniversary of the Commonwealth Ombudsman, c/f Field, C (2007)

¹¹³ See also concluding remarks Field, Chris (2007). Presentation to Western Australian Chapter of Administrative Law September, referring to Peter Shergold's perception of statutory ombudsmen

Says Peter Shergold in his published speech of August 2007:

His activities help to improve the quality of government service delivery and to ensure fair and impartial treatment of recipients – in an environment in which the ever present danger of internal red tape, poor record keeping, bureaucratic and inadequate governance can find expression in administrative drift. The pain in the bum is a small price to pay for identifying and remedying defective administration. It might even increase the trust which citizens need to have in their governments, parliaments and public services”.

The big O’s have had the law on their side. When the Ombudsman Act was passed in 1976 it was supported by other legislative enactments designed to make public administration more demanding – the Administrative Appeals Tribunal Act and the Administrative Decisions (Judicial Review) Act.”

And later on page 3:

“The Ombudsman in particular provides assurance to citizens that the workings of officialdom are subject to expert scrutiny particularly of the myriad of small decisions that can have such a large impact on their lives. The Ombudsman’s office is a vital part of the network of integrity that ensures public accountability for the way in which a public service uses funds in the public interest

Then on p4 of the same speech:

The Westminster system as the APS values make explicit requirements for public servants to be responsive to elected government

Yet there are significant constraints on the avowed obeisance and fealty that journalists imagine epitomizes the contemporary relationship between secretaries and the ministers they serve. Rather I talk here not of the robust policy advice that is provided quite appropriately behind closed doors. Rather I talk of the necessity to ensure that neither executive power nor administrative authority are overstepped.

I cite the same important paragraph from Peter Shergold’s published speech as was chosen by Chris Field in his concluding remarks about the role and nature of ombudsmen

Peter Shergold is modest and frank. He was always committed to the highest standards of accountability. He admits to making errors of judgment during his public service career with the reflective wisdom of hindsight.

But he speaks also of passionate commitment

“to ensuring that government services are delivered on time on budget and to government expectations.”

This is what the Australian community expects.

There appears to be insufficient accountability. Standards seem to have slipped. The game called *“accountability shuffle”* is played by experienced players.

Regulators look to shuffle responsibility to industry-specific complaints schemes run funded and managed by industry participants, apparently see fit to overlook reports of gross distortion of market power when such a scheme decides to take *“independent legal advice”* to support the position of scheme members or undertakes *“legal posturing,”* and does not see a role for timely intervention when substantiated concerns are raised.

I refer to the section of David Adams’ essay that relates to failure of governance since governance at government level (as opposed to corporate level amongst suppliers of goods and services) is central to improving the quality of government service. I quote directly below from Adams yet again:

For most public policy issues it is possible to identify one or more levels of government which have specific responsibilities and within governments one or more departments. This enables goals to be set resources allocated and ministers held accountable. The more levels of government and the more departments that are involved the greater the risk of policy inertia. So which level(s) of government and which departments are accountable for tackling poverty? The paradoxical answer seems to be almost none and probably none.

The fact that in 2001 there are no readily agreed answers to these basic questions highlights the malaise of the current situation.

The issue of governance and the vicarious liability of statutory authorities has not been properly addressed or established. If complaints schemes are set up and then abandoned by regulators without proper oversight, the public finish up dealing with self-run complaints schemes with a vested interest in protecting their own interests.

Government Departments have to take responsibility for accountability for or review of the actions of industry-specific complaints schemes set up under their jurisdictions. Perceived poor structuring of Memoranda of Understanding regarding interactions between statutory authorities and such schemes will not relieve such responsibility.

Notwithstanding that internal mechanisms may be available for review of complaints handling, or merits review of any complaint undertaken, external mechanisms need to be transparently in place and accessible so that responsible statutory authorities can address in a timely and responsible way anything problems that may arise with complaints handling, including failure altogether to investigate a complaint regarding conduct or other matters under the jurisdiction of such schemes.

Further, if evidence exists of violation of existing provisions by an energy provider, for example unjust and inappropriate coercive threat of disconnection of essential services, and such evidence has been provided directly to the responsible regulator, it is not appropriate for that regulator to suggest that it will only become involved if systemic breaches are demonstrated. Breaches are breaches, systemic or otherwise, and compliance enforcement needs to be taken seriously at all times when those breaches are demonstrable.

If compliance enforcement is not properly accessible, perhaps the Compliance Sections of regulators have no role to play in upholding standards or in consumer protection. That cannot be what best practice policy principles intend.

Beyond that it is not mandatory to conciliate and nor should complaints schemes or regulators endeavour to force conciliation onto complainants.

What can be expected of accountabilities, clarification of jurisdictional boundaries and the like and when?

Because of information asymmetry and lack of understanding about their rights, in many cases without readily being in a position to identify those rights, they are easy targets of flawed policies and threatening, coercive and misleading conduct in endeavours to form explicit contracts with suppliers of bulk energy. Some apply for exemption of licences and are therefore out of the control of the regulators, whilst potential complainants cannot even approach the scheme.

Consumer detriments have reached a point where the community has begun to seriously despair that anything will be done to achieve proper resourcing and commitment to consumer protection.

As mentioned in Part 3 of this submission (subdr242part3), but continued in this submission in more detail, it may be contended that are levels of conduct, often driven by existing policy that fall into a grey area where social justice issues have been compromised and re-balancing has become overdue. If it were not the case, the current Review of Consumer Policy would be redundant.

The concept that outcomes that are achievable in any *“fair and reasonable manner.”*

The opportunity exists in the current Productivity Commission's Review of Australia's Consumer Policy Framework to address the shortfalls. There are numerous conflicts of interest. For example it is not in the interests of regulators and project funders to admit to flaws in the consumer protection system of any description. Those who are funded are reluctant to find fault with regulators.

Equally those "*under the thumb*" of regulators through formal provisions, either legislative or through other instruments such as Memoranda of Understanding and an a defensive position. Positions become entrenched during inter-body negotiations, and inadequately drafted Memoranda of Understanding about further options if parties disagree make it impossible for either the parties themselves or the public to transparently and appropriately consider further options when stalemates arise.

Proposals have been put to the Australian Government to remove the cost disincentive to states and territories of taking action under the Australian law, a view presented by the CAV in their 2006/2007 Annual Report.

Until or unless a truly independent consumer body that is removed from regulator control and industry-funded run and managed complaints handlers without power or clout, under "*regulator thumb*" and politically disabled from making a meaningful contribution to consumer protection beyond negotiating credit terms with suppliers in hardship cases or reporting incidents of unacceptable market conduct to the regulator, with binding powers so diluted (available only with the consent of the scheme member, rarely proffered and unilaterally binding only).

Regarding misleading and deceptive conduct that form part of the range of complaints in the case study cited it is of some comfort to know from the 2006/2007 Consumer Affairs Victoria Annual Report that company employees can be held personally liable for their misleading and deceptive conduct.

This has been expressed in that reported as follows:¹¹⁴

The Director was granted leave to appear in a High Court case that was successful in clearly establishing that company employees can be held personally liable for their misleading and deceptive conduct, in trade or commerce, within the scope of their normal duties for a company. A greater emphasis was placed on obtaining undertakings from non compliant traders about their future conduct.

Such undertakings are enforceable by law and are useful to achieve speedy and effective marketplace outcomes.

¹¹⁴ Consumer Affairs Victoria 2006/2007 Annual Report, p8
Found at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/\\$file/cav_annualreport_2007_contents.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/$file/cav_annualreport_2007_contents.pdf)

I repeat that at both the Melbourne Public Meeting on 4 September and the parallel meeting in Bendigo the following day, John Tamblyn mentioned that full retail competition would not necessarily mean lower prices but could mean that:

*“competition is sufficient to keep the marketplace in balance.”*¹¹⁵

At the Bendigo meeting on 5 September Mr. Tamblyn said:

*“competition is sufficient to keep the marketplace in balance, even if every customer is not necessarily well informed.”*¹¹⁶

More recently I have had an opportunity to examine briefly the inter-relationship between agencies and between agencies and industry-specific complaints schemes that are set up by policy-makers and regulators ostensibly to provide mechanisms through which consumer complaints can be addressed.

Missing is a proper process for governance and accountability and inter-agency confusion or lack of political will to address issues of concern, take compliance enforcement seriously or develop communication patterns, including through instruments such as Memoranda of Understanding.

Market conduct will never be corrected with good theory policies in place that are not upheld by proper and responsible compliance enforcement.

Lightening the regulatory load in a responsible way is one thing, but diluting consumer protection is another. Therefore due care must always be taken to ensure that consumer protection is not sacrificed in the interests of *“competition efficiency”* or that the fundamental principles of the National Competition Policy are forgotten. Sadly, too often the corporate and government social responsibility goals of national competition policy are readily misunderstood or ignored.

In that backdrop I now turn to more specific issues regarding government policy and who this may be impacting adversely on access to justice for consumers, including through complaints mechanisms that are either inadvertently or deliberately structured as bodies ostensibly inaccessible under administrative law, sometimes out of the reach of State Ombudsman with governance mechanisms that are mostly internal, and confusion in the minds of both policy makers, regulators and the general public as to governance and accountability parameters when things go wrong.

¹¹⁵ CUAC Quarterly Newsletter AEMC review of effectiveness of FRC,” p. 4.

¹¹⁶ CUAC September Quarterly “AEMC Review of Effectiveness of FRC

One example is the case study cited where “*legal posturing*” and “*legal stances*” were taken by a complaints scheme when serious issues of misconduct were raised that were seen to be driven by both directly and indirectly by statutory policies that failed to consider the impacts of such policies in making inaccessible existing enshrined rights and entitlements of consumers in the written and unwritten law.¹¹⁷

The football game of accountability played between various agencies with Memoranda of Understanding that have, some perhaps being engrossed leaving either inadvertent or deliberate loopholes defining accountability structures and options when the parties are unable to agree.

One such example is the MOU between the Essential Services Commission Victoria and Energy and Water Ombudsman Victoria. I will discuss and outline the concerns about this shortly and how it has led to frustrated consumer access to justice and to poor government and non-government accountability where consumer interests are concerned.

If a body is set up under government-direction and through specific legislative instruments, in the case of EWOV, the *Essential Services Commission Act 2001*, the *Gas Industry Act 2001* (s36) and the *Electricity Industry Act 2000*, the latter two making specific reference to performance parameters, public perceptions of bias and the like, then there must be some projected accountability resting with the prescribed agencies who set up these bodies, even though they have separate legal identities.

I invite direct inspection online of ESC 2006-2007 Compliance Report for Victorian Energy Retail Business February 2007 for an update on what has been happening, assuming that all reportable incidents both material and systemic are on record and reported.¹¹⁸

I also refer again to the EAG (2004) Report and evidentiary material presented to the Productivity Commission of failure to report or act on complaint(s) by EWOV over a 14-month period and the accountability football game that has ensued as a result of not clearly placing such schemes under administrative law and more objectively accountable to a statutory authority such as State of Commonwealth Ombudsmen, removed from regulator and funder control.

I also invite direct inspection online of the submissions to the ESC invitation to stakeholders to participate in the current ESC Review of Energy Regulatory Instruments.¹¹⁹

¹¹⁷ Further details are provided shortly in a particular case study example
¹¹⁸ ESC 2006-2007 Compliance Report for Victorian Energy Retail Business February 2007 found at <http://www.esc.vic.gov.au/NR/rdonlyres/949F62FF-B891-4543-939A-00435469E079/0/EnergyRetailBusinessesComplianceReport200606.pdf> and <http://www.esc.vic.gov.au/public/Energy/Consultations/Energy%20regulatory%20instruments%20review/Submissions.htm?docName=Review%20of%20energy%20regulatory%20instruments>
¹¹⁹ ESC Review of Regulatory Instruments found at <http://www.esc.vic.gov.au/public/Energy/Consultations/Energy%20regulatory%20instruments%20review/Submissions.htm?docName=Review%20of%20energy%20regulatory%20instruments>

Needless to say, all energy suppliers and their associations would like to see all industry-specific consumer protections gone.

In my view, the protections in place appear to be focused on clear-cut hardship and hardship policies, and on cases where bills are overdue but consumers are finding it hard to meet obligations. Wrongful disconnection processes are clearly defined for such cases, and there is a clear need for energy-specific hardship policies that are effective

There appears to be nothing to protect consumers against unwarranted imposition of contractual status such as in the bulk hot water provisions. In fact, it seems that the policies in place represent severe and seemingly intractable consumer detriment, as illustrated by this plea for State Ombudsman direct input and recommendation, not only with the secondary issues of complaints handling under administrative law but on the wider issues of consumer protection illustrated by this tip of the iceberg case impacting on some 26,000 Victorian consumers and many in other States.

I support the findings and recommendations of the joint consumer response dated 3 April 2008¹²⁰ to that current Review by Consumer Utilities Advocacy Centre and Consumer Action Law Centre, both funded by the CAV. That submission included the following additional recommendations to the Review

1. This process should not consider the removal of any small end user protections except in instances of duplication or where the protection has been superseded.

We do not believe this process should consider the substance of regulation pertaining to small end-user protections.

The Commission should therefore reject industry's inevitable calls for further deregulation. While there may be benefit in streamlining the structure of regulatory instruments, we see no case to reduce the level and substance of protections for Victorian households, and neither did the Productivity Commission or the AEMC.

¹²⁰ Joint Submission, Consumer Utilities Advocacy Centre (CUAC) and Consumer Action Law Centre (CALV) (2008) Response to ESC Review of Regulatory Instruments found at <http://www.esc.vic.gov.au/NR/rdonlyres/D9F18B40-BEAC-4113-AD2F-5FEC62157B85/0/CUACCALCandSVdP.pdf>

2. The review must facilitate frequent timely and close consultation with consumers.

We have not had the opportunity to examine in detail each of the eight codes and 21 related guidelines to assess the relevance of individual consumer protections or in which regulatory instrument that protection best sits. At the last meeting of the Commission's customer consultative committee members were advised that the Commission did not expect a detailed response on each of the instruments under review.

As such the comments on specific instruments outlined below should not be construed to signify that consumers are not interested in all other areas. We expect to actively participate in the consultation processes of the review and as the Commission provides more detail on its thinking

3. The substance of consumer protections relating to marketing must not be changed.

The current Code of Conduct for Marketing Retail Energy in Victoria was first developed in May 2002 with the introduction of full retail contestability into the Victorian electricity market. It was reviewed in 2004 and amended to cover both electricity and gas. There has been some criticism that the Marketing Code duplicates consumer protection provisions in the Fair Trading Act 1999 (Vic) (FTA). However, rather than duplicating the FTA, it reinforces and extends provisions of generalist consumer protection legislation.

Generalist consumer protections do not provide regulation with respect to:

- Training, product and regulation knowledge of marketing representatives;*
- The keeping of 'no contact' lists; and*
- The information required to be given by a retailer to ensure a customer's explicit, informed consent. 1*

The recent AEMC review of the effectiveness of competition identified a series of problems relating to marketing misconduct, following numerous research collected by consumer organisations that clearly demonstrated the need for robust consumer protection and regulatory oversight. Customer complaints about marketing have remained at high levels since the introduction of full retail competition.

As such, we see no case for any deregulation of the marketing provisions contained in the Marketing Code, and would strongly oppose any move to do so, given the wealth of evidence demonstrating the need for such consumer protections.

The research collected by consumer organisations resulted in a recommendation by the AEMC that there needs to be rigorous monitoring of compliance with existing regulation. The Commission remains the regulator best placed to monitor compliance with the Marketing Code of Conduct as it has the data, the experience and the systems in place.

4. Consumer protections relating to credit management should remain in place, recognizing the need to prevent consumers being unreasonably denied access to energy, and the substandard credit reporting system.

An integral part of the consumer protection framework is those regulations pertaining to access, to ensure consumers retain connection to energy. We are aware of industry criticisms that the Retail Code restriction enabling a retailer to only take into account utilities-related debt in a credit report incurs additional costs to gain that information.

However we strongly oppose any attempt to enable a retailer to deny access to energy on the basis of a general poor credit rating, which could be incurred due to an unpaid debt relating to overdue videos, or late payment of a cable television account. As the Commission knows, the Government's Inquiry into the financial hardship of energy consumers clearly demonstrated that consumers – well aware that energy is essential – are much more likely to renege on other financial commitments in order to keep paying their energy bills. A poor credit rating is therefore not necessarily indicative of a consumer's payment behaviour in relation to essential services.

The Commission should also be aware of systemic problems within the credit reporting framework that raise real questions – these include:

- quality and accuracy of information provided on credit reports;*
- capacity and willingness of the regulator to enforce compliance with regulation;*
- ineffective complaints handling and external dispute resolution schemes; and*
- misuse of information in credit reports.*

Indeed, the Australian Law Reform Commission's Review of Australian Privacy Law now underway explicitly addresses some of these issues.

5. Regulation pertaining to information disclosure should be strengthened.

The Government has informally signalled its intention to deregulate energy retail prices. While that is not a position we endorse, if prices are deregulated the regulator must ensure that there is sufficient information in the market for consumers to be well enough informed to feel confident to participate and thereby promote competition.

Consumers must

- have the capacity to compare energy products easily • are able to access information in a timely manner*
- are alerted to key terms and conditions (e.g. early termination fees, payment arrangements etc).*

One key weakness in the current framework is that while a customer can request an offer in writing without obligation, there is no similar obligation to provide that within a certain timeframe. The practical effect is that retailers are not providing that information to consumers within a timeframe that provides the consumer with the capacity to use it.

We recommend that the regulation pertaining to that obligation include a timeframe of no more than 3 business days for compliance.

6. The concept of explicit informed consent must be clearly defined in the Retail Code.

While general contract law allows for consent to be implied from particular circumstances, in the context of essential services for which contractual relations have not been historically required, informed consent is integral to the operation of a fair and effective market.

In our view, informed consent consists of five principle components:

- information disclosure;*
- capacity of the consumer to understand the information;*
- genuine understanding by the consumer;*
- complete voluntariness of the transaction; and*
- that the decision making to enter the arrangement/contract is made by the consumer.*

Explicit consent ensures that the consent is verifiable and auditable (in writing signed by the customer or recorded by electronic communication).

Energy-specific marketing regulation informs how the concept of explicit informed consent is implemented. Clause 6.3 of the Victorian Marketing Code of Conduct provides the types of information that must be provided to consumers before entering into a contract. While Victorian fair trading legislation provides - for telephone marketing agreements (and not for door-to-door sales) - that the consumer must be informed of “all matters relevant to the consent of the purchaser”, energy-specific regulation clearly identifies what those matters are.

By contrast the several submissions by energy providers who would like to see all industry-specific protections codes, guidelines and provisions gone altogether, or considerably diluted.

Whilst streamlining and avoidance of duplication may be desirable, I vigorously oppose removal of current Victorian energy protections whilst at the same time making another plea for compliance enforcement commitment and accountability for the operation of the energy-specific complaints scheme.

My particular experience of energy provision and reform has been enhanced by negative experiences of policy and regulatory impacts seen to have driven unacceptable market conduct and thus to have contributed to compromised productivity goals overall, assuming for an instant that everyone can at least theoretically agree that competition and productivity goals are not all about efficiency, but also include social policy considerations and obligations as part of the original intent of National Competition Policy (NCP) goals. That was recognized some eight years ago when the Senate Select Committee on Competition.

These perceptions seem to have become regularly distorted by government advisers, policy-makers, rule-makers, regulators and other stakeholders with a vested interest. There will always be interest groups, special interest groups, research groups,

Though I have in three chapters including an Executive Summary (subdr242part1)) some components of the Productivity Commission’s Draft Report, various issues consumer focused as a crucial components of the nation’s overall productivity goals, I digress here to provide a few broader perspectives that extend a bit beyond the specific recommendations made for a new national generic law.

This is firstly because I believe that interpretations of competition and economic policies may have lost sight of the original fundamental goals of the National Competition Policy. This is discussed in some detail in Part 2 along with further comment on the Overarching Goals of the Commission’s recommendations for a new generic consumer law.

Beyond that I believe that attention to formulation of a consumer policy cannot be made without due regard also to gaps in governance and accountability for the policy-makers and agencies that are responsible in the first place for regulations that themselves have the potential to seriously compromise consumer protection, and broader productivity goals.

As discussed at some length, with specific examples to support privileged evidentiary material already provided to the Commission, I believe that regulatory reform also has to urgently attend to the gaps in governance and accountability issues that are leading not simply to possible “*unnecessary regulatory burdens*” but also to direct detriments to consumer protection through the adoption of regulations that fall so far short of best practice and consumer protection goals as to require urgent attention. This means harmful and inappropriate regulations that have been retained for an unacceptable length of time, such as the bulk hot water charging arrangements.

If these issues cannot be addressed through the current Consumer Policy Enquiry then perhaps the Productivity Commission will consider the issues in the context of their support for the Steering Committee for the Review of Government Services Provision.¹²¹

There is insufficient to ensure that best practice benchmarks as directed in the legislation¹²² and as in any case are highly desirable practices. One example is the Energy and Water Ombudsman Victoria (EWOV). I discuss first in some detail the Constitution of this body as contained in publicly available documents.

The point of this is not merely to bring into public scrutiny the operations of this particular industry-specific scheme, but illustrate through doing so some of the pitfalls of reliance on the present structure of such schemes and the access to justice issues that may arise through poorly structured and reliable governance structures, internal and external accountability, performance parameters.

Beyond that there are issues of poorly clarified policy matters that fall jointly to policy makers and service delivery agencies who are the nominated regulators.

There may be a strong case for strengthening the role of the State Ombudsman to specifically include jurisdiction over complaints bodies set up by policy makers and regulators under enactments, more so if those bodies, conferred with separate legal identity are serving the public interest, fielding complaints from the public and making judgments about regulatory instruments, often without proper consultation with the responsible regulators, or without timely consultation as required.

¹²¹ I am also aware of the Productivity Commission’s support of the Australian Government Competitive Neutrality Complaints Office and believe that some of the issues that I can provide may be appropriate for that arena. One of these issues is specific to energy reform generally, impacts of vertical and horizontal barriers to competitive neutrality and direct refutation of the finding of the Australian Energy Market Commission (AEMC) that competition in the Gas and Electricity Retail Markets in Australia has been effective and that total price deregulation, with the last component of consumer protection, being the default safety net provisions, is justified. These recommendations have been supported by the PC in their Draft Recommendation, notable under 5.4 and elsewhere in the Draft Report, and this is of great concern to many stakeholders. Please refer to Draft material provided on disk to the Productivity Commission during February 2008

¹²² See for example s36 of the *Gas Industry Act 2001* regarding public perceptions of bias and the specific references to the Federal Government’s (21997) *Benchmarks of Industry-Specific Complaints Handling* (note the legislation does not attempt to call these schemes Alternative Dispute Resolution – they do not mediate, advocate, arbitrate and are closely associated with the regulator, acting as an extension of regulatory control, albeit set up with a separate legal identity that may actually facilitate accountability controls and more independent

At any rate the policy makers, regulators and complaints scheme in this particular example appear to be separately and collectively confused about external governance parameters, as much as they may be more clear-cut Merits Review processes in place or internal mechanisms to Internal Board level if the conduct of the case has been satisfactory.

Where the conduct of a matter is such that public perception of bias have become concerns because of legal posturing and obtaining independent legal advice well beyond the parameters of jurisdiction; and where a complaint “in books” and “in action” remain in that nebulous state for an excessive period (say 6-15 months or more for example) without a single substantive issue of conduct complaint being addressed; and without proper direct referrals to the appropriate external bodies (for example Essential Services Commission on legal interpretation and clarification issues; serious breaches whether or not systemic; serous breaches when patently systemic.

I note again the remarks made by the Victorian Aboriginal Legal Service (VALS) in their response to the Victorian Parliamentary Committee’s Dispute Resolution Discussion Paper as cited below.

SELECTED DISCUSSION OF HARMFUL INDUSTRY-SPECIFIC REGULATION - ENERGY

Mr. Banks, in discussing a second wave of “behind the border” reforms “which began in the late 1980s”, focused on the

“efficiency of public utility services and the flexibility of labour markets

At that point I stop to discuss the *“efficiency of public utility services”* in such a way as I hope will call attention to the staggering perceived deficiencies, now two decades on that are impeding consumer protection as an integral component of productivity goals.

These concerns relate to poorly conceived regulations not simply because they are *“excessive”* and representing an *“unnecessary burden,”* but because they were so ill-conceived in the first place

I come to a specific example presently, and in fact have a whole dedicated technical submission to support these claims relating to *“bulk hot water”* policy provisions wherein policy-makers, regulators and energy suppliers, licenced or unlicenced^{123/124}

As mentioned in Part 3 of this submission (242DR), the bulk hot water provisions represent a good example of misguided and inappropriate unfair and unjust implied contract provisions that are squarely the primary responsibility of policy-makers and regulators. It is incumbent of those parties to ensure that regulations do not contravene conflicting legislation and other provisions in the written and unwritten law.

Suffice it to say here that billing practices and operations, seemingly driven by existing policy can be interpreted as misleading, against the public interest.

It would seem that the whole concept of the bulk hot water charging arrangements in place and endorsed by regulators and policy-makers alike are not only misleading to the public; fails the transparency and informed consent tests; but also seems to have the effect of re-writing contract law altogether, thus seemingly stripping end-users of their fundamental contractual and other rights. This matter is discussed elsewhere in more detail.

¹²³ Note policy-makers and regulators are actually exempting energy suppliers, especially those providing *“embedded network”* and similar *“energy only”* provisions, and have incorporated into policy language and definition such phrases as “water products” when they mean the heating component of heated water supplied to the Owners Corporation wherein the *“heating component”* cannot be measured with an instrument designed for the purpose i.e. an energy-specific meter through which gas or electricity passes to filter, control and regulate the flow of gas through the meter and associated metering installation

¹²⁴ Refer for example to the article by Tim Brook in CUAC’s September 2005 Quarterly *“Embedded Networks – Disconnected Customers”*

Whilst Unfair Contract Provisions, and the provisions under Fair Trading and Trade Practices legislation does not cover policy-makers and regulators, they must surely take their share of vicariously liability for unacceptable market conduct that can be shown to be either directly or indirectly driven by statutory policies endorsed by such parties.

Beyond that, the provisions of the existing Victorian Unfair Contracts legislation offer enhanced and valued protection (*in theory, but weakened by poor compliance enforcement mechanisms*). These provisions should be echoed in the provisions adopted by other States, but diluted by over-reliance on weak and often inaccessible provisions under existing generic law. Much has been said about the extraordinary weaknesses of those generic laws and I had my voice to the concerns already expressed by many parties without repeating them here.

The Victorian Unfair Contracts provisions were introduced in consumer protection and should be adopted by other States. The Director of Consumer Affairs recognizes that the law needs reform at national and state levels with more focus on principles and fairness in the market. He has suggested more broadly defined range of unfair conduct covered in the general law.¹²⁵

The wisdom of removing such provisions simply because they are adopted in only “one or two States.” has been questioned by many stakeholders in the current review. I add my significant concerns about this and oppose this proposal. Such a decision would be detrimental to the philosophy of enhancing proper consumer protection – which is diluted enough as it is.

¹²⁵ Consumer Affairs Victoria Annual Report 2006/2007 Directors Report p9

Gas Industry Act 2001¹²⁶

This Act regulates the Victorian gas industry. It requires persons who distribute or sell gas to obtain a licence from the Essential Services Commission of Victoria, or a licence exemption. It also provides for VENCorp (the Victorian Energy Networks Corporation), the independent system operator for the Victorian gas wholesale market. Key provisions include a consumer safety net for domestic and small business customers in the transition to effective retail competition.

In its Annual Report 2006/7 the Department of Primary Industries (DPI) reports its responsibility to oversee the retail energy market in Victoria as follows¹²⁷. Hopefully bringing this matter to their direct attention as a significant regulator failure and complaints management failure will bring appropriate responses. The machinery of response is slow

Benefits for energy consumers

DPI oversees the retail energy market in Victoria. To reinforce and enhance the benefits of full retail competition, initiatives undertaken in 2006–07 included:

- developing policy and governance arrangements to deploy advanced metering infrastructure in Victoria*
- developing a framework for energy consumer hardship with consumer organisations and energy retailers*

in Victoria

- further developing retail price arrangements to provide greater certainty of energy prices for consumers.*

¹²⁶ Nowhere in the *Gas Industry Act 2001* is there any provision for water meters to pose as gas meters. Both in this instrument and in the Gas Distribution Code gas meters are described as instruments through which gas passes to filter control and regulate the flow of gas passing through those meters (or the metering installation).

Yet creative application of provisions for energy suppliers, licenced and unlicenced (the latter category stripping consumers of proper protection and redress) under “policy” guidelines allow for unjust imposition through creative attempts to re-write contract law and trade measurement practice of charges for water products and value added products though energy retailers are licenced to sell gas and electricity, not value added or water products

Any provisions that changes these provisions to allow loopholes through which consumer protection can be further eroded will be made without due regard to the obligation to ensure that existing provisions to not contradict protections under other provisions

¹²⁷ Annual Report DPI 2006/2007 Part 1 p16 found at [http://www.dpi.vic.gov.au/dpi/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3070a6e7b500a364ca2573af001641a0/\\$FILE/06_07_Annual_Report_Part1.pdf](http://www.dpi.vic.gov.au/dpi/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3070a6e7b500a364ca2573af001641a0/$FILE/06_07_Annual_Report_Part1.pdf)

The DPI and the regulator already grants licence exemptions and there are concerns about “energy-only” contracts’ arrangements for the charging to end “bulk hot water products” and the perception that these arrangements were undertaken to prevent price-shock to consumers, despite violating best practice trade measurement and the intent and spirit of the default *National Trade Measurement Act 1960* and its regulations, and despite endeavouring to re-write contractual law.

The price shock argument is weak and invalid since the proper contractual party is the owners Corporation, as already explained by Consumer Affairs Victoria, covered by current Owners Corporation legislation, and covered by common law contractual provisions, as well as the provisions of the *Residential Tenancies Act 1997*.

In terms of the apparently bizarre arrangements in place for “*energy only contracts*” assuming that this is referring to calculations of energy consumption for the heating of centrally heated bulk hot water systems in rented apartments and other settings.

This is often undertaken without the benefit of site reading; without the benefit of reading of separate meters whilst at the same time charging end-consumers for reading of both water and gas meters without transparently outlining these on bills that should be presented for payment directly to the landlord;

It also involves using water meters as substitute gas meters, with charges for energy being effected in cents per litre with the sanction of the regulator.

Both the regulator and the industry-specific complaints scheme EWOV have been directly informed by Consumer Affairs Victoria about the obligation of the regulator to ensure that there is no

“overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries.”

In addition both parties have been informed that the end-consumer is not the proper contractual party.

Yet the matter remains unresolved.

Facilitated by flawed regulations adopted by energy regulators (the ESC Victoria and equivalents in other states) and either tacitly or openly endorsed by energy policy-makers (the DPI for example), apparently ignored by fair trading bodies; energy providers are undertaking the following:

- Deeming water meters to be appropriate substitutes for gas or electricity meters
- Installing satellite water meters with the collusive consent of landlord representatives (Owners Corporation), apparently endorsement of energy regulators and policy-makers for the express purpose of theoretically reading these meters to calculate energy consumption, even though:
 - Gas and electricity do not pass through water meters
 - Gas is measured in megajoules not litres
 - Electricity is measured in kilo-watt/hour not litres
- Using apparently approved algorithm formulae to charge for bulk energy to calculate charges improperly imposed on end-users of bulk energy used to centrally heat water tanks in multi-tenanted dwellings
- Charging for deemed energy usage (which cannot possibly be individually calculated with the use of water meters, if they are read at all) in cents per litre
- Claiming provision of “*heated water*” by implication though the quality of water, notably its temperature, cannot and is not guaranteed when supplied from a cold-start tank containing water heated by a single energy meter (gas or electricity) installed with the explicit consent of Owners Corporations on common property infrastructure, where responsibility for provision and costs of water rests with the Owners’ Corporation unless
 - (a) water efficient devices are fitted in each residential apartment occupied by an end-user of water hot or cold;
 - (b) separate metering calculating by appropriate trade measurement is available to each such end-user accessing communally heated water for each component of energy supplied
 - (c) there is an explicit contract obtained with informed consent appropriately obtained and taking into account not merely energy-specific regulation, flawed or otherwise; but a range of rights and entitlements under a clutch of other provisions, including Residential Tenancies provisions, Owners’ Corporation Provisions; water industry provisions; trade measurement best practice and intended provisions (once utility restrictions are lifted); rights of natural and social justice.
- Failing to recognize that energy suppliers or their servants/contractors and/or agents are licenced to sell gas or electricity not water products, value added products

- Failing to recognise that water is supplied by a water authority by contractual arrangement with an Owners Corporation in multi-tenanted dwellings, with custody change-over of that water supply being at the outlet of the mains.
- Failing to recognize that in terms of bulk energy, under existing energy provisions, the custody change-over point is at the point distribution point, in such a case at the outlet of the meter on common property infrastructure as Owners Corporation responsibility
- Failing to recognize that supply does not commence when the tap is turned on by an end-user of centrally heated water, but when the gas or electricity leave the point distribution point and enter the outlet of the meter on common property infrastructure – so that the Owners’ Corporation not the end user is legally the designated “customer”
- Failing to recognize that though meters are on common property infrastructure, responsibility for their accuracy and maintenance fall to the distributor under existing legislative provisions
- Failing to recognize that regardless of contractual and liability considerations, water sold as heated that is not consistently hot, is unfit for the purposes intended; and in any case is not chargeable to end-users whose energy consumption cannot be properly and separately measurement using an instrument designed for the purpose. Water meters are simply not designed for the purpose.
- Alleging with regulator and policy-maker endorsement that such practices were adopted to prevent price shocks to end-users are not legally contractually obligation or else have been improperly coerced into contracts that legally belong to Owners’ Corporation
- Endeavouring to coerce explicit contractual arrangements under pain of threat of disconnection of heated water, even though energy suppliers are licenced to sell gas and electricity not water, water products or value-added products.
- Failing to adopt proper contractual practice by holding Owners’ Corporation entities responsible for bulk energy supplied to property supply addresses.
- Effectively stripping consumers of their enshrined rights under multiple provisions that are not energy-specific by using coercive, misleading and deceptive measures to imply the existence of separate energy meters in the heating of individually consumed energy that has been supplied by a single bulk energy serving several tenanted apartments or similar multi-tenanted dwellings.
- Seeking exemptions of licence under existing flawed provisions from such bodies as the DPI to exploit embedded supply provisions (inset customers)

Redress for end-consumers suffering measurable detriment and erosion of enshrined rights and forced into acceptance of products and trade measurement practices using instruments not designed for the purpose and where no contractual obligation exists or should exist is complex, especially given that such practices appear to be driven by policies implemented by regulators who appear to be ignorant of all aspects of contractual and other provisions that impact on consumer rights, regulator obligation and supplier responsibility.

Though this issue is again discussed elsewhere in this document and in numerous other written and oral submissions, some privileged I take the opportunity to point out that there may be deficiencies in the use of existing and proposed terminology.

GENERAL CONSIDERATIONS – ALTERNATIVE DISPUTE AND COMPLAINTS SCHEMES MECHANISMS

Standards of conduct

The Victorian Bar has raised some valid objections to aspects of the Civil Justice Review's Exposure Draft.

These include issues relating to

- a. first, the introduction of a statutory overriding purpose;
- b. secondly, the introduction of statutory overriding obligations imposed on all participants in the civil justice system.

Whilst supporting the introduction of a statutory over-riding purpose of the sort introduced in the *Civil Procedure Act 2005* in New South Wales, the Bar has raised some concern (2.3 and 2.4 p2 *Response to Commission's Exposure Draft*) about the Commission's proposal in response to alleged 'unbridled adversarialism' to mandate for an identical standard to the conduct of all participants in the civil justice system, whether they be:

- *parties (represented or otherwise);*
- *lawyers (external and in-house);*
- *litigation funders;*
- *insurers;*
- *other persons providing "assistance" to any party involved in a civil proceeding.*

If such a proposal is adopted, I would be particularly concerned that if the proposed statutory overriding obligation is to be extended to this category of persons, this would *"in effect remove the immunity that such persons currently enjoy."*¹²⁸

¹²⁸ See *Cabassi v Villa* (1940) 64 CLR 130 at 141. *c/f* Victorian Bar's Submission to Victorian Parliamentary Law Reform Commission's Civil Justice Review Exposure Draft, p 3 2.6 and 2.7

I also reflect the Bar’s concerns in referring to Professor Michael Bridge’s definition¹²⁹ that the “*duty to act in good faith*” may be problematic as a concept

“.....which means different things to different people in different moods at different times and in different places”.

Perhaps the VPLR Committee; the VPLR Commission and the Productivity Commission would take note of the proposal by The Bar that the overriding obligation, if imposed on all participants, and not just the parties and their lawyers, the “*over-riding obligation*” should be:

a. a duty to act honestly; and

b. a duty to assist the Court in achieving the overriding purpose –

that is:

_ to minimise cost and delay;

_ to conduct litigation in a proportionate manner.

I have extended this to include the suggestions of others and some of my own as follows:
The objective could possibly read:

- *to ensure that consumers are sufficiently well-informed and sufficiently confident to benefit from and stimulate effective competition¹³⁰; and to ensure that both suppliers and consumers exercise a duty to act honestly.*
- *To incorporate the justice principles of equality accessibility and effectiveness¹³¹*

¹²⁹ Bridge, “*Does Anglo-Canadian Contract Law need a doctrine of good faith?*” (1984) 9 Can Bus LLJ 385 at 407, cited by Gordon J in *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd* [2007] FCA 1066 at [136].

¹³⁰ As suggested by CHOICE in their response to the PC’s Draft Report

¹³¹ Added by me to incorporate the core values of the Victorian Attorney-General’s Justice Statement (may 2005) DOJ

In court proceedings, parties should have an obligation

(a) to assist the Court in achieving the overriding purpose –¹³²

that is:

(i) to minimise cost and delay;

(ii) to conduct litigation in a proportionate manner.

The ADR process can occur before or during proceedings, and participants contemplating court action and active engagement in the ADR process need to be clear of the obligations and expectations of them before embarking on the process.

The Bar has raised concerns also about a statutory overriding obligation not to engage in misleading and deceptive conduct in litigation which may be open to different interpretations in civil than that applied under the *Trade Practices Act 1974* (Cth) and equivalent State Fair Trading Acts.

Accordingly the Bar has suggested a simpler requirement to act honestly and reasonably.

Pre-action protocols

In its initial response dated December 2006 to the VPLR Commission's Consultation Paper The Victorian Bar has expressed opposition to the

“introduction of any compulsory pre- action steps or protocols”

on the grounds that

“they inevitably increase the cost of litigation and or of marginal utility

(2.10 p 6 of the Victorian Br Submission)

If increase in costs would be the outcome of such protocols the wisdom of their implementation should be considered.

However, the Bar has made some useful suggestions regarding verification procedures; first case management conference to determine core issues; early stage case management conference to review pleadings; clarify matters in dispute or seek additional information.

¹³² As suggested by the Victorian Bar in its Response to the Victorian Parliamentary Law Reform Committee's Civil Justice Review

The Bar has raised concerns about any proposed requirement for pre-action protocols to be adopted; and if adopted whether there should apply routinely to all civil proceedings. The Bar has reasonably requested that it become involved in the development of any pre-action protocols.

In particular the Bar has reasonably suggested that the parties should have the option to consider whether some form of alternative dispute resolution (ADR) procedure would be more suitable than litigation, and if so, endeavour to agree which form is best adopted, with such measures including mediation and early neutral evaluation. These proposals seem more than desirable.

Not all cases are suited to alternative dispute resolution, mediation or conciliation and it is not always in the public interest that this should be undertaken or mandated. Therefore I support the Bar's suggestions about pre-action protocols and the cautions contained in their submission to the [VPLR Commission's Civil Justice Exposure Draft](#), on pages 7 and 8 under paragraphs 3 to 3.7.

Costs

Another matter of concern, as raised by the Bar in that submission is the question of costs and the proposal by the VPLR Commission that each litigant be limited to recovering the costs of engaging a single legal practitioner per examination. Some circumstances may indicate good reason for more than one such practitioner to be present at the examination "in order to facilitate the orderly conduct of the examination (*para 4.6 p9 Bar submission to VPLR Commission's Exposure Draft*)

I disagree with the Victorian Bar's view under 2.45 that

"2.45 There is no warrant for mandating that the Court should have regard to:

(a) the financial resources of the parties; and

(b) whether the proceeding involves issues that affect or may affect the public interest, in making orders for costs or security for costs, as these are already matters that the Court may have regard to in the exercise of its discretion."

Rather, I believe that these factors are important considerations when costs are determined and that a mandate to include these may be in the public interest.

Collection of Data

I bow to the Bar's view that current practices of the Supreme County and Magistrates Court in preserving the confidentiality at all costs in mediation processes may be a valued part of success at mediation.

Whilst the Bar has suggested under 3.1.10 that better statistical data should be maintained to ascertain cases referred to mediation and stage of proceedings at the time or referral; cases that settle at mediation but before trial and cases referred to mediation during the trial and settle at that mediation.

I agree with the Bar's view that improved data collection scope and quality by the Supreme Court and County Court may be warranted based on the published figures available and cited by the Bar under Chapter 3.2.8 of their Submission

Civil ADR Processes

The Bar is clear that confidentiality of ADR processes must remain intact as a cornerstone of ADR processes. The concept of preserving perceptions of neutrality in ADR facilitator is extremely important. I support that viewpoint.

It is my view that perceptions of neutrality are difficult to preserve when referring to industry-run, funded and managed complaints schemes, regardless of perceived "balance" of representation on Boards or Councils.

At least three industry-specific schemes (*not two as mentioned by CALV*) have Boards that are exclusive to industry participants. These are Energy and Water Ombudsman Victoria (EWOV), Energy and Water Ombudsman NSW (EWOV) and Telecommunications Ombudsman (TIO).

I discuss these and other concerns under the heading Current Use and Reach of ADRs. (*VPLR Committee submission in preparation – for which this segment represents a draft overview*)

Complexity and diversity of ADR supply landscape

There is no doubt that the ADR supply landscape is diverse and complex and I can empathise with the goal of this Committee to investigate the feasibility of ensuring greater consistency and accountability for Victorians wishing to access alternative dispute resolution (*p18 Discussion Paper 2007*).

Criminal Case Conference

I agree with the Bar's support of the introduction of a voluntary and properly resourced pilot scheme for Criminal Case Conferencing, as analysed in Ch 1.2.1 to 4.21 of their Submission to the VPLR Committee Discussion Paper¹³³

¹³³ Victorian Law Reform Committee Alternative Dispute Discussion Paper found at <http://www.parliament.vic.gov.au/lawreform/>

Case Management

The Bar has suggested the allocation of *sufficient judicial resources* for more intensive case management (2.26 p11), and has further suggested The Bar believes that

“well- directed case management will be instrumental in reducing overall delay and costs in the civil justice system in Victoria.”

These is an important needs and should be considered by the Commission

Under 2.27 p 11 Submission to VLPR Commission’s Exposure Draft The Bar has suggested a number of practical objects for the first case management meeting with under 2.27 (e) include whether alternative dispute resolution or reference under Order 50 is appropriate. The suggestions are reproduced below for ease of reference.

“2.27 The objects of the first case management conference should be to:

- (a) identify the issues to be determined;*
- (b) lay down the parameters for discovery and evidence;*
- (c) resolve how expert evidence (if any) is to be managed;*
- (d) identify whether any questions in the proceedings should be determined as a separate question ahead of the determination of other questions;*
- (e) whether alternative dispute resolution or reference out under Order 50, is appropriate;*
- (f) whether admissions of uncontroversial facts should be encouraged;*
- (g) (possibly) streaming of cases into different “tracks” (as per the UK civil justice model).*

Self-represented litigants

The Bar is to be congratulated for supporting the Courts' recommendation the Commonwealth and Victorian Governments

“2.34 should provide an adequate level of legal aid funding to ensure that people have adequate legal representation and that the operation of the courts is not adversely affected by inter alia increased numbers of litigants in person.”

Lessons to be learned

The Victorian Bar is also to be congratulated for summarizing the useful lessons to be learned from Civil Justice Reform in other jurisdictions as follows:

For example, the Bar has referred to reforms at Commonwealth level the Australian Law Reform Commission (“ALRC”) undertook a review of the civil justice system¹³⁴

“8.2 There are some common themes that underlie the various reviews. Some of the common concerns identified are that:

(a) the civil justice system needs to be more affordable;

(b) the civil justice system needs to be more readily understood;

(c) the civil justice system needs to be more effective in dealing with increasingly complex disputes.

8.3 Some of the common strategies identified in the various reforms to address the abovementioned concerns are:

(a) the enhanced use of case management;

(b) the use of appropriate dispute resolution options;

(c) the simplification and standardisation of procedural rules.

8.4 The Victorian Courts are cognisant of these developments. They recognise that consideration must be given to possible changes to the way they perform their basic roles and functions, in the light of changes in community needs and pressures.²⁶”

¹³⁴ Australian Law Reform Commission Report (2000) Managing Justice No. 89. c/f Submission dated December 2006 by Victorian Bar to Victorian Parliamentary Civil Justice Review Exposure Draft, p 27, p 8.1 Lessons to be learnt

Fairness, Accessibility and Equity

Chapter 3 of the Discussion Paper “ADR and access to justice” identifies the key factors enabling individuals to access justice:

- *Ability to identify a legal need*
- *Ability to obtain assistance, advice and support (including legal representation)*
- *Ability to participate effectively in dispute resolution processes*
- *Ability of all individuals to access mechanisms to protect legal rights equally, regardless of factors such as socio-economic status or place of residence.*

The core values expressed by the Victorian Attorney-General in his 2004 Justice Statement¹³⁵ are as follows:

“Based on the rule of law a number of core values underpin the justice system and are promoted by the Justice Statement:

Equality – *all citizens should be equal before the law. This is promoted by the independence of the judiciary from the other arms of government*

accessible justice and respect for human rights.

Fairness – *the processes of justice should be fair incorporating principles of natural justice and proportionate sanctions and remedies.*

Accessibility – *the justice system should provide appropriate access to all people regardless of their means and a range of processes which are appropriate to the issue to be resolved.*

Effectiveness – *the justice system should be responsive and able to efficiently deliver the outcomes expected of it by the community.”*

Factors such as cost, delay, complexity and formality are some of the impediments to accessing justice that the Discussion Paper has already identified.

¹³⁵ Department of Justice, Victoria New Directions for the Victorian Justice System 2004-2014: Attorney-General’s Justice Statement (2004) 9

CALLING A ROSE BY ITS NAME – ADR AND COMPLAINTS SCHEME PROVISION¹³⁶

Discrepant perceptions of ADR provision, providers and definitions

Firstly I would like to briefly discuss the various perceptions interpretations of ADR exist, especially since the Productivity Commission has madder strong recommendations for more reliance of “ADR” and “Ombudsman” services whilst referring principally to self-funded and run industry-specific schemes that may not be quite as accountable as the public might prefer and expect.

Chris Field’s 2007 ADR Supply-Side Survey¹³⁷ was encompassed these bodies under the headings shown

The comments under each are mine, but I have also reproduced and credited the table from which the headings were drawn.

Regulator ADR providers

Consumer Affairs Victoria

Victorian Equal Opportunity and Human Rights Commission

Legal Services Commissioner

Non-regulator ADR providers

Many of the schemes listed as ADR providers in the Discussion Paper and in the Department of Justice ADR Supplier Survey do not meet my own perception of the definition of ADR providers. Before discussing these and focusing more exclusively on industry-specific complaints schemes, I note the following reservations in the classification process.

The **Victorian Small Business Commissioner** undertakes the whole range of tasks that should be associated with ADR provision, namely information provision, complaints handling, mediation, conciliation and arbitration. The label of ADR is appropriate and meets my definition of such a provider. The staff training parameters and experience of those delivering the service stand out as being appropriate for the responsibilities involved in ensuring that outcomes for those accessing the service are not compromised because of the nature and quality of the ADR input at any stage of justice access.

The **Dispute Resolution Centre Victoria** as part of the Department of Justice neither mediates nor arbitrates but stays in neutral gear facilitating dialogue between disputing parties in a face-to-face situation. I believe this makes the label of ADR entirely appropriate. Though its services are free, it redirects enquiries to Consumer Affairs Victoria for consumer complaints, which may be a subtle way of indicating either that access to its services must be by referral, or else that it does not become involved in consumer disputes, but rather more general ones.

¹³⁶ These are not synonymous terms. Industry-specific complaints schemes are misnamed ADRs and ‘ombudsmen. A vast majority of statutory bodies would also be better termed complaints schemes or regulators. Most do not offer ADR services at all, and certainly not mediation or conferencing

¹³⁷ Ibid Field, Dr. Chris (2007) ADR In Victoria Supply-Side Survey

The **Accident and Compensation Conciliation Services** has listed conciliation and arbitration services only, but in its responses to the ADR Provider Survey undertaken by the Department of Justice in 2006, claimed that they exercise powers that are closer to arbitration, for example, the power to make directions in matters where there is no arguable case. These considerations may exclude this impartial service from being properly classified as an ADR Provider. I would have thought that at least mediation as a facilitative exercise and conciliation were crucial components of then exercise of providing ADR, if not also arbitration.

Victoria Legal Aid lists as its services information, conciliation, case management, professional advice, education and referral. The parameters of conciliation are unclear and under the question “what options do you offer for someone wishing to lodge a complaint or enquiry simply lists “*not applicable*” in the ADR Provider Survey undertaken by DOJ. One has to ask whether this body is appropriately labeled as an ADR. Its funding and representation is rarely available for civil matters, except perhaps in selected human interest issues.

The **Health Services Commission** does provide information handles complaints, mediates and conciliates, but has no arbitration powers and no directional power.

Many issues concerning privacy overlap with some of the jurisdictional powers of the Privacy Commissioner, and the public remain confused in terms of direction to the appropriate resource for various privacy-related enquiries.

The **State Ombudsman** is seen to be entirely impartial, but acts principally as a provider of information and “complaints handler” regarding complaints against State government agencies. This statutory body has wide powers of investigation upon receipt of a complaint. It neither mediates, conciliates, arbitrates or gets the parties together. Decisions are made on paper and investigation combines paper and telephone enquiry. Recommendations can be made by this body that may facilitate constructive change to current practices. This is not alternative dispute resolution.

The **Privacy Commissioner** is seen as entirely impartial and has an important role to play in policy development. It has listed itself as providing information, complaint handling and conciliation and has wide powers of investigation, though there is much confusion between its roles and the roles of the Health Services Commissioner, for example. There is certainly room for further clarification and public education there.

The **AAMI Consumer Appeals Ombudsman** is an internal dispute service run and managed by AAMI. The term Ombudsman is inappropriate in such a context. Most commercial companies have an internal appeals mechanism offering information, complaints handling and conciliation for those dissatisfied with AAMI services. Whilst this may be an excellent service for those who require it, it hardly merits the term ADR.

This leaves the industry-specific complaints schemes that I do not believe warrant the use of the term ADR for all of the reasons that I will discuss in a more dedicated way, using the Energy and Water Ombudsman Victoria has the service that I am best equipped to comment on in detail, but the same principles may apply to one or all of the others.

The CAV body has its work and resources cut out for them already with policy work, research into consumer issues; hosting of consumer Congress events and the like, to say nothing to endeavouring to meet the demand for upholding of fair trading, unfair trade practice and trade measurement legislation

The following is taken directly from David Tennant's Paper given at the 3rd National Consumer Congress 2006:

Specifically Chris's division of consumer advocates into categories and subsequent mapping of the current landscape for consumer advocacy in Victoria and beyond includes industry government and regulatory bodies¹³⁸.

Individually and collectively industry government and regulatory bodies play crucial roles in delivering good consumer outcomes. They are not however consumer advocates.

Let us consider the example of government agencies like Fair Trading Offices or Consumer Affairs Bureaux. Government's interest in consumer issues is real, significant and of critical importance. Commonwealth, State and Territory regulators like our hosts, Consumer Affairs Victoria, provide vital services to consumers. Through events such as this congress they stimulate debate and discussion and shine a light on issues that can deliver enormous consumer benefits. Initiatives like the recently released Report of the Consumer Credit Review can seek to articulate and rectify imbalance in the way our laws operate in practice. That said, Consumer Affairs Victoria and its colleague agencies around the country balance roles and duties owed to more than one group or interest. Consumer needs are considered and balanced, sometimes even prioritised – but they are not the primary and overriding duty.

¹³⁸ The mapping is undertaken in narrative form and then appears in a table at pages 40 to 43 of the draft Discussion Paper. Interestingly, there is no reference to the 100 or so financial counsellors currently operating in Victoria in a mix of full-time, part-time and volunteer roles.

Table 2
Q4: What types of ADR service does your agency provide?

ADR Supplier	Information	Complaint Handling	Mediation	Conciliation	Arbitration	Other
REGULATOR ADR						
Consumer Affairs Victoria	♦	♦	♦	♦	-	♦
Equal Opportunity Commission Victoria	♦	♦	-	♦	-	-
Legal Services Commissioner	♦	♦	♦	♦	-	-
COURT AND TRIBUNAL ADR						
Magistrates' Court	♦	♦	♦	-	♦ Note 1	♦
Victorian Civil and Administrative Tribunal	-	-	♦	♦	♦	-
NON-COURT ADR						
AAMI Consumer Appeals Ombudsman	♦	♦	-	♦	-	-
Accident Compensation Conciliation Service	-	-	-	♦	♦ Note 2	-
Banking and Financial Services Ombudsman	♦	♦	-	♦	-	♦
Dispute Settlement Centre Victoria	♦	♦	♦	-	-	♦
Energy and Water Ombudsman (Victoria)	♦	♦	-	♦	-	♦
Financial Industry Complaints Service	♦	♦	♦	♦	♦	♦
Health Services Commissioner	♦	♦	♦	♦	-	-
Ombudsman Victoria	♦	♦	-	-	-	-
Public Transport Ombudsman	♦	♦	-	♦	-	-
Victorian Small Business Commissioner	♦	♦	♦	♦	♦	-
Telecommunications Industry Ombudsman	♦	♦	-	♦	-	♦
Victoria Legal Aid	♦	-	-	♦	-	♦
Victorian Privacy Commissioner	♦	♦	-	♦	-	-
Total	16	15	8	15	4	8

Table Note 1: The Magistrates' Court may use arbitration to settle civil claims. The Court does not consider this process to be an ADR strategy.

Table Note 2: ACCS indicated that they exercise powers that are closer to arbitration, for example, the power to make directions in matters where there is no arguable case.

Definitions of ADR in civil disputes and criminal matter

Conceptualisation and terminology issues complicate the proper analysis and understanding of ADR provision and identification of improvements.

I agree that one of the difficulties of capturing and understanding the practice of ADR in Victoria is the terms 'mediation' is understood and applied differently. Worse still, self-perception of ADR supply tends to govern information about that supply and regulators often double-up as funders; policy-makers; and public relations entities.

It is interesting that Sir Laurence Street and NADRAC refer to the concept of ADR encompassing conflict avoidance, conflict management and conflict resolution.

As mentioned in the Discussion Paper Professor Tania Sourdin¹³⁹ describes ADR as encompassing processes that are either adjudicatory or non-adjudicatory; binding or non-binding. She describes the processes as "*negotiation, mediation, evaluation, case appraisal and arbitration*"

Just as each provider appears to view mediation different, so the definition of the term "*mediator*" also differs.

¹³⁹ Sourdin, Tania, *Alternative Dispute Resolution* (2nd ed, 2005), 3 c/f VPLRC's Discussion Paper September 2007

The Thesaurus (Australia) describes the term “*mediator*” variously as:

Go-between, Intermediary, Third party, Arbitrator, Negotiator. Moderator., Referee, Umpire

For the purposes of this the VPLR Committee’s ADR Discussion Paper the term ADR has been taken to apply to as

“processes other than judicial determination in which an impartial person assists those in dispute to resolve the issues between them.

Further these processes are described as

- *Information provision*
- *Complaint handling*
- *Facilitation*
- *Conference*
- *Mediation*
- *Conciliation*
- *Arbitration*
- *Expert appraisal and determination*

Even given that enormous range of interpretations, I dispute that industry-specific schemes such as EWOV are routinely and consistently accepted as “*impartial bodies*” given their governance, structure, funding and close affiliations with both the industry regulators who control them through Memoranda of Understanding (MOU) and strict jurisdictional boundaries; and with industry participants, in many cases exclusively comprising the Board of Management, though the Committee or Council does have some community organization representation.¹⁴⁰

¹⁴⁰ Note that contrary to the statements made in the Discussion Paper, not all industry-specific complaints schemes have an even ratio, if at all of industry to consumer participation. In the case of the TIO, Energy and Water Ombudsman NSW Energy and Water Ombudsman Victoria and the membership of Boards of Governance (constitution) are exclusively industry participants. The submission by CALV believes this applies only to the two former-named but EWOV is also included in this governance structure. Pressure should be exerted to correct this to provide better balance and enhanced perceptions of relative independence.

The role of ADRs

The Victorian Aboriginal Legal Service (VALS) submission to the VPLR Committee's Alternative Dispute Resolution (ADR) Discussion Paper favours a co-mediator model consistent with many community-based ADR interventions because it better fits with the concept

“A trained lay person helping to build social connectedness and facilitating increased levels of support for the parties”

This is especially relevant in the context of ADR offered to culturally or linguistically diverse cultures and Indigenous Australians in particular.

It should be noted however, that for civil consumer disputes for the most part handled by industry-specific complaints schemes, NO mediation or conferencing is offered at all. These bodies are more complaints handlers and information disseminators with very limited jurisdictional power, and lacking in public perception of neutrality given that they are funded, run and managed by industry participants. This is discussed further later.

For the present, suffice it to say that levels of expertise and training are variable and inconsistent, in providing even simply conciliation in civil consumer disputes apart from the simplest ones such as financial hardship, wrongful disconnection of energy services or connection problems and the like (energy industry-specific complaints schemes, for example misleadingly known as ‘ombudsmen.’ In addition other bodies that have been listed as ADR providers in the survey conducted by Dr. Chris Field¹⁴¹

The VALS submission to the VPLR Committee criticizes the assumptions made in the ADR Discussion Paper, largely based on Dr. Chris Field's ADR Supply-Side Survey¹⁴². This is discussed in some detail in the body of this submission.¹⁴³

¹⁴¹ Field, Dr. Chris (2007) *Alternative Dispute Resolution in Victoria: Supply-Side Research Project Report*, Department of Justice, Victoria. Commissioned Report by DOJ Victoria, heavily relied upon in ADR Discussion Paper, Victorian Parliamentary Law Reform Committee

¹⁴² Field, Dr. Chris, (2007)

¹⁴³ VALS (2007) Submission to VPLR Committee's ADR Discussion Paper

I agree with VALS that the Discussion Paper implies that ADR is cost effective without specifying what ADR is meant to do. VALS refers to the Field Report on Supply Side authored by Dr. Chris Field¹⁴⁴ and the doubts that are cast on how cost effective ADR is; whether is meant to be a

“cut-price alternative to Court” or an

“early intervention option which is more flexible and involves the parties in developing a solution”

That is assuming the terms ‘ombudsman’ or ‘alternative dispute’ or even ‘appropriate dispute resolution’ are justified at all, in referring to these schemes.

Another gap highlighted by the VALS submission to the VPLR Committee’s Discussion Paper on ADR is the failure to adequately address the issue of the relationship between Courts and ADR. It is suggested that recognition of the complexity and differences between forms of ADR are noted in the Discussion

“there is no attempt to suggest that there may be a need to be some difference in approach to ADR.”

Questions about regulation of ADR at State level, and particularly regarding the VPLR Committee’s Discussion Paper coincides with the Productivity Commission’s Review.

As previously observed in the Executive Summary, the term *“alternative dispute resolution”* needs to be defined correctly, properly resourced administered and accountable. I strongly disagree that current ADR provisions are adequate, and cannot see how industry-specific complaints schemes can appropriately be included under this heading at all or that the term “ombudsman” is justified. In fact both terms are misleading. These schemes are run, funded and management by industry participants and do not mediate at all. They handle complaints and endeavour to achieve conciliatory resolution. Even the so-called “binding decision” powers enjoyed by some in theory, need consent to be applied. This is rarely given. Their jurisdictional powers are exceptionally limited. This is discussed elsewhere in considerable detail.

¹⁴⁴ Ibid Field, Chris (2007) ADR in Victoria cited in Bibliography to VPLR Committee’s Discussion Paper, -133

As previously mentioned I would like to the phrase

“inarticulate, vulnerable, disadvantaged and culturally or linguistically diverse.”

Both vulnerability and disadvantage tend to mostly conjure up financial hardship, and this is indeed an area where protections need to be robust. Including the term “*inarticulate*” more overtly includes those with language, or cognitive barriers, psychiatric or intellectual disability, or for some other reason finds it too challenging to actively seek consumer protection.

At a recent 2008 Public Hearing of the VPLR Committee’s Inquiry into ADR, several community groups^{145/146} advocated for bridging the very significant gaps in meeting the needs of marginalized groups in facilitative information assimilation and interpretation; regulatory design (with the emphasis on ADR provisions).

The groups attracting particular focus at that hearing, and in written submissions to the VPLRC’s ADR Inquiry as well as the PC’s Consumer Policy Inquiry was focused on provisions for culturally and linguistically diverse groups, including indigenous Australians.

Cultural differences in particular highlight the need for targeted information accessibility; assistance with interpretation and comprehension of information and decision-making processes and ADR programs that will meet the needs of all individuals and groups in accessing justice, not only as consumers of goods and services but in terms of accessing equity under criminal justice parameters. See discussion also under ADR provision.

The VALS submission convincingly argues that there is need to create space for:

- *A community based Alternative Dispute Resolution (ADR) model that is a distinct entity separate from the Courts;*
- *Greater use of restorative justice approaches and*
- *Utilization of Indigenous Australian knowledge in the development of ADR models, dispute resolution processes and restorative justice programs.*

¹⁴⁵ Victorian Aboriginal Legal Service (2008) Ms Greta Clarke (2008), Research Officer, *Advocacy Presentation to Victorian VPLR Committee’s ADR Inquiry Public Hearing* 25 February 2008 in support of written submission

¹⁴⁶ Mr. George Lekakis (2008) Chairperson Victorian Multicultural Commission. Oral Presentation to Victorian VPLR Committee’s ADR Inquiry Public Hearing 25 February 2008. See also written submission supporting the oral presentation

In discussing the obstacles to creating the valued space for the above and making practical suggestions on an appropriate ADR model for Indigenous Australians, the VALS oral and written submissions to the VPLR Committee provides strong arguments in support of these proposals that could also be utilized to the benefit of other marginalized groups, including other culturally and linguistically (CALD) groups; transient visitors to Australia, including international students with or without Commonwealth grants such as AusAID; and those with psychiatric or intellectual impairment.

One marginalized group discussed at the VPLRC's ADR Inquiry Hearing was victims of crime, notably serious crime. The problems faced by these groups in obtaining best outcomes if any fro ADR inputs was aired.¹⁴⁷

Another specialist group accessing ADR processes was youth groups requiring youth services or youth justice facilities¹⁴⁸

Maginalized groups that have not yet had any recognition in terms of consumer needs, information needs, CALD considerations or access to criminal and civil justice are international students, notably those on Commonwealth stipends such as AusAID.

The exemplary practical experience of VALS is working effectively with marginalized groups is not all that qualifies this body to make recommendations for reform. Their experience in attempting to advocate for more inclusive and realistic policies has frequently been thwarted by cost considerations or mainstream political objectives. These factors have the potential effects of excluding significant improvements.¹⁴⁹

The VALS submission eloquently discusses merits of formal equality as superior to substantive equality. Equality and fairness principles are also discussed with suggestions that challenge the current system of disproportionate penalties for the poor and the role of a combined application of formal and substantive equality.¹⁵⁰

¹⁴⁷ Crime Victims Support Association (2008) Presentation by Mr. Noel McNaramara, CEO, in support of written submission to VPLRC's Inquiry into Alternative Dispute Resolution

¹⁴⁸ Department of Human Services Children, Youth and Families Division; and Youth Services and Youth Justice Division. Powerpoint and oral presentation with considerable preliminary and tabled written submissions for VPLR Committee's Inquiry into ADR, Discussion Paper and Public Hearing 25 February 2008

¹⁴⁹ Paraphrased from Victorian Aboriginal Legal Services (VALS) written submission to VPLR Committee's ADR Enquiry, p4

¹⁵⁰ Ibid, VALS (2007 and (2008) respectively and VALS Submission to PC, and VALS submission to VPLR Committee ADR Discussion Paper (2007)

On page 39 of his Summary Draft Report (Vol 1) the Productivity Commission discusses the option of making better and more use of ADR arrangements. Whilst recognizing that such schemes have their limitations, the PC suggests that

ADR can deal with many consumer complaints at lower cost than tribunals or the small claims courts.

Flexibility

More than one submitter to the VPLR Committee's Discussion Paper has suggested strong resistance to

".....the temptation of recommending a less flexible and more rigidly structured ADR process"

this is an important consideration if, as perceived for example by the Victorian Bar (the Bar), if this will indeed

"ultimately increase the cost of ADR and reduce access to justice"
(2.3 The Bar's Submission p.6)

The concept of flexibility has also been supported by other submitters to the Discussion Paper. Nevertheless, flexibility should never be confused with reduced accountability.

There is insufficient accountability in the diverse landscape of alternative dispute and complaints schemes mechanisms. I do not believe the two terms to be mutually exclusive.

There is overlap between the goals and proposals for reform for Alternative Dispute Resolution provision proposed by the Productivity Commission and the Victorian Parliamentary Law Reform Committee's Inquiry into Alternative Dispute Resolution.

The PC is aware from various submissions, privileged and otherwise, that I entirely disagree that the current ADR provisions are adequate for industry-specific complaints schemes, and believe that widespread disagreement about terminology and functions of ADR for both civil and criminal matters complicates effective discussion of this area of protection.

I can do no better than direct serious attention to the articulate and convincing concerns expressed by Victorian Aboriginal Legal Services (VALS) that a confusing picture exists as to the benefits of ADR.

I support all of the arguments contained in the VALS submission to VPLR Committee's Inquiry into ADR that the existing picture as to the benefits of ADR are unclear within the Discussion Paper, The same concerns can be applied to proposals made by the Productivity Commission.

In terms of the specific recommendations made by the PC, a first principle is to challenge the use of the term ADR in applying this term to industry-specific complaints handling bodies, inappropriately and misleadingly using the term 'ombudsman.' This is further discussed shortly.

The PC also refers to "*widespread support*" for existing so-called ADR "ombudsmen services."

The PC appears to have failed to take into account verifiable concerns as shown by FOI examination of records, for example in the interactions between the industry-specific scheme Energy and Water Ombudsman (EWOV), accountable under a Memorandum of Understandings to the Essential Services Commission (SEC) the current energy regulator in Victoria.¹⁵¹

On pages 429-430 of Vol 2 of the Draft Report the PC has referred to ombudsmen schemes, suggesting low levels of complaints particularly in relation to energy (this appears to be contrary to evidence – see latest published complaints statistics and evidence of rising incidence).

Court directed ADR

The Victorian Bar has commented on the extensive use made by the courts of the ADR process. Apparently the Supreme and County Courts refer proceedings privately provided mediation, and this is normally undertaken by a barrister or solicitors. Referral can be without a court order.

The Bar has observed that often contractual terms in various contractual documents require medication. Though under the Commercial Arbitration Act an arbitrator can conduct ADR under a variety of processes including "*mediation, consultation or other means*" the Bar suggests that this rarely occurs in practice, according to anecdotal evidence.

Apparently the Courts are already routinely using mediation processes after pleadings and discovery and that barristers often conduct medication as well as arbitration.

¹⁵¹ EAG (2004) "*Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*" Found at <http://www.chronicillness.org.au/utilitease/downloads/Enery%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc>

There are indeed many current impediments to accessing seamless redress from

“Complaints Handling” to

Conciliation (excludes Magistrates Court, Dispute Settlement centre Victoria and State Ombudsman; to

Mediation (if offered at all, which is rare for non-court ADR providers of all descriptions); to

Determinations/directions (where offered at all, limited to TIO and Banking and Financial Services Ombudsman; and to Accident and Compensation Commission where there is no arguable case); to

Arbitration (limited to Magistrates Court, VCAT (not exactly an ADR service through them as court-based) and to the Financial Industry Complaints Service¹⁵² and to Victorian Small Business Commissioner; to

Supreme or County Courts where indicated

The Victorian Bar in its submission to the Victorian Parliamentary Law Reform Commission’s Civil Justice Consultation Paper comments that under s47A of the *County Court Act 1958* (Vic) referral to private arbitration is an option, though the Supreme Court does not currently have this power.

The Bar is supportive of the introduction of a panel of suitably qualified and experienced dispute resolution practitioners which would be available to the Courts to undertake relevant ADR processes, and observes that there is no legal impediment to introducing a power of the Court to refer to proceeding or more typically a question in a proceeding to a binding ADR process such as private arbitration.

However, the Bar does not support any notion that

“consumers should not be entitled to commence legal proceedings in a Court unless and until they have exhausted the rights available to them under any relevant IDR scheme as it involves an unnecessary interference with access to justice”

¹⁵² This may indicate no more than a binding agreement, binding the scheme member only not the complainant

On those grounds the Bar has sought further clarification of the VPLR Commission's intent in stating that

“More effective use should be made of industry dispute resolution schemes. There should be no impediment to the use of such schemes merely because legal proceedings have been commenced.”¹⁵³

I support Bar's views on this, but remain concerned that if this is allowed for consumers, will it also mean that goods and service providers as members of IS-EDRs can commence proceedings before any attempt has been made to make proper arrangements for a consumer who, for example is already facing financial hardship and already in debit to that provider, or for some other reason has not had an opportunity to harness legal assistance in order to address the power imbalance issues.

CALV has referred to the current situation where if litigation is on-foot, ID-EDR schemes refuse to investigate a dispute, which

“can result in an arbitrary and anomalous ‘race to issue’ with the consumer seeking to contact the EDR scheme before the trader issues a complaint in the Courts.”¹⁵⁴

To counter-act such an outcome, CALV has suggested that where the plaintiff is a member of an industry EDR scheme, attempting to conciliate the claim by the EDT process be made a precondition to filing a complaint, thus providing an opportunity for a non-litigious outcome if achievable.

¹⁵³ Victorian Parliamentary Law Reform Commission's Consultation Paper, c/f Victorian Bar's submission to that paper dated December 2006

¹⁵⁴ Submission by CALV to Victorian Parliamentary Law Reform Commission's Alternative Dispute Resolution Discussion Paper. 3 (iv) Courts should encourage industry EDR schemes

PERCEIVED INADEQUACIES IN CURRENT INDUSTRY-SPECIFIC COMPLAINTS HANDLING

Structure, governance, accountability, transparency and efficiency and effectiveness of industry-specific schemes

I strongly disagree that dispute processes, especially in relation to utilities are operating smoothly and satisfactorily. I particularly dispute this in relation to the operations of the utility complaints scheme EWOV. I have provided direct evidence to support my view, including evidence that this body, intended as a conciliatory scheme has on occasion issued threats of closure of file if legal advice was sought, and that delays of well in excess of 12 months in handling of complaints are common.

Reporting to regulators of even serious complaints is inconsistent. Quality of input and decision-making is inconsistent.

It vigorously dispute the claim that

“only a few major difficulties have been evident and these have been satisfactory resolved” (p429 PC DR)

In any case reliance on quantitative data out of context and without due regard to the seriousness of certain complaints and indications that even a single complaint or a handful can be indicative of systemic problems.

Though focused on the energy the following observations may equally apply to other industries.

I refer to the manner in which AEMC has interpreted the data provided by EWOV, and appears to have minimized the proportion of complaints about misconduct associated with misleading or deceptive conduct and/or high pressure sales by failing to also see EWOV’s feedback about complaints received in full context, remember that only a small proportion of customers ever actually complain, and the figures provided by EWOV are indicative of a much higher level of misconduct and post-switching dissatisfaction that the AEMC is prepared to concede.

Whilst conceding that this type of conduct is serious and requires

“an effective consumer protection framework to deter such conduct and support the functioning of an effectively competitive market in which direct marketing can play a pro competitive role in facilitating consumer choice

The AEMC's view that such an effective dispute resolution framework currently exists is not upheld by all stakeholders. The PC's echoed view is also not upheld by all stakeholders.

In particular, the absence of effective compliance enforcement has the effect of actively encouraging misconduct. Unenforced or unenforceable regulations are useless instruments however effective they may seem on paper and in principle.

The issue of enforcement compliance is discussed in more detail elsewhere, but meanwhile refer to the EAG 2004 Report on compliance and enforcement issues.¹⁵⁵ Please also refer to Andrea Sharam's 2004 paper *Power Markets and Exclusions*.¹⁵⁶

EWOV had expressed discomfort over the use that had been made by the AEMC of their data regarding conduct, impacts of switching behaviour, levels of dissonance and frank dissatisfaction post-switching, and other such issues.¹⁵⁷ These concerns are discussed further elsewhere.

Another gap highlighted by the VALS submission to the VPLR Committee's Discussion Paper on ADR is the failure to adequately address the issue of the relationship between Courts and ADR. It is suggested that recognition of the complexity and differences between forms of ADR are noted in the Discussion Paper.

“there is no attempt to suggest that there may be a need to be some difference in approach to ADR.”

There is a view that perhaps deserves consideration – are industry-specific complaints schemes, misleadingly referred to as “ombudsman” and in my view not properly defined either as ADR either – more co-regulatory bodies.

Peter Kell in his speech at the 2005 National Consumer Congress¹⁵⁸ was openly skeptical of the value of self-regulatory and co-regulatory approaches¹⁵⁹.

¹⁵⁵ Ibid EAG (2004)

¹⁵⁶ Sharam A (2004) *“Power Markets and Exclusions”* Financial and Consumer Rights Council, Melbourne

Found at <http://www.vcooss.org.au/images/reports/Full%20Report.pdf>

¹⁵⁷ Refer to EWOV (2008) Submission to AEMC First Draft Report, January

¹⁵⁸ Kell, Peter (2005) *“Keeping the Bastards Honest – Forty Years On, Maintaining a Strong Australian Consumer Movement is needed more than ever. A consumer perspective....”* Speech by Peter Kell at National Consumer Congress 2005 March, p1. Peter Kell is CEO of the Australian Consumers' Association (ACA)

¹⁵⁹ Note that industry-specific complaints schemes such as energy (so-called) ombudsmen are run, funded and managed by industry scheme members, who have the option to refuse proposals for binding decisions, rarely exercise such an option; and appear to have excessive power in that the constitution of such bodies as EWOV is exclusive to industry participants; though a Committee does have some consumer-organization representation

As previously cited, in discussing the Draft recommendations contained in Productivity Commission's Review of National Consumer Policy, Peter Kell refers to co-regulatory schemes as in most cases being no more flexible than black letter law, and in many cases, considerably less flexible, less market friendly in the face of changing market conditions.¹⁶⁰

As to more effective and extensive use of dispute resolution services provided by government departments and the courts (through pre-hearing processes) these are worthy goals and some of the principles have been discussed elsewhere in this submission. The use of experienced private ADR providers appears not to have been discussed by the PC in its Draft Report, and neither has due attention been given to proposals made to accommodate the specialized and dedicated needs of marginalized groups such as Indigenous Australians¹⁶¹, and other marginalized groups, whether the issue relates to cultural or language barriers or other barriers to effective access to pre-court assistance.

Peter Kell has specifically expressed the view that industry-specific complaints schemes

tend to work most effectively when they are incorporated into a broader statutory framework

Chapter 3 of the VPLR Committee ADR Discussion Paper "*ADR and access to justice*" identifies the key factors enabling individuals to access justice:

- *Ability to identify a legal need*
- *Ability to obtain assistance, advice and support (including legal representation)*
- *Ability to participate effectively in dispute resolution processes*
- *Ability of all individuals to access mechanisms to protect legal rights equally, regardless of factors such as socio-economic status or place of residence.*

¹⁶⁰ Ibid Peter Kell's Speech at NCC 2005 p4

¹⁶¹ See for example the extensive suggestions made by VALS in their submission to the PC's Issues Paper in the current consumer protection inquiry.

I refer again to the core values expressed by the Victorian Attorney-General in his 2004 Justice Statement¹⁶² as cited above:

These values are also reflected in the Benchmarks for Industry-Specific Complaints Handling, formulated by the Federal Government in 1997 and incorporated as mandated service-delivery parameters in certain prescribed legislation such as s36 of the *Gas Industry Act 2001*. Sadly, despite mandate, those parameters are not always met, and there is not always sufficient proactive regulatory supervision of this.

Factors such as cost, delay, complexity and formality are some of the impediments to accessing justice that the Discussion Paper has already identified.

Since these IS-EDRs (or more correctly IS-CS) are conciliatory bodies, most with no binding powers, or at any rate powers that are regularly used, and those who do have binding powers, achievable only by consent of both parties (*a power in any case rarely used*), *there is of course of guarantee of satisfactory outcomes*).

CALV may have mistakenly suggested in its submission to the VLPR Committee's Discussion Paper that EWOV has teeth in making binding decisions on the scheme member. Not only are these rarely made, but the parties have to agree.

In principle the opportunity of avoiding expensive litigious proceedings in the hope of achieving conciliation is a worthy one, but it could be argued that this should be undertaken by suitably qualified ADR practitioners.

IS-EDR schemes do not arbitrate or mediate as a rule, but rather tend to provide a mix of information, "complaints handling" (which can take 365 days or more for complex cases) and conciliation with rare binding decisions for those authorized to make these, with the scheme participant's consent and binding only on such a participant.

I disagree with CALV that IS-EDR¹⁶³ schemes are normally (or rather in general):

"an extremely effective means of resolving disputes in a non- litigious and equitable manner,"

I acknowledge the role that these schemes play in more routine issues of financial hardship, billing and transfer issues, the "*bread and butter*" cases for example of EWOV.

I also acknowledge that industry-specific external dispute resolution schemes (IS-EDR may have a role to play if certain changes are made to governance, accountability, jurisdictional parameters and staff training to allay any public perceptions of bias and/or impediments to comprehensive, accountable, fair, efficient and effective service delivery.

¹⁶² Department of Justice, Victoria New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement (2004) 9

¹⁶³ A term which I believe is better described as IS-CS (for industry-specific complaints scheme

As to effective, Andrea Sharam (2004)¹⁶⁴ reported that:

“.....that taking complaints to the EWOV frequently leaves the customer in the position of having an unaffordable instalment plan.”

This is hardly a desirable outcome, but perhaps it avoids litigation. It does not meet community service obligation goals or uphold the social justice principles of the National Competition Policy, or in the long-term resolve the issue for the consumer, who can enter into a revolving door situation with spiraling debt despite the intervention of the IS-EDR.

Moreover EWOV has been upon FOI discovery of documents (through EAG 2004) inconsistent in its reporting obligations regarding systemic issues.

I note CALV’s recommendation that mandatory conciliation be imposed on disputing parties through industry-specific complaints schemes (I-S EDR).

If there is any consideration being given by the VPLR Committee to mandated conciliatory measures imposed on consumers, through industry-specific complaints schemes (I-S EDR) under their current structure, governance, accountabilities and jurisdictional limitations this would seem to many to represent such dilution of consumer protection as to be outrageous.

However, I note that the VPLR Commission¹⁶⁵ has supported referral to ADR referral without the consent of the parties. It is pleasing that noting human rights considerations, the Commission has limited its recommendation to compulsory referral to ADR processes where agreement is reached by consent of the parties, rather than processes which lead to compulsory binding decisions, which would be contrary to the philosophical underpinnings of the ADR process and creating a satellite court without the standing of a court. This would also impact on the development of case law, especially where public interest issues are involved.

¹⁶⁴ Sharam A (2004) Power Markets and Exclusions *Financial and Consumer Rights Council, Melbourne*

Found at <http://www.vcross.org.au/images/reports/Full%20Report.pdf>

See also Sharam, A (2003) *Power Failure: Why Victorian Households Are Not Plugging into Electricity Competition*” Institute for Social Research Swinburne University, Working Papers No 8: June 2003

Refer also to *ASIC (1999) Approval of external complaints resolution schemes, ASIC Policy Statements [PS 139]*

[http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps139.pdf/\\$file/ps139.pdf](http://www.asic.gov.au/asic/pdf/lib.nsf/LookupByFileName/ps139.pdf/$file/ps139.pdf) c/f EAG Report on Essential Services Commission Energy and Water Ombudsman Victoria 2004 as for citation 66

Kliger B (1998) Unfair Deal, Financial and Consumer Rights Council, Melbourne http://avoca.vicnet.net.au/~fcrc/research/utility/unfair_deal/index.htm c/f EAG Report on Essential Services Commission Energy and Water Ombudsman Victoria 2004 as for citation 66

¹⁶⁵ Victorian Law Reform Commission, Summary of Draft Civil Justice Proposals as at 28 June 2007, Exposure Draft for Comment (2007), 30

Whilst there may be grounds to restrain direct court action by providers against consumers until alternative measures of resolution are explored (meaning strictly non-court), it cannot be appropriate to strip consumers of the right of redress because the structure of EDR is conciliatory.

CALV's submission to the Discussion Paper¹⁶⁶ has referred to the "teeth" of I-S EDR schemes in the case of those who have some power to make binding decisions, but the submission fails to acknowledge that these decisions are only achievable by mutual consent between the parties in dispute (service or goods provider and consumer); and are so rarely made as to represent almost meaningless protection.

In the case of EWOV in responding to the ADR Provider Survey conducted by the Department of Justice (through Dr. Chris Field) in 2006, EWOV omitted mention at all of its power to make binding decisions by sent as it was such a rarely used power and binding only on the scheme member.¹⁶⁷

In discussing accessibility for many consumers to information redress and complaints mechanisms, in its submission to the Productivity Commission's Draft Report, COTA has pointed out that

"While the internet has, for many consumers, improved the knowledge base from which they inform their consumption choices and decisions on product purchases, retirees and pensioners are less likely to have access to, or familiarity with, such information sources. Similarly, they are very unlikely to be aware of, nor know how to pursue their rights under, the implied statutory warranty provisions of the Trade Practices Act and the various Fair Trading Acts.

Complaints procedures and other redress mechanisms can also be confusing and drawn out affairs. It is important that disadvantaged consumers have ready access to parties who can support them, and act for them, in pursuing such courses of action."

I venture to express the view that one such industry-specific complaints scheme funded, run and managed by market participants may not always be seen by the public as being optimally objective and free of conflicts of interest. *s36 Gas Industry Act 2001* covers such a concern.

¹⁶⁶ CALV Submission to Victorian Parliamentary Law Reform Committee's Alternative Dispute Resolution Discussion Paper of September 2007

Found at <http://www.parliament.vic.gov.au/lawreform/>

¹⁶⁷ EWOV Jurisdiction found at <http://www.ewov.com.au/pdfs/Organisation/Charter%2030%20May%202006.pdf>

In the new consumer protection framework, one would hope that more distance will be achievable so that industry schemes are neither too close to the regulator nor to the market participants and in a far better position to take an impartial view within a well-funded framework with top leadership and adequate funding to cover a range of consumer needs.

It is my considered view that proposals to extend the role of industry-specific complaints schemes will fail to address consumer detriment and community expectation unless certain specific issues are addressed.

I have concerns about the quality of input, independence, governance of some of the categories included under the broad heading of ADR, an acronym which can either be mean “*alternative*” or “*appropriate*” dispute resolution, as mentioned in Ch 2 p 5 of the Committee’s Discussion Paper. How is the term “*appropriate*” determined and by who?

Why for example, should it be more appropriate to approach a conciliatory body, run, funded and managed by industry participants; possibly be left in limbo with inconclusive results for 12 months or more for complex complaints resolution; and rely on general powers to make binding decisions, only if both parties agree and only if the complaints scheme can bring itself to bite the bullet and even suggest binding decisions. I will discuss these issues shortly.

What does “*resolution of dispute*” mean if it is reliant on conciliation alone? Power imbalance exist in the first place between consumers and providers of goods and services. Power imbalances also exist in the ADR forum or conciliatory complaints body arena (industry-specific complaints schemes).

As to independence, surely independence simply defined by separate legal structure, such as a company limited by guarantee without share portfolio. is not the kind of independence generally used in a meaningful way in this context.

See for example the structure and governance of the EWOV, discussed in further detail in the body of the submission (in preparation).¹⁶⁸

Turning now to jurisdictional limitations, in the new consumer protection framework, one would hope that more distance will be achievable so that industry schemes are neither too close to the regulator nor to the market participants and in a far better position to take an impartial view within a well-funded framework with top leadership and adequate funding to cover a range of consumer needs.

It is my considered view that proposals to extend the role of industry-specific complaints schemes will fail to address consumer detriment and community expectation unless certain specific issues are addressed.

¹⁶⁸ EWOV Constitution found at <http://www.ewov.com.au/pdfs/Organisation/Constitution%2030%20May%202006.pdf>

These include:

- **Public perceptions of bias** (sometimes to the extent of increasing the power imbalance against consumers by taking legal advice to support scheme member perspectives)
- **Jurisdictional limitation** and excessive apparently subservient accountability to the industry-specific regulator
- **Governance issues**
- **Adequate staff training** including proper understanding of fundamental legal issues impacting on consumer rights (for example common law contractual rights; unfair trade practices; existing protections under residential tenancies and owners cooperation provisions; specific industry-specific technicalities)
- **Unacceptable delays** in finalizing complaints in complex matters

Simply adding another accountability tier will not address current gaps.

I endorse the view that advocacy, complaints processes, appropriate redress and affordable recourses for consumers receiving less than they deserve and are entitled to precisely because of those power imbalances. Dr. Field has argued in favour of a national consumer advocacy body, citing the precedent of a national consumer advocacy body in the UK which is government-created and funded.

I believe that all industry-specific “*ombudsmen*” of IS-CS¹⁶⁹ schemes should be removed altogether from their direct accountability to industry-specific statutory bodies and also from composition of constitutions that allow excessive market participant involvement. It is not the purpose of this particular submission to pursue this line of thinking at present, though I plan to return to the topic. I further believe that application of the term ombudsman is misleading to the public and should be removed.

I quote directly from the PC’s Draft Report (2007)

“widespread support for the range of ADR mechanisms currently available including industry specific ombudsmen in key financial and essential service areas; and dispute resolution services provided by Fair Trading offices and over governments and the courts (through pre hearing processes)”

¹⁶⁹ A more accurate acronym for industry-specific complaints schemes (IS-CS) than IS-EDR) which implies the same status and approaches as trained mediation or co-mediation in a neutral setting, normally face to face with the parties in dispute conducted in a neutral manner

Some such support for industry specific complaints schemes has come directly from providers of such services, including those providing survey responses to the ADR Supplier Survey 2006 conducted by the Victorian Department of Justice through Dr. Chris Field.

That ADR Supplier Survey posed a number of survey questions that were the basis of self-reports and self-perceptions. Many questions were posed in a general way, but such niceties as staff selection parameters, details of governance, independence, decision-making, especially where mandated under legislation (for example under s36 of the *Gas Industry Act 2001*)

The case study cited examples such concerns and relates to a real live matter that has for 14 months ongoing been the subject of unresolved and unsatisfactorily complaint about energy and water matters, complicated by regulatory policies that are seen to be actually driving unacceptable market behaviour

At the same time as shunting responsibility to such schemes, regulators disempower them to substantially as to make their powers weak and unenforceable.

The sometimes do not concern themselves with blatant evidence that systemic deficiencies are left unreported.

This is where there is room to consider whether schemes that enjoy “*separate legal identity*” and therefore see themselves as untouchable under administrative law. This cannot be in the public interest where these bodies are nominated to field public complaints, including regarding essential services, and where there are concerns about how adequately those complaints are managed and whether public perceptions of bias may be issues.

I refer to and quote again to Professor Luke Nottage’s¹⁷⁰ concerns in original May submission to the Productivity Commission’s Issues Paper and attached also to his submission to the PC Draft Report¹⁷¹

“Particularly in small claims therefore a growing number of consumers are likely to turn to the burgeoning industry-association based “ombudsman” dispute resolution schemes. However these are not designed efficiently to aggregate collective interests.

¹⁷⁰ Associate Professor University of Sydney Co-Director Australian Network for Japanese Law
¹⁷¹ Nottage, Luke (2007) and (2008), Submissions to Productivity Commission’s Issues Paper and Draft Reports respectively Australia’s Consumer Policy Framework. SUB114

Also despite regulators providing some minimum standards for these schemes there are some remarkable uncertainties surrounding such schemes. In particular it is unclear whether the dispute resolution processes are governed by administrative law principles (natural justice binding the scheme/association and the industry member) or arbitration law (binding the association/adjudicators industry member and consumer – once they opt in and even though not bound by the outcome) or simply contract law (binding all three relevant parties). Since different implications follow and the Courts have not given us a clear ruling on such a hugely busy dispute resolution sector legislative intervention is necessary here too.

As mentioned at the outset, Australian consumer law – “in books” and “in action” – has been allowed to slip for too many decades in too many areas to the detriment of consumers more than firms. It urgently needs to be reassessed from first principles in light of current thinking in economics but also many other disciplines and then reformulated comprehensively to maximise its impact on all involved. In doing so however Australia needs also to become more open to developments in the laws practices and community expectations of major trading partners such as Japan and the EU. This will be hard because we had become accustomed to them coming to us for inspiration; but it is now time to learn also from them.”

I refer again to Peter Mair’s concerns in his submission to the Productivity Commission’s Draft Report (SUB112)

I refer to and support Peter Mair’s response to the PC’s Draft Report in which he refers to a consumer-policy framework that would “*make market players accountable*” and “*set a new benchmark for consumer protection.*” He summarizes this concept as providing a framework in which

“competing suppliers would cooperate to ensure consumers are well informed before individually offering in good faith products that are fit for purpose but if necessary allowing complaints to be resolved independently.”

Peter Mair goes on to speak of conscious decisions to perpetuate wrong-doing in these words:

“As is, breaches of the golden rule are usually conscious decisions taken by suppliers (and sometimes customers) people knowingly doing the ‘wrong thing’, because they can and know they won’t be stopped. Black letter regulation to protect particular dealings often becomes a game of contrived frustration: prospectively, exposing breaches of golden rule principles might change the game. It will be interesting to see what support there is for a golden rule approach in the business sector including industry associations and other peak industry bodies.

Regulators also can be mightily at fault. Whatever golden rule arrangements might be agreed, success will often depend on front line regulatory agencies applying them with a suitable commitment to their own accountability. Some major national regulatory agencies apparently have scant regard for their charges observing anything akin to the golden rule, misbehaviour in markets is often condoned with alacrity and some regulators simply choose not to pursue with proper purpose what otherwise would seem to be their clear legislative responsibilities. Regulatory agencies that are seen to be compromised or underpowered would ideally be made subject to an extended freedom of information obligation to explain apparent shortcomings.

I suspect that proposal for regulators with consumer protection roles to be made more openly accountable is the main point I would want to add to the framework proposed by the Commission. The commission knows well from its previous inclination to allow independent reviews of regulators that there is resistance to external review from regulatory agencies and their political patrons even so it may be worth putting that proposal on the table again—adopted it would be a powerful force for good.

Peter Mair’s perceptions have hit the nail on the head. Currently regulators with consumer protection roles appear not to be upholding their responsibilities.

Though the case study in this submission (Part 4 SUB242DR), is focused on energy provisions, Peter Mair has cited many other examples of similar regulatory failures arising in other arenas. For example he has referred to

golden rule principles and observable market misbehaviour is routinely stark in markets for retail financial services.

He has spoken of complaints bodies that do not hear complaints (p4). He cites the case of ASIC in turning away legitimate complaints on the basis that aggrieved members can ‘go somewhere else’

He claims that this a

“regulatory attitude which “plays into the hands of both industry funds and for profit funds, which collectively can all charge more as a result of the regulators; apparent acquiescence

I can certainly testify directly to the *“buck-passing”* attitude faced when legitimate and serious complaints are lodged and not even investigated by either complaints scheme or regulator on similar pretexts, declining to openly identify external avenues of complaint and referring to internal merits review systems chaired by industry members, when frequently one of the Board Members may be the subject of complaint, and even after an attitude of “legal posturing” has already been demonstrated as promoting perceptions of bias and enhancing the market power imbalance.

Peter Mair then refers to Tribunals without jurisdiction to hear the matter or make any decision. This has been identified in many arenas but Mr. Mair cites the financial industry again.

He refers (p5) to the standard jargon that is used by industry-specific schemes in justifying decisions made allegedly in

‘in a fair and reasonable manner’ ‘exercising the powers and discretions properly’’ and in good faith responsibly and reasonably’ and ‘giving proper regard to the member’s interests’.

These phrases will be familiar to many complainants to such schemes and those who make Tribunal applications

Mr. Mair continues (p5)

This response to the applicant’s eyes frankly made no impression on the prospect of an independent assessment of the matter coming to a directly contradictory conclusion – that the decision was not made in a fair and reasonable manner having proper regard to the essentially similar funds management interests of all the members of UniSuper.

Misleading conduct is also a matter of degree and policies in place can either deliberately or inadvertently condone such conduct by allowing loopholes and interpretations to creep into regulatory instruments, including codes and guidelines that overtly, almost unashamedly, appear to exploit consumer rights, entitlements and interests.

I again uphold Peter Mair's perceptions which have hit the nail on the head.

I will shortly demonstrate by deidentified case example that things do go wrong, providing details of the substantive allegations in a specific unresolved case "*in books*" and "*in action*" for over 14 months" without any attempt to date being made by the complaints scheme at any level to investigate the substantive issues of the complaint at all, but instead over-stepped by far the parameters of its own published jurisdiction by undertaking "legal posturing" a formal written "*legal stance*" supporting the position of the subject of complaint, a Board member of its Constitution, and endeavouring apparently without proper understanding of the legal and technical parameters involved or the requirement to consider relevant regulations as extended to those where consumers have existing enshrined rights.

This observation was also sustained in other submissions to the Productivity Commission's current Review. See for example The Victorian Council of Social Services has recommended in its response to the Retail Policy Working Group Composition Paper that:¹⁷²

"The regulation of marketing must ensure both that consumers are protected from inappropriate aggressive and misleading conduct; and that the benefits promised by competition – choice and value – are accessible to all consumers and facilitated by comprehensible and complete information that facilitates choices based on comparison."

¹⁷² Victorian Council on Social Services (VCOSS) (2007) Submission to MC Retail Policy Working Group Composite Paper (National Framework for Distribution and Retail found at http://www.vcoss.org.au/documents/VCOSS%20docs/Submissions/2007/SUB_070730_RPWG%20Composite%20Paper_VCOSS.pdf
See also MCE Retail Policy Working Group National Framework for Distribution and Retail Policy www.mce.gov.au

The wrongful disconnection payment has been very successful in Victoria by encouraging retailers to take extra care to follow the correct procedure before disconnection.¹⁷³ This has ensured that most customers in hardship have received all the protections they are entitled to, and given those who have been wrongfully disconnected sufficient compensation for both the material costs they have incurred (such as replacement of spoiled food and purchase of take away food and alternative lighting) and the stress and trauma. We strongly support the inclusion of a wrongful disconnection payment in the national framework.

The public continues to be misled by the application of the term “*ombudsman*” to these schemes, which implies direct accountability to Parliament and a level of independence and impartiality that quite simply does not exist and should not be implied at all.

The proposal to create under 5.3 DR Recommendation a new national energy and water ombudsman for example adds a new tier to accountability, does not remove the misleading term of ombudsman and proposes to retain the existing structure governance and funding.

Chris Field recently identified¹⁷⁴ the witty and amusing insights on the role of statutory Ombudsman¹⁷⁵ expressed by Dr. Peter Shergold, the latter until recently Secretary, Department of the Prime Minister and Cabinet on the occasion of the 30th Anniversary of the Commonwealth Ombudsman¹⁷⁶ Dr Shergold’s views on the role and nature of the statutory Ombudsman is shown earlier in this document.

¹⁷³ The grey area is with the bulk hot water provisions evidently inappropriately sanctioned by the Victorian (and other States) energy regulator despite provisions that exist in consumer protection and in identifying the correct contractual party – viz Owners Corporation for bulk energy supplied to water tanks on common property infrastructure where provisions. In addition, the new provisions under the MOU between CAV and ESC specifically requires that the ESC in particular avoids *overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries*. Neither complaints schemes (in this case EWOV), nor the regulator appears to be able to assimilate these requirements or to recognize the conflict and clear consumer detriment through erosion of existing rights. Therefore unjust threats of disconnection, actual disconnection and threats by energy suppliers of unjust legal action against those who do not recognize contractual obligation continue unchecked.

¹⁷⁴ Field, Chris (2007) “*Early perspectives from Chris Field in his role as Western Australian Ombudsman*” Speech to Western Australian Chapter of Administrative Law September

¹⁷⁵ As opposed to those bodies misleading using the term. In the context of industry-specific complaints schemes run-funded and managed by industry participants

¹⁷⁶ Shergold, Peter (2007) “*At least every three decades*” *Acknowledging the Beneficial Role of the Commonwealth Ombudsman*. Speech by Dr. Peter Shergold, Secretary Department of the Prime Minister and Cabinet at 30th Anniversary of the Commonwealth Ombudsman 8 August 2007

Peter Roger Shergold AC is an Australian academic and former public servant. Until February 2008, he was the Secretary of the Department of the Prime Minister and Cabinet (PMC), and as such was the nation's most senior public servant and a key advisor to the Prime Minister of Australia. He was succeeded by Terry Moran, who had been the head of the Victorian Department of Premier and Cabinet.

The public deserves to know the difference between the two applications of the term Ombudsman. The mere use of the term implies a statutory role and direct accountability to Parliament. The excuse of habit is not sufficient. It is a misleading term in the context of industry-specific schemes and should be altered to eliminate misleading public perceptions.

Therefore, in order to avoid misleading public perceptions these schemes should be more accurately described as external industry-specific complaints schemes or the use of the acronym E-ISCS.

Such schemes are normally under regulator thumb and are set up under industry-specific enactments, with a theoretical but rarely enforced role for peak consumer bodies such as Consumer Affairs Victoria under Fair Trading provisions

Beyond that ongoing debates exist about who is actually responsible if things go wrong during the investigatory and conciliatory role of industry-specific schemes.

The case study example cited here and referred to in other submission is one such example where “*legal posturing*,” “*legal stances*” and other unacceptable complaints management processes deserves further investigation, but where regulators are reluctant to assume their proper role in responding to such concerns.

They prefer to wait for the unlikely event that a scheme that has a vested interest in protecting its own vested interests (to paraphrase from the Senate Select Committee’s deliberations on NCP Socio-economic consequences of national competition policy¹⁷⁷ views on vested interests

After retiring from the position in February 2008, Shergold became the first head of the University of New South Wales Centre for Social Impact.[1]
Shergold earned a Bachelor of Arts in politics and American studies from the University of Hull, and later a Master of Arts degree from the University of Illinois at Urbana-Champaign and a Doctor of Philosophy from the London School of Economics.
After moving to Australia, he became a lecturer in economics at the University of New South Wales in 1972. He was appointed as head of the university's economic history department in 1985.
¹⁷⁷ SCC (2000) “*Riding the Waves of Change*” A Report of the Senate Select Committee Ch 5 the Socio-economic consequences of national competition policy. 2000 found at http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc

So again, from Graeme Samuel¹⁷⁸ in 1999 during the dialogue about the socio-economic impacts of competition policy referred to above began his musings with observations of the more sinister aspects of the public interest – what he had previously described as attempts by those “having a vested interest to claim the retention of their vested interest. He suggested that:

“one of the objectives of competition policy is to subject those claims to a rigorous independent transparent test to see whether in fact vested interests are being protected or whether public interests are genuinely being served by the restrictions on competition that are the subject of reviews under the Competition Principles Agreement.”

The experiences outlined within the case study described in this Chapter and referred to in other components of this multi-part submission 242DR do not encourage me to believe that at least for more complex cases these goals are obtainable in terms of consumer empowerment, an efficient fair and safe trading environment within the energy industry, or that protection for vulnerable and disadvantaged consumers under current provisions is anywhere near sufficient.

If existing structures, funding, and parameters of the Victorian energy complaints scheme remain intact but accountable to a national energy ombudsman, as proposed under 5.3 of the Productivity Commission’s Draft Report, little is likely to change.

Recommendation

Separation from regulator control, more independence, better accountability, re-examination of jurisdiction, improved staff professional development

¹⁷⁸ Graeme Samuel commenced as Chairman of the ACCC in July 2003. His professional career has spanned the fields of law, investment banking and, since the early 1990s, a number of roles in the public service relating to sport, the arts, health, business affairs and competition policy. Graeme was President of the National Competition Council and the Australian Chamber of Commerce and Industry, Commissioner of the Australian Football League, Chairman of the Melbourne & Olympic Parks Trust, the Inner & Eastern Health Care Network and Opera Australia, and a Board member of Docklands Authority and Thakral Holdings Limited. Graeme holds a Bachelor of Laws from Melbourne University and a Master of Laws from Monash University. In 1998 he was appointed an Officer in the General Division of the Order of Australia.

Recommendation

Extended powers of statutory ombudsman to facilitate investigation and enquiry poor management by so-called “ombudsman” as industry-funded run and managed by industry participants

In 1997, the Federal Government issued a set of six benchmarks for industry-based dispute resolution schemes.¹⁷⁹ This phrase suggests complaints handling but not alternative dispute resolution, which mean something different, are conducted differently and include impartial mediation, a component altogether missing from Industry-Based CDR.

Though some schemes refer to these as “optional” in many cases they are mandatory and identified specifically under the associated regulatory enactment when referring to what the schemes are expected to deliver. This applies to EWOV, where under s36 of the Gas Industry Act, the six benchmarks are specified as mandatory.

There is also provision under the same clause of public perception of bias.

I discuss in a specific case study report below both perceptions of bias and the extent to which EWOV may be meeting the mandatory benchmark criteria, despite its rosy perceptions of its own performance in self reports during participation in the “Alternative Dispute Resolution Supply-Side Survey”¹⁸⁰ commissioned by the Victorian Department of Justice in 1997 and conducted by Dr. Chris Field, at the time on the Management Committee of EWOV

As noted by Denis Nelthorpe

“These benchmarks were drafted by a national committee made up of government, regulatory, industry and consumer representatives as a guide to an increasing number of industries looking to establish industry based complaint schemes (IS ECS) as opposed to internal complaints handling mechanisms (IS-ICS)

¹⁷⁹ Dept of Industry, Science & Tourism, (1997) *Benchmarks for Industry-based Customer Dispute Resolution Schemes* August

¹⁸⁰ Field, Chris (2007) *“Alternative Dispute Resolution in Victoria: Supply-Side Research Project. Research Report”*, Department of Justice, Victoria

These are similar values to those identified as core values of the Attorney-General's Justice Statement (May 2004]

Benchmarks for Industry-based Customer Dispute Resolution Schemes

accessibility

The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers.

independence

The decision-making process and administration of the scheme are independent from scheme members.

fairness

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

accountability

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

efficiency

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

effectiveness

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

I refer more to reports on Complaints Line concerning industry-specific complaints schemes misleadingly known as “Ombudsman”¹⁸¹

Some schemes operate according to these principles better than others. For example many schemes allow you to lodge your complaint over the phone some prefer it in writing and some are required by legislation to receive it in writing. Some schemes issue regular public reports; others do not. Some schemes have consumer representatives on their boards/councils; others have industry representatives on them only. Greater questioning of the schemes by customers (about how they operate) may help to improve compliance with the benchmarks.

It addresses the essential elements of effective complaints handling and how these should be implemented. It is available from Standards Australia. (02) 9746 4700

(2) Australian Standard on Complaints Handling

This standard (AS 4269) was issued in 1995.

Energy specific issues

Turning now to energy-specific complaints handling, I discuss EWOV’s Jurisdiction, Constitution, relationship with its regulator, misgivings, and also provide a deidentified case study of perceived poor case handling over a 14-month period in a case that should have been handed over to the Victorian Government at an early stage as a serious material and systemic complaint in many respects outside EWOV’s general experience and jurisdiction, though the more routine conduct issues could have been readily addressed.

I venture to express the view that an industry-specific complaints scheme funded, run and managed by market participants may not always be seen by the public as being optimally objective and free of conflicts of interest. Section 36 of the *Gas Industry Act 2001* covers such a concern.

The PC’s Review of Australia’s Consumer Policy Framework has recognized consumer protection gaps In two areas of current State and Territory responsibility – consumer credit provision (including finance broking); and the consumer protection aspects of energy services – the PC believes that the case for a national approach is well-established.

¹⁸¹ www.Complaintline.com.au

Despite the perceptions of the Committee and self-reports in the survey undertaken by the Department of Justice in 2006 of ADR provision, not all industry-specific complaints schemes have Boards of Governance (Constitution) that provide any balance between consumer and industry representation. The Energy and Water Ombudsman is one of these. Its Constitution is exclusive to industry participants, though his Committee does have three only consumer representatives. Another is apparently Energy and Water Ombudsman New South Wales. A third is the Telecommunications Ombudsman.

In relation to industry-specific complaints schemes in particular, I discuss in some details concerns about perception of bias; governance issues; interpretations of independence; limitations of jurisdiction; the extent to which prescribed benchmarks for industry-specific complaints handling may be compromised, despite rosy self-perceptions.

As to the issue of binding decisions, these are only possible if both parties in conflict agree, and they are so rarely made as to question their value at all.

Most industry-specific complaints schemes are apparently subserviently bound to their industry-specific regulators to such a degree and with such limited jurisdictional powers as to bring into question whether the full range of consumer protections can possibly be met.

This is further discussed later with regard to perceived independence, perceived conflicts of interest; governance, structure, funding and the like. Suffice it to say here that I believe that industry-specific complaints schemes are neither as independent as they would like to believe; nor are they always perceived as “*neutral*.” negotiating parties.

Indeed they are sometimes seen to be enhancing perceptions of power imbalance than aiding conflict resolution.

CALV has stated that

“The independence of EDR schemes should be contrasted with other industry schemes that do not share this level of independence. For instance the Australian Retail Association (the ARA) takes consumer feedback (for instance complaints about scanning errors under the Code of Practice for Computerised Checkout Systems in Supermarkets) but the ARA is clearly an industry representative body.”¹⁸²

I am unable to see why the ARA which more transparently carries the name implying that it is an industry association is so vastly different to EWOV for example as an industry-specific complaints scheme, or the use of the term “*Ombudsman*” included in its name and those of similar schemes, implying total impartiality, changes things significantly.

¹⁸² CALV (2007) Submission to Victorian Parliamentary Law Reform Commission ADR Discussion Paper

The fact of the matter is that industry EDR schemes, despite any label attached to them are excessively associated with the regulators in an apparently subservient relationship under Memoranda of Understanding. This means that policy and regulatory flaws remain untouchable if these systemic deficiencies are identified in the course of examining any complaint.

In addition, the decision-making processes that are mandated for some, such as for EWOV under the *Gas Industry Act 2001* s 36 are not necessarily been met with regard to impartiality, independence of decision-making, or public perceptions of bias.

I can substantiate these claims with direct evidentiary material, including, for example evidence that EWOV is prepared to take legal advice and “*legal stances*” to add to the existing power imbalances between service providers and consumers; and even on occasion to “*threaten closure of the file forthwith*” if a complainant contemplates legal advice. By contrast to current identified practices, EDR schemes are especially expected to uphold and apply under Benchmark provisions for dispute resolution that they all claim to adopt

It has been my direct experience as an personal advocate for others that EWOV on occasion can appear to the consuming public with grievances about energy provision more like an industry association than an “*ombudsman*” or impartial “*alternative dispute resolution service*” with perhaps less accountability in practice and less objectivity.

Each year, some 250,000 consumers of industry and commerce products and services contact the following industry-based ADR schemes for help.¹⁸³ How well as these services performing? Significant differences in the quality and scope of service provision have been identified and some just do not properly fall under the ADR category despite being generally included in published data under such a description.

It is an inaccurate perception, as indicated in the VLRP Committee’s Discussion Paper and in the DOJ ADR Survey 2006 that there is an even representation of consumer representatives on all the boards of the industry-specific schemes.

In the case of ESC Victoria, The ESC New South Wales, and the Telecommunications Ombudsman for example the Boards of Management are exclusive to industry participants. However, EWOV’s Committee does have three consumer organizations representatives.

The Bar will have its reasons for suggesting that non-binding arrangements are important considerations for extension of Supreme and County Court powers¹⁸⁴

¹⁸³ National Alternative Dispute Resolution Advisory Council (NADRAC) (2003) Resolving customer disputes case studies and current issues – ADR – A better way to do business” 4-5 September Sydney, NSW
Found at <<http://www.anzoa.com.au/docs/publications/NADRAC%202.PDF>>

¹⁸⁴ Victorian Bar Association (2007) Submission to Victorian Parliamentary Law reform Commission’s Civil Justice Review, December Executive Summary, p6

My primary concern with regard to non-binding arrangements is the perceived legal value and status of such agreements – and whether they are worth the paper that they are written on.

The Victorian Bar believes that non-binding arrangements to have a role. Those with experience of even ratified agreements, for example before a Family Court will know that often even “*legally binding*” agreements can have diluted value as often enforcement is conceptual rather than a reality unless one wants to repeatedly re-appear before a Court to complain that the agreement has not been upheld. This applies to other arenas also.

Governance, Leadership and Reporting Concerns – ADR – with emphasis on existing energy provisions

Relating to inter-related considerations throughout the PC Draft Report discussed elsewhere in some detail but shown here because of overlapping considerations

5.5 – Gaps under this section seeking mandated , viz

“guaranteed access for consumers to effective and accountable alternative dispute resolution mechanisms or complaints management within the energy sector”

Returning to issues of accountability, structure governance and leadership, I start with structure and constitution and address some myths perceived to exist about “balanced representation on EWOV’s Constitutional Board.

Firstly the Constitution of EWOV is exclusive to industry participants. There is a Council or Committee with less strength and power which allows three consumer organization representations to sit on it. A previous office-bear was Dr. Chris Field, who was also until his resignation to take up a position elsewhere on the Governance Board of CUAC.

Apparently each of the EWOV Scheme Participants are required to pay EWOV a annual levy of sum of \$20,000 to secure founder membership of the Scheme and that the parties to the published EWOV Constitution formulated in May 2006, some two months after the adoption of the ESC Bulk Hot Water Charging Guidelines became effective.

Annual; and start-up levies imposed on Industry Scheme Participants as providers in the energy distribution chain is further discussed below with relevant extracts directly taken from the EWOV Constitution.¹⁸⁵

Major industry participants, being energy retailers and/or wholesalers, often with licence rights over water meters and non-negotiable catchment allocations when obtaining sole rights of provision of bulk hot water services, were signatories under common seals to the EWOV Constitution formed in May 2006.

¹⁸⁵ EWOV Constitution found at Constitution of EWOV found at <http://www.ewov.com.au/pdfs/Organisation/Constitution%2030%20May%202006.pdf>

No consumer body or party appears to have been included as party to the Scheme neither does it appear that proper and wide community consultation was sought. There is a big distinction between being on the Constitutional Board and on a Committee of Management in terms of power and clout and this is not recognized by a large majority of the general public, policy advisers and others.

It is often the case that the subject of a complaint is a Constitutional Board member.

EWOV Jurisdiction

Apparently, the existing Victorian energy-specific industry-based complaints scheme **EWOV**, funded, run and managed by industry participants is debarred under its charter from undertaking any of the following tasks:

- *The setting of prices and tariffs*
- *Commercial activities outside of an energy or water provider's licence or core business*
- *The content of Government policies, legislation, licences and codes*
- *Complaints which are being or have been considered by a court or tribunal*
- *Any matter specifically required by legislation*
- *Customer contributions to the cost of capital works bearing in mind current law and reasonable and relevant industry practice*
- *Actions taken by an energy or water provider and their consequence*
- *Actions taken at the direction of a person or entity having regulatory or administrative power*

This means very limited powers of investigation and recommendation. In fact it is very difficult to know just what this body can do and who has overall regulatory control on policy design issues. Is it the ESC or the DPI? Do these bodies work together to ensure that consumer rights are not compromised when devising policy and regulation? Is there sufficient overall supervision and monitoring of compliance enforcement?

In any case on studying the above list it is extremely difficult to determine just what EWOV can achieve beyond clear-cut wrongful disconnection cases where financial hardship exists or there are simple billing enquiries.

EWOV Constitution

Clause 9 of the EWOV Constitution allows for¹⁸⁶

“Each participant (to) pay the Annual Levy in two tranches at six monthly intervals or such other times as determined by the Board. The Annual Levy and the manner of payment shall be determined annually by the Board and shall be based on the amount required to fund the Annual Funding Figure for the relevant year.

The Annual Levy shall be allocated between the Participants on the following basis

(a) each Founding Electricity Member, each Founding Gas Member, and Melbourne Water Corporation (for so long as it is a member) will pay \$20,000 towards the Annual Levy;

Each other member will contribute an amount based on its Customer numbers at the commencement of the relevant Financial year (or in the case of a member which becomes a member after the commencement of the current Financial year, based on its Customer Numbers at the time it becomes a member....”

Under *Clause 11 (Funding, Special Levies)* The Board (of EWOV) may at any time and from time to time obtain money for the purposes of EWOV Limited in addition to the Annual Levy by raising a special levy from the members.

Section 11.3 provides for start-up levy contributions, whilst 11.4 provides for new member contributions of \$5,000 or any other such amount as may be determined by the Board in consultation with the Essential Services Commission.

Customer Numbers			Amount
Electricity Members and Gas Members who hold a Licence	Water Members	LPG Members	
N/A	Less than 40,000	Less than 5,000	\$2,000
Less than 200	40,000 – 59,999	5,000-24,999	\$5,000
200 - 499	60,000-199,999	N/A	\$10,000
500 or more	200,000 or more	25,000 or more	\$20,000

¹⁸⁶ EWOV Constitution found at <http://www.ewov.com.au/pdfs/Organisation/Constitution%2030%20May%202006.pdf>

Clause 9c of the EWOV Constitution provides that

(c) each Contracting Participant will contribute an amount as determined by EWOV Limited which EWOV Limited considers equitable based on the Contracting Participant's Customer Numbers at the commencement of the relevant Financial Year (or in the case of a Contracting Participant which becomes a Contracting Participant after the commencement of the current Financial Year based on its Customer Numbers at the time it becomes a Contracting Participant which EWOV Limited considers equitable based on the Contracting Participant's Customer Numbers at the commencement of the relevant Financial Year (or in the case of a Contracting Participant which becomes a Contracting Participant after the commencement of the current Financial Year based on its Customer Numbers at the time it becomes a Contracting Participant

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(a) each Founding Electricity Member, each Founding Gas Member, and Melbourne Water Corporation (for so long as it is a member) will pay \$20,000 towards the Annual Levy;

Each other member will contribute an amount based on its Customer numbers at the commencement of the relevant Financial year (or in the case of a member which becomes a member after the commencement of the current Financial year, based on its Customer Numbers at the time it becomes a member....”

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Customer Numbers			Amount
Electricity Members and Gas Members who hold a Licence	Water Members	LPG Members	
N/A	Less than 40,000	Less than 5,000	\$2,000
Less than 200	40,000 – 59,999	5,000-24,999	\$5,000
200 - 499	60,000-199,999	N/A	\$10,000
500 or more	200,000 or more	25,000 or more	\$20,000

The signatories to the **EWOV (Victoria) Ltd Constitution** formulated in **May 2006** are as follows:

1. **Citypower** Ltd ACN 064 561 056 (Jointly owned by Cheung Kong Infrastructure/Hong Kong Electric 51%; Spark Infrastructure 49%)¹⁸⁸ (Electricity Distribution)
2. **United Energy** ACN 064 651 029 (now owned by Alinta 34%, DUET 66%, both in turn now owned by the Babcock and Brown and Singapore Power Consortium).¹⁸⁹ (Electricity Distribution). Not Singapore Power is owned by the Singapore Government.
3. **Powercor** 064-651-109 ((Jointly owned by Cheung Kong Infrastructure/Hongkong Electric 51%; Spark Infrastructure 49%)¹⁹⁰
4. **Solaris Power Ltd** ACN 064-651-083 (now owned by Alinta, in turn owned by the Babcock and Brown/Singapore Power consortium)¹⁹¹ (Electricity Distribution)
5. **Eastern Energy Ltd** ACN 064-651-118 (owned by SP Ausnet (51% Singapore Power, owned by the Singapore Govt), the trading name for China Light and Power)¹⁹² (Electricity Distribution)
6. **Powernet** Victoria (ACN not included against Common Seal signature)¹⁹³ (network and transmission networks) (*link directs to SPI Powernet Pty Ltd ACN 079 798 173 ACCC Undertaking till 2010*)

There appears to be a singular lack of inclusion amongst the Constitution signatories of consumer organizations or individuals. Though EWOV has a Committee or Council with three community representatives including CALV, and TUV, this is not quite the same as having balanced representation between industry participants and consumer representatives on the Constitution. There market power balance issues inherent in the design of these administrative arrangements.

Without vexatious intent, one cannot help wondering about the decision-making independence of the so-called industry-specific Energy and Water Ombudsman Victoria (EWOV) and whether this has more of a likeness to an industry association than an ombudsman.

¹⁸⁸ AER (2007) State of the Energy Market (SEM), Jul 2007 p9

¹⁸⁹ Ibid AER (2007) SEM p9

¹⁹⁰ Ibid AER (2007) SEM p9

¹⁹¹ Ibid AER (2007) SEM p9

¹⁹² Ibid AER (200& SEM p9

¹⁹³ Source

http://www.accc.gov.au/content/item.phtml?itemId=573107&nodeId=c63beadf6604efa9c804470ce7a83a4e&fn=d00_38036.pdf

EWOV Charter extract: Reportabilities

Clause 7(p) of the Ombudsman’s Charter (EWOV)¹⁹⁴ which provides for:

“Reporting to the Essential Services Commission as and when required under licence or agreement”

Handling complaints from the public, especially those relating to essential services carries a huge moral obligation. Regardless of legal entity structure, EWOV has specific responsibilities, as well as under s36 of the *Gas Industry Act 2001*, legal responsibilities to ensure that best practice standards are adopted.

The Objects of the Constitution of EWOV are as follows:

The objects of EWOV Limited are to establish an energy and water ombudsman scheme and to appoint an energy and water ombudsman with power on behalf of EWOV Ltd to receive, to investigate and to facilitate the resolution of:

- (a) Complaints as to the provision or supply of (or the failure to provide or supply) electricity, gas or water services by a Participant to a customer as required by a Licence or agreement, under legislation or under an applicable industry code;*
- (b) Billing disputes*
- (c) The administration of credit and payment services in the circumstances of a particular customer*
- (d) Disconnection, restriction and refundable advance complaints*
- (e) Complaints from owners or occupiers of land or other property about the way in which a Participant has exercised its statutory powers in relation to that particular land or other property or in relation to neighbouring land or other property*
- (f) Complaints referred by the Essential Services Commission in relation to the conduct of a Participant’s electricity, gas or water services businesses; and*
- (g) Such other complaints as may by agreement with the ombudsman and the complainant be referred to the Ombudsman by Participant*

¹⁹⁴ EWOV Charter found at <http://www.ewov.com.au/pdfs/Organisation/Charter%2030%20May%202006.pdf>

Accountability Issues

For the record, courts and tribunals have upheld that even in the face of a separate legal entity structure such as that held by EWOV, as a company limited by guarantee without share portfolio; the subservient nature of such a body, for example under the terms of an MOU; its operational and jurisdictional parameters and obligation to abide by legislation and regulations under the jurisdiction of a statutory agency such as the ESC; with accountability also to the DPI renders such a body in practice as being little more than a servant contractor/and agent to a statutory authority.

In fact the identities of the two (ESV and EWOV) and their relationship may possibly be seen to be identical in many respects notwithstanding separate legal entity structure, and a possible conflict of interest. Since EWOV is administered by ESV and is much “*under thumb*” it could be reasonably argued that ESV would not wish to find its apparent servant/contractor deficient in service delivery.

By contrast, given EWOV’s relationship with the regulator and dependence of its regulations for its very existence, to say nothing of direct income from scheme participants, it could perhaps also be argued that EWOV is in a weak position to expose regulatory deficiencies in an appropriate manner.

Somewhere along the line the policy maker responsible for both EWOV and ESV, namely the Department of Primary Industries (DPI, Victoria, has to show that due process and accountabilities in performance management and operation are delivered in the public interest.

It is not unusual for integral components of a statutory agency to be siphoned off into a separate legal identity structure. This has the superficial effect of “*cordonning off*” accountabilities, whilst presumably allowing political agendas and “*regulatory approaches of the day*” to

EWOV’s excessively close relationship with both industry participants and with the regulator may be a factor that seems to many stakeholders to compromise perceptions of independence and scope.

Industry-specific so-called “*Ombudsman*” so-called ADR providers based on self-perception or “*complaints schemes*” and their staff need to have regular access to proper legal advice in interpreting consumer rights and other issues brought before them, and where there is complexity and jurisdictional overlap, should not only receive maximal support and proper governance, but should proactively seek legal or other advice in order to best make decisions in the public interest.

In any case, the public may be gaining an impression that consumers are dealing not with an ombudsman, but an industry association.

EWOV is a company limited by guarantee without share portfolio.

Despite this legal identity structure and the fact that office-bears can be sued in their own right (with apparently no indemnity being offered to staff, if I am correct), this body is in fact subservient to a statutory authority Essential Services Commission (ESV) Victoria and operates substantially as a servant/contractor to that authority through a

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Memorandum of Understanding, which requires regular meetings to exchange information (although it has been found that proper record keeping may be lacking regarding Minutes refer to the EAG Report (2004)¹⁹⁵ following FOI access referred to elsewhere

In those circumstances, the statutory authority in this case, the ESV has projected vicarious liability for the actions of a body subservient to it in such a significant way. Courts and tribunals have upheld that notion.

The same applies to the Department of Primary Industries (DPI) as the policy-maker to whom both ESC and EWOV are accountable.

Following along that train, there is a Memorandum of Understanding between the CAV and EWOV and between the CAV and the ESC – the principles of accountability are encapsulated here also, with particular reference to provisions under the Fair Trading Act and the existing Victorian Unfair Contract legislation, the terms of which are under threat, to perceived consumer detriment (see PC Recommendation 7.1 DR)

Problems with regulator commitment to compliance enforcement, both under the FTA and TPA have been discussed by stakeholders making submissions to the PC. I will refrain from detailed discussion here on that issues, covered under my responses under 7.1, save to say that in this whole triangle, the CAV also has something to answer for in terms of its involvement in matters impacting on breaches of either the FPA or TPA, and also weaknesses in existing legislation.

EWOV has projected statutory responsibilities to maintain proper records, minutes of all meetings held with regulators, policy makers, including the ESC, DPI and CAV.

Staff Training and Professional Development issues

Beyond that, the Energy and Water Ombudsman Victoria (EWOV) apparently does not have sufficient training or expertise to deal with matters of complexity such as interpretation of rules and regulations of a technical nature such as those relating to the bizarre complex and incomprehensible arrangements for energy supplied for hearing communally heated water, that is “*bulk hot water*” in multi-tenanted dwellings.¹⁹⁶

Some concerns under the Constitutional objectives of EWOV as discussed above showing a verbatim extract from that published Constitutional, are sufficient training and resourcing of EWOV staff (and those in similar industry-specific complaints schemes) such that they are able to handle complex billing disputes and issues of hardship.

¹⁹⁵ EAG (2004) Report on the Essential Services Commission Energy and Water Ombudsman Victoria (EWOV) Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code. 2004 found at <http://www.chronicillness.org.au/utilitease/downloads/Enery%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc>

¹⁹⁶ This is discussed in considerable detail elsewhere under 5.1 though other recommendations impact on that analysis and that section of the draft report.

These seem to be by far the highest bread-and-butter type cases that EWOV is able to handle, with the reservation, as expressed in Andrea Sharam's Report *Power Market and Exclusions*¹⁹⁷ that many cases deemed to be resolved satisfactorily actually result in a debtor to an energy supplier being placed in a position of further spiraling debt

Jurisdictional Issues

Nor does the jurisdiction of EWOV (and presumably also other such schemes in other states) allow involvement in matters of policy. Nonetheless EWOV has been known to take on complaint matters that are not only out of their jurisdiction or technical expertise to handle, but fail to refer on matters of policy to the DPI or matters of regulation to the ESC for direct input. This does not measure up to the parameters of best practice, as required specifically under s36 of the *Gas Industry Act 2001 (GIA)* and the equivalent provisions for electricity.

I can directly testify to this and have provided copious privileged information in support which must remain privileged because of protection of personal data and other considerations discussed with the Productivity Commission in privileged correspondence.

Yet EWOV apparently involves itself in protracted debate over these issues, even taking direct independent legal advice and endeavouring to use such advice as a tool of high-pressure conciliation technique, instead of directly referring such matters in a timely and appropriate way to the policy maker (DPI) and regulator (ESC)¹⁹⁸

Schemes such as EWOV are run, funded and managed by industry participants, with constitutions exclusive to industry participants, though some like EWOV have some consumer body representation on Committees or Councils – not quite the same thing or with the same power. s36 of the *Gas Industry Act 2001* makes refers to perceived conflict of interest in the minds of the public – in my mind this is a significant issue that would deter me as a consumer from seeking input from a scheme run under current operational, constitution and jurisdictional parameters, whether or not nationalised if there were other alternatives. Yet complainants are forced to deal with EWOV if a complaint comes up that needs resolution, regardless of their expertise to deal with certain matters

¹⁹⁷ Sharam A (2004) *“Power Markets and Exclusions”* Financial and Consumer Rights Council, Melbourne. Found at <http://www.vcross.org.au/images/reports/Full%20Report.pdf>

¹⁹⁸ Please see copious privileged written submissions associated with Sub 101 and subdr242; with copious further draft material referring to a range of matters including energy regulations and “external” complaints schemes These schemes are run, funded and managed by industry participants, with constitutions exclusive to industry participants, though some like EWOV have some consumer body representation on Committees or Councils – not quite the same thing or with the same power. S36 of the Gas Industry Act makes refers to perceived conflict of interest in the minds of the public – in my mind this is a significant issue that would deter me from seeking input from a scheme run under current operational, constitution and jurisdictional parameters, whether or not nationalised if there were other alternatives.

EWOV apparently does not encourage direct complaint to the regulator or policy-maker and in my personal experience is willing to hold on to a matter for in excess of 12 months, endeavouring to achieve conciliation at all costs, even using high-pressure “*conciliation*” techniques such as threat of closure of file if the complainant or representative sought legal advice. This cannot be acceptable conduct for a complaints scheme howsoever named.¹⁹⁹

How does an inarticulate, vulnerable or disadvantaged consumer deal with such techniques, or for that matter the majority of more sophisticated complainants without such personal circumstances as impediments to assertive informed communication? Do such approaches render inaccessible proper justice and timely early intervention with the view of avoiding expensive litigation? If not, they should be reviewed.

Should not these high pressure “*conciliatory techniques*” be seen in exactly the same light as the marketing conduct referred to as high pressure marketing sales techniques during door-knocking and telephone campaigns – often the subject of direct complaint to such bodies as EWOV? What is the difference?

Could it be the case that leaving a file open for in excess of 12 months is viewable as a technique to discourage consumers from pursuing a complaint because of running out of stamina and incentive or resources.

EWOV is predicting high demands on their time when price deregulation becomes absolute, viz. the removal of retail price default options. Their complaints levels have risen not dropped and they have referred to the serious nature of some of the complaints made. They have also expressed concern about the manner in which the AEMC has interpreted their complaints results.

Some complaints results do not appear to have been included in reports of long-standing complaints data published by EWOV, even though they have run into two, even three reporting year cycles.

It is a reasonable expectation that EWOV (*and similar complaints schemes*) identifies in its first letter of confirmation of lodging a complaint the limitations of its jurisdiction and powers, clarifies the scope of the matter in writing as understood by them, and finally promptly refers matters to other appropriate bodies where their jurisdictional powers do not extend to the nature and scope of complaint, allowing the complainant or representative the option of making that complaint directly to the responsible body (e. g. Essential Services Commission; Department of Primary Industries; Consumer Affairs Victoria; ACCC).

Holding onto a complaint that is complex and out of jurisdiction not only delays resolution but can be seen as unfair and adding undue stress to the consumer’s plate. Where jurisdiction does apply it should not be acceptable to side-step responsibility for investigating conduct issues by playing a game of “*football*” with other authorities thus delaying proper management and resolution. Where issues relate to Fair Trading or Trade

¹⁹⁹ Again please see copious privileged written submissions associated with Sub 101; as mentioned above.

Practice legislation, these issues should also be promptly referred for resolution with the appropriate body.

I refer again to Luke Nottage's perceptions as expressed in his direct submission to the PC's Draft Report²⁰⁰ as discussed above.

Provision for Memorandum of Understandings between Essential Services Commission under the *Section 16 of the Essential Services Commission Act 2001*.

Section 16 of the Essential Services Commission Act 2001 requires the Commission to enter into Memoranda of Understanding (MOU) with a number of prescribed agencies. The legislation identifies that an MOU may include any matter that the Commission and prescribed body consider appropriate, but must include the matters set out in the regulations. In particular, the Commission Regulations 2001 require that an MOU must provide for the integration and coordination by the parties of their regulatory or other activities and must include:

- the objectives of the MOU relating to regulated industries*
- the roles of the parties*
- how the parties will jointly consult and communicate on regulatory issues that affect them*
- what formal processes will be followed in the relationship between the parties.*

²⁰⁰ *Burgeoning industry-association based "ombudsman" dispute resolution schemes'* – a phrase directly quoted from the submission by Dr. Luke Nottage Assoc Prof Faculty of Law Univ of Sydney

I now turn to the actual MOU between the ESC and EWOV, and I quote directly from the Memorandum of Understanding between EWOV and the Essential Services Commission dated 18 April 2007²⁰¹

Background

A EWOV operates a customer dispute resolution scheme approved by the Commission involving energy and water businesses (amongst others) regulated by the Commission (regulated scheme members)

B The parties have entered into a memorandum of understanding to provide for consultation between them and the integration and co-ordination of their regular activities, in the same spirit as memoranda of understanding entered into between the Commission and the prescribed agencies

C This memorandum does not deal with constitutional, governance or scheme operational issues for which the Commission has regulatory responsibility under EWOV Constitution or Charter

The mission of EWOV Limited, as outlined in the Memorandum of Understanding between the ESC and EWOV is described under 4.2 as follows:

4.2

“The mission of EWOV Limited is to receive investigate and facilitate the resolution of complaints and disputes between consumers of electricity gas and water services in Victoria and entities participating in the EWOV scheme. The mission is founded on principles of independence natural justice access, equity effectiveness and community awareness.

²⁰¹ Memorandum of Understanding ESV and EWOV 21 April 2007, p1
Found at
<http://www.esc.vic.gov.au/NR/rdonlyres/D2670BDF-80FC-4713-AC86-A8F155D46CAF/0/MOUEWOV.pdf>

I quote from the Memorandum of Understanding between ESC and EWOV, p 4, regarding the functions of EWOV. Clause 4.3²⁰²

4.3 The functions of the Ombudsman²⁰³ are to receive, to investigate and to facilitate the resolution of

(a) complaints as to the provision or supply of (or the failure to provide or supply) electricity, gas or water services by a Participant to a customer as required by a licence or agreement, under legislation or under an applicable industry code

(b) billing disputes

(c) The administration of credit and payment services in the circumstances of a particular customer

(d) Disconnection, restriction and refundable advance complaints

(e) Complaints from owners or occupiers of land or other property about the way in which a Participant has exercised its statutory powers in relation to that particular land or other property or in relation to neighbouring land or other property

(f) Complaints referred by the Essential Services Commission in relation to the conduct of a Participant's electricity, gas or water services business; and

(g) Such other complaints as may, by agreement with the Ombudsman and the complainant, be referred to the Ombudsman by a Participant

In relation to the handling of Complaints EWOV (termed “The Ombudsman”) must operate in the following way:

²⁰² Memorandum of Understanding ESV and EWOV 21 April 2007, p4
Found at
<http://www.esc.vic.gov.au/NR/rdonlyres/D2670BDF-80FC-4713-AC86-A8F155D46CAF/0/MOUEWOV.pdf>

²⁰³ Meaning industry-specific complaints schemes

4.3

The Ombudsman, in handling complaints, must pursue them in a fair, reasonable, just, informal and expeditious manner having regard to the law and licences, industry codes, deemed contracts and good industry practice applicable to the relevant Participant

5 *How the parties will consult*

5.1 Where relevant, the Commission, will, as early as practicable, consult with EWOV:

- (b) in the conduct of an inquiry or investigation, after first consulting with the Minister; and*
- (c) in preparing and reviewing the Commission's Charter of Consultation and Regulatory Practice*

5.2 EWOV will, if requested in writing by the Commission to do so, consult with the Commission

- (a) in relation to any matter specified by the Commission which is relevant to its objectives or functions; and*
- (b) in respect of a matter specified by the Commission which may impact on a regulated industry*

I quote directly from a submission from EWOV to the Review of the Essential Services Act 2001²⁰⁴

Extract EWOV to the Review of the Essential Services Act 2001, p2

Our relationship with the Essential Services Commission

The primary role of the Energy and Water Ombudsman (Victoria) (EWOV) is to receive, investigate and facilitate the resolution of complaints involving consumers and energy and water service providers in Victoria. To 31 October 2006, we had handled some 103,500 cases.

EWOV has a strong and close relationship with the Essential Services Commission of Victoria ('the ESC'). At a foundational level, electricity, natural gas and water providers are required by legislation and/or licence conditions to participate in a customer dispute resolution scheme approved by the ESC — namely EWOV. There are numerous references to the ESC in EWOV's Constitution and Charter. These are complemented by a Memorandum of Understanding between EWOV and the ESC.

At a day-to-day level, EWOV contributes to the ESC's consultation processes and provides regular reports to the ESC — for example, on cases involving marketing issues. EWOV also participates as an observer in the ESC's Customer Consultative Committee meetings. EWOV and ESC staff members meet regularly to discuss systemic issues and cases requiring ESC interpretation. ESC representatives frequently provide advice and assistance to EWOV conciliation staff.

As such, EWOV's comments are based on our experiences of working closely with the ESC.

EWOV suggests it is worth keeping these principles in mind during the review of the Act. If amendments to the Act are proposed, it is worth asking if they are consistent with, or an enhancement of, these principles.

EWOV notes that AGL also cited these principles in its response to the Issues Paper.

²⁰⁴

EWOV (2006) Submission to Review of Essential Services Act 2001
[http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMA/\\$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMA/$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf)

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Next I refer to the specifics of the MOU²⁰⁵ between the CAV and ESC updated on 18 October 2007, replacing the previous MOU of 2004. Under Clause 4 of the MOU the role of Consumer Affairs Victoria is described as follows:

4 The role of Consumer Affairs Victoria

4.1 CAV is responsible for maintaining an effective framework for consumer protection services in Victoria and for providing an effective business licensing and registration function. The role of CAV is

(a) protect and promote the interests of consumers^{206,207}

(b) ensure markets work in the interests of consumers and the broad community; and

(c) improve access to consumer protections services, particularly for vulnerable consumers

²⁰⁵ Memorandum of Understanding between CAV and ESC 18 October 2007
Found at http://www.esc.vic.gov.au/NR/rdonlyres/5CF8C62C-0314-4FD3-B792-FA8E6520769F/0/MOU_CAV_Oct07.pdf

²⁰⁶ It cannot be in the interests of consumers to allow unconscionable threat of disconnection of essential services to go without sanction. It cannot be in the interests of consumers to suffer detriment because of unjust and unwarranted imposition of contractual status where the proper contractual obligation lies with the Owners Corporation.

It cannot be in the interests of consumers to have their expectations of the core values of the Attorney-General's Statement of Justice upheld in every respect. It cannot be in the interests of consumers, inarticulate, vulnerable, or otherwise to suffer any form of detriment in the name of "competition goals"

The current bulk hot water pricing and charging arrangements are unjust and unfair and have the ongoing effect of stripping end consumers of bulk energy, whether or not as embedded customers, whether or not receiving indirectly suppliers provided to Owners' Corporation entities energy supplies for the heating component of "heated water" or "hot water" depending on temperature quality' or through indirect sources through embedded networks in a more technical sense (custody changeover occurring between providers thrice over or more, rather than directly from distributor to retailer to Owners' Corporation or equivalent to end user, with the Owners' Corporation or equivalent being the proper contractual party

²⁰⁷ It cannot be in the interests of consumers, long-term or otherwise to prevaricate or delay proper sanctions of unacceptable market conduct. Effective markets need to be safe and sustainable. Compromised consumer confidence is compromised consumer protection – according to Consumer Affairs Victoria. That is a worthy goal. When can we expect to achieve this?

4.2 CAV administers over 40 statutes. For the purposes of this Memorandum, the FTA is the most relevant. The functions and powers of the Director under the FTA include

- (a) to advise persons of their rights and obligations under the FTA or related consumer legislation*
- (b) to receive complaints from persons and to deal with them in accordance with the FTA*
- (c) to investigate breaches of the FTA*
- (d) to prosecute breaches of the FTA*
- (e) to institute and defend proceedings in accordance with the FTA*
- (f) to encourage the preparation and use of codes of practice and guidelines in safeguarding and promoting the interests of suppliers and purchasers of goods or services and to prepare and submit to the Minister for Consumer Affairs codes of practice for the purposes of the codes and guidelines being prescribed in regulations*
- (g) in respect of matters affecting the interests of purchasers and suppliers
 - (i) to investigate those matters; and*
 - (ii) to conduct research; and*
 - (iii) to collect and collate information**

4.3 CAV's role and functions are the basis of its concern with the market conduct of energy retailers. Its concern is predominantly about breaches of the FTA having regard to the impact of the breach, whether further consumer detriment can be avoided, and whether the retailer has been the subject of previous enforcement actions

Whilst CAV is most concerned about serious breaches of the FTA, a broader understanding of breaches of the FTA by a trader is important to inform CAV of the most appropriate compliance and enforcement action to take against a trader

The objects of the Memorandum are

2 Objectives and purpose of this memorandum

This memorandum seeks to:

- (e) ensure that the regulatory and decision making processes of the parties in relation to regulated industries are closely integrated and better informed*
- (f) avoid overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries*
- (g) provide for sharing information between the parties in the context of their respective roles in relation to regulated industries; and*
- (h) promote the adoption of a best practice approach to regulation*

I particularly refer to object (b) referred to above in relation to avoiding overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries.

Such a conflict has occurred in relation to the Bulk Hot Water Charging Guideline ESC Guideline 20(1) for reasons discussed elsewhere. This example is given to illustrate that it is not only important to identify what will appropriately reduce regulatory burden without compromising consumer protection, but also what is actively contributing to consumer protection compromise in an active way as inappropriate regulation.

The MOU between the CAV and ESC dated 18 October 2007 describes the role of the Commission (ESC) as follows:

3 The role of the Commission

3.1 The Commission currently has functions relating to the economic regulation of the electricity, gas, ports, grain handling, freight rail, taxi, hire care, tow truck, statutory insurance and water industries. Its specific functions are:

- (a) to perform such functions as are conferred by the ESC Act and the relevant legislation under which a regulated industry operates*

- (b) to advise the Minister for Finance on matters relating to the economic regulation of regulated industries, including the reliability issues*
- (c) when requested by the Minister for Finance on matters relating to the economic regulation of regulated industries, including reliability issues*
- (d) to conduct inquiries and report under the ESC Act on matters relating to regulated industries*
- (e) to make determinations in accordance with the ESC Act*
- (f) to make recommendations to the Minister for Finance as to whether an industry which provides an essential service should become a regulated industry or whether a regulated industry should continue to be a regulated industry*
- (g) to conduct public education programs for the purpose of promoting its objectives under the ESC Act and the relevant legislation and in relation to significant changes in regulation of a regulated industry and*
- (h) to administer the ESC Act*

Under 3.2 of that MOU between the ESC and CAV, the Commission's primary objective in performing its functions is described as follows and draw particular attention 3.2 (e) and (f) and to 3.3 in relation to market conduct

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

- (e) *to ensure that regulatory decision making has regard to the relevant health, safety, environmental and social legislation applying to the regulated industry*
- (f) *to ensure that users and consumers (including low-income or vulnerable customers) benefit from the gains from competition and efficiency; and*
- (g) *to promote consistency in regulation between States and on a national basis.*

3.3 The Commission must also perform its functions and exercise its powers in such a manner as the Commission considers best achieves any objectives specified in the relevant legislation under which a regulated industry operates

The Commission's objectives, functions and particular responsibilities under regulatory instruments are the basis of its concern with market conduct of entry retailers. Its concern is predominantly about systematic misconduct or systemic issues, particularly where it is suggestive of misuse of market power or the absence of effective competition

On his website, Consumer Affairs Victoria describes its role and functions as follows²⁰⁸:

Consumer Affairs Victoria

Consumer Affairs Victoria (CAV) is the Victorian Government's leading consumer protection agency, working towards the vision of 'informed and responsible consumers and traders'.

CAV aims to help make markets work better by providing services to, and engaging with, both consumers and business. CAV places priority on providing additional assistance to vulnerable and disadvantaged consumers.

The main functions of CAV are to:

- *provide information and advice to consumers, tenants, traders, landlords and the government on consumer and tenancy issues*

²⁰⁸

Consumer Affairs Victoria About Us

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE+-+Consumer+Affairs+Victoria>

- *educate consumers and traders on their rights and responsibilities and changes to the law*
- *seek to reduce disputes between consumers and traders and tenants and landlords including the provision of a dispute resolution service*
- *ensure compliance with consumer laws*
- *promote product safety*
- *regulate the consumer environment through licensing and registration*
- *promote accurate trade measurement*

By contrast, in the 2006/2007 Annual Report, the CAV has reduced its range of primary functions but omitting direct mention of “ensuring compliance with consumer laws: using the phrase *“regulate industry conduct”* instead

This could be because of the option that may be already available to the CAV to refer compliance to the ACCC. Consumer Affairs Victoria reports in its Annual Report the following regarding its goals and functions

Goals of CAV^{209/210}

Empowered consumers; an efficient, fair and safe trading environment; protected vulnerable and disadvantaged consumers and optimized organizational capability

The bread and butter clientele of EWOV comprises hardship cases with overdue bills where disconnection and reconnection are issues, though there are some where misleading conduct has led to inappropriate connections. Andrea Sharam²¹¹ has pointed out that in most cases where conciliation is reached through EWOV’s intervention, the

²⁰⁹ Consumer Affairs Victoria Annual Report 2007
Found at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/\\$file/cav_annualreport_2007_intro.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/$file/cav_annualreport_2007_intro.pdf)

²¹⁰ The recommendations made by the Western Australian Council of Social Services (WACOSS Submission to the Productivity Commission (re-published as SUB243DR suggest how risks of market failure cause so much detriment to consumers that industry-specific consumer regulation is required and how those facing financial hardship and other detriments are disproportionately affected. That submission seeks proper recognition by the PC of these factors

²¹¹ Sharam A (2004) *“Power Markets and Exclusions”* Financial and Consumer Rights Council, Melbourne
Found at <http://www.vcoos.org.au/images/reports/Full%20Report.pdf>

client ends up with further entrenched debt. These outcomes are not providing sufficient protection for consumers of energy, consistent with the goals of the Victorian Government (CAV cited above).

The role and functions of Consumer Affairs Victoria²¹²

Functions

The agency has three key roles, namely to:

- advise the Government on the consumer policy framework and manage the legislative and non legislative program related to this framework*
- regulate industry conduct, monitor entry regulation in some industries, and manage guarantee funds covering residential tenancies, property services and motor car trading, and*
- provide services including information, advice, education, complaint handling (primarily through the provision of third party conciliation and mediation services) and business registration and licensing services.*

Consumer Affairs Victoria is the initial entry point for all consumer enquiries from across the State, having subsumed, over the last three years, the services previously provided by numerous community agencies formerly funded by CAV. Many services are provided from the seven regional offices established over the last three years across the State.

CAV administers 50 Acts of Parliament, some covering industry generally (for example fair trading, trade measurement, and business names), and others covering specific industries.

Licensing and registration schemes cover liquor suppliers, estate agents, motor car traders, credit providers, finance brokers, travel agents, prostitution service providers, introduction agents, second-hand dealers and pawnbrokers, fundraisers and other not-for-profit entities, trade measurement certifiers and retirement villages.

²¹² Consumer Affairs Victoria Annual Report 2007
Found at
[http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/\\$file/cav_annualreport_2007_intro.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/$file/cav_annualreport_2007_intro.pdf)

New schemes covering conveyancers, owners' corporation managers and funeral service providers are due to come into effect soon.

Important areas of consumer expenditure specifically outside the scope of the agency's complaint handling (but not its compliance and enforcement) activities include energy and water, health and health insurance.²¹³

Some areas within the regulatory scope of Consumer Affairs Victoria do not have a primary consumer focus. The legislation on prostitution is driven more by occupational health and safety, child protection and crime prevention objectives.

The second-hand dealers and pawnbrokers legislation is also more about general crime prevention than consumer protection, while the liquor licensing scheme has harm minimisation and preservation of community amenity as its central objects.

Most complaints are dealt with by conciliation when they are assessed as being justified and within jurisdiction. Complaints can also trigger investigations of breaches and subsequent compliance or enforcement action. Approximately 120 matters end up being dealt with by courts or tribunals. Legal specialists within Consumer Affairs Victoria conduct prosecutions, undertake civil actions and initiate disciplinary actions.

They also handle appeals against decisions of the licensing and registration bodies.

Other administrative remedies are also used extensively by the agency, including court enforceable undertakings, infringement notices and warning letters.

While most of CAV's services are provided directly by Consumer Affairs staff, CAV also funds a range of organisations to provide programs to vulnerable and disadvantaged Victorians on its behalf.

²¹³ Presumably, these areas now being outside the expenditure scope of the CAV, because of the existence of industry-specific industry-run-funded and managed complaints schemes for energy and water and health insurance; and the existence of the Health Insurance Commissioner. However, compliance and enforcement remain under the umbrella of the CAV's jurisdiction for these areas. It is a fairly new development that the CAV would not handle direct energy and water complaints, whereas during 2007 its online information pages specifically invited such complaints.

This approach is consistent with the Victorian Government's long-term action plan to tackle disadvantage and create opportunity for all Victorians.

It emphasises:

- *the provision of accessible and affordable universal services for all Victorians, and*
- *targeting support for those in greatest need*

It also includes a strong commitment to expanding place-based approaches, and working in partnership across Government, and with local governments, the community sector, business and local communities.

By funding external providers, CAV can direct assistance to where it is most needed.

Many of the funded programs deal directly with individuals and communities, and so have a capacity-building component.

CUAC²¹⁴ and CALC are amongst CAV's funded projects, seven community-based agencies in regional and metropolitan locations to provide advocacy to consumers and private rental tenants

Consumer Utilities Advocacy Centre Ltd

The Consumer Utilities Advocacy Centre Ltd (CUAC) has been an active advocate for Victorian consumers since its office opened in August 2002, taking a leading role in State and national policy and regulatory decisions affecting Victorian energy and water consumers.

CUAC also has an important role in facilitating the participation of other consumer advocates through its grants program, which supports research and capacity-building projects that enhance consumer input into the regulatory debate, build expertise on consumer utility issues and support and facilitate the participation of consumers.²¹⁵

²¹⁴ CUAC does not undertake direct advocacy for consumers, but is involved in a number of policy advocacy initiatives

²¹⁵ Refer to further discussion about CUAC, a policy advocacy agency without individual clientele funded by the CAV at \$500,000 a year. Extracts from the CAV 2006/2007 are shown below

Financial counselling program

Financial counselling is a service primarily for low-income vulnerable individuals, families or groups who are experiencing disadvantage and/or disputes concerning their financial and debt situation. Consumer Affairs Victoria funds 44 community-based organisations to provide this service free of charge and without conflict of interest, as well as funding the peak body. The program includes both casework and community development.

Community program

Advocates

Through its community program CAV funds seven community-based agencies in regional and metropolitan locations to provide advocacy services to consumers and private rental tenants. The advocacy program supplements CAV's enquiry and conciliation services by providing locally accessible consumer and private tenancy advocacy services for clients who are vulnerable or disadvantaged and who require face-to-face intensive support.

CAV-funded advocacy programs served over 3,900 clients in 2006–07.

Statewide and special projects

Consumer Action Law Centre (CALC)

The Consumer Action Law Centre is the result of a merger of Victoria's two specialist consumer law community legal centres, the Consumer Credit Legal Service (CCLS) and the Consumer Law Centre Victoria (CLCV).

CAV and Victoria Legal Aid (VLA) are partnering to fund CALC for a period of three years to undertake civil casework and policy research and advocacy. All parties have agreed to and signed a memorandum of understanding.

CAV's funding primarily supports legal advice and professional development for financial counsellors, advocates and other service providers as well as policy research and advocacy on consumer issues. VLA's funding is primarily for casework.

Housing Action for the Aged Group

Housing Action for the Aged Group (HAAG) is a not-for-profit community organisation established to provide tenancy and housing support and advice to senior Victorians residing in all types of rental accommodation, including public and private housing, caravan and residential parks, rooming houses and retirement villages. CAV funds HAAG to assist tenants to access CAV services as well as undertake specific projects relating to older persons' accommodation issues.

Peninsula Community Legal Centre

Peninsula Community Legal Centre (PCLC) is funded through VLA to provide free legal services to the Frankston and Mornington Peninsula communities. CAV also funds PCLC to develop and deliver specific consumer and tenancy projects to the local community.

Tenants Union of Victoria

CAV funds the Tenants Union of Victoria to provide assistance and advocacy for tenants of private residential properties and residents of rooming houses and caravan parks in Victoria. The TUV is also funded to undertake specific tenancy projects and policy advocacy.

Grants program

CAV also makes recommendations to the Minister to approve grants from some of the trust funds administered by CAV, for purposes stated in the relevant legislation.

In its July 2007 Response to the Final Report of the Review of the Essential Services Commission Act 2001 addressed to the Victorian Minister of Finance, the VCOSS raised some important issues regarding both information-gathering and enforcement. I refer to enforcement issues, and quote below directly from the VCOSS submission referred to

“We also support recommendations 25 and 26 regarding bringing consistency to the Commission’s enforcement powers and enabling the Commission to attach proportionate penalties to breaches of licence conditions codes and determinations.

We have long been of the opinion that the primary weakness in the energy consumer protection framework has been the impact of non-compliance and while the Commission has been quite successful in working with businesses to encourage compliance it has limited means to address and discourage breaches through the application of appropriate penalties. Revocation of a licence is a serious matter with grave consequences and the Commission should have at its disposal a range of penalties that are more appropriate for the types of breaches that generally occur.”

4 P Grey & P Lewis World Energy Retail Market Rankings: second edition June 2006 First Data Utilities & Vaasa EMG Utility Customer Switching Research Project 2006

5 Langmore M & Dufty G Domestic electricity demand elasticities: issues for the Victorian energy market 2004

I also again ref to the findings, upon FOI enquiry of the Energy Action Group (2004) cited in full below:

EXCERPTS FROM ENERGY ACTION GROUP (EAG) (2004)²¹⁶

EWOV public reporting

Resolution No. 17 (1 Jul – 31 Dec 2003)

High disconnections reported but not cited as a systemic issue or reported to the ESC as systemic.

Resolution No. 16 (1 Jan – 30 Jun 2003)

Mentions 'billing' issues relating to FRC as systemic but in separate article discusses EWOV Special report on disconnection and restriction of supply (capacity to pay) without stating that it constituted a 'systemic' issue. Recommendations (p.9)

- that the retail code be reviewed and relevant clauses clarified*
- that the ESC develop of 'good practice' guideline for retailers dealing with capacity to pay issues.*

The guideline refers to that developed by energywatch and Ofgem in the UK not to the guidelines associated with Victoria's Retail Code. The former are voluntary and the later are legally binding regulatory instruments.

²¹⁶ Energy Action Group (2004) "*Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*" Found at <http://www.chronicillness.org.au/utilitease/downloads/Energy%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc>

Resolution No. 15 (1 Jul – 31 Dec 2002)

Reporting on matters put before the ESC as systemic: “high gas and electricity disconnection rates’ (p.3)

Otherwise systemic billing delays report back from previous issue of Resolution.

Article on the adoption of many retailers of voluntary ‘hardship’ policies but EWOV notes in same article that electricity disconnection cases up by 21% (although gas down by 9%)

Resolution No. 14 (1 Jan – 30 Jun 2002)

Reports on high disconnection rates, reasons given are need for EWOV details on notices and more awareness of scheme amongst community organisation. However, does not state as in doc 15, that may result from less flexible credit management by retailers.

Systemic issues reported to ESC include the high gas disconnection rates and upwards trend in electricity disconnections.

Case study report on Binding Decision re ‘Hardship’. This is the only Binding Decision re capacity to pay.

Resolution No. 13 (1 Jul – 31 Dec 2001)

Reported on the Getting Connected conference

Systemic issues reported the ESC: disconnections

Resolution No. 12 (1 Jan – 30 Jun 2001)

Reported on high disconnections stating the result appeared to be due to less flexible payment arrangements. EWOV has raised the issues with companies concerned and with the Office of the Regulator-General. Did not classify as systemic.

Resolution No. 10 (1 Jan – 30 Jun 2000)

Reports on high gas disconnections, suggests retailers should be taking greater account of capacity to pay. Not cited as systemic

Resolution No. 9 (1 Jul – 31 Dec 2000)

Notes higher than anticipated gas disconnection rates

Resolution Nos. 11, 8, 7, 6, 5, 3, 2

No specific attention to disconnection rates. No mention of systemic

Resolution No 1

Discusses a hardship case, debt waiver agreed.

Annual Report 2003

AGL, Origin Energy and TXU noted as moving to develop hardship policies.

Submitted to the ESC a systemic issue, the findings of a special research project on disconnection and restriction cases EWOV received from January – September 2002.

Annual Report 2002

Reported on the ‘Getting Connected — Genuine Utility–Consumer

Partnerships’ conference held on 9 November 2001 in Melbourne regarding hardship

High disconnections noted but not listed as a systemic issue

Annual Report 2001

EWOV reported gas disconnection cases and stated it raised the issue directly with the Office of the Regulator-General. Stated that Gas retailer Origin Energy gas Disconnection cases appears to generate from a less flexible approach to payment arrangements

Annual Report 2000

Reports on high gas disconnections, suggests retailers should be taking greater account of capacity to pay. Not cited as systemic

Annual Report 1999

Notes high gas disconnection rates not mentioned as systemic

Annual Report 1998

No mentions

ESC response

The ESC has reviewed its performance monitoring and reporting processes, to assess the adequacy of its current hardship and affordability performance indicators. However, 'performance auditing' audits the systems (ie policy and procedures) the retailers have in place not their actual performance.

In terms of ESC performance reporting, data is collected from the retailers. No attempt is made to triangulate by obtaining data directly from customers. Data provided by community organisations has been ignored.

Discussion

The EWOV can make Binding Decisions and could have exercised this power to send a very sharp signal to retailers that non-compliance would not be tolerated. Instead only one such decision has been made, and FCRC (Sharam 2004) reports that taking complaints to the EWOV frequently leaves the customer in the position of having an unaffordable instalment plan. The EWOV also has a MOU (see http://www.esc.vic.gov.au/apps/page/user/pdf/MOU_EWOV_Nov03.pdf)²¹⁷ with the ESC that it could have used to prompt the ESC into addressing the issue appropriately. It has not used the dispute resolution mechanism available in the MOU. It is also worth commenting that despite EWOV's efforts to bring this systemic issue to the attention of the ESC, EWOV has not been consistent in its reporting. A more robust identification of the issue as 'systemic' and linkage to retailer non-compliance with the Retail Codes may have assisted in prompting the ESC to act. The EWOV also may have bought the regulators lack of action more pointedly to the attention of the public and the Victorian government. A regulatory failure of this scale and duration clearly requires action.

References

ASIC (1999) Approval of external complaints resolution schemes, ASCI Policy Statements [PS 139]

[http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps139.pdf/\\$file/ps139.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ps139.pdf/$file/ps139.pdf)

Kliger B (1998) Unfair Deal, Financial and Consumer Rights Council, Melbourne

http://avoca.vicnet.net.au/~fcrc/research/utility/unfair_deal/index.htm

Sharam A (2004) Power, Markets & Exclusion, Financial and Consumer Rights Council, Melbourne <http://www.vcross.org.au/images/reports/Full%20Report.pdf>

²¹⁷ Please note this MOU between ESC and EWOV was revised on 21 April 2007
Found at Memorandum of Understanding between CAV and ESC 18 October 2007
Found at
http://www.esc.vic.gov.au/NR/rdonlyres/5CF8C62C-0314-4FD3-B792-FA8E6520769F/0/MOU_CAV_Oct07.pdf

With some irony²¹⁸ I further quote EWOV from the same submission in relation to best practice utility regulation. In discussion the 1999 Utility Regulators Forum – which includes the ESC, EWOV refers and is cited below as identifying from that forum nine principles of best practice utility regulation:

Extract from 2006 Submission by EWOV to Review of Essential Services Act 2001 (p2)²¹⁹

Best practice utility regulation

In 1999, the Utility Regulators Forum — which includes the ESC — identified nine principles of best practice utility regulation:

- *communication (information to stakeholders on a timely and accessible basis) consultation (participation of stakeholders in meetings)*
- *consistency (across market participants and over time) predictability (a reputation that facilitates planning by suppliers and customers) flexibility (by using appropriate instruments in response to changing conditions)*
- *independence (autonomy, freedom from undue political influence)*
- *effectiveness and efficiency (cost-effectiveness emphasised in data collection and policies)*
- *accountability (clearly defined processes and rationales for decisions, with appeals)*
- *transparency (openness of the process).1*

EWOV suggests it is worth keeping these principles in mind during the review of the Act. If amendments to the Act are proposed, it is worth asking if they are consistent with, or an enhancement of, these principles.

EWOV notes that AGL also cited these principles in its response to the Issues Paper.

²¹⁸ Given direct experience of complaints handling exceeding 14 months where conduct issues have not yet been addressed, where legal posturing and premature of file have characterized complaints management; and other concerns have included failure to report to regulators or in reporting systems unresolved matters

²¹⁹ EWOV (2006) Submission to Review of Essential Services Act 2001, p2

CASE STUDY – EXAMINING PERFORMANCE AGAINST MANDATED BENCHMARKS FOR SERVICE DELIVERY IN INDUSTRY-SPECIFIC COMPLAINTS HANDLING (ENERGY)

Fairness: Prescribed benchmark parameters under specific enactments²²⁰

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness by making decisions on the information before it and by having specific criteria upon which its decisions are based.

EWOV's handling of the cited case study, discussed in detail below has not been seen to be fair, just or impartial. Legal posturing, threat of closure of file if legal advice was sought and other inappropriate judgments and high pressure conciliation have characterized the handling of the complaint from the outset.

EWOV has not seen fit in 14 months to make a direct referral yet to the ESC despite being aware of this issue as a systemic one. Indeed the bulk energy supplier has indicated to EWOV that unless the regulator specifically instructs them to cease and desist further harassment and coercive conduct seen to be driven by statutory policy associated with existing bulk hot water charging policies authored by the ESC as current Victorian regulator

EWOV has not seen fit in 14 months to investigate the issue conduct issues at all, and became confused as to who would take responsibility for this aspect of the complex complaint, which also related to policy and regulatory impacts seen to be driving unacceptable market conduct, as well as complex legal and technical interpretations – matters well out of EWOV's jurisdiction that ought to have been referred to the Victorian Government in a timely manner.

EWOV has expressed the view that the energy provider has acted in accordance with regulatory provision and instruction, without due regard to the multiple consumer protections that have been ignored by the regulator, and the more recent provision under the MOU between the CAV and ESV regarding conflict of regulatory provision

²²⁰ In this case example under s36 of *Gas Industry Act 2001*

Accountability Prescribed benchmark parameters under specific enactments²²¹

“The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.”

EWOV failed to publish this outstanding matter in its last report. It is reasonable to expect that be corrected in the next Annual Report and Complaints Report²²². The matter has been outstanding for almost 14 months without a single component of conduct being addressed and a football game between all agencies involves as to who should do this.

EWOV has failed to undertake proper reporting and referral as required. There is nothing new about this – their failure to report issues, and secondly, failure to report issues as systemic are well recorded. I support this claim with reference to the EAG reported quoted shortly in full. The regulator believes reliance should be placed on EWOV to make such a report at the end of their enquiries – which after fourteen months they have not even begun.

In any case there is independent evidence of this being a systemic issue, other tenants residing at the same block of apartments have verified this upon direct interview, and the supplier has admitted that this is widespread and applies to all (erroneously) deemed to be obligated to them for bulk hot water charges.

EWOV has left it to the Complainant’s representative to make all direct referrals to the Victorian Government, including to the CAV, DPI and ESV.

Notwithstanding these referrals have been made all statutory authorities have failed to take these issues seriously enough and respond in a timely and appropriate way.

EWOV has over 14 months failed to appropriately refer the matter or to deal with the conduct issues, through possibly a combination of perceived procedural inertia, misguided perceptions, poor understanding of the complex legalities and technicalities involve; perceived biases; proven *“legal posturing”* and *“legal stance”* approaches, perceived *“high-pressure conciliation techniques”*

²²¹ Similarly under s36 of *Gas Industry Act 2001*

²²² Refer to the disturbing report by the Energy Action Group (2004) about transparency accountability and reportability speaks for itself.
EAG (2004) Energy Action Group (EAG) (2004) *“Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.”*

Found at

I refer in particular to the extreme vulnerability of the complainant with a serious irreversible psychiatric history, a history of parasuicide and an actual suicide plan and intent some three weeks after a further threat of unconscionable disconnection of hot water services by the energy provided licenced to sell gas or electricity but not hot water products; with no contractual relationship with the complainant except in the minds of the policy-makers; energy regulators; energy suppliers; Owners Corporation; and industry-specific complaints scheme EWOV, misleadingly calling itself ‘ombudsman’ and “alternative dispute resolution” provider.

Efficiency Prescribed benchmark parameters under specific enactments²²³

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

I refer the disturbing EAG Report²²⁴ about the lack transparency accountability and reportability, and the total lack of triangulation in communications between EWOV, ESC and complainants speaks for itself.

EWOV appears not handled this matter in an appropriate way, has not kept track of the parameters of the complaint, handled case-management hand-over appropriately or referred the matter in a timely way to the Victorian Government.

To keep an urgent and serious complaint of this nature “in-books” for this length of time; to fail to include the matter as outstanding in the complaints reports and annual reports for the preceding year; and to all intents and purposes to fail any intent to appropriately refer this matter to the Victorian government in a timely ay, and considering jurisdictional boundaries, can hardly represent efficiency.

To fail to ensure proper file-hand-over from one successive case manger to another, does not represent efficiency or proper corporate governance

To fail to respond appropriately to each communication, at least by electronic automatic acknowledgement does not indicate efficiency

To fail to answer repeated requests to identify the ESC personnel involved with contact details does not indicate efficiency or a spirit of cooperation.

To fail to have appropriate accountable procedures in place does not indicate efficiency.

²²³ In this case example under s36 of *Gas Industry Act 2001*
²²⁴ Energy Action Group (EAG) (2004) “*Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*” Found at <http://www.chronicillness.org.au/utilitease/downloads/Energy%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc>

Effectiveness Prescribed benchmark parameters under specific enactments²²⁵

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

It is not my view that the handling of this complaint meets the effectiveness criteria in any sense.

There has been a complete lack of proper supervision or accountability in the handling of this matter for 14 months.

In the case study cited, there have been four case managers in 14 months with the matter still unresolved. All case managers involved appeared to be without a proper understanding of the residual issues of the substantive complaint; the jurisdictional parameters; proper referral procedures and the various legalities and technicalities involved, or the necessity to consider enshrined consumer protections and provisions in the written and unwritten law other than those that are just energy-specific.

Despite being directly informed during discussions between the CAV, ESC and EWOV, that the Complainant is not then relevant contractual party, the matter remains unresolved and in dispute.

Despite knowing that the Complainant is an exceptionally vulnerable disadvantaged consumer on low fixed income with a psychiatric history and parasuicide history, who some three weeks after one of the letters of coercive threats of disconnection used as a technique to force an explicit contractual obligation to the supplier, and despite knowing the risks and stresses involved for the Complainant and his family members, no swift action has been taken to date by anyone in this matter.

The accountability football game continues and the substantive issues of conduct investigation have not been addressed at all,

One wonders how much investigation may be necessary, given

- the written letters of coercive threat from the energy supplier improperly and unjustifiably issued, one during the course of as an yet unresolved complaint;
- the direct admission of the supplier that the letters were sent and the intent expressed by the supplier to continue with similar conduct (on the basis that it was sanctioned by the regulator);

²²⁵ In this case example under s36 of *Gas Industry Act 2001*

- that leaving aside the unresolved contractual debate, the supplier has also breached the provisions of the Product Disclosure Statement ESC Guideline 19 in demanding information in excess of what is normally required; that there is evidence available that inappropriate supply charges have been made also to other tenants on the same block; that there is clear evidence available that the issue is systemic – even by the supplier’s own admission, stating to EWOV that unless the regulator changed the rules applying not only to this Complainant but all others supplied by them with bulk energy via the hot water service on the Owners’ Corporation common property infrastructure under its remit, the same conduct would continue.

I have interviewed and obtained selected accounts sent to end-consumers of bulk energy past and present residing at the particular block of flats occupied by the Complainant.

I can testify directly to multiple and unjust consumer detriments resulting from market conduct seen to be driven by existing policies.

EWOV’s idea of complex complaints management seems to be to pass the management of the file from one case manager to the next as each one leaves, allow several months for each successive case manager to read the file, whether or not completely, and to start the whole process from scratch on each occasion.

In each case the allocated case managers have four times over been entirely unable or unwilling to grasp the complexities of this case or to recognize or identify jurisdictional boundaries or follow prescribed referral processes to which they are bound.

EWOV staff quite simply appear not well-enough informed to be in a position to provide accurate and effective advice to the public when inter-related regulations are involved within and outside energy provisions; nor do they have sufficient technical skill to make judgments about matters that properly lie under the jurisdictions of Victorian Government departments or statutory bodies.

Despite suggesting in their responses to the ADR Supplier Survey commissioned on behalf of the Department of Justice that *“half of EWOV’s staff are legally qualified”* there appears to be little evidence that most complaints handlers there have either understanding or training in the relevant legal or technical matters or understanding of the broader issues of contract law, trade measurement legislation or any other legislation that need to be taken into account when making assessments of complaints.

Instead of referring matters outside jurisdiction or, understanding EWOV seems to battle on taking on tasks outside jurisdiction and at the same time neglecting the core issues of conduct that form part of any complex substantive complaint such as this one.

None of this represents effective complaints management.

In every respect these concerns are indicative of poor internal and external governance.

These issues are of serious community concern where there are complex complaints left to an industry-specific scheme with a perceived vested interest. There is also an incentive to delay resolution since EWOV is paid according to the length of time a complaint remains open, in addition to substantial scheme membership fees.

Yet EWOV claims to “resolve” disputes, fairly swiftly and independently and to have a staff at least half of which have “*legal qualifications*”²²⁶ without specifying what those qualifications may be.

The case study shown illustrates poor inter-body communication and handling of complex complaints, poorly identified accountabilities, despite all available instruments, and poor public policy governance generally. That is not an acceptable outcome.

²²⁶ Self-reports in ADR Supply-Side Survey undertaken on behalf of Department of Justice by Chris Field. See Field, Chris (2007) *Alternative Dispute Resolution in Victoria: Supply-Side research Project* Research Report, Department of Justice, Victoria (2007)

DEIDENTIFIED CASE STUDY OF A REAL-LIFE COMPLAINT ‘IN BOOKS AND IN ACTION WITHOUT RESOLUTION FOR OVER FOURTTEN MONTHS

The case study provided demonstrates by deidentified case example that things do go wrong, providing details of the substantive allegations in a specific unresolved case “*in books*” and “*in action*” for over 14 months” without any attempt to date being made by the complaints scheme at any level to investigate the substantive issues of the complaint at all, but instead over-stepped by far the parameters of its own published jurisdiction by undertaking “legal posturing” a formal written “*legal stance*” supporting the position of the subject of complaint, a Board member of its Constitution, and endeavouring apparently without proper understanding of the legal and technical parameters involved or the requirement to consider relevant regulations as extended to those where consumers have existing enshrined rights.

Despite the involvement of the peak Victorian consumer body, Consumer Affairs Victoria in explaining to both regulator Essential Services Commission and complaints scheme Energy and Water Ombudsman that the Complainant was not the “*relevant customer*”, and that the sacred rights of existing and enshrined rights consumers must be protection, neither the regulator nor the complaints scheme has been either able or willing to see that this is the case.

Instead a protracted unresolved debate has been perpetuated wherein a stalemate appears to have been reached with the apparent powers of the peak Victorian consumer body CAV being so far unable to convince the regulator to take a prompt and responsible action regarding the existence of guidelines and codes encapsulated into regulator policy that have had a direct and seriously damaging effect on consumer rights under multiple provisions.

The responsible industry-specific regulator Essential Services Commission (ESC) Victoria (ESC appears to be resistant to accepting direct accountability for the complaints scheme set up under its prescribed powers, and despite revised provisions contained in a Memorandum of Understanding²²⁷ between the Consumer Affairs Victoria (CAV)²²⁸ and the ESC dated 18 October 2007²²⁹, the offending regulations remain in place and continue to cause widespread consumer detriment, with unacceptable market conduct seen to be driven by the policies that have been challenged.

Amongst the terms and objectives of the new MOU between the industry-regulator ESC and the peak Victorian complaints body CAV, with jurisdiction over some 40 enactments, amongst other things provides under its Objects the following clause

(i) avoid overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries

Despite this, and the stalemate position being reached between the Complaints representative and the industry-specific complaints scheme, the state energy regulator appears to have taken the position that after 14 months of delay in even commencing enquiries regarding alleged conduct²³⁰ (

Not all regulations protect consumers. Some are directly harmful because of misconceptions about the obligation to ensure that existing and enshrined consumer protections are not eroded because of misguided regulations, including policies that directly contradict those rights.

²²⁷ Memorandum of Understanding between Consumer Affairs Victoria and Essential Services Commission updated on 18 October 2007, triggered by a specific complaint about gaps in protection and existing regulations. The provisions under one of the objects of that MOU have not yet been met, viz *“avoid overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries”*

²²⁸ Source: CAV 2007 Annual Report found at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/\\$file/cav_annualreport_2007_intro.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2007/$file/cav_annualreport_2007_intro.pdf)

Consumer Affairs Victoria (CAV) protects and promotes the interests of consumers in Victoria. It is responsible for reviewing and advising the Victorian Government on consumer legislation and industry codes. It also advises and educates consumers, tenants, traders and landlords on their rights, responsibilities and changes to the law registering and licensing businesses and occupation; conciliating disputes between consumers and traders, tenants and landlords; enforcing and ensuring compliance with consumer laws. The issue of compliance enforcement has been an issue of debate and contention in the current Consumer Policy debate and elsewhere.

²²⁹ With the revision triggered by the specific case study complaint lodged the subject of discussion
²³⁰ Supported by supported by written letters of coercive threat which the bulk energy supplier has admitted to sending and is adamant that according to its interpretation of the regulations, everything is in order and according to best practice

Some regulations are so flawed as to cause direct detriment as well as unjust and inappropriate imposition on contractual status on the wrong parties – many of those being vulnerable and disadvantaged end-consumers of bulk energy, for example, whose incomes are stretched enough without having to pay bills that do not belong to them.

Because of information asymmetry and lack of understanding about their rights, in many cases without readily being in a position to identify those rights, they are easy targets of flawed policies and threatening, coercive and misleading conduct in endeavours to form explicit contracts with suppliers of bulk energy. Some apply for exemption of licences and are therefore out of the control of the regulators, whilst potential complainants cannot even approach the scheme.

In the 2004 *Winters v Buttgieg* case before VCAT²³¹ one supplier imposed charges on the tenants receiving bulk hot water ten times in excess of their consumption.

In other cases, suppliers of bulk energy are outsourcing their backroom and IT and claiming no responsibility for metering and billing. Many end-consumers are unaware that if there is a contract in the first place, or even an implied contract unilaterally imposed, the energy supplier is responsible for the actions of its servants, agents and/or contractors. In many cases a protracted battle can ensue about proper contractual status.

It is the responsibility of regulators to ensure that provisions are not put in place that add to confusion about contractual responsibility, leave potential for protracted, stress and expensive debate between suppliers and end-consumers and at taxpayers expense involve expensive enquiry and debate between the responsible agencies.

That is exactly what has occurred in the case study cited, with all responsible parties, including policy bodies and regulators and complaints scheme playing a football game of accountability with discrepant interpretations as to the legalities and technicalities involved.

misleading conduct that result in the formation of explicit contracts for provision of “*water products*” on the basis of being informed that their “hot water consumption is being monitored” and records show that they have individually consumed a specified amount of gas or electricity, where in fact the regulations have exempted bulk energy suppliers from making site-specific visits for meter readings; where water meters pose as gas meters, where individual consumption cannot be justly and appropriately measured with an instrument designed for the purpose as specified in the legislative provisions, and where in any case the contact properly lies with the Owners Corporation.

²³¹ As reported in CUAC’s 2005 September Quarterly. “*Embedded Networks – Disconnected Consumers*”. Article by Tim Brook for CUAC

Before again referring to some of the political and philosophical issues that may impeding the proper application of compliance enforcement in the context of the Victorian attitude to reduction of the regulatory burden with regard to administrative and compliance burden, I raise the issue whether the existing provisions for bulk hot water pricing and charging of “*water products*” but misleading implying that proper accountable trade measurement practices are in place (*using for example such phrases “your hot water consumption is being monitored”*), but without explaining how this is done and whether existing.

The existing arrangements for assessing alleged individual consumption of the heated component of bulk hot water using bizarre algorithm formulae are tantamount to endeavouring to weigh a bag of applies with a oil funnel.

Arrangements like these have been formed as collusive ones between policy-makers, regulators, energy suppliers and Owners Corporations, with the complaints scheme making judgments about appropriate contractual status without training and knowledge of the requirements incumbent on the regulators to ensure that there should be no overlap of conflict between regulatory schemes. Creative arguments are then presented by complaints schemes (in the case study cited EWOV), as to whether such a conflict is “real or imagined” thus adding to the market power imbalance and endeavouring to force a complainant to accept contractual status inappropriately.

In the case study cited, the matter was taken to the complaints scheme EWOV, as an industry-run body with the legal status of a company limited by guarantee without share portfolio, but nevertheless directly accountable to the regulator (despite the regulator’s

Background

As mentioned in Part 3 of this submission (SUB242DR), in the case study example provided of both unacceptable regulatory policy and unacceptable standards of complaints management by an industry specific scheme.

The claims made in that case study, which have been supported with privileged evidentiary material supplied to the Productivity Commission, including actual letters of threat of disconnection issued by the bulk energy supplier, used as a lever to coerce contractual relationships, albeit that instruments designed for the purpose of measuring energy consumption are not in use, but rather substitute meters posing as gas or electricity meters, whereby energy is measured and charged in cents per litre through sanctioned policies put in place by energy policy-makers and regulators.

The range of alleged serious conduct issues on the part of the energy supplier have been driven by unacceptable regulatory provisions the bulk hot water charging for the “*heated water*” or the heating component of centrally heated water. The heating component cannot be separately measured with a prescribed instrument under the *Gas Industry Act 2001*, being a meter through which gas passes to filter, control and regulate the flow of gas.

Neither the industry-specific complaints scheme Energy and Water Ombudsman (EWOV) nor the policy-makers and regulators have yet been able to resolve this issue and accept in a timely and appropriate manner that the existing provisions are seriously flawed and in contravention of consumer rights and protections within and outside energy provisions, despite advice from the peak Victorian consumer protection body, Consumer Affairs Victoria that the end-consumer of bulk energy is not the relevant customer, but rather the Owners Corporation.

Provided below are further details of the case study shown to illustrate in Peter Mair's words that²³²

Regulators also can be mightily at fault. Whatever golden rule arrangements might be agreed success will often depend on front line regulatory agencies applying them with a suitable commitment to their own accountability.

²³² Mair, Peter (2008) Submission to Productivity Commission's Draft Report Review of Australia's Consumer Policy Framework, p1

CASE STUDY 1– COMPROMISED CONSUMER PROTECTION

In this case study, an inarticulate, vulnerable and disadvantaged consumer (the Tenant), through a nominated representative upon written authority, as an end-consumer of bulk energy not contractually obligated to form any contract with the energy supplier, brought a complaint before the industry-specific complaints scheme, Energy and Water Ombudsman Victoria (EWOV).²³³

To ignore the market and regulatory failure in this case and those similar is to fail to take a responsible action. To allow this matter to become the continued victim of accountability football is to fail public duty and responsibility. The ESC has an enhanced obligation to vulnerable and disadvantaged consumers.

The Tenant (Complainant), with a serious incurable psychiatric illness and a history of parasuicide, had signed up a residential tenancy lease some months after being released from hospital after exacerbation of his illness.

The lease was a standard tenancy lease. No mention had been made in the lease about the liability of the Tenant for water charges of bulk gas charges, for the central heating of a communal water tank supplying heated water of varying temperature to a group of residential tenants in a twin block of apartments.

Under the terms of a standard residential tenancy lease, the Tenant expected to be free of any and all charges for water, hot or cold.

The Tenant relied implicitly on protections and provisions the enshrined consumer protection provisions of the *Residential Tenancies Act 1997*, s53-55, 69 (Victoria); and associated water industry provisions; and under the provisions of Owners Corporation (previously known as Body Corporate) deeming the Owners Corporation liable for certain charges associated with common property infrastructure (which includes hot water services and air-conditioning); The *Residential Tenancies Act 1997*.

Prior to accepting the lease and taking up tenancy, the previous tenants vacating the same residential apartment had confirmed that in the three years of their tenancy in that particular apartment, they had not had to pay any charges for water, hot or cold, since there were no water efficient devices fitted; and secondly since there were no separate energy meters for tenants receiving centrally heated water through a single meter for each of the two twin-apartment buildings, with each meter situated in the open car-park of each building and readily accessible for meter reading purposes.

At that time the Tenant was quite unaware of the existence, intent, or application of provisions endorsed as “Guidelines” for bulk hot water charging authored by the Victorian energy regulator, Essential Services Commission Victoria (ESC).

²³³ Refer to EWOV, Constitution found at <http://www.ewov.com.au/pdfs/Organisation/Constitution%2030%20May%202006.pdf>

Prior to taking up tenancy, the Tenant received notification from the utilities connecting middleman service that a dual fuel account had been set up with another energy provider (not the one providing the bulk energy) for domestic supply of gas for cooking and heat and nominating water authority responsible for supply of water.

Upon direct enquiry (twice) that water authority had confirmed that the landlord through the Owners Corporation (previously Body Corporate) had accepted responsibility for water charges. No water efficient devices fitted at any of the apartments at the property supply address, so no water charges applicable to tenant under *RTA*.

The Tenant took up delayed tenancy since the apartment was not ready to occupy because of works being done

Though the *RTA* was not created to identify liabilities between energy suppliers and tenant, the RTA provisions are relied upon as enshrined rights.

The tenant occupies the apartment alone, uses the shower a daily; uses cold water for his washing machine and cooks very little, using minimal water for washing dishes.

The Tenant rarely obtains a hot shower since the water from the boiler tank is heated from cold start and travels up from the car park area on the ground floor up a flight of stairs to level 1 where his flat is located; and the archaic hot water system is inefficient, with pipes probably not lagged or insulated; and it takes over 200 litres of water to pass through before any real heating is achieved. Other tenants have complained also about the quality of the water. Quality of water provision remain unaddressed, so even if any contractual obligation were somehow found to exist, the services provided are not fit the purpose designed.

Arrangements were made by the Tenant for fitting of new carpeting in apartment at own expense to replace worn and dangerously fitted carpeting in all rooms. Also fitted new solid wooden front door for additional security. Had the Tenant known about complications with bulk hot water provisions none of these additional expenses would have been taken. In fact the tenant would have sought alternative accommodation in the first place.

The Tenant had enjoyed several months of peaceful tenancy till he received as a letter box drop the first letter of heat from the energy supply supplying bulk energy (gas) to the overall supply address, discovering it in his letter box a photocopied letter issued to all new tenants around that time, without care to discover who had moved in or out or their respective

The letter misleadingly implied that the bulk energy supplier had rights to supply hot water services. No mention was made as to the basis for these rights other than that the landlord had agreed to installation of meters and for bulk energy to be supplied – the first piece of evidence that a contractual relationship was formed between energy supplier and landlord (through Owners Corporation, presumably).

The first threat stated that the landlord had agreed for bulk hot water to be supplied to the property address – meaning the main supply at the outlet of the mains, since there is only one bulk hot water supply. Therefore the contract was formed directly between the supplier and the landlord or agent, and the satellite water meters were also fitted with landlord consent, but encouraged by existing policies for pricing and charging.

The threat was issued by a Tier 1 gas and electricity retailer, in this case supplying the heating only through a single bulk gas supply meter, situated on common property infrastructure within a block of rented apartments, after entering into an agreement with the landlord to install a metering installation (owned by the distributor) and to supply bulk gas to the property supply address with six apartments in Block 2 and four in block 1, each served by a single only bulk gas hot water system.

The Tenant has never received bills from the bulk energy supplier. Though the bulk energy supplier apparently deems the tenant to be contractually obligated, they are still required to ascertain personal details and formally set up an account for him as a new tenant on the property. This is to follow ESC policies. Refer in particular to Product Disclosure Statement 19. This does not however, require the kind of detail required in each the letters of threat issued.

There appear to be no guidelines as to how energy suppliers should go about setting up accounts for deemed customers receiving bulk energy supplies. Though the guidelines on the one hand deemed these customers to have contractual obligations, it is certainly not clear how those obligations are expected to be imposed. However, it cannot be the intent to allow coercive threat in order to force a contractual relationship.

It is commonplace for such warnings to be issued, and most residential tenants do give in. Others take the matter to the TUV for cost-recovery recourse without taking any action against the supplier.

The letter of threat was issued out of the blue as a matter of standard policy, since the energy supplier is a default supplier for bulk energy to heat the communal water tank (boiler tank). The supplier must have been able to ascertain that a new tenant had taken up residence. The letter they sent was a standard one and issued to all new tenants on the block dating back to about mid 2006.

The bulk energy pricing and charging Guidelines authored by the Essential Services Commission dated December 2005 became effective on 1 March 2006, since which time some 26,000 Victorian end-consumers of bulk energy have been adversely affected by dilution of their enshrined rights and protections until multiple provisions in the written and unwritten law.

This letter of threat and subsequent letter some weeks later were confusing as to the basis on which the energy supplier had sought to impose contractual status on the tenant. He had never heard of them, they were not mentioned in the lease or in the utility confirmation letter dated utilities connection middleman.

The Tenant he had relied upon the *RTA* provisions, and had been told by the outgoing tenants that they had never had to pay for water hot or cold because of the absence of separate gas meters for bulk energy supplying the boiler tank and because of the absence of water efficient devices.

The Tenant had taken on the tenancy in the belief that he would have to budget for rent and fuel gas and electricity for domestic cooking and heating only, not water, value-added water or bulk energy.

The Tenant's budget is very tight on a permanent disability pension. Fuel prices are about to go up with price deregulation. Managing his budget is a source of constant anxiety for the tenant. His supporters had invested funds into making improvements to his apartment for his comfort expecting a long term tenancy. Had we known that these complications were likely to arise retrospectively with inappropriate imposition of contractual obligation for bulk energy supplies, he would have chosen an alternative rental property.

The letters of coercive threat energy inappropriately requested personal details beyond those required under the ESC Guideline *Product Disclosure Statement (19)*.

Upon discovery of an initial letter of threat the bulk gas energy supplier to disconnect hot water supplies within seven days of the date of the letter if the recipient did not comply with request to provide personal identification and other personal data by way of formalizing an explicit contract. The Tenant was unsettled by this, particularly given his vulnerable condition. At the time it was very difficult to discuss the matter with him rationally.

The successive letters of threat in a letter box drop openly distributed to "The Occupier" of the Tenants' premises, threatened to cut off his water supplies within seven days if he failed to provide personal data and set up an account by way of acknowledging unilaterally imposed deemed customer status as a recipient of the heating component of bulk hot water. These threats were issued without establishing the tenants vulnerabilities if they existed. The second threat came at a time when the tenant was actively contemplating suicide and had found a means through which he could execute this. The attempt was averted. He remains under close watch and is in a particularly vulnerable position, aside from being of low income on a fixed disability pension.

The coercive threats were cushioned along these lines:

"This gas is individually monitored and the quantity used by each apartment is billed directly to the respective apartment. In order to do this we need to set up an account for you."

If we don't hear from you within seven (7) days from the date of this letter, your apartment's hot water supply may be disconnected until we receive your details.

Though that particular suicide plan was averted, there was no telling what impact the threats could have had in precipitating a serious contemplation and plan for suicide. There have been previous such attempts.

The Essential Services Commission has a particular enhanced duty towards those who are vulnerable and disadvantaged, with financial hardship not being the only criteria, though in this case that is also a factor because of low fixed income and disability.

The actions of the supplier in issuing such threats without establishing the recipient's vulnerabilities were unconscionable; further threats equally so.

The supplier was informed of those vulnerabilities by EWOV. Despite that the supplier shamelessly stated that it would proceed with issuing disconnection notices and impliedly effect disconnection (of hot water services) believed to be sanctioned by energy policies in place.

There was no redirection on either of the letters of coercive threat to any complaints recourse or assistance, or financial hardship program if applicable.

This is not a matter of overdue bills. There are none yet. This is a matter of use of improper coercive threat to a vulnerable individual without establishing those vulnerabilities at a time when the threats could have represented a last straw in ability to cope. In this case the recipient had a past suicide history and ongoing suicidality, with a serious incurable mental illness.

In one case of disconnection, the victim paid the ultimate price of death since the disconnection had affected someone on life support. Though this had occurred in New Zealand, it illustrates what can happen to a vulnerable individual when threats are issued of the nature described and provided.

The Owners' Corporation had been contacted. They denied involvement in the matter but accepted that the tenant would not accept any contractual liability to the energy supplier, given the terms of the standard tenancy lease and the provisions of the *RTA*.

The landlord's agent, upon making direct enquiry with the energy supplier was informed that the initial letter of threat had been issued by the energy supplier in error. Nonetheless a second letter of threat arrived some weeks later also threatening disconnection of hot water services if the tenant did not form an explicit contract with the supplier.

The supplier had been consistently inconsistent about the location of the meters, type of meters, whether access to meters had been achieved implied denied access to meters, with unjust expectations that the tenant, could and should provide safe, unhindered access to meters (subsequently found to be water meters), though these resided in a locked room with the boiler tank with keys and meters in the care, custody and control of the Owners' Corporation on common property infrastructure.

A complaint was lodged with EWOV which remains unresolved and unreported in its Annual Report on reportable incidents.

It was later independently discovered by the tenant that the meters relied upon for estimated calculation of gas consumption through the bulk gas meter were in fact water meters posing as gas meters. This matter was taken up with EWOV, without resolution, with stalling as to whether there was any obligation to identify the type of meters relied upon. Ultimately it was confirmed that the water meters were owned by the energy supplier.

Despite the fact that the water is not owned by the energy supplier, who is licenced to sell gas and electricity not water, water products or value-added products, and notwithstanding the absence of any contract to supply “*heated water*” or obligation to pay for the “heated” component of the water, the supplier persisted in its perception, driven by existing policies that the tenant was liable and contractually obligated not only for the cost of the heating component of the heated water supplied, but also for the unfair and unjust implied contract provisions requiring provision of safe, convenient and unhindered access to meters.

Despite the absence of any requirement to undertake suite-specific readings (an option rejected during the deliberative processes in the formation of the flawed energy guidelines for pricing and charging of “*bulk hot water*” it can be presumed that the water meters had been installed for the express purpose of reading water volume consumed by individual tenants, so that conversion factor algorithms could be made to calculate deemed gas usage. Energy does not pass through water meters. This is discussed in detail elsewhere.

Bills issued by the same energy supplier (Tier 1) to other tenants imply that separate gas meters exist as under gas usage separate numbers are allocated besides the MRIN for the bulk gas meter. This is misleading.

No bills have been issued yet to the tenant in this case study but that will be the intent when the complaint file before EWOV is closed.

The industry-specific complaints scheme EWOV had misleadingly implied by the use of the term “*the meter*” that this had been located through contact between the bulk energy supplier and the Body Corporate, that it was located behind locked doors with the boiler tank, and that once keys were obtained an accurate reading would be obtained.

On the one hand the supplier indicated that access to “the meter” had been denied; on the other confirmed through the complaints scheme that no gas had been consumed for water heating purposes by the tenant in question for several months.

The requirement to provide safe convenient and unhindered access to meters (whether or not meters suitable for measuring gas) is an unfair trade term even if any contract is shown to exist, since the tenants do not have key access to the boiler room, which is on common property infrastructure and in the care custody and control of the body corporate.

The energy supplier had been consistently inconsistent about the type of meters, the location of meters; when read; whether read, how the calculations were made. In fact none of the questions posed has yet been answered.

In this regard the conduct of the energy supplier appears to have been misleading and deceptive.

There are issues also about the application of supply charges imposed on individual tenants. There is one bulk meter for gas; one supply charge is applicable and the liable party is the landlord. It seems that hidden charges for meter reading of both water meters and gas meters may be causing unwarranted supply charges to be imposed on tenants.

Despite the bulk hot water provisions and practices being common and impliedly acceptable, legally enforceable or consistent with consumer rights entitlements and protections.

The DPI had claimed that the arrangements were in place to help avoid “*price shock*” to individuals. This is a weak and invalid argument since the proper contractual party is the Owners Corporation under existing legislative provisions.

The arrangements in place appear to be a collusive arrangement between policy-makers, regulators, energy suppliers, landlords (Owners Corporations) and complaints schemes. No-one is willing to admit that these arrangements infringe existing consumer rights and entitlements.

However, end-consumers of bulk energy should not be contractually obligated but rather the landlord. This excuse surely cannot excuse appalling trade measurement practices wherein water meters are allowed to pose as gas meters, magical algorithm conversion factors used to calculate deemed gas usage; site specific reading is rejected; and parties who have no previous knowledge of any contractual obligation are badgered and coerced into explicit contracts by energy suppliers licenced to sell gas and electricity not water products or value added products. The water is owned by the Water Authority.

Current review of regulatory provision which will soon revert to federal jurisdiction is likely to allow price deregulation and cancellation of standing offers and deemed contracts. This will force the market into market contracts.

Energy suppliers will then use the new powers to refuse to connect or continue connection to recipients of bulk hot water including the Tenant, unless he explicitly forms a contract.

There are concerns also about the position of embedded consumers. These consumers receive reticulated supplies through middlemen who purchase gas and redirect to an alternative network. Often embedded network distributors are provided with exemption from obtaining licences and act as billing agents or asset management parties who are exempt from current energy regulation. This means that there are no complaints recourses except the more expensive generic ones. On-selling occurs sometimes up to ten times the value of the gas consumed.

Allegations in this case

Allegation 1 unconscionable conduct

In this case the tenant has alleged **unconscionable conduct**, by virtue of issuing unwarranted coercive threat of disconnection of hot water services by an energy supplier licenced only to sell gas and electricity in circumstances where no contract existed and without identifying the vulnerabilities of the subject of threat, who in this case is an exceptionally vulnerable and disadvantaged individual with permanent psychiatric disability, a history of parasuicide; ongoing suicidality; social phobia; recently hospitalised and discharged on community treatment orders to aid in compliance with psychiatric treatment.

No redirection was offered in the content of the letters of threat to any Complaints Scheme; and in the personal details sought by way of forcing the Tenant into an explicit contract were in contravention of the Product Disclosure Statement; the provisions of the *Energy Retail Code 2006 v2* and now 2007 v3 and of the *Fair Trading Act 1999*, including the issue of further threat during the course of an as yet incomplete investigation of the complaint by EWOV, whose conduct has been the subject of separate concern.

In the circumstances during a particularly low mood instability bout, the fear of losing essential services could have had a disastrous effect and has similar potential in the future. The conduct of the provider was in my opinion unconscionable because no due care was taken to assess the risk imposed and the threat was issued as a deliberate coercive attempt to secure an unwarranted contractual relationship. Even after the supplier became aware of the Tenant's vulnerabilities, further threat was issued to him as "The Occupier" in a letter-box drop whilst the complaint remained open before EWOV.

No attempt was made to redirect to complaint or redress recourses. Instead the supplier shamelessly advised EWOV that it would continue to rely on its perceived rights under sanction policies (seen to be the drivers for unacceptable market conduct and in Victoria impacting on some 26,000 Victorians, many vulnerable and disadvantaged).

The Tenant has a serious incurable psychiatric illness and vulnerability to stress besides financial hardship and difficulty managing bills. Any future contractual relationship with the supplier or imposed contractual obligation will impose further difficulties and stresses on him in dealing with a provider imposed on him without choice who has already demonstrated inappropriate market conduct.

The contract at least under common law provisions lies with the body corporate who invited the supplier to fit the metering installation on the common property infrastructure of an Owners Corporation property supply address, commenced to take supply when that agreement was formed, and became the relevant customer as one who consumers "*no more than 10,000 GJ per annum.*" This applies to some **1.6 million Victorians** and not restricted to a natural person.

The distribution point is the point at which the gas leaves the point distribution infrastructure at the double custody changeover point – the outlet of the meter. Gas is not measured through water volume calculations and does not pass through water meters.

The Complainant and his supporters have been most anxious about the prospect of further badgering coercive behaviour and potential loss of essential services (water) that the provider is not even licenced to sell.

In the circumstances this has promoted fear and dissonance about accepting premises that have unexpectedly come with so much baggage notably lack of choice in changing a provider of essential services with a contract more properly belonging to the body corporate, where that provider's conduct has been unacceptable, reflects business practices that are unfair and inappropriate and appears to reflect predatory market conduct in a clear-cut case of power imbalance. This is a detrimental outcome from the practices alleged.

This does not excuse the manner in which threats were issued to the vulnerable tenant, one of them during the course of an as yet unresolved complaint before EWOV. This was in contradiction of the provisions of both the *Energy Retail Code* and the *Fair Trading Act*.

The issuer of those threats, the Tier 1 bulk energy supplier, has no contract with our son; is not licenced to sell the water that the supplier intended to disconnect; and was using instruments to measure energy that were not designed to measure such a commodity.

That the threats were issued at all is a problem. There is never any justification for the issue of threats. This is a complex **contractual issue**,

There are issues of the absence of implied contract; unfair and inappropriate practices; the nature of the threats and the pretext and purpose of issuing such threats – by way of endeavouring to force a contract that should not exist at all.

Allegation 2 Breach of implied contract

It would seem that policy makers and regulators have seen fit to re-write contract law in their policy provisions regarding bulk hot water.

They have been advised that they may not make regulations that

“overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries

As previously mentioned such a clause is now contained in the Re.

Besides conflict with regulatory schemes there is the issue of conflict with rights enshrined within common law contract provisions.

The absence of a contract being central to the complaint, and endeavours to improperly coerce the Complainant into accepting such a contract under pain of disconnection of essential services.

The implied contract is an issue of debate between the parties. No contract exists except in the mind of the retailer; in faulty interpretation; or else in the intent behind the deliberative documents final decisions and bulk hot water charging guidelines. No provisions exist as to how such a unilaterally perceived contract should be formalized and enforced, but surely the intent could not have been coercive threat without informed consent and chance to refute through proper channels.

The landlord invited the supplier onto the premises to fit the metering installation; the distribution supply point is the point at which gas leaves the distribution system pipe and enters the outlet of the meter on Body Corporate infrastructure. The Body Corporate and *“commences to take supply”* when the gas leaves the distribution pipe and enters the outlet of the meter on Body Corporate infrastructure.

“Deemed contract” terms as provided for in the *Gas Distribution Code* are intended to apply to those who were without market contracts at the time of free retail competition FRC taking effect in Victoria and other states where franchise arrangements were in place for certain customers and standing offers became applicable. This term was not intended to apply to those who became end-users after FRC was effected.

The decision by this supplier and others to creatively apply this term to those after FRC who were supplied by bulk gas energy through a single meter following either an implicit or explicit arrangement with the Body Corporate, does not impose a legal contract with the end-user of bulk energy.

These complexities and nuances are legal and technical matters not as clearly understood even by those making the rules. I venture to say that poor understanding of the niceties of contract law have given rise to interpretative flaws.

The general perception that existing interpretations apply simply because of pragmatic arrangements that do not even uphold the intent and spirit of trade measurement provisions has given rise to apparent exploitation of those least able to fight back – the soft targets who have faced detriment from the outset.

These anomalies will continue to impose detriment on such end-consumers unless the future regulatory design rights these wrongs.

Allegation 3 Threats, intimidation and coercion

There was justification exists for disconnection warning or threat.

Notwithstanding these considerations, the supplier in this case and others similar, persist in the belief that a contract exists and even that provisions exist to allow disconnection under these circumstances. This is the central matter in dispute as a question of contract law.

Quite simply, given that the Distribution Supply Point under the Gas Distribution System Code 2007, v 8.1 and previous versions (Victoria) is defined as follows:

“The **distribution supply point** is a **point of a distribution system** at which gas is withdrawn from the point distribution system for delivery to a customer which is normally located at:

- The inlet of a gas installation of a customer;
- The outlet of a meter; or
- The end of a main

and includes a “**supply point**” and an “**ancillary supply point**” as defined in the Gas Industry Act in relation to a distribution system

and also given that

the Body Corporate by the admission of the supplier of bulk energy to the property supply address “chose” the supplier to supply bulk gas to the outlet of a single meter for each of two twin buildings supplying multiple tenants; and given that hot water system and air-conditioning systems are situated on common property infrastructure in Body Corporate ownership and control;

and also given that

No contract exists between the supplier and the end-user of bulk energy in this case and others similar despite the manner in which numerous parties have interpreted existing provisions

No obligation exists to form such a contract, deemed or otherwise. No market contract exists.

Deemed contract terminology was only meant to refer to those who had the right to stay on standing offers at the outset of full retail competition, not those receiving bulk hot water as EWOV has chosen to interpret

Supply Point Gas (*Residual Provisions*) Act 1994)

Ancillary Supply Point (*Order in Council Victorian Government Gazette s197 29 October 2002 pursuant to s42 of the Gas Industry Act 2001 (note ss 42-46 sunset in December 2007)*); and **Ancillary Supply Point** within the *Gas Industry (Residual Provisions) Act 1994*)

These provisions which over-ride “guidelines” are specific about interpretation, and allow for a **single supply point** for billing purposes under certain conditions, in case there is interpretative discrepancy over other points.

A Body Corporate entity as the **relevant customer** in this case,

“**commences to take supply**” when, the at the point at which **double-custody changeover of energy** occurs, from distributor to retailer, and then from retailer to Body Corporate whether or not it (that energy) passes through facilities owned or operated by another person after that point and before being so supplied.

(This refers to s 46 of the [Gas Industry Act 2001](#) and 42, 43, 44, plus Gas (Residual Provisions) Act 1994; Order in Council 29 October 2002 under s 43, pursuant to s197 Victorian Govt Gazette).

Allegation 4 Unfair business practices (Fair Trading Act 1999)

Includes the expectation that the end-consumer, who has no obligation to form a contract and is not the ‘**relevant customer**’ in this case, assumes all contractual responsibility and then battles to address merely the cost-recovery component. One of the unreasonable contractual terms of the contract that the supplier wished unilaterally to impose was provision of safe, convenient unhindered access to meters behind locked doors in the care custody and control of the Body Corporate.

Those meters are satellite water meters owned by the bulk energy supplier and installed for the express purpose of using them as substitute gas meter.

Such practices appear to have been endorsed by existing provisions.

Gas does not pass through water meters.

Electricity does not pass through water meters.

Water meters are unsuitable instruments for measurement of energy.

Gas is measured in megajoules (MJ).

Electricity is measured in KW-h.

Any measurement that allows for water volume calculations or some other bizarre equivalent, to be part of the equation that calculates energy consumption is fundamentally flawed. These provisions do not uphold public interest, best practice standards or the spirit and intent of existing provisions. The provisions are as good as relying on an oil funnel to measure the weight of a bag of apples.

Energy retailers are licenced to sell gas and electricity not water products or heated water. In some cases where exemption granted non-licenced embedded network distributors are using similar methods without accountability through energy regulations (see for example [Winters v Buttigeig](#) VCAT 2004)

There is an imbalance of power; the end-consumer has no provider choice; contractual status has been unilaterally and inappropriately imposed through misinterpretation of the intent of existing legislation regarding relevant customer and deemed contracts; demands were made to form an explicit contract under pain of threat of disconnection of hot water; the cost-recovery mechanism through s55 of the [RTA](#) imposes additional and unnecessary burdens on the end-consumer including filing fees through VCAT which would offset cost recovery, and in this case not readily achievable since the Complainant is unable to participate in legal proceedings without detriment.

Allegation 5 Unfair and inappropriate trade measurement

Adversely impacting on the consumer, even if a contract is somehow shown to exist yet this issue has not been mentioned. At least the intent of existing provisions appears to have been breached.

Finally there is the question of risk of a rise in rent following negotiations with the landlord. The premises were accepted in the expectation that all water charges would be met by the landlord in the absence of separate gas meters for bulk hot water (*especially as the previous tenants had confirmed that they never had to pay during their three years of tenancy*), and that the rent incorporated all utility charges other than dual fuel for domestic cooking and heating.

There is nothing in the energy legislation that deems the Complainant to be contractually obligated. Neither EWOV nor ESC has been able to substantiate that claim with reference to the legislation but have referred instead to deliberative documents and “*guidelines*” considered to be flawed and inappropriate using trade measurement practices that are unacceptable, interpretation of “**relevant customer**” that are not consistent with broader definitions within legislation.

The deemed clauses in the *Gas Industry Act 2001* refer to those on standing contracts at the time that Full Retail Contestability became operational. Existing deemed clauses under Section 43-46 of the *Gas Industry Act 2001* which subset on 31 December 2007.

The unacceptable market conduct has been made possible by existing statutory public policy provisions under guidelines authored by the Essential Services Commission.

Allegations that these bizarre policies were adopted to prevent “*price shock*” to end-consumers appear to be weak and invalid since they are not the contractual party.

These issues remain in contention and cannot be resolved with creative interpretation of the *Gas Industry Act 2001* which never intended water meters to pose as gas meters, and which refers to deemed contract provisions for those affected by franchise changes at the commencement of full retail contestability, not to residential tenants, legally taking occupation of premises with stand lease provisions implicitly deeming the supply of water and other utilities to be the responsibility of the Owners Corporation, unless water efficient devices were fitted; and secondly unless each utility could be individually metered.

In Victoria these represent some 26,000 end consumers of bulk energy that cannot be measured using an instrument designed for the purpose, who are not properly the contractual parties, yet being held responsible, in breach of their several rights under multiple jurisdictions not only for the costs of energy calculated in cents per litre using bizarre algorithm conversion formula, without the benefit of site reading, and using water meters posing as gas meters. This contravenes the spirit and intent of trade measurement regulations

At the time of initial enquiry ESC staff had been instructed not to clarify public policy. Some clarification was ultimately provided by way of provision by e-mail of a single Final Decision dated December 2005: document relating to bulk hot water provision.

Those provisions were adopted on 1 March 2006 and have allegedly been seen as drivers for unacceptable market conduct and practices endorsed by public policy. This impacts on some 26,000 Victorian consumers based on figures published in ESC documentation dated 2004. Many end-consumers unaware of their rights and entitlements have been coercively intimidated into accepting contractual status.

Allegation 6 Misleading and deceptive conduct

This is alleged on the part of the supplier the subject of complaint

For example inconsistent and misleading statements as to the basis for assuming that a contract existed; use of terminology implying the existence of gas meters; allocation of a meter number implying a separate gas meter, other than the MIRN).

Allegation 7 Misleading details in bills issued to other tenants on same block

For example using terminology and meter identification numbering that implies separate gas meters

Allegation 8 Similar inappropriate and unacceptable business conduct

Alleged towards the Complainant and other tenants living on the same block

Other tenants on the same block have complained about inappropriate conduct and have supplied me with some of the bills issued. One tenant received an absurd estimated bill for \$500 from the same bulk energy supplier. There had been a burst water pipe in one tenant's apartment. Perhaps the endeavours were made to apportion equal responsibility amongst the tenants for any hot water wastage activated by that incident.

Whatever the reasons for bills of this nature, something needs to be done about giving leave to suppliers to charge what they will; except high costs of challenge with accuracy of meter readings, notwithstanding the meters relied upon are not energy meters, but instead water meters through which no gas passes, thus being unsuitable instruments for the purpose. The range of conduct issues are applied as a matter of policy by the supplier in more than one state.

Allegation 8 Contravention of the intent of trade measurement and utility provisions

Notwithstanding existing policy provisions which appear to have been the drivers for inappropriate market conduct

Allegation 9 Inappropriate supply charges

Inappropriately applied to end-consumers, including additional hidden charges that may also be incorporating water meter reading charges as well as gas meter reading, if meters are read at all, since site-specific reading was rejected as an option

Allegation 10 Inaccuracy of deemed consumption of gas and charges applied

(Notwithstanding the claims of absence of any contract with the end-consumer (Complainant) or obligation to form one.)

There are previous issues of over-charging by a Tier 1 supplier wherein the Department of Infrastructure at that time with the energy portfolio demanded prepayment of overcharges to consumers to the tune of some \$800,000.

Allegation 11 Use of trade measurement practices that are against the intent and spirit of national and state trade and utility measurement provisions²³⁴

These would become **invalid and illegal** once existing utility exemptions are lifted, as is the intent and as has already commenced (using water meters posing as gas meters to calculate estimated and actual gas consumption for gas used to heat water centrally heated water.

It was recognized and noted in the Deliberative Document Review of Bulk Hot Water dated July 2004 that these practices were breaching the intent of trade measurement law and fair trading provisions.

Act No 64 of 1960 (with amendments to Act No 27 of 2004) provides as follows:

Allegation 12 Compromised protections and adequate access to appropriate recourses

This allegation is leveled at the policy-makers and regulators and the inadequately resourced and informed industry-specific complaints scheme

There are concerns about the impacts on some 26,000+ Victorians using bulk gas energy centrally heated; and some 200+ of bulk energy used to heat single boiler tanks with a single bulk meter at the property of the Body Corporate.

Existing policy arrangements affect those in embedded networks, caravan parks, rooming houses, nursing homes. Embedded networks are those where unlicensed distributors not covered by Energy Codes and legislation can purchase gas or electricity from the original network, transfer to another network and on-sell at inflated prices without recourses available to consumers other than through common law provisions.

Despite the intent of provisions under the *National Measurement Act 1960 18R*, delays with the lifting of certain utility exemptions have left loopholes in legislation that allow unacceptable market conduct. The default provisions are under this Act, since the mirrored provisions under the Victorian *Utilities (Metrological Controls) Act 2002* remains impotent without regulations to accompany it.

This has been the case for some four years. Delays will now be perpetuated till around 2011 when National Trade Measurement provisions will be adopted for all states and territories.

²³⁴ Note as reported in the CAV Annual Report 2006/2007, Director's Report, p9 "*A major historic development...during the past year was the agreement that the Commonwealth will assume its full constitutional responsibility for trade measurement (weights and measures). In 2010 the Commonwealth will take over functions relating to weights and measures, which the State has performed since the mid-nineteenth century.*"

The default provisions are under the *National Measurement Act 1960 Act No 64 of 1960 (with amendments to Act No 27 of 2004* Transactions by utility meters to be in prescribed units of measurement

If apportioning amongst owners is deemed appropriate, the current arrangements are not appropriate for rented apartments and those tenants in an “*embedded situation*” even if the term embedded network is not strictly applicable.

There are concerns about the impacts on some 26,000+ Victorians using bulk gas energy centrally heated; and some 200+ of bulk energy used to heat single boiler tanks with a single bulk meter at the property of the Body Corporate. These issues impact on a huge proportion of the community. Because of the multi-jurisdictional nature of the issues, they have for many years fallen into the two-hard basket.

The only recourse suggested by EWOV after nine months of handling the matter as a predominantly policy issues was a cost-recovery mechanism retrospectively against the landlord through s55 of the *Residential Tenancies Act 1997*.

This does not address the contractual issues, conduct of the supplier of inadequate policies. Without policy change these issues will continue to compromise consumer protection, already at low ebbs.

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Despite pressure from community organizations such as Consumer Utilities Advocacy Centre (see for instance reference to *Winter v Buttigeig* before VCAT December 2004, article in Spring Quarterly September 2005 CUAC – Embedded Networks – Disconnecting Consumers; these practices continue and appear to be endorsed by statutory policy deemed to be flawed and detrimental to community interests.

Revised Body Corporate provisions under the *Owners Corporation Act 2006* effective from 31 December 2007 do not address tenant issues but rather owner and administration issues and the complexities of the many issues raised regarding bulk hot water arrangements are not addressed at all. I disagree with any perception that these arrangements are appropriate in multi-tenanted dwellings or that consumer protections are adequate.

Note the *Owners Corporation Act 2006* is another example of legislation not echoed in other states, but nevertheless lends important clarity and protection that should be echoed in similar provisions elsewhere instead of repealed because other states have not adopted the provisions

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Energy retailers are licenced to sell gas and electricity not water products or heated water. In some cases where exemption granted non-licenced embedded network distributors are using similar methods without accountability through energy regulations (see for example *Winters v Buttigeig* VCAT 2004)

There is an imbalance of power; the end-consumer has no provider choice; contractual status has been unilaterally and inappropriately imposed through misinterpretation of the intent of existing legislation regarding relevant customer and deemed contracts; demands were made to form an explicit contract under pain of threat of disconnection of hot water; the cost-recovery mechanism through s55 of the *RTA* imposes additional and unnecessary burdens on the end-consumer including filing fees through VCAT which would offset cost recovery, and in this case not readily achievable because of the complainant’s condition.

The last allegation of inadequate and compromised protections and adequate access to appropriate recourses is leveled at policy-makers and regulators and the inadequately resourced and informed industry-specific complaints scheme

I refer to the *Benchmarks for Industry-Based Customer Dispute Resolution Schemes* as approved by the Federal Government in 1997²³⁵, which include:

Accessibility; Independence; Fairness; Accountability; Efficiency and Effectiveness. As noted by Denis Nelthorpe

these benchmarks were drafted by a national committee made up of government, regulatory, industry and consumer representatives as a guide to an increasing number of industries looking to establish industry based complaint schemes (IS ECS) as opposed to internal complaints handling mechanisms (IS- ICS)

The values embraced by those benchmarks are similar to those identified as core values of the Attorney-General’s Justice Statement (May 2004)

There are discussed in detail elsewhere. Their adoption is mandated for energy within the Gas Industry Act 2001. Adherence to those benchmarks should be closely monitored and made more accountable. Separation from regulators and funders in the monitoring of performance standards may be one way of ensuring better accountability.

²³⁵ Federal Government (1997) *Benchmarks for Industry-Based Customer Dispute Resolution Schemes*

Bringing the schemes under administrative law with a fall-back option to consult with the State Ombudsman is another way of achieving better accountability. I remain concerned about half-baked self-regulation, as referred to by Peter Kell in his 2005 speech to the National Consumer Congress and discussed elsewhere.

I make a plea for high, accountable and adequately monitored service standards across the board and for re-examination of the fundamental principles of government accountability at all levels.

Creating separate legal entities to perform certain functions should never be seen as a means of escaping proper accountability

That was the central theme of this submission.

PC DRAFT RECOMMENDATION 9.6 Access to remedies

A provision should be incorporated in the new national generic consumer law that allows consumer advocacy through increased resourcing of legal and financial services, especially for vulnerable and disadvantaged consumers

I generally support this recommendation.

I would like to see the term “*vulnerable and disadvantaged consumer*” to be expanded to include:

“inarticulate, vulnerable, disadvantaged or cultural or linguistically diverse consumers”

With some further clarification to encompass examples of categories described above, including specific mention of those with psychiatric or intellectual disability; cognitive impairment; personal circumstances temporary or permanent, including but not limited to cases where financial hardship may hamper access to essential and other services.

Access to legal advice and representation

The convincing and articulate submission by VALS to the PC’s Issues Paper²³⁶ raised a number of issues in relation to costing issues and access to justice. VALS made these comments that need reconsideration in the public interest

“The framing of this inquiry suggests that regulation is unaffordable and ineffective compared to empowerment. More generally the terms of reference imply skepticism about the need to protect consumers and a concern that it ‘costs too much’ to protect consumers by regulation.

Since the Commonwealth Government removed \$120 million in 1996 from the legal aid system, civil legal aid in Australia has been virtually non existent. The Commonwealth Government appears to have forgotten that not only is effective regulation necessary but effective enforcement must also be available. People on low incomes need access to the civil justice system including consumer protection if this is to be a reality.”

²³⁶ VALS (2007) Response to PC’s Issues Paper, May found at VALS submission to the Productivity Commission in response to the Consumer Policy Framework Issues Paper (January 2007) – sent 28 May 2007
Found at http://www.pc.gov.au/__data/assets/pdf_file/0008/63890/sub079.pdf

As mentioned under discussion of PC Recommendation 5.1, VALS has made some important observations about the risks of

“simplified regulation in increasing the scope for unscrupulous businesses to utilize loopholes to get around simpler legislation”

VALS suggested that the revised system would have to make more readily accessible remedies at Courts and Tribunals, with re-establishment of civil legal aid system, especially for those who are disadvantaged in a variety of ways. VALS has also cautioned against weighing up monetary value alone to the expense to relative significance to a person of low income.²³⁷

One issue that needs to be considered in making such provisions is that legal aid is just that – a grant-in-aid that is normally repayable at some stage. This can run into many thousands of dollars. This means that if and when the circumstances of a party receiving legal aid changes, the cost of simply accessing justice through legal redress can be prohibitive.

Examples are shown in Family Law where one or both parties are found eligible for legal aid. If either has equity in property, caveat’s against that property are placed against the value of that property by Legal Aid preventing sale of the property till the grant-in-aid is reclaimed. This can wipe out years of equity and place the recipient of legal aid in a position of acute financial disadvantage.

In many circumstances more informal remedies, and those under a variety of ADR options may not only be more affordable, but bring better overall outcomes. Having said that I qualify that this is applicable to circumstances where ADR inputs are truly independent and the provision of inputs is from trained personnel undergoing ongoing professional development.

I exclude industry-specific complaints schemes funded, run and managed by industry scheme members who in any case are misnamed ADR providers and do not normally mediate

Whereas family law disputes are private matter between parties in dispute under family law provisions, if redress has to be sought by consumers against providers of goods and services in a similar way, the power and financial imbalances make access to justice difficult if not impossible for most. It is no longer possible to receive aid for financial matters in family law, which places parties at a huge disadvantage if they cannot afford the cost of financial resolution.

The mere existence of generic laws and even the existence of aid for civil legal aid does not necessarily provide fair and accessible access to justice.

²³⁷ VALS (2007) Response to PC Issues Paper May, p4

VALS has argued that²³⁸

“VALS argues that costs for early intervention are worth it. Funding for early intervention should perhaps focus on essential services rather than non essential services if cost is considered an issue. VALS repeats that costs for early intervention are worth it.”

I now refer to and fully support of the VPLRC’s Civil Justice Review and the submission by PILCH, cited below²³⁹

PILCH’s submission reference raises the following issues and makes the following related recommendations:

(a) The principle of equitable access to justice underpins a fair and efficient civil justice system.

Recommendation 1: PILCH recommends that, in its Civil Justice Review, the VLRC give priority to the importance of access to justice as a fundamental requirement of a fair civil justice system.

(b) PILCH considers that there is a lack of availability of appropriate and timely legal advice in civil law matters. PILCH considers that costs to parties and the resources of the courts could be saved if people were able to obtain appropriate legal advice in civil matters at an early stage.

Recommendation 2: PILCH recommends that the Commonwealth and Victorian Governments continually increase funding to community legal centres to enable them to provide case work assistance to the community in civil justice matters.

Recommendation 3: PILCH recommends that the Victorian Government seek to restore the National Civil Legal Aid Scheme in partnership with the Commonwealth Government.

²³⁸ VALS (2008) Response to CP Issues Paper p5

²³⁹ PILCH (2006) Submission to Victorian Law Reform Commission’s Civil Justice Review. Found at <http://www.pilch.org.au/files/QMM5TXC717/PILCH%20Submission%20to%20Civil%20Justice%20Review.pdf>

Recommendation 4: *PILCH recommends that the Commonwealth and Victorian Governments, as a minimum, include the following extensions to the current civil law legal aid guidelines:*

- i Assistance should be available for matters where the amount of the claim is less than \$5,000.00;*
- ii Increased assistance in the area of Crimes Family Violence should be available for applicants and respondents to intervention orders.*
- iii Assistance should be available in employment matters such as unfair dismissal or unlawful dismissal matters, de facto property settlements and property settlements in the Family Law Courts.*
- iv Legal assistance to prisoners should be increased.*

Recommendation 5: *PILCH recommends that Victoria Legal Aid ensures that when determining eligibility for aid pursuant to the guidelines, that the concept of ‘special circumstances’ is not interpreted in an unduly restrictive manner.*

Recommendation 6: *PILCH recommends that VLA ensures that when determining eligibility for aid pursuant to the guidelines, the ‘potential benefit to the public’ of bringing a discrimination complaint is not interpreted in an unduly restrictive manner.*

Recommendation 7: *PILCH recommends that VLA ensures that when determining eligibility for aid pursuant to the guidelines, the public interest guideline is not interpreted in an unduly restrictive manner.*

Recommendation 8: *PILCH recommends that VLA does not seek financial contribution from applicants who have been granted aid under a ‘public interest’ guideline.*

Recommendation 9: *PILCH recommends that VLA considers the introduction of a system of ‘cascading’ financial contributions from applicants, where applicants do not mean the means test.*

(c) PILCH considers that the Supreme Court of Victoria and County Court of Victoria’s policy regarding provision of language services is inadequate and inconsistent with the Department of Justice’s languages services policy.

Further, the lack of free interpreting services for utilisation by practitioners acting pro bono creates a significant barrier to making pro bono referrals to practitioners who would otherwise be prepared to provide pro bono advice and assistance to clients referred through PILCH.

Recommendation 10: *PILCH recommends that the Victorian Government take immediate action to ensure that interpreting services are made available in all civil proceedings in Victorian courts and that the practice of Victorian courts is consistent with the Department of Justice's languages services policy.*

Recommendation 11: *PILCH recommends that the Victorian Government provide funding for the provision of telephone interpreting services for legal practitioners acting on a pro bono basis.*

(d) PILCH considers that the availability of funding for disbursements in litigation is critical to ensuring access to justice in pro bono matters. The lack of available funding for disbursements creates a significant barrier to a matter being progressed and undermines the applicant's ability to have the merits of his/her matter determined and the applicant's access to the court system.

Recommendation 12: *PILCH recommends that the Victorian Government provide funding for disbursements in pro bono matters where the matter raises an issue which requires addressing for the public good, or the applicant is seeking redress in matters of public interest for those who are disadvantaged or marginalised, or the matter raises an issue concerning the human rights of the applicant involved.*

Recommendation 13: *In the alternative, PILCH recommends to the Law Aid Scheme's Board of Trustees that:*

i the guidelines for eligibility for assistance be extended in the manner outlined in Recommendation 12.

ii it introduce provision for waiver of the \$100.00 application fee in cases where payment of the application fee would cause significant financial hardship or where the matter raises an issue of public interest or human rights.

iii it introduce provision to grant funding retrospectively in situations where disbursements were incurred urgently or where there is some other compelling reason for funding the disbursements retrospectively.

(e) PILCH considers that the risk of adverse costs orders is one of the most significant barriers to access to justice in public interest matters, because the threat of such orders acts as a strong deterrent to bringing or continuing litigation.

Recommendation 14: *PILCH recommends to the Victorian Government that it consider adopting the Model Guidelines which provide that the State will consider giving an undertaking not to pursue costs if it is successful in public interest proceedings in which it is a party.*

Recommendation 15: *PILCH recommends to the Supreme Court of Victoria that the court considers an amendment to the Order 63 of the Supreme Court Rules to incorporate provisions relating to costs and public interest litigants.*

(f) Victorian courts are facing an ever-increasing number of litigants who appear unrepresented, largely because they cannot afford to pay for legal services and cannot access, or do not know of, government-funded legal services.

These self-represented litigants are often not familiar with the substantive law or the legal system, which places them at a significant disadvantage and drains already overburdened court resources.

Recommendation 16: *PILCH recommends that the Victorian Government provide additional duty lawyer resources to all the courts in Victoria similar to the system used in the Victorian Civil & Administrative Tribunal and the Magistrates' Courts.*

Recommendation 17: *PILCH recommends that the Victorian Government provide adequate funding for the Self-Represented Litigants Coordinator scheme at the Supreme Court of Victoria.*

Recommendation 18: *PILCH also recommends that the State Government create and fund the position of a Self-Represented Litigants Coordinator in each court.*

Recommendation 19: *PILCH recommends that the Victorian Government provide additional funding to prepare, publish and deliver training and educational material for judicial officers on best practice management of self-represented litigants.*

Recommendation 20: *PILCH recommends that the Victorian Government provide additional funding to examine and implement technological solutions for self-represented litigants.*

(g) PILCH is concerned about the emerging practice in Australia of large corporations using ‘SLAPP’ writs (Strategic Litigation against Public Participation) as a form of intimidation against individuals and community groups who voice opinions on matters of public interest which differ from the interests of these corporations.

Recommendation 21: *PILCH recommends that the Victorian Government introduce legislation against the use of SLAPP Writs.*

(h) PILCH considers that the growth of the litigation funding industry raises important public policy considerations which highlight the need for comprehensive regulation of litigation funding agreements and the litigation funding industry. Further, it is desirable that a strong approach be taken to consumer protection in this area.

Recommendation 22: *PILCH recommends that the State Government take steps to introduce legislative provision to ensure that the professional obligations of lawyers to act independently and in the interests of clients are upheld in the context of litigation funding arrangements.*

PILCH notes the submission of the PILCH Homeless Persons’ Legal Clinic (HPLC) which complements the submission of PILCH and focuses on the barriers to accessing justice for homeless persons. PILCH strongly endorses the submission of the HPLC.

PILCH also notes the submission of the Human Rights Law Resource Centre Ltd (HRLRC), which addresses the term of reference relating to non-party participation in civil proceedings.

PILCH strongly endorses the submission of the HRLRC.

I call attention now the presentation made by The Hon, the Chief Justice Marilyn Warren at the November 2004 AGM, on the occasion of the tenth anniversary of PILCH discussing the importance of public and private partnership entitled *Future Directions: A Public-Private Partnership*²⁴⁰

²⁴⁰ Warren, Marilyn The Hon, the Chief Justice (2004). PILCH and Pro Bono: The Importance of the Public-Private Partnership1 Presentation at PILCH AGM 24 November 2004 found at http://www.pilch.org.au/files/DYXA19FTM7/Justice%20Warren_s%20Speech%202004.pdf
The author The Hon the Chief Justice Marilyn Warren acknowledges the assistance of her Research Associate, Ms Natalya Dingley.

In that talk, in discussing future directions for the public and private partnership, the author of the paper presented observed that

“In the past ten years, the most visible changes in relation to pro bono appear to be the way in which firms are now actively managing pro bono files. Nevertheless, as important and valuable as pro bono programmes are, they can be in no way a substitute for government funding. Government commitments to legal aid have waned over the past few years and court expenses are on the rise. The need is growing and the funding to meet it somehow needs to be made available.”

Thus, it should be clear that pro bono by itself cannot and does not replace the need for legal aid funding. In concert with legal aid, however, it is a very valuable way of improving access to justice. As Chief Justice McLachlin of the Supreme Court of Canada has commented:

Lawyers need to think of legal aid as an essential public service like health care or education and work with others to improve coordination of pro bono services. All players must work to improve public access to information about the law and legal system.¹²

Thus pro bono can be valued most I suggest where it does not stand alone. As the law and society itself becomes more complex, obstacles to public access to justice can be expected to continue to grow. Increased demand can be met only through a concerted effort between governments for the funding of legal aid and through private law firms providing pro bono. Therefore, a highly constructive relationship between relevant government departments and pro bono organizations such as PILCH must be promoted and maintained where appropriate. Increased coordination should also see more lawyers in the private sector offered the opportunity to provide pro bono.

Happily, this need for increased co-ordination seems to be understood by the national government, which established the National Pro Bono Task Force to examine the key issues affecting pro bono work in Australia. Arising from the Task Force's recommendations, the Government has provided seed funding to establish the National Pro Bono Resource Centre. The Centre envisages itself as a sort of support for local providers such as PILCH Victoria and has the active contribution of PILCH members. This sort of initiative must continue with its emphasis on public-private partnership.

Nonetheless, despite all this focus on improving access to justice, it is important to remember that one should remember that the goodwill and satisfaction that comes from giving without receiving should not be jeopardised. In other words, access to justice must be coupled with quality of service. Lawyers should be encouraged to give freely of their time without being overly pressured to do so. Taking this kind of stance to pro bono should maintain the very high level of service which those receiving pro bono have come to expect.

The author noted that

“.....in Australia there is a call for pro bono to become part of the practice of public sector lawyers.⁶ In the main it appears that whilst government lawyers are presently providing in a sense pro bono services it is largely a result of individual pursuit rather than as part of structured departmental policy. Departments may soon be instituting change along the lines employed by private practices to ensure that more government lawyers take on pro bono; we await further developments.

In the United States the Model Rules of Professional Conduct call upon all lawyers to undertake pro bono work. This is not yet the case in Australia. Ten years ago in America the motivating cause for attorneys to take on such cases was a moral and ethical obligation. Now that has changed: as in Australia the business case for pro bono is being increasingly emphasized in that country.

For example it appears that there is an interesting link between pro bono activities of American law firms and a firm’s profitability. According to one study compared to their competitors where US law firms had strong pro bono programs they generally seemed more resistant to economic slumps; their clients appeared more loyal during the tough times.⁷ As well every law firm that made American Lawyer magazine’s top 50 ‘Most Profitable Law Firms’ list in 2003 had robust pro bono policies in place.⁸

Lastly it seems that US firms are seeing pro bono as a ‘win-win’ situation for their clients for the simple reason that it offers their lawyers the chance to get more ‘hands-on’ experience. All this adds up to additional expertise improved reputation recruiting advantages and client connections. Perhaps no direct link to a client’s bottom line profitability – but the link aguably is certainly there.

One wonders whether the majority of Australian law firms make the connection? As discussed already it would appear that many are beginning to.

As with US government lawyers many departments have pro bono policies in place.

According to the US Department of Justice Policy Statement the government has set a goal of a minimum of 50 hours of pro bono legal and volunteer work per employee each year.⁹ Perhaps we might see similar goal-oriented policies in place in our own departments soon.

If reliance on generic laws at a national level may have the effect of further eroding already eroded rights to redress all the way from attempted conciliation to arbitration with proper legal support, not just for the vulnerable and disadvantaged on means test criteria, but in the interests of the rights of individuals at large to proper access to justice, then any proposal to either retain State control or revert to a national regime is unacceptable.

Australians need better access to justice not diluted access.

They need better access to legal assistance in civil matters, not redirection to inadequate complaints handling bodies inappropriately and misleadingly assuming the title of “ombudsman” where these bodies are run, funded and managed by industry participants.

It is one thing seeking the cooperation of industry in self-regulatory measures and quite another diluting proper access to justice by rendering inaccessible recourses that hitherto the public have come to rely upon.

Whilst I have had no chance to properly study the Victorian Civil Justice Commission’s proposal’s for reform, and cannot so much access submissions to that Inquiry on their own website because of non-disclosure policies to publish online in an equitable and accessible way submissions so that debate and discussion can be effectively till after a final decision is made.

However, I do not support any move that will dilute redress opportunities, proper funding for such redress, more especially when other avenues for resolution fail.

Further, there are circumstances where the public interest is not served at all by conciliation and settlement, but needs to be represented by effective redress against industry bodies and regulatory bodies alike who do not uphold public protections

I give one example unrelated to energy for a change, since I have discussed elsewhere my concerns in that arena and the extent to which I believe current policies in more than one State appear to be driving unacceptable market conduct with inadequate statutory recourse.

PILCH through their pro bono scheme is supporting a case of discrimination against overseas students seeking equity through concession fares for travel on public transport.

The plight of international students, including those on Commonwealth of Australia grants (such as AusAID) to selected eligible international students from developing countries in access justice, including equity in a range of provisions; alternative dispute mechanisms, courts, and concessions such as those afforded to permanent Australian residents for public transport

I quote from a recent article in PILCH MATTERS²⁴¹ informing interested parties of progress in this matter.²⁴²

“In February 2007 the Ethnic Communities Council of Victoria (ECCV) approached PILCH for pro bono assistance to bring representative action on behalf of international students in the Victorian Equal Opportunity and Human Rights Commission. This action was to explore whether the denial of concession rates to international students by the Department of Infrastructure constituted racial discrimination in the provision of goods and services under the Equal Opportunity Act 1995. During the course of this action the Transport Legislation Amendment Bill 2007 was entered into the Parliament of Victoria.

If passed this Bill could effectively eliminate any future applications to the Commission or to the Victorian Civil and Administrative Tribunal (VCAT) and quash the legal debate regarding discrimination against overseas students with respect to transport concessions”

“The current government policy funnels international students into the disadvantageous position of paying full transport fares for the sole reason that they are non-citizens at a cost of around %40 per month. Central to this matter is the issue of racial discrimination. On the basis of these broader public interest issues PILCH referred the matter to one of its member firms for pro bono assistance”

²⁴¹ PILCH is a non-profit independent legal referral service with a network of members which represents the diversity of the legal profession. Its role is to coordinate the provision of pro bono (without fee) legal assistance. It does so through four pro bone programs, the Public Interest Law Scheme, the Victorian Bar Legal Assistance Scheme (LIVAS) and the Homeless Persons’ Legal Clinic (HPLC). PILCH also engages in targeted law reform and advocacy work, and provides community education and professional training. PILCH Matters is directed to its members, to the broader legal and allied services communities and interested members of the public.

²⁴² PILCH Matters (2007) “A Fare Go The Case for Concession Cards for International Students” (Nov) by Anna Lyons PILCH Secondee and Marlena Pitrone PILCH and BVALS Administrator found at http://www.pilch.org.au/html/s02_article/article_view.asp?art_id=446&nav_cat_id=237&nav_top_id=64

PILCH reports that

“Under current conditions there remained scope for the ECCV to make an application to VCAT. The passing of the New Bill currently before the Legislative Council in the Parliament of Victoria would sever this avenue.”

In the event the Bill was passed before PILCH could conclude this matter successfully.

The point of raising this issue is to illustrate the extent to which natural justice rights are being eroded consistently

Victoria and NSW are the only two States unwilling to view the above issue as one of equity and discrimination.

SELECTED ENFORCEMENT ISSUES

PC DRAFT RECOMMENDATION 10.1 ENFORCEMENT – Chapter 10

(REFER TO p70 Vol 1 Draft Recommendations)

The new national generic consumer law should give consumer regulators the capacity to:

- *Seek the imposition of civil pecuniary penalties, including the recovery of profits from illegal conduct, for all relevant provisions*
- *Apply to a court to ban an individual from engaging in specific activities after the court has found that a breach of consumer law has occurred*
- *Issue notices to traders requiring them to substantiate the basis on which claims or representations are made; and*
- *Issue infringement notices for minor contraventions of the law*

The PC has commented on a number of perceived weaknesses in the current generic provisions providing consumer protection. There would appear to be a number of

“... systemic impediments in the framework that detract substantially from its capacity to protect and empower consumers and to reinforce the role of competitive markets in delivering lower prices and a wider range of goods and services”

(PC Draft Report Volume 1, p 8 and 9)

Some examples include

- *Regulatory complexity*
- *Costly variation in regulation with few or no offsetting consumer benefits*
- *Perverse outcomes for consumers*
- *Lack of policy responsiveness to emerging needs*
- *Problems relating to contract terms and information disclosure*
- *Complex redress arrangements for consumers wishing to pursue complaints*

The quantitative work done by the PC indicates that:

“...addressing these impediments could deliver sizable benefits for consumers and the community. As well as directly assisting consumers a more nationally coherent consumer policy framework and changes to some specific components of that framework would help to promote productivity growth and innovation – the cornerstones of Australia’s strong economic performance over the last two decades.”

(PC Draft Report, p11)

The PC has identified a number of missing or poorly applied policy tools in current generic consumer protection provisions, and believes that there is significant scope to do much better.

“The changing nature of consumer markets and the growing expectations of consumers themselves mean that in the absence of remedial action the costs of deficiencies in the current policy framework will almost certainly grow. It is primarily with an eye to the future that the Commission has concluded that aspects of the framework are in need of an overhaul.”

(PC Draft Report, p11)

With reference to dealing with unfair contract terms that cause detriment, the PC found that

“...the absence of dedicated measures in the TPA and most of the FTA to deal with unreasonable and one-sided contract terms or so-called ‘unfair terms’ is seen by mean as a deficiency in the current generic framework.

These include terms that allow unilateral variation of contracts at any time for any reason or removing the liability of an essential service provider for interruptions in supply.”

The report commissioned by the PC provided an overview of:²⁴³

“The material differences between the objectives substantive prohibitions interpretation enforcement sanctions and remedies in Commonwealth State and Territory generic consumer protection legislation.”

(part I Introduction p5 of the Corones/Christensen Report, commissioned by Productivity Commission for Consumer Policy Inquiry)

In particular, material was taken to mean:

- *“Business compliance costs;*
- *The level of protection afforded to consumers or their ability to seek redress; and*
- *The ability of firms to innovate or supply products at least cost.*

The structure of this report is to consider first in Part II the Commonwealth consumer protection regime contained in the Trade Practices Act 1974 (Cth) (TPA), and other Commonwealth legislation, namely the Australian Investment and Securities Commission Act 2001 (Cth) (ASIC Act), and the Corporations Act 2001 (Cth).

Having considered the material differences between Commonwealth legislation, in Part III we compare the TPA (the template legislation) with the equivalent provisions of the State and Territory Fair Trading legislation including the enforcement powers of the State and Territory regulators, noting the material differences.”

²⁴³ Professor Stephen Corones and Professor Sharon Christensen Comparison of Generic Consumer Protection, September 2007 Report Commissioned by Productivity Commission’s Inquiry into Australia’s Consumer Policy Framework
Found at http://www.pc.gov.au/__data/assets/file/0009/73692/consumerprotectionlegislation.rtf

Given below is an extract from the Corones/Christenson commissioned report comparing genetic consumer protection regimes

3.2 Comparative Table

Table 2: Comparison of Objects of TPA and FTAs

Vic	<i>Fair Trading Act</i>	s1. The main purposes of this Act are— protect consumers regulate trade practices provide statutory conditions and warranties in consumer contracts provide for unfair terms in consumer contracts to be void product safety & information provide for codes of practice.
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Despite the stated objects of the Fair Trading Act (Victoria), and the provisions of separate Unfair Trade Practices legislation, consistent and proper access to these protections and commitment to enforcement has been at best equivocal.

The Victorian Government’s research paper focused on the relative merits of generic against industry-specific regulation²⁴⁴

In discussing deficiencies in enforcement and regulation, the paper recognizes the value of

“.....efficient enforcement procedure for detecting breaches of the standards established including systemic monitoring and concentrating on known sources of wrongdoing and publicity to induce consumer complaints.”

²⁴⁴ Consumer Affairs Victoria (2006) *“Choosing between general and industry specific regulation”*. Research Paper No. 8 Nov

In addition, the paper reference to Cranston 1984 p55²⁴⁵ referring to how much also depends on

“the spirit in which any controls are operated”

The paper suggests that one way to enhance perception exists that enforcement is taken seriously is the promotion of successful prosecutions (*p 23 CAV comparison*)

Where industry-specific regulation exists and is retained (for example where the generic provisions remain silent) or in particular industries where more specificity is required than can be covered by general legislation, it is also recognized that unless additional resources are available to enforce the industry-specific regulation it is unlikely to improve the outcomes for consumers.²⁴⁶

The CAV Comparative Report referred to the submission by the NCC to the PC’s inquiry into the regulation of third party access to infrastructure services²⁴⁷ in evaluating the relative merits of industry-specific and general regulation, quoting on p21 these observations by the Council²⁴⁸:

“Inevitably, however, an economy wide orientation does impose some trade offs. Legislation capable of accommodating a wide range of circumstances cannot be as specific and detailed as that designed say, to regulate a particular industry. Tailoring this broader framework to specific situations will therefore occur more largely at the administrative level, rather than being directly determined in and by the legislature. (NCC 2001, p. 35)”

²⁴⁵ Cranston R (1984), *“Consumers and the law”*, Weidenfeld & Nicolson, London c/f CAV Research Paper cited under citation 2 above

²⁴⁶ Consumer Affairs Victoria (2006) *“Choosing between general and industry specific regulation.”* Research Paper No. 8 November 2006, p 23, citing Commonwealth Office of Regulation Review

²⁴⁷ Productivity Commission (2001), *Review of the national access regime*, Report no. 17, Canberra c/f CAV Research Report 2006 *ibid*, bibliography p24

²⁴⁸ NCC (National Competition Council) 2001, *Legislation review of clause 6 of the Competition Principles Agreement and Part IIIA of the Trade Practices Act 1974*, Submission to the Productivity Commission, January, Melbourne c/f CAV Research Paper 2006, Bibliography 23 as for citation 4 above

The same report referred to the ACCC's observations, reproduced below²⁴⁹

“Industry based regimes have the advantage that they can be tailored to the particular needs of the industry. For instance, a particular technological requirement in the telecommunications industry is the need for any-to-any connectivity which is specifically catered for in Part XIC but is not a consideration directly relevant to Part IIIA.

At the same time the generic provisions of Part IIIA have a number of advantages.

One is that Part IIIA can act as a catalyst for the development of industry-specific regimes...

Another advantage is flexibility. It is impossible to predict what changes in technology the future will hold or the effect these changes will have on industry. A generic access regime is adaptable and may capture new or emerging technologies more effectively than would stand alone legislation. Similarly a generic regime provides flexibility for deregulation as technical and other conditions change over time...

“A final advantage of a generic regime is that it can operate as a benchmark. Part IIIA and the Competition Principles Agreement offer consistent criteria against which the standard and quality of the access regime must be measured. This helps to ensure the integrity of the access provisions.

For these reasons the Commission supports the retention of both industry-specific and generic access regimes. (ACCC 2000, p. 9)”²⁵⁰

²⁴⁹ ACCC (2001) Submission to the [Productivity Commission Review of the National Access Regime](#), Canberra c/f CAV Research Paper cited above under citation 3

²⁵⁰ There is widespread support for both industry-specific and generic provisions is widespread. I endorse such support. See for example VLAS's submission to the issues paper arguing not simply for industry-specific but mechanisms targeted at particular marginalised or disadvantaged groups and their needs (e.g. Indigenous Australians; cultural groups; internal students; psychiatry or intellectually challenged)

The CAV Report, on p29 referred to the Law Council findings as follows²⁵¹:

“...Part IIIA has been augmented to a large extent by industry specific regimes such as those developed for telecommunications, gas and electricity. Industry specific regimes address industry specific issues more comprehensively than a generic access regime can ever do.

The Law Council is of the view that industry specific regimes should be encouraged to the extent that they are truly required to deal with industry specific issues. To the extent that issues are generic across industries, these must be addressed by the common principles in a revised Part IIIA. (Law Council of Australia 2001, p. 2)”

On p28 of its Research Report the CAV paper discussed some of the disadvantages of generic regulation as follows

“Some disadvantages of generic regulation include:

- Uncertainty for both companies and consumers about the precise application of provisions to particular circumstances if the regulatory framework is too broad*
- lack of appropriate, targeted coverage in that regulation cannot be tailored to individual financial markets and products and their particular characteristics and weaknesses (in extreme cases, this could compromise prudential security), the regulator’s resources being thinly spread, so that it cannot take a systematic approach in supervising an industry from a long term perspective, but randomly targets problem areas for concentrated short term scrutiny and intervention*
- an essentially court-based, adversarial and ad hoc approach to enforcement with little reliance on industry co-operation and voluntary compliance in response to accountability measures and moral suasion*

²⁵¹ Law Council of Australia (2001), *“Legislation review of clause 6 of the Competition Principles Agreement and part IIIA of the Trade Practices Act 1974”* by the Productivity Commission, Submission by the Law Council of Australia c/f CAV Choosing between general and industry specific regulation Research Paper No. 8 November 2006, p 23, citing Commonwealth Office of Regulation Review, bibliography p23

- *fines and the costs of redress can be expected to be met by remaining investors to their detriment*
- *loss of financial industry-specific regulatory expertise and knowledge (institutional memory). (Insurance and Superannuation Commission 1996, p. 76)²⁵²*

The PC has identified a number of missing or poorly applied policy tools in current generic consumer protection provisions, and believes that there is significant scope to do much better.

“The changing nature of consumer markets and the growing expectations of consumers themselves mean that in the absence of remedial action the costs of deficiencies in the current policy framework will almost certainly grow. It is primarily with an eye to the future that the Commission has concluded that aspects of the framework are in need of an overhaul.”

(Productivity Commissions Inquiry into Australia’s Consumer Policy Framework, Draft Report, p11)

I again refer to and support the views of Peter Kell as expressed in his speech at the 2005 National Consumer Congress

Another area that barely gets touched on in the Productivity Commission's draft report but, I think, should be a core focus of any such review is consumer protection enforcement. It is an area where, I think, all of us would like to have seen more activity but it has also been an area where there have been some major successes and these deserve close examination. Any such review, I believe, would have to conclude that effective enforcement action is vital to effective consumer protection, and a review of this sort should be looking at where we need additional powers, whether it is the front end or the back end when it comes to remedies, and that should be a central focus of such a review.

²⁵² Insurance and Superannuation Commission (1996) *“Submission to the inquiry into the financial system”*, Submission 53, c/f bibliography p 23 CAV Research Report ibid

This is also an area of enforcement where the apparent dichotomy between prevention and cure, I think, breaks down a bit. Successful regulatory agencies - and you look at the activities of, say, the ACCC and ASIC over time - will seek to link, wherever possible, regulatory activity that is aimed at prevention with regulatory activity that is aimed at cure. There is nothing like a successful and high profile enforcement action to change the practices and, perhaps, even the culture of poorly behaved firms, large or small, in the market. It can also be very useful in educating and warning consumers - the case studies of actual enforcement outcomes and the sorts of problems that have emerged.

As one former ASIC Chairman once said:

The definition of an experienced investor is one who has already lost money.

I do not know that we have to go that far but it is certainly the case that enforcement and enforcement outcomes should be the focus of any such review.

The Productivity Commission's second suggested area of focus is on mechanisms for coordinating policy development across jurisdictions, and avoiding regulatory duplication - not one of those really sexy issues but this is an important issue. I think we have to make sure that it looks at where that sort of problem is real rather than talking about it in a general sense.

I now turn to enforcement policies and guiding principles for which the DPI claims direct responsibility online.²⁵³

(The DPI's)

“enforcement policy provides the guiding principles necessary for a fair safe and equitable application of the law in the day to day dealings of authorised persons with the general public and others. The policy is also a clear indication of what the public will receive from law enforcers by way of information choice and safety.”

²⁵³

DPI Enforcement found at
<http://www.dpi.vic.gov.au/DPI/dpincor.nsf/childdocs/-7F1041F3C997FDDCCA256DB00021E202-5E308C7F594A2EA7CA25728E00010E85?open>

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Definitions

The following definitions apply to terms used in the online DPI policy statement:

- ***Compliance** means the state of conformity with the law. DPI will secure compliance with the Acts for which it is responsible through three types of activity: (a) extension (includes communication of information*
- *promotion and capacity building)*
- *(b) compliance monitoring and auditing*
- *and (c) enforcement.*
- ***Enforcement** activities are designed to compel compliance and include: (a) formal inspection to verify compliance; (b) investigation of suspected breaches of the law; (c) measures to compel compliance without resorting to formal court action*
- *for example*
- *directions*
- *notices*
- *on the spot fines*
- *prohibition orders and warning letters; (d) measures to compel compliance through court actions such as injunctions*
- *prosecutions*
- *court orders*
- *undertaking entry works and cost recovery through civil action.*

Consumer Affairs Victoria - enforcement

On his website, Consumer Affairs Victoria describes its role and functions as follows²⁵⁴:

It still rests with the CAV to ensure enforcement, though there appear to be grey areas as to just what the Essential Services Commission should be doing regarding enforcement, and where the DPI fits in with ensuring that this is achieved.

Compliance enforcement by the ESC and also by the CAV have been debated as being adequately achieved, either because of lack of political will, funding, structure or weaknesses in the law. Tools of enforcement are fairly pointless if not accompanied by resources and political will.

The Director of Consumer Affairs²⁵⁵, has expressed the following views about effective implementation of general consumer laws, cited from the Directors Report in the 2006/2007 CAV Annual Report

Effective implementation of general consumer laws requires that the regulator is established with clear and appropriate independence, transparency and accountability.

The Director is employed under Part 3 of the Public Administration Act 2004 and, therefore, does not have the same statutory independence as other, equivalent, general regulators.

The effective implementation of the Director's statutory functions has been impacted by the position's lack of statutory independence.

Looking forward, as part of the on-going review of the legislation, it would be desirable to consider whether a commission structure would be more appropriate for Consumer Affairs Victoria and whether there should be a clearer separation of the regulatory and policy advising functions of the organisation.

²⁵⁴

Consumer Affairs Victoria About Us

<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE+-+Consumer+Affairs+Victoria>

²⁵⁵

David Cousins as Director of Consumer Affairs Co-signatory of the MOU dated 18 October 2007 between CAV and ESC along with Mr. Greg Wilson on behalf of the latter as ESC Chairperson

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Subdr242Part4 Open Submission

Productivity Commission's Review of Australia's Consumer Policy Framework DR

Focus on regulatory reform, government accountability, complaints mechanisms and redress

Madeleine Kingston

The enforcement commitment of the Victorian energy regulator Essential Services Commission has been the subject of dissatisfaction and debate for a considerable time. There appears to the public to be a lack of political will.

Therefore, I wholeheartedly support the Productivity Commission's recommendation 10.3 that

Productivity Commission Draft Recommendation 10.3²⁵⁶

“Australia’s consumer regulators should be required to support on the nature of specific enforcement problems their consequences steps taken to address them and the impact of such initiatives. Such commentary should be informed by surveys of targeted stakeholder”

I have tried over the past several months to highlight by example and evidentiary material growing concerns about these issues.

²⁵⁶ The Department of Consumer and Employment Protection WA (SUB248 2008 to PC DR) have supported this recommendation also as have others

SELECTED DISCUSSION OF HARMFUL INDUSTRY-SPECIFIC REGULATION - ENERGY

Mr. Banks, in discussing a second wave of behind the border' reforms "which began in the late 1980s, focused on the

"efficiency of public utility services and the flexibility of labour markets"

At that point I stop to discuss the "*efficiency of public utility services*" in such a way as I hope will call attention to the staggering perceived deficiencies, now two decades on that are impeding consumer protection as an integral component of productivity goals.

These concerns relate to poorly conceived regulations not simply because they are "*excessive*" and representing an "*unnecessary burden,*" but because they were so ill-conceived in the first place

I come to a specific example presently, and in fact have a whole dedicated technical submission to support these claims relating to "*bulk hot water*" policy provisions wherein policy-makers, regulators and energy suppliers, licenced or unlicenced^{257/258}

As mentioned in Part 3 of this submission (242DR), the bulk hot water provisions represent a good example of misguided and inappropriate unfair and unjust implied contract provisions that are squarely the primary responsibility of policy-makers and regulators. It is incumbent of those parties to ensure that regulations do not contravene conflicting legislation and other provisions in the written and unwritten law.

Suffice it to say here that billing practices and operations, seemingly driven by existing policy can be interpreted as misleading, against the public interest.

It would seem that the whole concept of the bulk hot water charging arrangements in place and endorsed by regulators and policy-makers alike are not only misleading to the public; fails the transparency and informed consent tests; but also seems to have the effect of re-writing contract law altogether, thus seemingly stripping end-users of their fundamental contractual and other rights. This matter is discussed elsewhere in more detail.

²⁵⁷ Note policy-makers and regulators are actually exempting energy suppliers, especially those providing "*embedded network*" and similar "*energy only*" provisions, and have incorporated into policy language and definition such phrases as "water products" when they mean the heating component of heated water supplied to the Owners Corporation wherein the "*heating component*" cannot be measured with an instrument designed for the purpose i.e. an energy-specific meter through which gas or electricity passes to filter, control and regulate the flow of gas through the meter and associated metering installation

²⁵⁸ Refer for example to the article by Tim Brook in CUAC's September 2005 Quarterly "*Embedded Networks – Disconnected Customers*"

Whilst Unfair Contract Provisions, and the provisions under Fair Trading and Trade Practices legislation does not cover policy-makers and regulators, they must surely take their share of vicariously liability for unacceptable market conduct that can be shown to be either directly or indirectly driven by statutory policies endorsed by such parties.

Beyond that, the provisions of the existing Victorian Unfair Contracts legislation offer enhanced and valued protection (*in theory, but weakened by poor compliance enforcement mechanisms*). These provisions should be echoed in the provisions adopted by other States, but diluted by over-reliance on weak and often inaccessible provisions under existing generic law. Much has been said about the extraordinary weaknesses of those generic laws and I had my voice to the concerns already expressed by many parties without repeating them here.

The Victorian Unfair Contracts provisions were introduced in consumer protection and should be adopted by other States. The Director of Consumer Affairs recognizes that the law needs reform at national and state levels with more focus on principles and fairness in the market. He has suggested more broadly defined range of unfair conduct covered in the general law.²⁵⁹

The wisdom of removing such provisions simply because they are adopted in only “one or two States.” has been questioned by many stakeholders in the current review. I add my significant concerns about this and oppose this proposal. Such a decision would be detrimental to the philosophy of enhancing proper consumer protection – which is diluted enough as it is.

Gas Industry Act 2001²⁶⁰

This Act regulates the Victorian gas industry. It requires persons who distribute or sell gas to obtain a licence from the Essential Services Commission of Victoria, or a licence exemption. It also provides for VENCORP (the Victorian Energy Networks Corporation), the independent system operator for the Victorian gas wholesale market. Key provisions include a consumer safety net for domestic and small business customers in the transition to effective retail competition.

²⁵⁹ Consumer Affairs Victoria Annual Report 2006/2007 Directors Report p9

²⁶⁰ Nowhere in the *Gas Industry Act 2001* is there any provision for water meters to pose as gas meters. Both in this instrument and in the Gas Distribution Code gas meters are described as instruments through which gas passes to filter control and regulate the flow of gas passing through those meters (or the metering installation).

Yet creative application of provisions for energy suppliers, licenced and unlicenced (the latter category stripping consumers of proper protection and redress) under “policy” guidelines allow for unjust imposition through creative attempts to re-write contract law and trade measurement practice of charges for water products and value added products though energy retailers are licenced to sell gas and electricity, not value added or water products

Any provisions that changes these provisions to allow loopholes through which consumer protection can be further eroded will be made without due regard to the obligation to ensure that existing provisions to not contradict protections under other provisions

In its Annual Report 2006/7 the Department of Primary Industries (DPI) reports its responsibility to oversee the retail energy market in Victoria as follows²⁶¹. Hopefully bringing this matter to their direct attention as a significant regulator failure and complaints management failure will bring appropriate responses. The machinery of response is slow

Benefits for energy consumers

DPI oversees the retail energy market in Victoria. To reinforce and enhance the benefits of full retail competition, initiatives undertaken in 2006–07 included:

- developing policy and governance arrangements to deploy advanced metering infrastructure in Victoria*
- developing a framework for energy consumer hardship with consumer organisations and energy retailers*

in Victoria

- further developing retail price arrangements to provide greater certainty of energy prices for consumers.*

The DPI and the regulator already grants licence exemptions and there are concerns about “energy-only” contracts’ arrangements for the charging to end “bulk hot water products” and the perception that these arrangements were undertaken to prevent price-shock to consumers, despite violating best practice trade measurement and the intent and spirit of the default *National Trade Measurement Act 1960* and its regulations, and despite endeavouring to re-write contractual law.

The price shock argument is weak and invalid since the proper contractual party is the owners Corporation, as already explained by Consumer Affairs Victoria, covered by current Owners Corporation legislation, and covered by common law contractual provisions, as well as the provisions of the *Residential Tenancies Act 1997*.

In terms of the apparently bizarre arrangements in place for “*energy only contracts*” assuming that this is referring to calculations of energy consumption for the heating of centrally heated bulk hot water systems in rented apartments and other settings.

This is often undertaken without the benefit of site reading; without the benefit of reading of separate meters whilst at the same time charging end-consumers for reading of both water and gas meters without transparently outlining these on bills that should be presented for payment directly to the landlord;

²⁶¹ Annual Report DPI 2006/2007 Part 1 p16 found at [http://www.dpi.vic.gov.au/dpi/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3070a6e7b500a364ca2573af001641a0/\\$FILE/06_07_Annual_Report_Part1.pdf](http://www.dpi.vic.gov.au/dpi/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3070a6e7b500a364ca2573af001641a0/$FILE/06_07_Annual_Report_Part1.pdf)

It also involves using water meters as substitute gas meters, with charges for energy being effected in cents per litre with the sanction of the regulator.

Both the regulator and the industry-specific complaints scheme EWOV have been directly informed by Consumer Affairs Victoria about the obligation of the regulator to ensure that there is no

“overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries).”

In addition both parties have been informed that the end-consumer is not the proper contractual party.

Yet the matter remains unresolved.

The National Measurement Institute (NMI) has openly acknowledged that²⁶²

In a modern society, many activities need reliable, legally traceable measurement, so that we can be confident of their integrity. These include:

- *trade measurements, such as in the supply of electricity, gas and water;*
- *agricultural and mineral exports;*
- *detection of drunk or speeding motorists;*
- *monitoring of workplace noise or environmental contamination;*
- *assessment of food quality; and*
- *consumer transactions, such as buying food or petrol.*

In trade, the buyer expects to receive fair measure. Usually it is not feasible for an individual consumer to check this, so governments establish legal metrology systems to protect consumers’ interests. Although systems for regulating weights and measures have existed in many societies for thousands of years, the range of consumer transactions has increased with time and with technological advances.

²⁶² Fact Sheet Legal Metrology – legal traceability of measurements, NMI found at <http://www.measurement.gov.au/assets/documents/nmiinternet/NMI3220060104093102%2Epdf>

The National Measurement Act 1960 Act No 64 of 1960 (with amendments to Act No 27 of 2004) provides as follows:

18R Transactions by utility meters to be in prescribed units of measurement

A person is guilty of an offence if:

- (a) the person sells a quantity of gas, electricity or water for a price; and*
- (b) the price is not a price determined by reference to a measurement of a quantity in the unit of measurement required by the regulations.*

Penalty: 50 penalty units.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

Regulations associated with that Act, viz, *National Measurement Regulations Statutory Rules 1999 110*²⁶³ currently exempt utility meters providing gas and electricity, but not cold water meters (with qualifying clauses) in all circumstances but there are future goals to remove such exemptions when the infrastructure is in place to accommodate such changes. State legislation in Victoria has not caught up with national standards and provisions²⁶⁴, despite the existence of the *Utilities Act 2002* (Victoria) (effective 2003) but without current regulations to match, so rather impotent for the last four years, thus compromising consumer protection).

With reference to the *National Measurement Regulations 1999 Statutory Rules 110*²⁶⁵ it could be argued that **unjust measurements** are being applied and unjust pricing formulae (*notwithstanding apparent endorsement by the current Victorian energy regulator*) and that the principle that a penalty should apply to:

*“a person whose act or omission causes or is likely to cause a measuring instrument in use for trade to give a measurement or other information that is incorrect is guilty of an offence if the person acted or omitted to act with the intention of causing that result of with reckless indifference to whether that result would be caused.”*²⁶⁶

²⁶³ *National Measurement Regulations 1999 Statutory Rules 1999 110 as amended made under the National Measurement Act 1960 . Compiled to 1 July 2004 taking into account amendments up to SR 2004 No 132*

²⁶⁴ See further discussion in separate documentation relating to existing utilities provisions, State and Federal, and refer in particular to the National Measurement Institute’s role and parameters

²⁶⁵ *Ibid National Measurement Regulations 1999 Statutory Rules 1999 110.*

²⁶⁶ Refer to *National Measurement Regulations 1999 Statutory Rules 1999 110 a amended made under the National Measurement Act 1960 s8(1) amended by No 17/2000 s7(1)*

In its July 2007 Response to the Final Report of the Review of the Essential Services Commission Act 2001 addressed to the Victorian Minister of Finance, the VCOSS²⁶⁷ raised some important issues regarding both information-gathering and enforcement.

I deal first with enforcement issues, and quote below directly from the VCOSS submission referred to

“We also support recommendations 25 and 26 regarding bringing consistency to the Commission’s enforcement powers and enabling the Commission to attach proportionate penalties to breaches of licence conditions codes and determinations.

We have long been of the opinion that the primary weakness in the energy consumer protection framework has been the impact of non-compliance and while the Commission has been quite successful in working with businesses to encourage compliance it has limited means to address and discourage breaches through the application of appropriate penalties. Revocation of a licence is a serious matter with grave consequences and the Commission should have at its disposal a range of penalties that are more appropriate for the types of breaches that generally occur.”

The CAV convenes Victorian Regulators’ Forums with the intention of contributing to improving regulatory practice in Victoria

The CAV website advises as follows:

Regulators’ Forum

Since 2003–04, CAV has convened the Victorian Regulators’ Forum, with the intention of contributing to improving regulatory practice in Victoria. The Forum facilitates discussion of common operational and governance issues among senior management of Victoria’s regulatory agencies.

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²⁶⁷ VCOSS (2007 Response to Final Report of the Review of the Essential Services Commission Act 2001

Presumably this means that opportunities will arise to address this long outstanding and unaddressed issue that has plagued the community for decades concerning bulk hot water provision, and governance transparency and accountability issues. These issues appear to have slipped out of hand and need urgent addressing in the public interest

The opportunity exists under the current Review of energy regulatory instruments ESC (2008)²⁶⁸ to reconsider the appropriateness of retaining the Bulk Hot Water Charging Arrangements, requiring energy regulators to apply trade measurement practices that will in any case become illegal and invalid once the Trade measurement regulations are formalized under national provisions and current utility exemptions are effected.

Meanwhile, the spirit and intent of those provisions are being violated as are consumer rights generally

The Bulk Hot water charging provisions represent a good example of misguided and inappropriate unfair and unjust implied contract provisions that are squarely the primary responsibility of policy-makers and regulators.

It is incumbent of those parties to ensure that regulations do not contravene conflicting legislation and other provisions in the written and unwritten law.

Whilst Unfair Contract Provisions, and the provisions under Fair Trading and trade practices legislation does not cover policy-makers and regulators, they must surely take their share of direct and vicariously liability for unacceptable market conduct that can be shown to be either directly or indirectly driven by statutory policies endorsed by such parties.

Beyond that, the provisions of the existing Victorian Unfair Contracts legislation offer enhanced and valued protection (in theory but weakened by poor compliance enforcement mechanisms). These provisions should be echoed in the provisions adopted by other States, but diluted by over-reliance on weak and often inaccessible provisions under existing generic law. Much has been said about the extraordinary weaknesses of those generic laws and I had my voice to the concerns already expressed by many parties without repeating them here.

The purpose of raising unfair contract provisions is to again support existing Victorian provisions and dispute the wisdom of removing such provisions simply because they are adopted in only “one or two States.” Such a decision would be detrimental to the philosophy of enhancing proper consumer protection – which is diluted enough as it is.

There appears to be a general perception amongst policy-makers and regulators that in seeking to secure competitive market contracts it may be permissible to omit to mention any front-end or back-end penalty to consumer detriment that switching choices may herald. This was one issue discussed at the recent Public Meeting auspices by the AEMC Retail Competition Review on 4 September 2007 chaired by John Tamblyn.

²⁶⁸ Review of energy regulatory instruments ESC (2008) Found at <http://www.esc.vic.gov.au/public/Energy/Consultations/Energy+regulatory+instruments+review/>

I now quote from Louise Sylvan's speech at the 2005 National Consumer Congress concerning the need for consumers to be aware of inappropriate risk. The Bulk Hot Water Guidelines currently in use impose such a risk by their very existence. Consumers are not aware from interpretation of their bills of use of the phrase "*hot water services*" that they are being inappropriately stripped of their contractual rights; that the contractual party should be the Owners Corporation' that they are being charged twice for heated water, once in their contractual arrangement with the Owners Corporation, and then under coercively obtained contracts with energy suppliers who have formed what seem to be collusive arrangements with energy policy-makers, regulators, bulk energy suppliers and Owners Corporation in order to implement pricing and charging methodologies that violate the intent and spirit of trade measure practice.

They also do not get to find out that the quality of the water is unlikely to be up to scratch that the trade measurement tools and methodologies are not designed for the purpose intended (with water meters posing as gas meters) and that there are no plans to retrofit the old buildings to ensure energy efficiency, water quality guarantees or any other service guarantee that should be included whoever is held contractually responsible for the heating component of bulk hot water serving multi tenanted dwellings.

So here are the relevant remarks made by Louise Sylvan in her speech²⁶⁹

The point of having those types of laws and regulations is so that people do not bear the substantive economic transaction costs that they would need to bear if they had to assess all of those aspects of a product or service in order to actually engage in a transaction. The laws are also there to ensure that people are not inappropriately at risk that elements of quality and safety in products and services that are not able to be assessed by consumers are not required to be assessed by consumers in the marketplace.

²⁶⁹ Sylvan, Louise (2005) "*Laying the foundations - getting the regulatory framework right*" Speech at 2005 National Consumer Congress. 15-17 March Louise Sylvan is deputy Chair of the ACCC Found at <http://www.fairtrading.nsw.gov.au/pdfs/corporate/louisesylvan.pdf>

COMMENT ON ADVOCACY ISSUES

Though covered in a previous component addressing all aspects of the PC's Draft Report, for completeness I repeat some comments relating to advocacy provision, since this component is primarily about service quality, redress and empowerment.

In Chapter 7 of its 2006/2007 Annual Report, Consumer Affairs Victoria refers to the statutory authorities and "bodies" that it supports and services that form part of the consumer protection and trade regulation framework in Victoria.

CAV's 2006/2007 Annual Report²⁷⁰

The Consumer Utilities Advocacy Centre Ltd (CUAC) was established by the Government in 2002 to ensure that the interests of Victorian electricity gas and water consumers – particularly low-income disadvantaged rural regional and Indigenous consumers – are effectively represented in policy and regulatory decisions. CUAC receives funding from the Government through Consumer Affairs Victoria of \$500, 000 per annum. The Minister for Consumer Affairs is the sole member of CUAC. The Directors of the Board are Chris Field (Chair) John Mumford and Robert Bladier (members with expertise in areas related to the functions of the company) and Joan Sturton-Gill and Peter Hansen (representatives of key consumer interests).

CUAC's principal activities are to:

- operate as an independent advocate for Victorian electricity gas and water consumers particularly low-income disadvantaged and rural consumers • increase the capacity of consumers and consumer advocates to participate in policy and regulatory decisions on electricity gas and water through its own resources and its management of the CUAC Grants Program*

In my Part 1 (Executive Summary) submission subdr242part1 raised the issue of advocacy provision generally and referred to David Tennant's grounding theories as discussed in his paper presented at the 2006 National Consumer Congress²⁷¹

²⁷⁰ Extract Annual Report CAV 2006/2007 found at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2006/\\$file/cav_annualreport_2006_chp7.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Annual_Report_2006/$file/cav_annualreport_2006_chp7.pdf)

²⁷¹ Chapter Seven, Statutory Authorities
Victorian Council of Social Services (date) Submission to MCE Retail Policy Working Group
http://www.vcoass.org.au/documents/VCOSS%20docs/Submissions/2007/SUB_070730_RPWG%20Composite%20Paper_VCOSS.pdf

I again refer to consumer grounding theories, and to David Tennant's view that consumer advocacy policy that is not grounded in consumers is likely to be ineffective and potentially dangerous.

David Tennant ends his rebuttal of Dr. Chris Field's advocacy discussion paper on a provocative note just before his closing statements as follows

The paper seems to shift to consumer advocates the responsibility to learn and use another language that is not primarily about consumer needs. Further it suggests that consumer bodies must weigh the costs and benefits and present for consideration the solution that produces the maximized outcome to meet the long term needs of all consumers. What that sounds like to me is shifting the role of government to consumer advocates with government asking to only being told what it wants to hear. It is a recipe for reading down or diminishing the actual voice of consumers in favour of a more sanitised version of the reality. It might also be called a conflict.

I turn now to the speech given by David Tennant at the 2005 National Consumer Congress and quote him on the issue of the lack of investment on consumer capacity.²⁷²

This provides us with an opportunity to look at the lack of investment that has been made in consumer capacity and to design some responses to it and I would say to you that from the perspective of an agency that works at the front line there are quite distinct and quite recognisable differences between being a service deliverer and provider and being in a position and capacity to conduct research, to think about policy and law reform in a forward thinking way. That is not attacking the consumer movement as it exists in Australia at the moment. It recognises though that it does not have that capacity unless investment is made in it.

²⁷² Tennant, David (2005), "*The Community Sector's View. The Acid Test – Evaluating the outcomes from the Think Tank Sessions from the Viewpoint of the Disadvantaged Consumer.*" David Tennant is Director of Care Inc NSW
Found at <http://www.fairtrading.nsw.gov.au/pdfs/corporate/davidtennant.pdf>

So why invest in consumer capacity? Well, again, I referred to in the paper some of Louise Sylvan's writings on this very topic in a paper entitled: Activity Competition, the Consumer Competition Interface. It talks about that joining up or intersection between competition and consumer protection and indeed they do intersect, but one side of that intersection has almost totally dominated our thinking in recent years to the point where one cannot even have a discussion about consumer protection any more without it being discussed as part of the competition framework.

I have to tell you, as a consumer advocate, I am sick to death of having to find ways to enter a debate by saying: well, the competition angle is this and the consumer protection issue is this. In fact, what I would like to see is a recognition that consumer protection rates a balancing in that process and, in fact, if we were thinking of it as part of a framework it would perhaps be better to describe it as a framework of sustainability rather than one that enters and leaves in a discussion of competition. So if we are to have that discussion do we automatically leave behind economic considerations? Well, no, of course not. In fact in this room I think just it was either last year or the year before at the Bi-annual Bankruptcy Congress I heard Julian Disney deliver a paper encouraging and in fact challenging community agencies to not be afraid of having discussions about economic issues and indeed we should not be.

We should be able to talk about the economic impacts of doing things properly for the community groups and the consumer constituents that we represent because it is absolutely the case if we do not consider those things then the cost to the community are increased and Dr Andrew Penman was speaking about those things before. It is the case that those on lower incomes are not only more exposed to the dangers but have less choices available to them to do anything about them and in some instances they have no choices at all.

I strongly support recommendations made by David Tennant²⁷³ for a Commission for Effective Markets. To be effective markets need to be efficient, sustainable and fair. It is not public opinion that this is currently the case or that proposed energy reform measures will achieve that goal. Yet the dye seems to be cast and the market is hurtling in a direction that may injure market participants as well as further injure the general consuming public, and vulnerable and disadvantaged consumers in particular.

²⁷³ Personal communication. David Tennant is Director Care Financial Inc. ACT, author of “*The dangers of taking the consumer out of consumer advocacy.*” Speech delivered at 3rd National Consumer Congress, hosted by Consumer Affairs Victoria Melbourne 16 March 2006 available at <http://www.afccra.org/documents/TheDangersofTakingTheConsumerOutofConsumerAdvocacy.doc> The paper disagrees with the position adopted by Dr. Chris Field. The paper particularly disagrees with the view that “Consumer advocates should, as a first principle, be a voice for competition” It discusses alternative definitions of consumer advocate and the dangers of policy dogma. This ideology should be revisited and examined in the light of proposed policy changes

Returning to advocacy issues, Dr. Chris Field has argued in favour of a national consumer advocacy body, citing the precedent of a national consumer advocacy body in the UK which is government-created and funded.

The consumer advocacy movement in Australia has supported the notion of such a body and has requested from the Treasurer funding that would provide support for consumer policy advocacy by ensuring

“that the national peak consumer body has the ongoing capacity to undertake research consultation and give effective input to public policy development processes. This requires the commitment of more than core operating costs.”

I re-emphasize support of the PIAC submission to the Federal Treasurer dated 18 January 2008 which seeks, in addition to the proposals made by the Productivity Commission in its Draft Report funds for the ongoing sustainability of a National Consumer Body similar to that in the UK. The details are discussed elsewhere above. I support all the recommendations made by the PIAC to establish a sustainable advocacy body to include ongoing research and consumer representation.

CONCLUDING REMARKS

This is good place to end this Part 4 submission, and refer to a new component subdr242part5

Part 5 (subdr242part5) deals in considerable detail with the technicalities of bulk hot water service provision, the confusopoly which surrounds the appalling trade measurement practices that have been adopted allegedly to “present price shock to end consumers of bulk energy” where the proper contract lies with the Owners Corporation. It will show how water meters are posing as gas meters, contrary to the express expectations of the Gas Industry Act that meters are used to measure consumption of energy at all times using an instrument designed for the purpose – being a meter through which gas passes to filter control and regulate the flow of gas through that meter and associated metering installation.

The central theme of this submission is improved accountability by government departments in completing the framework for effective consumer policy development.

Quite detailed discussion has been provided of the discrepant interpretations of the so-called ADR landscape. In fact, most of the schemes referred to are complaints handling bodies set up under enactments and therefore accountable at least through the regulators who created them.

This component explains why I believe that the several bodies believed to be delivering these services are not in fact offering mediation at all, or impartial face-to-face facilitation of pre-court options between parties. Nor do they advocate, arbitrate or have equivalent training to professional ADR providers or those with levels of professional development and training best suited to such provision

Grey areas relating to administrative law provisions have been commented on also by others such as Professor Luke Nottage in his Submission subdr14 to the Productivity Commission's Draft Report and attached response to the Issues Paper in May appended to his second submission

It is time for better clarification, more accountability, and better inclusion through administrative law processes.

If a statutory authority such as the State Ombudsman, or an entirely independent complaints body, removed from under and regulatory control could managed whatever complaints handling schemes were put in place, this would restore public confidence in neutrality, and possibly bring fairer and swifter outcomes.

As to calling these schemes either Ombudsmen or alternative dispute resolution schemes – this is misleading and inappropriate. They do not deliver that type of service, and are run by scheme participants. They do not mediate, advocate, or arbitrate. For those few who do have them, the binding powers are weak and unilaterally binding only. These powers can only be exercised with the agreement of the scheme member so watery and unsatisfactory as a reliable and fair redress option.

Greater use of appropriate ADR services is important as a component of the process of obtaining seamless redress and access to justice.

Pressure to conciliate should not be part of the equation, and neither should the policy and regulatory bodies responsibility for the schemes under their own regulatory instruments endeavour to avoid addressing either material or systemic complaints against suppliers or the scheme itself when things go wrong.

This component has already explained in considerable detail the jurisdiction, constitution, and accountabilities of EWOV as contained in selected instruments²⁷⁴; and has also examined the updated Memorandum of Understanding between Essential Services Commission Victoria (ESC) and Consumer Affairs Victoria (CAV).²⁷⁵

There are gaps in those instruments.

There are debates about the applicability of administrative law to complaints schemes in their current structure. These gaps need to be bridged in the public interest.

²⁷⁴ See for example updated MOU between ESC and EWOV dated 21 April 2007

²⁷⁵ See for example updated MOU between ESC and CAV dated 18 October 2007

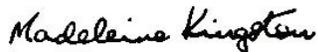
I have suggested widening of the powers and resources of State Ombudsmen to deal with complex matters, especially where the accountabilities of several statutory agencies may be involved and where the specific accountabilities of the industry-specific complaints scheme may continue to be foot-balled between agencies in such cases, leaving wide gaps in the whole accountability process.

In a climate of major change for consumer protection, there is a reasonable expectation the changes will deliver real, accessible, fair and effective redress and justice outcomes. If cursory tweaking by the appointment of an overseeing party without other structural and governance changes and without better accountability it will hardly be worth the effort of change.

Meanwhile, consumer confidence is eroded, and therefore so is consumer protection.

The public is relying on the Productivity Commission to deliver the best possible outcomes as it reaches the conclusion of this important enquiry.

On that note I close with reference to the next part which is more technically focused and deals in detail with the plight of end-consumers of bulk-energy and/or using embedded networks who are being unjustly imposed with contractual status under existing provisions.



Madeleine Kingston