20 October 2008

Telephone: (03) 9017-3127

Email: mkin2711@bigpond.net.au

Productivity Commission
Regulatory Benchmarking Project Stage 2
GPO Box 1428
Canberra City
ACT 2601

By email: <regulationbenchmarking@pc.gov.au>

Dear Commissioners

Regulation Benchmarking Review
Open Submission Part 1 for Publication with contact details

I appreciate the opportunity participate in the Productivity Commission's Regulatory Benchmarking Review Stage 2 (Draft Report).

Within the time constraints available to me I have selected a few topics to examine, providing a selected collation of opinions gleaned from submissions to various consultative processes, some best practice models for evaluation and leadership.

Please accept this in good faith with all disclaimers as in the body of the submission.

It has been rather hurriedly prepared in the midst of other commitments, please overlook flaws.

I hope there is still time to take some of these matters into consideration, but at any rate I would like the material published as an open submission and invite any enquiries. To that end I would like my telephone and email details made available for any enquiries that may arise or clarification sought.

Sincerely

Madeleine Kingston

Madeleine Kingston

Concerned citizen

OPEN SUBMISSION TO

PRODUCTIVITY COMMISSION'S REGULATORY BENCHMARKING REVIEW STAGE 2

COMPONENT RESPONSE PART 1

General Reform Issues

Madeleine Kingston

October 2008

Enquiries to:
Madeleine Kingston
(03) 9017-3127
mkin2711@bigpond.net.au

PREAMBLE

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

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

This overview component (Part 1)[1] of my submission deals with some philosophical beliefs and views about regulation selectively and in general terms to answer some of the issues raised by other stakeholders. The annotated contents will illustrate that a range of regulatory benchmarking topics is addressed, with emphasis on strategic planning, best practice evaluative and leadership models stakeholder consultative practices. Beyond that the material aims to reinforce the view that energy-specific regulation is essential, and that many of the protections in place are desirable and necessary, if not requiring further strengthening and clarification. Certain specific concerns are highlighted and discussed in more detail. The companion submissions 2A and 2B deal with specific matters, including certain existing arrangements that would benefit from review. Part 3 is focused on consumer redress and advocacy.

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

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

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

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

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[1] The numbering has been retained from a sequence of documents intended for the MCE arenas, since Part 1 is a grand overview of all documents prepared for the MCE SCO Table of Recommendations, NPWG and other parties.
Part 1 for the OPC submission deals with selected accountability, transparency and regulatory reform issues

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

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

Participation in consultative processes is stressful for all concerned especially if deadlines are inadequate. Such participation does not represent a favour to stakeholders, it is their right if time and opportunity permit

Further such participation may be seen as a service to policy-makers and regulators as well as the right of stakeholders to participate. Having said that policy-makers should not rely exclusively on the absence explicit endorsement or suggestion from stakeholders as an opportunity to adopt anything less than the best practice in policy and regulatory reform and implementation.

Whilst learning from stakeholders is an important part of policy formation, it is also up to policy makers and regulators to ensure that they do not infringe on the rights of individuals; that they do not expect businesses to choose which laws and provisions they need to uphold, since they are required to uphold them all; that they uphold the enactments and statutory provisions under which they are formed; that they recognize that the Crown is bound by enactments. Regulatory overlap and conflict is specifically forbidden in some enactments, for example the Essential Services Commission Act, s15 for example

I request that my contact details be retained on file indefinitely as an interested stakeholder willing to participate in future consultative processes and public hearings also. I would like to be notified of each and every development in this area either with research initiatives, legislative reform recommendations or public consultation opportunities. There is dearth of consumer voices.

It has been observed by others that the NEM resounds with a single handed clap that excludes consumers.

Access to consumer voice and protections for consumers of gas seem even less accessible. I would like every possible opportunity to provide direct consumer perspectives whenever consumer issues are at issue. This is one of several components but each intended to stand alone as a dedicated submission on selected topics.

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

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

Therefore I am seeking publication of these views – for the record, without necessarily believing that these attempts will represent anything more than a journey travelled, and regardless of final outcomes. As a late-comer to the arena of public consultative processes, it may be premature for me to adopt the stance of a committed cynic. However, I would be less than honest if I pretended to be anything less than jaded at this stage of involvement.

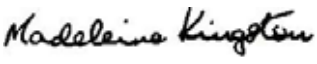
The leeway offered by the MCE SCO is appreciated with late submission, bearing in mind that the MCE SCO will also be interested in the material to be included within the jurisdictional Rules and how consistency between jurisdictions may be effectively achievable.

In any case various MCE arenas including the Retail Policy Working Group (RPWG); the Energy Reform Implementation Group (ERIG) and the Department of Resources Energy and Trade (MCE-RET) have already been alerted to some of the issues in previous submissions. There are components of interest to the Network Policy Working Group; ACCC, AEER, VenCorp, NMI and jurisdictional policy-makers and regulators.

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

The Law needs to be more specific and to clarify issues that have given rise to angst, expensive complaints handling; expensive government administrative burden; and the potential for private litigation. Market participants need to receive clear unambiguous instructions that do not leave them at potential risk; that do not require them to choose which laws and provisions that must uphold; or that may confuse them as to best business practice parameters. An unsettled market is one that has no potential to bring the best rewards for the business community or the community at large. This is a time of major policy regulatory and legislative reform. The climate may be ripe to learn some lessons from the past – and to remember the position the nation was in when the Senate Select Committee on National Competition Policy of 2000 found significant gaps in policy provision and adequate grasp or interpretation of the fundamentals of National Competition Policy.[2] Reducing regulatory burden is important where those burdens are duplicated unnecessary or harmful. Finding the right balance and choosing the right instruments to either shed or enhance is a highly skilled exercise. More care needs to be taken as to how and when this should be done.

I would be willing to accept any enquiries and request retention for publication of my contact details, notwithstanding the usual policies about suppression of such details for individuals.



Madeleine Kingston (03) 9017-3127 mkin2711@bigpond.net.au

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

Disclaimers

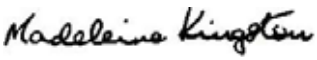
This material, including all appendices have been researched and collated prepared as a public document to inform policy-makers, regulators and the general public and hopefully to stimulate debate and discussion about reforms in a climate where regulatory burden and consumer protection issues are being re-examined. Its central aim is to provide a selection of collated views of stakeholders.

The material has been prepared in honesty and in good faith, expressing frank opinion and perceptions without malice about perceived systemic regulatory deficiencies and shortfalls, market conduct and poor stakeholder consultative processes, with disclaimers about any inadvertent factual or other inaccuracies. Perhaps I should go a step further and take a leaf from the wording of disclaimers adopted by CRA in their various reports[3] and add that

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

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

As to perceptions and opinions expressed by a private citizen, and those referred to from public domain documents, these too are expressed in honesty, good faith and without malice or vexatious intent, but reflect genuine concerns about policy and regulatory provision and complaints and redress mechanisms.



Madeleine Kingston

[3] See for example the CRA commissioned Report to the AEMC's Review of the effectiveness of competition in the gas and electricity retail markets in Victoria 2008

ANNOTATED CONTENTS AND STRUCTURE OF SUBMISSION PART 1

[4] 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

[5] 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*

[6] Kell, Peter (2006) *"Consumers, Risk and Regulation."* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006
Found at *http://www.choice.com.au/files/f124236.pdf*

[7] Allens Consulting Group Public Affairs. Industries *http://www.allenconsult.com.au/experience/industries.php?id=19*

Mentions the views of Peter Kell,[8] in discussing the importance of effective regulators – properly resourced and independent regulators without political pressure essential Mentions the views of PILCH (2005) relating to poor understanding of *"corporations of the relationship between corporate social responsibility and business."*[9]	154-156
Discusses of the provocative speeches by Peter Kell, CEO of Australian Consumer Association (CHOICE) at the 2005 National Consumer Congress March,[10] referring to *"less sensible arguments used to justify less regulation. Explores key arguments underpinning the "red tape debates believed to be misconceived'* and at the 2006 National Consumer Congress March 2006[11] Explores red tape misconceptions: *"Will the right consumer protection tools be made available regulators?"*	154
Gavin Dufty, sharp and eloquent critical analysis of the regulatory landscape. Now Manager Social Policy and Research at St Vincent de Paul Society. Mr. Dufty is also given to sharp and eloquent critical analysis also of the regulatory landscape.	156-167
Peter Mair's views on making the marketplace accountable (see sub 114 to PC's Consumer Policy Review (2008)	168-170

8 Kell, Peter (2006) *"Consumers, Risk and Regulation."* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006
Peter Kell was till recently CEO of the ACA, publisher of CHOICE magazine and peak consumer advocacy body. He became Deputy Chair at the ACCC in July 2008, taking over from Louise Sylvan who joined the Productivity Commissioner as a full-time commission around the same time

9 PILCH (2005) Submission to the Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee *Inquiry into Corporate Social Responsibility* (July), Executive Summary Overview (cited in my Part 2 submission to the PC DR) Found at *http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/submissions/sub04.pdf*

10 Kell, Peter (2005). *"Keeping the Bastards Honest – Forty Years on, Maintaining a strong Australian Consumer Movement is needed more than ever. A Consumer Perspective"* Published speech delivered at the National Consumer Congress 2005 March

11 Kell, Peter (2006) *"Consumers, Risk and Regulation."* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006, p 2..

[12] Consumers International Conference (2007) *Holding Corporations to Account* Luna Park, Sydney Australia 29-31 October

[13] Cowen B, Tynan P & N 1999. *"Reaching the Urban Poor with Private Infrastructure, Finance, Private Sector, and Infrastructure Network"*, Note No. 188, Washington, D.C.: The World Bank.

[14] Ibid Kell (2005) "*Keeping the Bastards Honest – Forty Years on…." NCC*

EXECUTIVE SUMMARY - Part 1 (prev 1 PC)

OVERVIEW OF PART 1 OF SUBMISSION

Submission to MCE SCO's National Energy Consumer Framework Policy Paper

Introduction

I write as a concerned private citizen enthusiastic about best practice regulations and the effective operation of governments.

The Productivity Commission (PC) is to be congratulated on undertaking the Regulatory Benchmarking Review.

Without benchmarking principles in place that are embraced, monitored and regularly reviewed no government or corporate operations can succeed. Without a corporate culture that is open to adoption of benchmarking, even if these benchmarks are mandated, no benchmarking regime can succeed. Without optimally meaningful stakeholder consultation, no government or corporate operations can succeed.

The absence of optimal levels of accountability and transparency in government and corporate operations means that decisions are made without the facts and circumstances that need to be considered to maximize the value of the decisions. Future planning becomes impossible without data that is required to mount a credible SWOT analysis.

A good example of paucity of data is that which was unavailable for a proper analysis of the competitive energy gas and electricity retail market undertaken by the AEMC. There are many who believe their assessment was flaws, as with South Australia. For the Victorian review CRA peppered its reports with disclaimers and mention of inadequate data or access to appropriate data from which conclusions could be wrong. An appendix with this submission highlights some of these flaws (Price and Profit Margins).

A separate appendix examines the extent to which proper assessment of the internal energy market may have been deficient because of the range of considerations that appear to have been missed altogether or incompletely assessed. Yet major infrastructure decisions have been made with far-reaching impacts on the basis of the assessments made.

In Victoria the small scale licencing framework has been incompletely considered at jurisdictional level. A feasibility study was apparently undertaken by EWOV to seek support for their reluctance to be nominated as the appropriate complaints handling body for complex matters with impacts on other regulatory jurisdictions, notably tenancy, owners corporation and trade measurement provisions. However, the results of that study were not published or made available to the policy-makers and/or regulators involved in decision-making. Without such data it is impossible to make a considered decision. Failure to produce those results requires the study to be replicated if an informed decision is to be made. Failure to publish means other stakeholders have no proper chance to effectively participate in the consultative arenas. Yet expensive consultative processes were run – providing a less than optimal chance for adequate stakeholder involvement.

Small scale licencing framework issues are being considered by the MCE SCO Network Policy Working Group. Hopefully more efforts will be made to seek data of a quality that will lead to informed decisions.

As things stand, because of apparent failure to appreciate technicalities, the bulk hot water arrangements which bear no relationship to embedded network provision of electricity to the premises of end-users, but rather rely on reticulation of heated water to those premises whilst the end-users are unjustly held contractually liable and landlords/owners profit from release from their obligations under other regulatory schemes on the basis of sanctions by energy authorities and regulators.

Failure to adopt best practice strategic planning results in ad hoc decisions being made without due care to consider impacts on all aspects of the market – making regulatory impact assessments an essential component of the strategic plan.

The same principles that are theoretically adopted in regulatory monitoring and enforcement apply to regimes designed to produced more streamlined, cohesive, efficient, effective transparent and accountable outcomes in regulatory practice, considering the impacts on the entire market. There is no excuse to overlook the needs of marginalized groups or others when assessing impacts. There is no excuse to ignore equity principles or to penalize demographic segments of the community because of which jurisdiction they live in or the type of accommodation they reside in.

The PC has explained its framework options on p15 of his Summary Draft Report (Box 2.1 as follows

Box 2.1 Framework options for benchmarking[15]

Performance benchmarking involves measuring and comparing indicators of regulatory performance across jurisdictions, and over time; without reference to any specific standards of regulatory performance across jurisdictions, and over time; without reference to any specific standards or performance

Standards benchmarking involves the comparison of jurisdictions' performance against best practice standards or policy targets

For a variety of reasons, performance, benchmarking of the quantity and quality of regulation are most likely to yield comparable results across jurisdictions

[15] Source: PC2007a, Productivity Commission (2007) Performance Benchmarking of Australian Business Regulation, Research Report, Melbourne c/f p25 Draft Report Stage 2

As reported on p1 of its Draft Report, the PC Report Performance Benchmarking of Australian Business Regulation had found that:

> *"benchmarking program could only be based on indirect indicators but could nonetheless yield various benefits including*
>
> - *Identifying differences in compliance costs and regulatory processes across jurisdictions*
> - *Increasing the transparency with which jurisdictions implement and manage regulation*
> - *Promoting 'yard stick' competition amongst jurisdictions*
> - *Facilitating a process of continual improvement.*

On p37 of its Draft Report, the Benchmarking Review discusses the principles of good design and review set out by the regulation Taskforce and COAG, which can be achieved through a variety of mechanisms.

Those identified in Chapter 2 of the Report identifies give outcome areas upholding the view that for a variety of reasons performance benchmarking of the quantity and quality of regulation are most likely to yield comparable results across jurisdictions (Box 2.1 (p15) Summary report).

Though I have focused my energies on highlighting deficiencies in selected areas, providing further analysis and detail of particular instruments and their perceived flaws, it is not my intent to turn the spotlight on a single group of bodies performing inter-related functions for the sake of the exercise (see detail in Part2, which was principally written for MCE and other federal arenas with energy oversight, regulation or advisory functions. The matters raised are illustrative of the types of gaps that may flag poorly designed regulation practice which includes robust consultation practice.

I have highlighted in particular the *"bulk hot water"* policy arrangements as they have been included within jurisdictional energy provisions, largely by way of deliberative documents and a Guideline which became effective on 1 March 2006 after two years of deliberation the detail and outcomes of which were not transparently published at till a year after implementation.

I will return to this issue presently as I intend to use this particular example as illustrating the poorest principles of regulatory design in terms of the following criteria *(Lattimore et al (1998), c/f PC Draft Report)*[16] targeting, timeliness, consistency, accountability; risk management; enforcement; flexibility.

In addition these provisions are illustrative of far more than that since they appear to highlight flawed regulatory practices that appear to contain the following flaws:

Inclusion of legally and technically unsound and unsustainable provisions which appear to be based on flawed reasoning and poor understanding of technicalities and other considerations;

Some of these may have been adopted on advice that Trusts need to preserve *"look through tax status"* in circumstances where it no longer derives income primarily from rent (for example)**.**[17]

There is so much more to this than tax status or alleged benefits to end-users, for example of utilities that are normally not passed on at all. Charging for anything that is not measured with an instrument designed for the purpose is a problem in itself. Charging for anything that specific conflicting enactments forbid is a problem. Failing to recognize specific provisions that forbid regulatory overlap and conflict raises new issues again. Unjustly allocating contractual status on the wrong parties is another issue.[18] Some of these matters are briefly discussed in this component and in more detail in ancillary submission 2A.

Inclusion of **substantive clauses that are unjust and unreasonable;**[19]

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16 Principles of Regulatory Design, *Lattimore et al 1998* c/f Productivity Commission, Performance Benchmarking of Australian Business Regulation: Quantity and Quality. Draft Research Report, p23 Box 2.4

17 This applies to what appear to be collusive arrangements between energy providers and Landlords/Owners/Owners' Corporations (responsibility Responsible Entity) entity)
Refer to VESC Small Scale Licencing Framework Final Recommendations (March 2008) and associated deliberative documents
http://www.esc.vic.gov.au/NR/rdonlyres/864FF246-D12C-494F-A4CD-A22BDFD98C9C/0/Smallscalelicensingframework.pdf

18 The Bulk Hot Water Charging arrangements adopted in three jurisdictions, Victoria, South Australia and Queensland represent an excellent example of this and of poor regulatory practice generally. Another example is the small scale licencing arrangements as applied to private residential tenants, rather than to transitory accommodation such as nursing homes and hospitals

19 Again one example includes the Bulk Hot Water policy arrangements in three jurisdictions, with Victoria the first to adopt practices that deserve stringent scrutiny. These policy provisions are now under the control of the DPI in Victoria, with the VESC intending under their current regulatory review to attempt somehow to validate the provisions by mere transfer from deliberative documents that remained under cover for three years; and from a Guideline (VESC Guideline 20(1) Bulk Hot Water Charging).
See also all associated deliberative documents from 2004 and 2005, and the Guideline for which the VESC hopes to effect cosmetic repeal, whilst still retaining the substance of the provisions by transfer from deliberative documents and the allegedly obsolete Guideline to the *Energy Retail Code* (see proposals under *Energy Retail Code* and response Madeleine Kingston Part 2A to

Inclusion of provisions that appear to be **facilitating conduct that could be interpreted as substantively or procedurally unconscionable** in threatening disconnection of essential services where the service alleged to be provided does not reach the premises (living quarters) of the recipient deemed to be contractually obligated); and where, for example in the case of the *"bulk hot water policy arrangements,"* statutory sanction appears to have been provided to allow water meters to pose as gas or electricity meters in determining derived costs that are imprecise, rule-of-thumb and appear to distort the fundamental principles of contract, besides representing direct regulatory overlap and conflict within and outside energy provisions current and proposed.

Appear to defy the fundamental and broader precepts of contractual law;

It is not uncommon for regulations to be formed without the slightest consideration of common law contractual matters; or the rights of individuals under the terms of unwritten laws generally.

The bulk hot water arrangements, for example represent an excellent example of such policy provisions seeking a way to consolidate on *"look through tax status"* for Owners' Corporation trusts, through collusive arrangements between energy suppliers and those entities or Landlords, with full policy sanction by regulators and rule makers at the expense of residential tenants.

It is one thing seeking to reduce costs and secure attractive packages if the benefits are passed on to residential tenants, and quite another if financial and other detriments result from provisions that appear to have been poorly considered in terms of the welfare of the community, good regulatory practice and other considerations impacting also on the industry. These matters are discussed in great detail in 2A (PC and MCE arenas) and in the much shorter submission to the Victorian Regulatory Review 2008 (2A Madeleine Kingston) already published.[20]

VESC Regulatory Review and more extensive material also named 2A prepared for MCE arenas and part of this submission to the PC as ancillary supporting material.
Such a process would effect concealment of introduction, purpose, authority, explanatory notes as to rationale for adoption and detail and effect of derived costings, contractual models and details of conversion factor principles; appendices containing economic rationales that will not stand up to scrutiny on legal and technical grounds.

[20] Madeleine Kingston (2008) Submission 2A to Victorian Energy Regulatory Review 2008. See extended version for MCE and Productivity Commission (pcsubdrpart2A_rb) as an ancillary document to this submission to the PC.'s Regularly Benchmarking Review. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/6AD5F77F-15F2-47E8-BA69-A0770E1F8C50/0/MKingstonPt2ARegulatoryReview2008300908.pdf*

Appear to facilitate the provision of inaccurate and misleading online, oral and written information by policy-makers and economic regulators; by industry-specific complaints schemes run and funded by industry participants in what may be considered to be a weak co-regulatory model of complaints redress, limited jurisdiction, perceived divided stakeholder loyalties and similarly provision of information of like ilk by energy providers, with both tacit and explicit encouragement from energy authorities and bodies, as to the rights of individuals under conflicting and overlapping schemes; within the unwritten laws, including the rights of natural and social and natural justice; and including conflicts within existing energy provisions; and in terms of the governance model of the proposed energy laws.

These considerations speak poorly of commitment to the provisions of Legal Compliance, which apply equally to government and commercial enterprises or other incorporated bodies.

These considerations have provided an irresistible opportunity to illustrate a wide range of regulatory failure parameters from which it may be possible to extrapolate conclusions on performance benchmarks if not standards benchmarking.

I note the PC's reservations about the obstacles to utilizing standards benchmarking methodology, which is the practice normally adopted by such agencies as Standards Australia.

I appreciate, that since there is no *"best practice"* standard in place yet against which

> *"the quantity of regulation can be measured*" in the absence of *"consensus about what is the optimal level of regulation*" and secondly
>
> *"quality relates to the outcomes achieved in terms of minimizing the regulatory burden imposed but also in achieving the intended benefits that flow from the regulation." (p15 Draft Report {PC Regulatory Benchmarking)*

To the extent to which a distinction needs to be made between the *"rules or laws designed to control govern or influence (the) conduct,"* of market participants as adopted by policy-makers; rule-makers; and regulators at large howsoever incorporated and the *"best practice standards"* or mandated regulatory practices, any measures adopted or recommended will be diluted by the absence of benchmarking standards in place against which comparison of jurisdictions' performance against best practice standards or policy targets can be measured.

I am only too well aware that there are occasions on which pragmatic decisions need to be made. The PC has explained that time constraints for the current study have precluded the development of standards against which current and future regulatory practice can be evaluated.

I support the PC's implied acceptance in principle (p16 Draft Summary Report) that standards benchmarking is a preferred option to adopt.

The pressure for agreement by all jurisdictions – and the *"need"* for the agreement may be a factor in compromising best practice evaluation of current regulatory practice. The absence of existing standards should not preclude consideration of considering, formulating

Whilst accepting the pragmatic considerations as an inevitable and perpetuating compounding factor in evaluative practice; the parameters relied upon are less than ideal. I am also concerned about the risks of reliance on performance benchmarking against standards benchmarking.

Having said that *"standards benchmarking"* is not without its own drawbacks, depending on the methodologies utilized. It is all too easy to rely of a tick-box approach in evaluation. There is so much more to this. Please refer to appendices *"Best Practice Evaluation."*

Whilst not intended as a criticism, as I see it there are no existing standards for benchmarking and that that the Commission has been obliged to rely on proxies; obtaining consensus from jurisdictions has proved difficult if not impossible at this stage; availability of data is less than optimal; and rosy self-self-perception of performance.[21]

I refer for example to the staggering rosy self-perceptions of Victorian agencies/bodies concerning its performance whilst at the same time graciously admitting that:[22]

> *"the comparisons also use data that many jurisdictions have collated for the first time, and Victoria understands that the Commission has not had the opportunity to conduct the detailed costs checks of data which it may be able to perform in subsequent editions. Issues of data consistency mean that a cautious approach should be adopted when making any inter-jurisdictional comparisons on the basis of the report."*

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[21] Direct quote, presumably Victorian Government (?VCEC) pp112-113
Refer same context to the he staggering self-perceptions of Victoria's performance, cited from *Performance Benchmarking of Australian Business Regulation, Quantity and Quality: Draft Report (2008) Summary Report,* pp 112-113 PC

[22] Productivity Commission direct citation of Victoria's rosy self-perceptions, op 112-113 Draft Report

I note the PC recommendation that

> *"Governments should not act to address problems until a case for action has been clearly established"*[23] *(box 2.6 p25 Summary Draft Report)*

I also note the PC's recommendation that:

> *"a range of feasible policy options – including self-regulatory and co-regulatory approaches – need to be identified and their benefits and cots, including compliance costs, assessed within an appropriate framework."*

I refer elsewhere to the views of Peter Kell about sparing the nation from half-baked self-regulation. I wonder also whether the tried and test – and in my view failed co-regulator practices under the so-called governance and alleged control of *"independent"* regulators may also come under the category of *"half-baked."*

I also note that the PC favours

> *"only the option that generates the greatest net benefit for the community taking into account all the impacts should be adopted."*

Time constraints prevent me from undertaking further discussion of how the *"net benefits for the community"* should appropriately be evaluated, what criteria should be used to determine this, and how the *"long term interests of consumers"* should be evaluated and determined.

Indeed others far better equipped to deal with these vexing questions have already made comment on this issues to many arenas, apparently unheard. This brings me to ask again whether there is any chance that economists and socialists can have any effective dialogue.[24]

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[23] Performance Benchmarking Review, Summary Report, p.25

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

At this stage I will limit my comment to the respected views of Gavin Dufty, Social Scientist, St Vincent de Paul Society in his repeated submissions to state and federal arenas, but particularly in the context of his VCOSS Congress Paper (2004).[25]

Though I cite elsewhere in a separate submission, Gavin Dufty's findings in relation to Universal Service Obligations and examples from government attitude, notably within the energy area, I isolate here what is relevant to regulatory shift of responsibility.

Gavin Dufty raises concerns about:[26]

> *".....significant issues for elected governments the community and other individuals and organizations involved in the development and delivery of social policy and associated programs. This paper will conclude that governments must legislate to ensure that regulators and other instruments act within the social and environmental framework mandated through the democratic process."*

The PC has proposed that

> *"Effective guidance should be provided to relevant regulators and regulated parties in order to ensure that the policy intent of the regulation is clear as well as expected compliance Ip25 Box 2.6 Summary Draft Report, Regulation Taskforce (2006))*

What about clarify from the consumer perspective. What about the perspectives and impacts on other stakeholders apart from those the subject of expected compliance?

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[25] Dufty, G, *Who makes social policy? – The rising influence of economic regulators and the decline of elected Governments.* Policy and Research Unit, St Vincent de Paul VCOSS Congress Paper 2004; and John Tamblyn's Paper presented to the World Forum on Energy Regulation, Rome, Italy 5 – 9 October 2003, Concurrent Overview Session 5 *"Are Universal Service Obligations Compatible with Effective Energy Retail Markets.* Victoria's Experience to Date.

[26] Dufty, Gavin *"Who Makes Social Policy – The rising influence of economic regulators and the decline of elected Governments."* VCOSS Congress Paper 2004 Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn's PowerPoint presentation at the World Forum on Energy Regulation, Rome Sept 2003. Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004 in a presentation entitled *"The Right to Service in an Evolving Utility Market.* (Are Universal Obligations compatible with effective energy retail market competition Rome 2003 – a similar talk with a changed title

Consultation requirements:

I discuss some concerns about current practices using my on recent experiences and perceptions as an illustration, but also referring to the experiences of stakeholders in multiple state and federal arenas over several years. Many of these stakeholders have become disillusioned generally

I have a strong philosophical commitment to the principles of governance, transparency, and best practice evaluation in achieving quality regulatory outcomes. For that reason I find it easy to relate to some of the practice endorsed by the Productivity Commission in its Draft Report.

It is additionally my understanding that the Rudd Government is committed to ensuring that these matters are on the agenda for addressing in a meaningful way. The public will expect to hold the Government to these promises.[27]

This component submission addresses certain selected components of just those issues.

It looks at the possibility of strengthening of agreements between prescribed agencies, public bodies, regulators and other entities and draws attention to weaknesses in existing Memoranda of Understanding in existence that though useful statements of intent are not generally followed up with more formal agreements between the parties that are legally binding. As a consequence *"gentlemen's agreement"* between bodies, though not supposed to be undertaken spuriously, are often taken to have no more than token application.

Though there are certain issues that the PC has chosen to focus on for the next three years with benchmarking, I have suggested that this area needs urgent review such that a more sustainable effect is obtained as a consequence of parties agreeing to best practice mutual consultation and adoption of practices that provide for consistent regulation within and between regulatory schemes.

Though most of the detail is contained in the supplementary submission 2A I have drawn particular attention to the unacceptable anomaly of particular instances of regulatory overlap and conflict between schemes that has already had the effect of causing market failure; consumer detriment by stripping end users of utilities of their rights under residential tenancies, owners' corporation and other provisions, as well as the provisions of the unwritten laws.

I have therefore included comment and recommendation that includes examining how government, quasi-government, policy-makers regulators and other entities providing a public service and developing regulations can be reminded of their implicit and explicit duty to avoid regulatory overlap with other schemes.

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[27] Refer to example to the Australian Government publication *"First Hundred Days"* (2008)

In the case of the Essential Services Commission, this body has an explicit requirement under s15 of the *Essential Services Act 2001* to do so. This has also been enhanced under the terms of their Memorandum of Understanding dated 18 October 2007 with Consumer Affairs Victoria. Both instruments appear to have had minimal impact.

The strategy of corporate re-badging frequently allows regulators and others to escape accountability and this is one of the issues that, subject to time availability, I hope to bring to the attention of the Productivity Commission in the context of their current Regulatory Benchmarking Project. I have discussed these matters at some length within this submission.

With regard to the *"bulk hot water policy arrangements"* that are the subject of detailed examination within Part 2A (along with other regulations and proposed jurisdictional and national regulations that may be potentially harmful, policy control for these has reverted to the Department of Primary Industries (DPI).

It is vociferously argued within this submission, in Part 2A and other inputs to MCE and jurisdictional arenas that that these arrangements may not be bringing the rewards that they should; are not representing best practice and are not geared to meeting either community expectation or meeting general and specific welfare needs.

Though in cases such as nursing homes and hospitals there is a case to consider small scale licencing arrangements differently, in the case of privately rented property for the most that which is made available to low-income and residential tenants with or without other disadvantages

I quote directly from the Rudd Governments pledges as contained in the publication *"First Hundred Days"* (2008),[28] in which the agenda for beyond those "100 days" of the new government is also flagged by a set of general objectives which include:

> *"harness(ing) the best ideas from people in business, in community organizations, in research institutions and elsewhere across the country;*
>
> *"pulling together the best resources and the best ideas from everywhere in the nation."*

I more fully quote the Rudd Government's pledges referred to above under the section *"Some Stakeholder Consultation Considerations."* It is encouraging that improved stakeholder consultative initiatives are being considered with enhanced expectations of transparent reporting

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[28] Australian Government (2008) First Hundred Days February 2008. (The Rudd Government's Commitment)
http://www.pm.gov.au/docs/first_100_days.doc#_Toc191998567

Because of time constraints the issues of concern have been addressed as thoroughly time would permit. Failure to comment on any one aspect does not imply either endorsement or rejection. I am working on responding to components of the Table of Recommendation for the Policy Paper, and have some particular reservations

I hope any criticisms and identification of weaknesses will be accepted in the spirit intended from a concerned private citizen. Whilst I am used to calling a spade a spade and exercising freedom of expression rights, I do not mean to offend.

One such criticism of many regulatory practices is the emphasis on process rather than outcomes. I share those concerns.

In setting benchmarks it is important that sufficient detail is incorporated in any *"guiding principles"* recommended including how the requirements of the proposed framework will be met or who will oversee that there are no hiccups in translating intent into practical application and adoption of broader principles.

Any sent of benchmarks needs to specify how the proposed framework will be implemented and monitored or who will oversee that there are no hiccups in translating intent into practical application and adoption of broader principles. The devil is always in the detail.

I have made similar recommendations in terms of implementation, for example of the MCE SCO Policy Paper and National Energy Consumer Framework and any proposals that are put forward by the Network Policy Working Group, since many of my efforts to date have been in the energy arena.

Ancillary material representing direct submission to the NECF, other federal arenas, including the Australian Energy Regulator (AER), Australian Competition and Consumer Council (ACCC).

I now refer to the Rudd Government's pledges as contained in the publication *"First Hundred Days"* (2008) [29]

[29] Australian Government (2008) First Hundred Days February 2008. (The Rudd Government's Commitment)
http://www.pm.gov.au/docs/first_100_days.doc#_Toc191998567

Gaps in meeting the National Competition Policy – initial discussion

See also dedicated Part 2 submission with overarching objectives.

> *"The Senate Select Committee had found that social services were not shown to improve during NCP.*[30] *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."*

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."*

The opening line of Chapter 5 of the SSC Report on the Socio-Economic Consequences of Competition Policy recognized that:[31]

> *"Market forces are global but the social fallout that policy makers have to manage are local"*[32]

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30 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*

31 Ibid SCC (2000) *"Riding the Waves of Change"*

32 Western Australian Parliamentary Standing Committee on Uniform Legislation and Intergovernmental Agreements, (1999) "*Competition Policy and Reforms in the Public Utility Sector,"* Twenty-Fourth Report, Legislative Assembly, Perth, , p xvii

Clause 1(3) of the Competition Principles Agreement provides that Governments are able to assess the net benefits of different ways of achieving particular social objectives.

Quoting directly again from Ch6 of the SSC Report of 2000. Without limiting the matters that may be taken into account, where this Agreement calls:

> *a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or*
>
> *b) for the merits or appropriateness of a particular policy or course of action to be determined; or*
>
> *c) for an assessment of the most effective means of achieving a policy objective;*
>
> *the following matters shall, where relevant, be taken into account:*
>
> *d) government legislation and policies relating to ecologically sustainable development;*
>
> *e) social welfare and equity considerations, including community service obligations;*
>
> *f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
>
> *g) economic and regional development, including employment and investment growth;*
>
> *h) the interests of consumers generally or of a class of consumers;*
>
> *i) the competitiveness of Australian businesses; and*
>
> *j) the efficient allocation of resources.*

Graeme Samuels[33], since 2002, Chairman of the ACCC, 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 interested to claim the retention of their vested interest.

Samuels 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 Senate Select Committee's 2000 enquiry did not in terms of dealing effectively with hardship policies implemented by the government or contracted out, that shifting of financial responsibility to

> *"bloody awful agencies which ought to be defunded"*

[33] Graeme Samuels is a former lawyer, merchant banker, a lawyer, a former president of the Australian Chamber of Commerce and Industry In 2002 Graeme Samuels was appointed Deputy to the then outgoing Chairman of the ACCC, Alan Fells, AO, (economist, lawyer and public servant now Dean of the Australian and New Zealand School of Government). Graeme Samuels assumed the position of Chair upon Alan Fels resignation in June 2003.
At the time of his appointment as Deputy Chair ACCC, Graeme Samuels was president of the National Competition Council (established in 1995 by COAG), a position currently held by David Crawford. When Graeme Samuels took over the position of Chair, Louise Sylvan replaced him as Deputy Chair ACCC
Graeme Samuels a former treasurer of the Victorian Liberal Party and as president of the Chamber of Commerce and Industry during the mid-nineties, he helped drive the campaign for tax reform
The NCP program ended in 2005-06 and COAG subsequently agreed to a new National Reform Agenda (to be supervised by the COAG Reform Council) at meetings during 2006.
The NCC finalized its NCP assessment work and focused on access regulation. On 13 April 2007, COAG confirmed that, under the National Reform Agenda, the NCC would continue responsibility for third-party access regulation. Access regulation seeks to promote effective competition in markets that depend on using the services of infrastructure that cannot be economically duplicated. *http://www.ncc.gov.au/articles/files/AR0607-001.pdf*
Sources: *http://www.abc.net.au/worldtoday/stories/s699268.htm*
and 2006/2007 Annual Report National Competition Council (NCC)
http://www.ncc.gov.au/articles/files/AR0607-001.pdf

> *"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."*

Competition policy issues are discussed in considerable detail in the body of this submission but are raised here in passing only under key points for immediate highlighting.

Universal service obligations, their role and implications are discussed in detail in the body of the submission later, with particular reference to the findings and views of Gavin Dufty, Manager Social Policy and Research, St Vincent de Paul Society in his VCOSS Congress paper in rebutting the views of John Tamblyn as the then Chairperson of the essential Services Commission, now Chairperson of the AEMC.

Andrew Nance's views and findings[34] (at the time with South Australia Council of Social Services (SACOSS) are also extensively cited and relied upon in the body of the text.

His full submission to the MCE SCO National Framework for Electricity and Gas Distribution and Retail Regulation – Issues Paper 2004 is discussed and reproduced elsewhere in this submission.

It is encouraging to note the Rudd Government's committed in the move to modern federalism

> *to end the blame game that has held back federal state relations for the last decade and blocked progress towards a modern Australian Federation."*[35]

The Prime Minister has promised a more effective Federation as a key plank in long-term plans.

We are looking forward to the outcomes of these commitments.

Governance, Leadership, Professional Development Issues across the board for funded entities of all descriptions, including contracted services

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[34] Nance, Andrew (2004) Personal Submission to MCE SCO National Framework for Electricity and Gas Distribution and Retail Regulation – Issues Paper October 2004. Found at *http://www.mce.gov.au/assets/documents/mceinternet/AndrewNance20041124123357.pdf*

[35] Rudd, Kevin (2008) *Modern Federalism for Australia's Economic Future*. Press Release March 2008

These issues are central to effective government, the proper functioning of competitive markets and consumer welfare generally.

Many believe that current standards of governance, accountability, leadership and professional development are not measuring up to expectation.

I remain gravely concerned about eroded public confidence in some of the general and specific areas of public accountability by government agencies and advisers. In particular I share the concerns of many stakeholders about the governance, accountability, leadership, and dare I say required skills of the new energy Rule Maker the Australian Energy Market Commission (AEMC), to meet current demands and expectations, and undertake dedicated and extensive discussion of their decisions regarding energy reform.

Much of this will be discussed in my companion submission of the same date addressing 5.4 and related issues within the energy market.

At the brink of nationalization in many policy and rule-making arenas, consumer protection measures should be accompanied by absolute confidence in transition and ongoing arrangements, appeal processes where government decisions, policies and actions can be effectively and swiftly met.

The State Ombudsman's powers should be extended to allow for addressing of policy issues where consumer detriment or poor practices are identified. This can often occur at the hands of the regulator. The perception of regulators of their *"independence"* and *"unaccountability"* because of their corporate re-badging needs to be formally addressed within the enactments under which they are created.

In the case of the Australian Energy Regulator, the ACCC site openly acknowledges that this corporatized body is an integral part of the ACCC, accountable to the latter, though often acting in an advisory rather than a regulator role; accountable to the Commonwealth Ombudsman; to Parliament.

In the case of the Essential Services Commission Victoria (VESC) and its associated complaints scheme EWOV the incorporation of these bodies to minimize liability, but not for the purpose of facilitating escape from accountability; both appear to think they have no external accountabilities. This issue as a principle and specifically in relation to these bodies is discussed in some detail in Section 8, pp201-208.

In 2000 the Property Council a research based organization prepared a report on the establishment of an Essential Services Commission.[36]

Perhaps it is time to remind the community of the recommendations made in that Report.

In one of its many recommendations, the Property Council recommended that the ESC be independent from, but accountable to Government.

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[36] Property Council of Australia. (2000) Establishment of an Essential Services Commission. A submission prepared by the PCA Victorian Division September 2000 Found at *http://www.dtf.vic.gov.au/dtf/rwp323.nsf/0/5908d74cdb91d9794a2569e400259e84/$FILE/ATT27YO8/sn22.pdf*

I wholeheartedly support the philosophies embraced by the Property Council recommended in the same report that:

> *It may be necessary to establish another arm of the Victorian Civil and Administrative Tribunal (VCAT) with sufficient resources and expertise to hear appeals from decisions made by the ESC and other bodies with decision-making powers which relate to essential services.*
>
> *There should be legislative requirements that procedural fairness is accorded in any hearing and to ensure that judicial review of decisions made by the ESC is accessible.*

I quote from the 2000 Property Council Report and recommendations concerning the establishment of the Essential Services Commission.

> ***Extract from Property Council's Report and recommendations 2000***
>
> ***Achievement of broader Government objectives of utility regulation best left to existing specialist bodies***
>
> - *The current regulatory regime involves a number of authorities and regulatory bodies having jurisdiction that overlap. The system requires a level of understanding as to who controls the issues. In establishing the ESC the opportunity must be taken to define the interface between the other jurisdictions to avoid confusion and waste of resources.*
>
> - *To some extent interests of consumers are best assured where specialists are available to comment on and consider pertinent issues* ***but*** *there must also be a central organization which has control of broader issues and is able to see the broader picture, for example a formalized regulator forum.*
>
> ***Changes required to the role or powers of these organizations***
>
> *As a result of the clarity that should come about by the establishment of the ESC the role and powers of other organizations should be refined accordingly.*
>
> *While we are looking at changes being defined though the equivalent of VCAT, Property Council believes there is a need to define which body is the single or final point of reference. We have concerns that the number of parties involved could dilute the effectiveness of the decision making process.*

I could not agree more that lack of understanding at all levels as to who controls the issues and proper definition of the interface between the other jurisdictions to avoid confusion and waste or resources is crucial.

The Property Council believed there was a need to define which body is the single or final point of reference. I could not agree more than in my direct experience, the number of parties involved diluted the effectiveness of the decision-making processes and made it possible for a protracted and expensive accountability shuffle to occur.

There was much to be learnt from the experiences that I attempt to cursorily relate – for those concerned with regulatory benchmarking such as the Productivity Commission perhaps the opportunity should be seized not only to resurrect original recommendations that seem to have been forgotten, but with eight years of hindsight since those recommendations were made, there is room to reconsider how enhanced functioning may be achieved at regulatory level and within government departments to improve consumer redress, enhanced regulatory outcomes and ultimately reduction of the burden on business through achieving enhanced consumer satisfaction, more effective regulation and reduced market failure.

However, VESC is perfectly well aware that EWOV was set up under statutory enactments; its parameters being specified under s36 and s28 of the *Gas Industry Act 2001* and *Electricity Industry Act 2000* respectively; that it fulfills a public role; that it has Memoranda of Understanding with other bodies in the spirit of a prescribed body; and that its Constitution and Charter specifically allow VESC with considerable control and decision-making power in EWOV's operations, consultation, parameters; report ability; and appointment of Board Members and Chairperson.

One of the issues of startling concern was the perception of the VESC of its own lack of external accountability o unwillingness to identify any; and also that EWOV, VESC and the DPI jointly believed that EWOV had no external accountabilities.

This is a misguided opinion that I will explore in more detail elsewhere. I have already discussed selected issues under Accountability Matters generally on (pp XX - XX

Meanwhile I express concerns about the manner in which market power imbalances have been enhanced not redressed by taking matters of complaint directly to EWOV and to the VESC. That matter represents the tip of the iceberg.

It was doubly complicated because a number of the issues were in fact about policies in place that were seen to be actively driving market power imbalances and unacceptable market conduct.

It seemed to me that the decisions made were of the consequence of self-serving findings that the issues were minimized where breaches were identified, or else poor interpretation of existing provisions.

In any case, the matter remained open before EWOV, and then VESC for 18 months, and has been re-opened because exactly the same conduct has re-surfaced.

Whilst I do not expect a policy change by VESC or the DPI, given that both are seeking to strengthen rather than reconsider the parameters of the bulk hot water arrangements discussed throughout this component submission, I remain extremely concerned about compromised consumer protection and empowerment.

Governments need to intervene when things go wrong. Many of the arguments presented by others are focused on market failures related to direct marketing. Little emphasis has been placed on the redress requirements and gaps for those who are unjustly imposed with deemed contractual status.

The case study is the top of the iceberg illustrating some of those gaps.

Finally after some involvement by the VESC, after an unresolved stalemate had been reached, it was suggested by the VESC that most matters be taken up with the DPI, who had taken over most policy issues relating to bulk hot water charging arrangements from 1 January 2008. Further DPI input is pending.

EWOV had 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 report quoted in full in an Appendix. 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 VESC.

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.

The matter has taken a full circle, with repetition of exactly the same issues, the same breaches of process; the same approaches; failure to identify complaints redress options' hardship options; failure to provide adequate notice of disconnection; incorrect disconnection process; relying of threat of disconnection of hot water services rather than energy.

The threats have resumed along the same lines, with failure to specify which legislation was relied upon to threaten disconnection of hot water supplies,; with an implied deemed contract being suggested on the basis only of ownership of the hot water flow meters theoretically used to calculate water volume usage.

Accordingly the matter has been re-referred to EWOV with all previous arguments enhanced and expanded and reiteration of the original breaches, but this time without going into alleged breaches under *FTA* and *TPA* considerations, which belong to other jurisdictions.

The Rules are preoccupied with process rather than the validity of claims concerning the existence at all of any deemed contract, or other unacceptable conduct.

Since EWOV has to rely upon the VESC or DPI for interpretation of legislation, the matter will continue to be handled as before, if at all. Twenty months on the matter is in exactly the same place, without an inch of progress or resolution.

One good example of exceptionally poor policy is the provision endorsed by jurisdictional energy policy-makers and regulators of energy to allow for the trade measurement, calculation, pricing and charging and deemed contractual issues impacting on end-users of energy whose energy consumption cannot be properly measured with instruments designed for the purpose.[37]

As reported by The Age, delays and misleading details in dealing with freedom of information applications to government agencies.

> *The Ombudsman's report notes that conflicts of interest have increased over the past year with public sector managers choosing to ignore clear conflicts and acting with their own interest in mind.*
>
> *"On several occasions when senior officers learned of a serious conflict of interest, they condoned the improper behaviour, ignored it or attempted to justify it," the report said.*

[37] See Bulk Hot Water Charging Guidelines ESC Guideline 20(1) and associated deliberative documents and correspondence. This guideline is specific to Victoria, but similar provisions exist in other states. This provision is about to be repealed as a Guideline with selected components from this and from deliberative documents leading to its adoption in 2005 and implementation on 1 March 2006 transferred to the *Energy Retail Code* (VESC) in the hope that such a transfer will validate the original concepts and help to re-write contractual, tenancies, owners corporation unfair contracts and other consumer protections within the written and unwritten laws. The explanatory notes are to be omitted. It is uncertain where the calculation and tariffs will be published. The moves are likely to make the provisions less transparent, but no more valid. The current trade measurement practices and calculation methodologies will become formally illegal with high penalties when existing trade measurement provisions are lifted. The provisions represent significant regulatory overlap with other schemes

In relation to Freedom of Information applications, The Age referred to the Ombudsman Report of continued complaints about FOI:

> *"with several cases where the reason given for claiming exemptions under the law was "clearly misleading."*
>
> *"Some agencies took advantage of every available exemption to provide as little material as possible," it noted.*

Finally the Age referred to the State Ombudsman's observation that

> *the misconception that merely having policies and protocols was sufficient to deal with conflicts of interest.*

Elsewhere, notably in the case studies in Appendices I have referred to the perception that identification of systemic issues and reporting is below expected standards within the energy industry in Victoria, as handled by EWOV as an intrinsic part of the Essential Services Commission though both enjoying corporate entity badging. Those structures do not exempt such bodies from accountability, though the structure does reduce liability.

I believe there is insufficient advocacy available for non-hardship matters. Whilst there are various agencies dealing with financial counseling and bring to the attention of energy policy advocates these issues, there is just not enough for other issues or other interest groups. The process of brining these issues to attention is unclear. There appears to be nothing at all available for gas advocacy.

Effective markets (safe, fair, sustainable)

Vertical and fiscal imbalances and implications – federalism and anti-federalism

Best practice evaluative processes – theory modes see appendix

The body of this and its companion submission includes reasonably detailed analysis of the overarching objectives and each of the other recommendations, though considerations under 5.4 form part of a companion submission dedicated to specific energy matters.

The two submissions should be read in tandem as many consumer-related issues overlap between the submissions. I have made some suggestions for re-wording of the over-arching objections, incorporating the suggestions of others also. In particular the use of the term *"in good faith"* may benefit from revised terminology. These selected comments are included here with more details elsewhere.

Please support me in my goal to expose flawed regulations and advocate for improved accountability, transparency and best practice regulatory reform.

I cannot sufficiently emphasize that this is not merely a plea to take care of those with hardship issues. I cannot possibly pretend to have the knowledge or skills to supplication for those with community service obligation needs because of hardship. There are numerous organizations whose expertise in this area does justice to those goals.

This submission and others goes well beyond seeking allegiance social and moral obligations, or wider application of national competition policies. These matters are discussed but in the overall context of regulation that is fair, sustainable and undertaken in a spirit of fairness, accountability and best practice.

It is a request from a concerned member of the community to seriously consider the impacts on the community at large, including industry market players, of allowing certain current jurisdictional policies and practices to remain unchecked, pending nationalization or considering incorporation of these practices into the national Laws and Rules without due care.

I provide some detail here of issues that are much more comprehensively addressed in an ancillary submission 2A which was written principally for federal and energy arenas. A much shorter version has already been published on the website of the Victorian Essential Services Commission as part of their current regulatory review.

It is included for the record to show examples of poor decision-making processes and consultative practices in several arenas that have had adverse outcomes, not only for consumers, but also for the market generally.

The main thrust of Part2A (and other components 2 and 2B not included here) be of some interest to the MCE Network Policy Working Group, I will directly ask for their particular consideration, but also that of the NECF Team, in addition to affected jurisdictions. I understand that the NPWG is focused on economic regulatory matters whereas the NECF is more concerned about contractual issues and the consumer protection framework.

There is considerable overlap in some of the matters raised between the economic and non-economic issues, to the extent that the derived costs adopted by three jurisdictions are based on a contractual and calculation model that is seen to be fundamentally flawed.

I have extensively discussed the VESC Draft Regulatory Review Decision published on 27 August 2008 by responding to a vast number of components from the National Energy Framework Table of Recommendations, but all of those comments are pertinent to the decision made jointly by the DPI and ESC to endeavour to consolidate on the arrangements by transferring large components to the *Energy Retail Code*.

Attempts by policy-makers and regulators to re-write contractual, tenancy, owners' corporation, trade measurement and other consumer protections in the written and unwritten law by adopting codes and guidelines, or alternatively Orders in Council will not serve to make the fundamental reasoning behind these guidelines more valid, legally or technically sound, or the requirement to avoid regulatory overlap with other schemes and other provisions within the written and unwritten laws, including the rules of natural and social justice or in line with community expectation.

The DPI and VESC proposes by transfer from deliberative documents and guidelines to the *Energy Retail Code* substantial proportions of this instrument evidencing poor regulation in the belief that such a transfer will somehow validate legally and technically unsustainable provisions that also represent regulatory overlap with other schemes as is specifically disallowed under s15 of the *Essential Services Act 2001*.

Under this heading a general discussion is undertaken of the philosophy behind this Guideline and the implications of transfer and retention in current form of most provisions, including contractual provisions seen to have distorted the intent of deemed provisions and definitions pertaining to provision of energy; supply address and supply point; energization (using the term separate metering when referring in fact to hot water flow meters that measure water volume not gas or heat); disconnection processes. The value of retaining this document in archives is discussed.

Flawed policies and practices have become commonplace and therefore accompanied by complacent indifference to consumer and marketplace impact. The Bulk Hot Water Guideline 20(1) is a good example of such a regulation. This instrument as a Guideline is similar to those adopted in three other jurisdictions.

The impacts of these provisions include the following:

1. Adoption of practices that appear to be **legally and technically unsound and unsustainable**;
2. Adoption of practices that could be interpreted as **substantively or procedurally unconscionable** in threatening disconnection of an essential services where the service alleged to be provided does not reach the premises of the recipient deemed to be receiving it
3. Adoption of practices that appear to **contain unfair substantive and procedural terms** as covered under Unfair Contract provisions within the Fair Trading and Trade Practices provisions
4. Implementing of practices that appear to **defy the fundamental and broader precepts of contractual law,** including under energy and other provisions in the written and unwritten law.

5. **Inaccurate information provided to consumers**: Adopt online publication by regulators and complaints schemes, and oral and written information provided to the public that may be construed as inaccurate as to the rights of individuals, especially in relation to residential tenancy rights. Providing inaccurate information to the public in this way may represent legal compliance breach
6. **Targetting**: The arrangements does not tartget the right group in terms of contractual liability, holding responsible contractually responsible to energy retailers residential end-users of heated water who receive no energy at all to their premises, but rather a composite water product which the suppliers are not licenced to sell or permitted to disconnect
7. **Timeliness** The arrangements were adopted retrospectively when there was long-standing evidence of market failure and appear to have had the perverse effect of enhancing rather than correct the failures
8. **Consistency**: Introduces inconsistencies and adverse interactions with other regulations and policies.
9. **Accountability**: Are unclear and conflict with definitions and provisions within and outside the energy arena, unfair and the processes for its application are not transparent or readily contestable outside of legal recourses. The provisions represent regulatory conflict with residential tenancies, owners' cooperation; spirit and intent of trade measure practice; contain substantive unfair terms; and because of regulatory overlap with other schemes contravene the express provisions of s15 of the *Essential Services Act 2001*
10. **Risk Management:** Because of unfairness, risk of conflict, expensive complaints handling, tribunal or legal appeal; leave providers following regulatory instruction at risk of breaching consumer rights; fair trading practices and the intent and spirit of national measurement laws; the provisions will in any case become formally illegal when remaining utility exemptions are lifted; the practices are also seen to have driven unacceptable conduct that appears to be tacitly overlooked
11. **Consultation:** Consultation processes from the outset were not transparent
12. **Enforcement: Non-existent in terms of consumer protection against unfair contractual terms and unacceptable market conduct**
13. **Flexibility:** Increasingly ineffective as consumers become more aware of their rights; oppose the regulation; seek other forms of redress; will breach national trade measurement laws;

Since the adoption of this Guideline 1 March 2006, after various deliberative processes during 2004 and 2005, it has been possible with regulatory sanction for energy retailers to undertake the following:

- Creatively interpret the provisions of the *Gas Industry Act 2001* and the *Electricity Industry Act 2000* by imposing on the wrong party's contractual status, where the proper contractual responsibility for any consumption and supply charges or any other associated charges lie with the Landlord/Owner or representative.
- Use water meters to effectively pose as gas meters using practices that could be construed as misleading, and has economic and trade measurement implications because of the methods employed to derive costs, using water volume calculations if calculated at all, to guest mate gas or electricity usage by rule of thumb methods specifically discounted by other schemes as valid calculation of energy consumption, and soon to become formally invalid and illegal under national trade measurement laws (Part V 18R *National Measurement Act 1960*).
- Use trade measurement practices that defy best practice as well as the spirit and intent of existing trade measurement laws and regulations, and which will become formally invalid and illegal as soon as remaining utility exemptions are lifted from national trade measurement provisions
- Effectively make inaccessible the enshrined contractual rights under conflicting schemes and other provisions in the written and unwritten laws end-users of heated water that is centrally heated and supplied to Landlords or their representatives, including tenancy provisions and common law rights under contractual law; as well as the specific provisions of unfair contract provisions and the provisions of other generic laws.

These practices in turn have enormous implications for the following:

1. Assessment of who the contractual party should be and how customer or relevant customer is properly interpreted under deemed or other provisions.

2. How soon consumer protections can be restored such that they can once again readily access their fundamental contractual, tenancy and other rights without threat by energy retailers and/or distributors of disconnection of heated water services reticulated in water pipes to individual flats and apartments without any physical energy connection, gas transmission pipe or electrical line.

3. When consumers can expect the issue of Landlord/Owner obligation to be factored into contractual governance models and energy provisions generally.

4. When the issue of avoidance of overlap and conflict with other schemes can be formalized as a regulatory requirement in the interests of best practice. Under the *Essential Services Commission Act 2001*, it is specifically required regulations avoid overlap or conflict with other schemes. The BWH provisions directly contravene that legislated requirement.

5. Whether the entire energy regulation framework and trade measurement framework can be seen to be compatible with the bulk hot water pricing charging and trade measurement provisions (economic stream – NPWG).

6. The legislative and other regulatory arrangements, including regulatory overlap with other schemes; and conflict within existing energy provisions with regard to the bulk hot water arrangements in general for residential tenants with consumer detriments illustrated by case study example.

7. The deemed contractual arrangements that are currently unjustly applied to multi-dwelling apartments and bulk hot water supply; and the parties that may be subject to these arrangements where they are residential tenants in commercially rented multi-tenanted dwellings with a single energization (connection) supply point.

8. The existing rights of end-consumers of energy and water in terms of regulatory overlap with other regulatory schemes with conflicting provisions as to the responsible parties in BHW arrangements impacting on residential tenants and the specified rights and obligations of Landlords and/or Owners' Corporation under certain enactments; as well as the implications of adoption of trade measurement practices that violate the spirit and intent of existing national laws which will formally render those practices invalid and illegal with high penalties when remaining utility exemptions are achieved.

9. Whether the current regulatory framework in relation to BHW service provision can be separately treated to other metered gas supplies; and especially given the definitions within all other existing energy provisions; the regulatory overlap with other schemes and with the provisions of unwritten laws; the implications under the Criminal Code

10. The dilemma faced by retailers in terms of the ongoing provision of energy services and BHW supply on the one hand being expected to uphold the terms of their licences by adopting the provisions of all codes and guidelines which include the BWH arrangements; and on the other observing their obligation under licence to sell disconnect or restrict gas and electricity not hot water products, composite water products or other such products.

11. The absence of any control under the existing regulatory framework by the current regulator(s) which:

> *"proscribes what information must be provided to be occupier but does not prescribe the language and format for such correspondence."*

12. Such gaps are at risk of being carried into the new national energy template law.

13. Terminology in current use dignified as *"vacant consumption letters"* often received many months after a tenant moves into a block of flats or apartments is being routinely sent as a first contact strategy including threat of disconnection of hot water services within 7-10 days (rather than the gas or electricity for which licences are provided currently).

Barely 17 months after their adoption, the DPI and VESC together decided to recommend cosmetic repeal of these guidelines, removal of the introduction, purpose and authority;

removal of clarification and explanation as to how trade measurement and derivative costs are currently formulated and by implication how these will be undertaken in the future; thereby compromising transparency principles even further

adopting practices that appear to be legally and technically unsustainable; representing regulatory overlap and conflict with other schemes and with the rights of individuals within the unwritten laws; conflicting with existing energy provisions and also with future governance models within the proposed NECF template Law and Rules; potential creating further regulatory burdens; and failing to sustain the original goals for the adoption of the Guideline in the first place – to achieve better transparency and to allegedly *"prevent consumers from price shock."*

I will refrain from detailed discussion here but these matters are examined in extraordinary detail in Part 2 as an ancillary supporting component of this submission, illustrating by reference to regulatory impact considerations; existing and proposed laws, notably residential tenancy provisions; owners' corporation provisions; unfair contract provisions in the substantive clauses of the provisions that energy providers are required to adopt. Significantly both the non-economic (contractual) and economic components of these provisions violate the intent and spirit of the National Measurement laws and regulations.

A Parliamentary Bill has recently formalized the application of the *National Measurement Act 1960* by introducing a national system of trade measurement for Australia commencing 2010.

I refer in particular to Part VA 18P, 18Q and 18R; Part IV will replace Part VA and once remaining utility exemptions are lifted a wider range of restrictions will apply, including unjust measurement provisions, clearer definitions as to liabilities, including alternative definitions for "premises" that are not restricted to the living quarters of individuals receiving reticulated water products to their respective flats and apartments.

For Victoria the application of these provisions is a fait accompli in the absence of any regulations to go with the *Utility (Metrological Controls) Act 2002*.

These matters are raised here as they illustrate but a single example of the adoption of regulatory practices that fall so far short of community expectation, best practice, proper trade measurement practices; and mandated requirements to avoid regulatory overlap with other schemes and implicit requirements to adopt regulatory and policy practices that support the provisions of the unwritten laws, including the rules of natural justice and moral and social justice norms in a climate of evolving community expectations and norms.

To deliver anything less than those expectations would be to fail the Australian. community at large and to place at risk the economic goals that we hear so much about.

As repeated elsewhere, retailers and distributors need to feel secure that the instructions that they are given are not producing the intended or unintended outcome of expecting them to choose which laws they are expected to uphold; to undertaken practices that fall short of best practice, including trade measurement practices; and will not in the future because of breach of trade measurement provisions leave them open to criminal charges and penalties; and that the disconnection processes that they undertake will not also leave them vulnerable to private litigation and/or criminal charges.

It may be possible to demonstrate as invalid and legally or technically unsustainable, any practice that relies on metering data or consumption or supply calculation methodology that is not based on a meter that can legitimately calculate the quantity of gas (or electricity) that passes through an energy meter, and its associated metering equipment to filter control or regulate the flow of gas or electricity that passes through such an instrument.

Beyond that the potential exists for criminal charges and/or civil penalties to be imposed on any energy supplier/provider who adopts practices that do not conform to all laws and regulations, regardless of any energy-specific provisions that may exist.

There is an apparently unrecognized requirement to show legally traceable consumption of energy in order to imply a deemed or explicit contract for the sale and supply of energy. The central contentions within this submission aim to demonstrate that.

If selected energy provisions have failed to infer this from existing legislative provisions and Codes, this may be to the ongoing detriment of energy suppliers and consumers alike.

For example, practices that cannot show legally traceable consumption of energy upon which to base alleged contractual status, including perceptions of *"deemed contractual status;"* may ultimately be shown to be invalid and legally and technically sustainable. These issues are discussed in extraordinary detail in submissions to the Victorian Essential Services Commission; to various MCE arenas, AER, ACCC, CAV. Please refer to Submission 2A as an extended submission for some of those arenas, a condensed version of which has already been published as part of the Victorian Regulatory Review 2008 (Sub 2 and 2A).

The claims made in that case study, which focuses both on the consumer detriments and the handling of the matter by the industry-specific co-regulatory scheme EWOV and its associated regulatory body VESC, is included in Part 3 to the Regulatory Benchmarking Review, as well as the extensive Part 2A, which have been supported with privileged evidentiary material supplied to the Productivity Commission, including actual letters of threat of disconnection 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 allegations included alleged unconscionable conduct by an energy supplier of bulk energy (where the proper contract lies with the owners Corporation) against a particularly vulnerable and disadvantaged end-consumer with a psychiatric and suicide history threatened with unjustified unconscionable conduct; threats, intimidation and coercion; unfair business practices (Fair trading provisions) unfair and inappropriate trade measurement practices contravening the spirit and intent of national trade measurement provisions but sanctioned by regulators); misleading and deceptive conduct; misleading details on bills issued to other tenants on the same block; inappropriate application of supply charges properly belonging to the Owners' Corporation; similar inappropriate and unacceptable business conduct to other residential tenants not contractually liable; inaccuracy of deemed consumption of gas and charges applied.

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.

For in excess of twenty months on behalf of a particularly inarticulate, vulnerable and disadvantaged end-consumer of bulk energy, I have disputed in many arenas the validity of current regulatory provisions which I believe have adversely and unacceptably impacted on some 26,000 Victorians and with similar impacts on end-consumers of energy in other states who have been unjustifiably imposed with contractual status by energy providers relying on perceived flawed policies that have effectively made inaccessible their enshrined rights under multiple provisions, not limited to energy, including the written and unwritten law; common law contractual provisions; rights of natural justice and other provisions.

In that matter, 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 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.

Before briefly discussing 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 enshrined consumer protections may be eroded by such arrangements.

Quite simply the arrangements in place are unfair and unjust, infringe consumer existing protections under multiple provisions and need to be drastically amended so that the proper contractual party is made responsible for the heating of water that is centrally heated to supply heated water to tenants in multi-tenanted dwellings.

This does not mean loss of income for the retailers, but simply arrangements that will properly determine who the contractual party is through transparent processes that take into account provisions that extend beyond merely energy-regulation.

The further justification for this is discussed in technical terms and in the context of various legalities in a separate section.

In Victoria the Department of Primary Industries (DPI) is responsible for policies for bulk hot water provisions, a term that has distorted the whole concept of energization and the obligations and rights of energy suppliers, using legally and technical unsustainable policy provisions that defy all reasonable principles of best practice, proper trade measurement, contractual law.

Currently the contractual rationale deems end-users of heated water contractually responsible for the delivery of energy to centrally heated water in blocks of rented apartments and flats, reside in deliberative documents of no legal weight.

Following direct challenge legal and technical to these flawed policies, taken up initially with the industry-specific complaints scheme Energy and Water Ombudsman (Victoria) Ltd, the Essential Services Commission as current Victorian jurisdictional regulator, and ultimately the Department of Primary Industries (DPI), it has been proposed that the existing bulk hot water pricing and charging provisions, be formally incorporated into the *Energy Retail Code*.

I have formally respectfully asked Treasury staff to identify what will be done restore community confidence and when. The matter has been referred to the Department of Energy Resources and Tourism for their consideration by Treasury staff and also directly by me as a concerned citizen, providing considerable detail with more to follow.

The energy marketplace is facing major structural reform; there is much regulatory uncertainty and consumer confidence is at low ebbs. This cannot be good for the economy or for the people.

Concluding Remarks

Will best practice regulatory benchmarking be sufficient without philosophical and organizational cultural commitment to their adoption?

Will consumer policy protections and implementation of some form of community service obligation alternative be sufficient, for example within the energy industry when price deregulation is effected in 2009; to add to the price hikes of 17% that were already implemented on 1 January 2008 through State initiatives, and even before completion of the AEMC's Review of the Effectiveness of Competition on Gas and Electricity Markets in Australia?

If the AEMC does commission professional evaluative input in the future, will it be prepared to be guided by evaluator recommendations and monitoring of outputs? The same question may be pertinent to other reviews and inquiries, including that of the Productivity Commission's Inquiry into Australia's Consumer Policy Framework. Evaluation does not start with the gathering of quantitative data but rather with a carefully structured strategic plan tailor-made for the purpose.

Will reversal of decisions be too costly or complex in this case, if a premature decision is made to deregulate?

Here's a quote for day directly from Michael Quinn Patton[38]/[39] for all those considering policy changes in the energy industry (or any other industry) that may impact on balance of power impacts.

> *"Keep six honest serving men. They taught me all I knew: Their names are What and Why and When and How and Where and Who. 2 —Rudyard Kipling"*

Will those already suffering poverty, or at any rate serious financial disadvantage sacrifice food, and other basic essentials in exchange for essential services like energy for heating and cooking? Could policy inertia set in with multiple governmental levels as suggested by Adams?

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[38] Patton, M. Q. (2002) *Qualitative Research and Evaluation Methods,* Sage Publications, p 276. See also Janesick (2003) Qual Health Res 13: 884-885

[39] Michael Quinn Patton lives in Minnesota, where for 18 years he was Director of the Minnesota Center for Social Research; former President of the American Evaluation Association and the only recipient of both the Alva and Gunner Myrdal Award for Outstanding Contributions to useful and Practical Evaluation from the Evaluation Research Society and the Paul F Lazarsfeld Award for Lifelong Contributions to Evaluation Theory from the AEA. In 2001 the Society for Applied Sociology awarded him the Lester F Award for Outstanding Contributions to Applied Sociology

The concern is how the Productivity Commission intends to meet the gap when the Commonwealth is required to meet the needs of the low fixed-income vulnerable and disadvantaged groups (not simply on financial hardship grounds), for example when energy price deregulation becomes a reality as is predicted.

Will the compensatory services following energy price deregulation and removal of the safety net be contracted services of a similar standard to what has been bluntly deemed by the Senate Select Committee as *"bloody awful services that should have been defunded…..'?*

In the meantime, will the nation expect best practice trade measurement practice with enforceable provisions when these are not? How else will the public interest be met?

Will consumer policy protections and implementation of some form of community service obligation alternative be sufficient, for example within the energy industry when price deregulation is effected in 2009; to add to the price hikes of 17% that were already implemented on 1 January 2008 through State initiatives, and even before completion of the AEMC's Review of the Effectiveness of Competition on Gas and Electricity Markets in Australia?

To take somewhat out of context the words of David Russell QC[40], when referring to Essential Services Legislation as *"Magic Pudding or Boarding School Blancmange."*

> *"The Victorian Opposition has foreshadowed revamping of and increased reliance upon the State's Essential Services Act 2001 should it win the next election. The desirability or otherwise of essential services legislative reform will continue to agitate the minds of our politicians for some time to come."*

On the issue of fiscal accountability and federalism, I provide selected citations from the writings of David Adams and Roger Wilkins who have extensively written on these topics.

It is a fact that Commonwealth expenditure is far lower than its income whereas the opposite is true of the States and Territories.

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[40] David Russell *QC, "Essential Services Legislation Magic Pudding or Boarding School Blancmange." Found at http://www.hrnicholls.com.au/nicholls/nichvol5/vol512es.htmhttp://www.hrnicholls.com.au/nicholls/nichvol5/vol512es.htm*

This is further discussed in relation to the views of David Adams[41] who refers to Roger Wilkins' views on federalism and anti-federalism. Both sought answers to vexing questions as to how the debate may impact on timely implementation of many of the PC's recommendations.

> *"The current situation where the commonwealth raises 80 per cent of total revenue in Australia but is only responsible for 60 per cent of expenditure is and for political accountability. There is a massive transfer of money from the commonwealth to the states and territories.*
>
> *This means that the states and territories are not answerable to the electorate for the taxes raised to support their expenditure. And the commonwealth, which raises the taxes, is not accountable for the way the money is spent"*

Meanwhile, on a lighter note, but still serious, we note the quotes cited by David Russell QC in another context but still referring to essential services legislation:

> *"Don' t look at me,' snapped Wesley Mouch. `I can't help it. I can't help it if people refuse to co operate. I'm tied. I need wider powers."*[42]

We should be careful to entrust those powers wisely and to uphold always the principles of fairness, equity, justice, transparency and accountability in all provisions impacting on the general public. How else can consumer protections be maintained? Again, compromised consumer confidence is compromised consumer protection.

It would be hard to envisage powers like these operating other than in wartime. They include the power to direct work to be done, to call in strike-breakers, to prohibit the use of consumption of the service and to requisition property. These executive acts would be virtually impossible to challenge in the courts.

In referring to Essential Services Legislation, but in the context of industrial relations The President of the Council for Civil Liberties, Queensland, said:

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41 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*

42 Rand Atlas: *Shrugged* (1957) Random House, New York p.500, c/f Russell D, QC, *"Magic Pudding or Boarding School Blancmange"*

> *"The philosophy of the Bill is directed towards giving unfettered power to the Executive to coerce citizens to obey the instructions of Ministers of the Crown."*

In 1979 Peter Applegarth, then Executive Member of the Queensland Council for Civil Liberties

> *"The Government's actions are motivated by fear.*
>
> *Fear that citizens will begin to tell the Government what the law should be, instead of the Government telling the citizens what the law."*

Two hundred years ago Thomas Paine said:

> *"All power is a trust handed to Government by the people. Any other power is usurpation"*

Now in the year 2007, Government initiatives are seeking to receive input from stakeholders adversely affected by regulations as evidenced by the philosophies embraced by the Productivity Commission's Inquiry in Australia's Consumer Policy Framework. There is a dearth of consumer input into enquiries such as this.

There are cautions about the tactical shift by industry groups, home and abroad and pertinent questions as to whether such a shift is motivated by a confluence of self-interest. In the area of goods, it is easy to say that growing competition from inexpensive imports that do not meet voluntary standards and a desire to head off liability lawsuits and pre-empt tough state laws or legal actions that may have resulted from a laissez-faire response to policies in place.

One interesting US example is the case of the Altria group, owner of the cigarette manufacturing firm Phillip Morris. The unexpected proposal was made by that group to allow the F.D.A. to regulate the manufacture and marketing of tobacco products. Such legislation is pending in the US. Critics are saying that this is a bid by Phillip Morris to weaken opposition to cigarettes by working with the government, and could help the company maintain its market share.

Reducing regulatory burden is a long-time goal of the Productivity Commission in Australia as well as of other bodies. It is commendable if the outcomes for all concerned are equitable.

The energy industry in Australia appears to be super-enthusiastic about the changes proposed putting forward well-structured and plausible arguments in the interest of least burdensome regulatory control. What will be the consequences for consumers?

Rosario Palmieri, a regulatory lobbyist at the US National Association of Manufacturers, a body that has often opposed government regulations, is reported as observing the change with equanimity.

The Director of Regulatory Policy OMB Watch (Office of Management and Budget) of the Washington group that tracks regulatory actions has never seen so many industries joining the push for regulation. He poses a pertinent question: will this achieve a real increase in standards and public protections or simply serve corporate interests?

Of the US situation Sarah Klein, a lawyer at the Centre for Science in the Public Interest is seeking to examine the problems created by a failed voluntary system in the grocery store and produce grower segment.

Ms Klein sees the situation as a strange bedfellow one where community organizations and watchdogs are putting into place national regulatory frameworks for quite different reasons to those of industry players. Says Klein:

> *"……industry officials consumer groups and regulatory experts all agree there has been a recent surge of requests for new regulations and one reason they give is the Bush administration's willingness to include provisions that would block consumer lawsuits in state and federal courts."*[43]

It is more than interesting that some of this thinking is reflected in the conceptual model proposed by Allens Arthur Robinson in the Composite Working Paper National Framework for Distribution and Retail Regulation recommendations (proposed national template Law, energy).

Some are saying that it is like Christmas in particular industries. However, many clauses are being challenged in the US courts where they block the inherent right of individuals to seek seamless redress through the courts and are not theoretically expected to rely on advocacy and alternative dispute models alone.

In the New York Times Opinion article dated 16 September 2007,[44] still on the subject of uniform regulation and in the case of toys, for example, mandatory testing is believed to be a good idea in principle. However, it is observed that

> *"unless the rules are backed up with vigorous enforcement the government's imprimatur could give parents a mistaken sense of security."*

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[43] New York Times September 16, 2007 In Turnaround Industry seeks US legislation. Found at *http://www.nytimes.com/2007/09/16/washington/16regulate.html?pagewanted=2&th&emc=th*

[44] New York Times September 16 2007 *The Need for Regulation.* Editorial Opinion.

For any set of government standards to work (in this case safety, but applicable to other matters) the Consumer Product (or in the case of Australia Goods and Services) must be able to enforce companies' compliance with spot checking of compliance and policing.

For such policing to occur in the energy industry in Australia resources are required. Will the state or the federal government have those resources to ensure enforcement, and in the case of those who find a way to shift the goal posts and escape or ignore enforcement strategies, even when generic provisions are relied upon, that may provide a challenge.

Without meaning to be unnecessary skeptical, but influenced by the US experience that has recently received press coverage, perhaps all responsible parties will see fir to carefully examine each proposal to lighten the regulatory burden that comes from industry and seek *"to understand the full consequences of regulations on all citizens."*

Should Australians be taking head of the cautions expressed by Edmund Mierzwinski, consumer program director at the US Public Interest Research Group in Washington. In his words *"I am worried about industry lobbyists bearing gifts. I don't trust them. Their ultimate goal is regulation that protects them, not the public."*

Said Jenny Scott, vice president for food safety programs of the Grocery Manufacturers Association, as reported in the New York Times.[45]

> *"It's a little unique when both consumer groups and industry associations are out there saying that we need new regulations and the government doesn't agree*

Robert Shull, deputy director for auto safety and regulatory policy at Public Citizen a consumer advocacy group based in Washington, said his organization and other consumer watchdogs would be keeping close tabs to see if these different proposals amounted to more than simply *"opportunistic attempts to avoid real regulation."*

Should Australians be asking the same questions and be wary of industry motives?

At present, within the energy industry benchmarks of best practice consumer-focused service deliveries and protections may have become a blurred and inaccessible partly because of under-funding and resourcing, but also perhaps because of policies that are weighted from the outset in favour of industry.[46]

There is also the question of procedural inertia. Without a dedicated research and policy body such as has been suggested by CHOICE (ACA) and other community organizations these gaps will continue to compromise proper protection.

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[45] Ibid, p 2 NYT 16 Sept07 In Turnaround Industry seeks US legislation

[46] Dufty, G, *Who makes social policy? – The rising influence of economic regulators and the decline of elected Governments.* Policy and Research Unit, St Vincent de Paul VCOSS Congress Paper 2004; and John Tamblyn's Paper presented to the World Forum on Energy Regulation, Rome, Italy 5 – 9 October 2003, Concurrent Overview Session 5 *"Are Universal Service Obligations Compatible with Effective Energy Retail Markets.* Victoria's Experience to Date.

The public has never felt less confidence that their rights will be upheld or that justice will be readily accessible. Theory and practice gaps have become more noticeable despite myriads of guidelines in place. Enhanced education of key energy regulatory staff and complaints scheme staff may not go astray.

In conclusion, responsible energy reform is welcomed in Australia.

Consumer policy reform is welcomed if it genuinely addresses community needs and expectations and the detail yet to be determined does not bring consumer protections down to the lowest common denominator.

In Australia there is a climate of compromised confidence in consumer protection. It is also a policy climate of proposed change, so it may be opportunistic to learn from the experience of or research of others by applying relevant principles in a different context.

Each year there is a National Consumer Congress. Besides this annual event, other forums exist to hear the views of expert on consumer protection issues. Are we any closer to resolving the issues that have plagued the nation for so long, on upon which so few can agree.

Or is Edmond Chattoe[47] right in suggesting that socialists and economists simply cannot dialogue for all the reasons he cites in the paper discussed above.

Advocacy, not matter of what quality and how well supported, may never be quite sufficient against policies and practices sanctioned by government agencies that are fundamentally flawed and detrimental to consumer protection considerations.

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

Amongst the factors that may impact on compromised consumer protection and on best practice formulation and implementation of standards may include the speed with which decisions are being made and concerns about public accountability, transparency and genuine commitment to consult beyond either manipulation of tokenism in seeking community input.

Lightening the regulatory load in a responsible way is one thing, but diluting consumer protection, or compromising the market through adoption of poorly conceptualized regulation 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.

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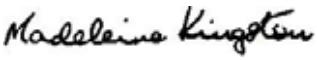
[47] Chattoe, Edmond, (1995) *"Can Sociologists and Economists Communicate? The Problem of Grounding and the Theory of Consumer Theory"* This research is part of Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Found at *http://www.kent.ac.uk/esrc/chatecsoc.html*

Sadly, too often the corporate and government social responsibility goals of national competition policy are readily misunderstood or ignored.

Finally, without regulatory benchmarking and close monitoring and re-evaluation of policy and regulatory practice, sustainability for Australia will be no more than a dream.



Madeleine Kingston

Concerned Private Citizen,

ADDITIONAL NOTES FOR VARIOUS AGENCIES AND ENTITIES

Selected Matters of Interest to Productivity Commission

The Executive Summary within this submission and certain dedicated components, including conclusions and recommendations provide more detail. A handful of concerns is highlighted again here

These issues illustrate matters relating to regulatory reform and benchmarking – of topical interest to the PC. The thrust of these matters is not new and was brought to the attention of the PC during the Review of Australia's Consumer Policy Framework earlier this year with supporting material and open submissions (subdr242). Please refer to conclusions and recommendations at the end of this component submission Part 2A.

Please refer to all segments dealing with public administration accountability, transparency, public sector values; reservations about the perceptions economic regulator(s) and industry-specific complaints schemes that appear to have no perception of public accountability; memoranda of understanding between bodies, including those for the purpose of the ESC Act deemed to be prescribed bodies, including EWOV and VENCorp despite separate legal structure as a company limited by guarantee without share portfolio fulfilling a public role Some cursory comments are contained on pp74-161- and Conclusions and Recommendations pp510-545. Please also refer to sections on Best Practice Evaluation and Leadership and suggestions for Consultative Processes and record keeping with emphasis on transparency and disclosure.

I would like particular to call attention to misconceptions by some regulators and policy makers, as well as complaints schemes concerning accountability generally. Many believe that their re-badging as corporate identifies removes external accountability. This is ridiculous. Most such bodies are created under statutory enactments and accountable in addition under others.

As discussed under other headings, the re-badging strategy is intended to limit liability not accountability. For example the AER is an intrinsic part of the ACCC and accountable to it, to the Commonwealth Ombudsman, to Parliament – and hopefully also to the taxpayers.

Whilst the ACCC and AER have transparent processes in place, this is not always the case with jurisdictions. For example, in relation to the many valid objections raised by the industry-run complaints scheme Energy and Water Ombudsman (Victoria) Ltd. and in response to proposals by the VASEC to add new client groups to the scope of complaints-handling relating to "small scale licencing providers, EWOV undertook a feasibility study to ascertain the scope of the market and other factors. This Report is not in the public domain. Yet policy decisions that are pertinent are being made or considered without access to the most fundamental data that normally form part of a SWOT analysis in making such major decisions. These decisions are still under consideration at national level by the MCE SCO Network Policy Working Group (NPWG) in terms of the national economic framework.

The implications are widespread also with regarding non-economic considerations for the National Energy Consumer Framework at a more advanced stage of formulation. There is so much inter-relation between the two streams on this one matter alone, that unless there is better communication between the two, and unless lessons can be learned from jurisdictional experiences and gaps in robust analysis, notwithstanding that at that level the motions of consultation have been undertaken; the same mistakes and gaps will repeat themselves at national level. Some mistakes are more expensive than others, and can cause unacceptable levels of detriment to the community as a whole. This may be one of them. Whilst alternative arrangements may be desirable for such small scale providers as nursing homes, educational institutions or student housing; hospitals and the like, for the private rental market a completely different set of considerations needs to be evaluated. It is my contention that this has not been achieved despite all consultations undertaken.

By contrast the Essential Services Commission Victoria, and its associated complaints scheme Energy and Water Ombudsman (Victoria) Ltd both believe themselves to be beyond external accountability or appeal.

EWOV has an internal Merits Appeal process concerning the decisions made on substantive components of complaints lodged with them. They refuse to identify or acknowledge any other level of challenge to decisions, as does the VESC. In addition concerns about performance can be taken up with the Scheme Ombudsman, but there appear to be no available directions as to what may happen beyond that and who is ultimately accountable. Specific repeated enquiry to all three bodies, VESC, DPI and EWOV has failed to clarify this, and neither is there anything online that will help to clarify this aspect of public policy.

The new NECF fails to clarify dispute mechanisms, mandated membership of complaints schemes and other factors impacting on appeal processes. These matters should be explicitly included in the new energy Laws and Rules.

Both the VESC and EWOV are accountable to the DPI.

EWOV was set up by the Victorian Government and has mandated obligations under s36 of the *Gas Industry Act 2001* and s28 of the *Electricity Industry Act 2000*. It has specified accountabilities under its Charter and Constitution to the Essential Services Commission and is obliged to consult with the VESC on a large number of regulatory matters associated with complaints brought before it. Though the VESC claims that it does not deal with individual complaints, there are many matters entirely outside of EWOV's jurisdiction or scope of expertise that should be routinely dealt with by VESC more especially where there are material or systemic concerns.

These matters should be clearly spelled out so that public is left in no doubt of the hierarchy of appeal mechanisms and there is no room for denial of accountability generally.

Instruments such as Memoranda of Understanding, because of intrinsic structural weaknesses, including failure to identify arbitrary processes in the event of disagreement between the parties to such agreements; and frequently the explicit absence of legally binding clauses, render these instruments of limited real value.

It would be helpful if these instruments could be viewed as interim steps as statements of intent, with mandatory progression to more formalized and legally binding agreements. Otherwise the risks exist that public policies will not be sustained because the parties to such agreements do not recognize any binding requirement to uphold the agreements in place for general protection and in terms of consumer policy.

This leaves many matters incompletely or unsatisfactorily addressed, as outlined in detailed case studies in this component, narrowly focused on the management of a specific complaint related predominantly to public policy and how these policies were seen to drive unacceptable market conduct, be legally and technically unsustainable and contributing towards market failure.

In any case, for all their flaws these instruments should be routinely made publicly available on the websites of each of the parties to those instruments.

As to disclosure and transparency in the timely publication of public policy documentation, including all codes, guidelines, commissioned reports; Issues Papers; Working Papers and Deliberative Documents in public consultation processes; Issues Papers; Exposure Drafts; Decisions; Revisions to original Decisions, it should be mandatory for these to be disclosed and published online, with specific email alerts provided to those registering an interest in receiving such alerts.

Failure to publish certain such items or to delay publication, sometimes for months or years (such as the deliberative documents and Decisions associated with the BHW Provisions, which were not published till the year after the arrangements were made effective, and are not the subject of a proposal to repeal crucial components and transfer others to the Energy retail Code. The cosmetic repeal is seen as tweaking that would facilitate convenient suppression of proper access to the rationale that led to the adoption of these arrangements and the detail of their ongoing application, including the original introduction, purpose and authority, the Appendices detailing the derived costings and explanatory notes.

Matters of interest to MCE Energy Reform Implementation Group

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

It would save time and duplication if a standardized format and terminology were to be adopted for jurisdictional and federal Tables of Recommendation, such that stakeholders could use a single template for responses.

Wherever possible, timing of public consultations could be matched and coordinated so that similar issues could be addressed for both arenas together. For example the Victorian Regulatory Review contained many components that were similar to the TOR and were best taken together in seeking stakeholder response

I am very concerned generally about consultative processes, advocacy and what seem to an outsider not part of the "elitist" consumer consultative committees to be exclusionary policies extended even to public consultations run by regulators and others.

For example, I had registered an interest in participating in the Victorian jurisdictional current Regulatory Review well in time for direct participation in any public meetings. The one in June was publicly advertised online. I registered an interest in attending but was informed that attendance was exclusive discussions to the Consumer Consultative Committee. Though offered an alternative opportunity for a private discussion, I felt that I would prefer to express my views openly in writing.

I was therefore disabled from participating in public meetings in a transparent manner. I have made up for this by sending copious written material. The deadlines for response to the Draft Decision Stage 1 were unrealistic (3 weeks). The Decision was published online on 27 August, with response due by 12 September.

The single Issues Paper dated May 2008 was not and is still not published online. It was tabled for the exclusive use of the CCC and unspecified stakeholders. None of the Working Paper Documents was published, so all discussions appear to have taken place behind locked doors.

When as a member of the community I did obtain a personalized copy the cover note suggested that it was a confidential document that must not be cited or disseminated. This cannot be appropriate public policy, even for a regulator with a corporate legal structure holding the belief of being entirely unaccountable externally. a view apparently also supported by the DPI.

The practice of re-badging arms of government services with corporate legal identify is intended to minimize liability but not accountability. The ACCC openly admits that the AER is an integral part of that federal body, but that it does have a corporate legal structure of its own. The AER is accountable to the ACCC, Parliament and the Commonwealth Ombudsman.

The same principles should apply to the jurisdictional regulators, including the Essential Services Commission.

On the one hand I was of the understanding that the corporate structures for regulators are theoretically designed to ensure that these bodies are relatively free from political influence.

On the other hand, the potential for executive powers to be influenced by perceptions of unaccountability, coupled with fear of making regulatory determinations that could lead to expensive legal challenge that may be distorting power imbalanced that appear to be already skewed. I am not alone in this opinion. Again, few community organizations have the time incentive or agenda to comment on such issues, and they have their hands full in any case with the client groups or theoretical policy advocacy and research agendas to concern themselves, more so when they already belong to the "elitist" stakeholder groups receiving privileged advanced notice of initiatives and privately tabled material that the rest of the community are unaware of.

I was also most concerned to read in the submission to the MCE 2006 Legislative Package by Energy Action Group (EAG)[48] regarding exclusionary practices for those consumer individuals or organizations who wished to participate in the Consumer Round Table capacity building 'egroup', and the level of control exercised over the contents of topics acceptable for group discussion. This is not a question of supporting any one stakeholder group, but simply of upholding the principles generally of equal opportunity for participation without fear of exclusionary practices.

Frankly I believe that there is room for enhanced strategic planning and enhanced governance and leadership in all of these arenas. Whilst these views may not be popular they need to be openly expressed every now and then.

Finally I mention the issue of poor quality explanations and information disclosure in many of the jurisdictional reports required by jurisdictional regulatory requirements, as identified by EAG in the same submission to the MCE SCO in 2006.

Beyond that issues such as disclosure of all Memoranda of Understanding between the VESC and other bodies, including with the DPI. I was unable to obtain this from either body, but will be seeking to access this and other documentation or links that will more clearly spelling out the precise relationship between the VESC and the DPI; between VESC and EWOV; between EWOV and the DPI and similar information.

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[48] Energy Action Group (EAG) (2006) Submission to MCE SCO L2006 Legislative Package. Found at *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf*
EAG declined to join NEMChat, one of the vehicles used by the Round Table to capacity build, on the grounds that the then Consumer Law Centre Victoria, now Consumer Action Legal Centre, had the right to control who participated in the "egroup" and what contents were acceptable for the group to discuss. Our position on this issue would appear to be vindicated with the subsequent removal of one member of the group correctly claiming that they represented large consumers on a number of issues. However the same individual
a) had a lot to offer to small consumers with their knowledge of gas and electricity issues
b) more importantly has a formal position representing the interests of less than 160 MWh electricity and 10GJ gas consumers on an Ombudsman scheme.

I already have some of this, but believe in the interests of transparency all should such information should be transparently available.

I quote overleaf the views of EAG (2006) in their submission to the MCE SCO Legislative Package:

> *EAG is also sensitive to the issue of very poor quality explanations and information disclosure in many of the jurisdictional reports required by jurisdictional regulatory requirements. It is almost impossible to assess how any distribution business across the NEM sets up their tariffs and charges. Ongoing work by the AER or a delegated jurisdictional regulator needs to be carried out on issues around the quality of supply and the regulatory reporting requirements and retail and distributor market processes. The best approach to date across the market has been work by the Essential Services Commission Victoria on the NEMMCo MSATS Customer Transfer arrangements. If consumers are to have any faith in the AER/AEMC regulatory arrangements then the AER needs to develop a skill set and* a quality control regime to examine a range of NEM and gas market practices and procedures over time.
>
> *As a further precaution EAG suggests that the MCE require that the AER provide resources for a non legislated trial period of time (say three years), where any valid comments made by consumers about deficiencies, oversight or poor behaviour by market participants are investigated and publicly reported on a regular basis (say half yearly) by the AER over the funded period.*
>
> *EAG has a number of important reservations around implementation of the regulatory accounting guidelines approach under the Australian light handed incentive regulation. The various jurisdictional regulators, ESC (V), IPART and the ACCC, have had considerable difficulties in developing a common data set to compare information across two regulatory cycles. This problem makes it very difficult to compare regulatory determinations. It is almost impossible to compare the two ACCC Transgrid transmission determinations or the 1999 and 2005 ESC of V Electricity Distribution pricing determinations. One of the objectives of the legislative package should be the development of data sets that allow the assessment of the effectiveness of the regulatory regime.*

Matters interest to MCE Retail Policy Working Group

Since all of these matters are of direct relevance to jurisdictions participating in the NECF and since the RPWG is considering all submissions, the matters contained in this component submission and all related submissions are crucial before jurisdictional rules are adopted to achieve consistency but without eliminating existing perceived flaws in conceptual thinking. In addition there are certain matters that should be clarified within the Law, including disconnection matters with particular refers to the unacceptability of disconnecting or threatening disconnection of heated water supplies with that water is heated in a communal water storage tank and energy supplied to the Landlord/Owner on common property infrastructure.

The whole question of the economic and non-economic philosophies that have been adopted in three jurisdictions relating to bulk hot water needs urgent re-examination.

It should be clarified within the law that the deemed provisions do not relate to end-users of water reticulated in water service or transmission pipes to apartments and flats, instead of gas service or transmission pipes or electric lines, regardless of network ownership or operation, and regardless of existence of or ownership of hot water flow meters which measure water volume only not gas, heat (energy) or electricity.

Those currently deemed to be receiving *"delivery of eclectic hot water services"* and *"delivery of gas hot water services"* are not appropriately labelled or otherwise considered embedded network customers at all. They receive no energy and both terms are misguided and meaningless. The confusion between energy and water provisions and parameters has led to distortion to the intended meaning of legislative provisions, including s46 of the *Gas Industry Act* regarding the sale and supply of energy and definition of the term *"meter"* as an instrument through which gas passes.

The *Gas Code* clarifies this further as an instrument that measures the quantity of gas that passes through it to filter control and regulate the gas that passes through it and its associated metering equipment. The concept of physical facilitation of the flow of gas to the premises deemed to be receiving it is central to the contractual governance model within the NECF, but unless these matters are further clarified within the Law, continuing distortions within the Rules will cause detriment and represent regulatory overlap with other schemes as is specifically disallowed under s15 of the *Essential Services Commission Act.*

Other matters for attention included proper monitoring of embedded network operations, which is exclusive to electricity provision.

Matters of interest to the MCE Network Policy Working Group

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

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

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

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

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

The derived formulae relying on finding a legitimate correlation between water volume consumption and gas consumption is based on flawed reasoning. The reasoning behind the adoption of a deriving a cost in the first place is questionable.

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

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

Some discussion is provided of embedded network considerations which are pertinent. Those receiving BHW are not embedded. They receive water only not energy. In any case the embedded network lexicon is exclusive to electricity.

A licenced supplier must provide gas. This is normally a supply remit issue with a local retailer linked to a particular Distributor. All energy supply points for BHW are considered a single supply and billing point for Distributor-Retailer settlement purposes under the Gas Code, consistent with the legislation.

Other economic issues are also raised in this submission, expanded in other components. These include discussion of the extent to which the effectiveness of competition in Victoria's gas and electricity markets may have been mis-assessed and prematurely determined by the AEMC, with major consequences for all decisions made, providing a checklist of factors that may have been altogether missed or incompletely assessed with regard to the internal energy market and external factors.

There are many who have disagreed with the AEMC's assessment for Victoria and for South Australia regarding retail competitiveness for gas and electricity.

In addition a brief discussion of price and profit market issues is raised with particular reference to the CRA Report relied upon by the AEMC and the paltry data obtainable.

This goes to highlighting possible deficiencies in data gathering practices to ensure availability of appropriate data in sufficient detail to help inform current and future policy decision and provide longitudinal comparisons.

It may be of interest also to all groups to study the attachment of best practice evaluation models. Evaluation is not an end-stage process; nor is it restricted to data gathering. It is a sophisticated strategic planning process that forms the basis of all planning and intervention, including policy changes.

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

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

The ACCC has a responsibility to consumers and works with the CAV and AER under Memoranda of Understanding. These issues are being drawn to ACCC and AER attention again. Though re-badged and with a separate corporate identify, the AER is an integral part of the ACCC with a number of accountabilities that include the ACCC, the Commonwealth Ombudsman, Parliament – and hopefully the Australian taxpapers.

By contrast the current Victorian Energy Regulator, Essential Services Commission, and its associated co-regulatory Complaints Scheme EWOV also with a separate corporate identity, but fulfilling a public role in the fielding of complaints and limited jurisdiction on certain matters, both believe themselves to be externally accountable. This is unacceptable in terms of taxpayer management of essential services.

I am most concerned that the current Victorian Regulator, VESC, its associated complaints scheme EWOV, and the Victorian department of Primary Industries all hold the view that VESC and EWOV are "independent" bodies and therefore unaccountable externally.

As mentioned above, the practice of re-badging arms of government services with corporate legal identify is intended to minimize liability but not accountability. The ACCC openly admits that the AER is an integral part of that federal body, but that it does have a corporate legal structure of its own. The AER is accountable to the ACCC, Parliament and the Commonwealth Ombudsman.

The same principles should apply to the jurisdictional regulators, including the Essential Services Commission. This should be more explicitly spelled out and made publicly known on all relevant websites, including VESC, EWOV and DPI.

The processes for appeal of regulatory or administrative decisions should be transparently available on the website.

With 15 months to go before handover to the AER of regulatory control there are certain matters that will further contribute towards already compromised consumer confidence and expectations of accountability and acceptable policy and regulatory practice.

The BHW provisions represents one of those concerns, and now comes under the DPI for economic regulatory policy, though the contractual arrangements seen to be unjust, legally and technically unsustainable are still under VESC regulatory control. Therefore decisions about disconnection of heated water supplies to residential tenants not supplied with any energy at all to their premises are being sustained without due regard for statutory provisions to avoid overlap and conflict with other schemes.

Some concerns about accountability and governance are discussed under that heading, but meanwhile, the purpose of again calling these issues to the direct attention of the ACCC and AER is to make sure that community concerns are reiterated, given the imminent transfer to the AER of regulatory control and the current moves to reform energy policy and nationalize regulatory approaches and standards.

EWOV now has an MOU with the ACCC and AER. They also have one with the CAV, and reciprocal MOU's exist between the CAV, ACCC and AER; as well as with the DPI. It is crucial that smooth dialogue occurs, better records are kept and better transparency achieved. These MOU's are not available online and not made available either upon direct request.

The DPI's MOU's with the VESC and other instruments explaining inter-body relationships is not available online, and has not been made available upon direct request. These instruments clarify public policy and should be readily accessible.

I have raised issues of inaccurate information being supplied by EWOV, and the current Victorian energy regulator regarding the rights of individuals, notably tenants under s52 and s53 of the *Residential Tenancies Act 1997*. Owners' Corporation provisions are also relevant as are *National Measurement Act 1960* Part V 18R.

I am concerned particular about information that is seen to be inaccurate and misleading. Information provided to consumers by statutory bodies, and by *"independent"* regulators and co-regulated complaints schemes believing themselves to be externally unaccountable. There are implications for legal compliance in the provision of online information. This is discussed under accountability issues.

In particular information available online, orally and in writing provided by current jurisdictional bodies and Victorian complaints schemes to consumers they must sign energy contracts with suppliers claiming to be supplying energy whereas these residential tenants are receiving heated water as a composite water product reticulated in water pipe to their premises.

This is contrary to their enshrined rights as residential tenants. In addition, given the methodologies used to apportion contractual liability in terms of economic regulatory practices, trade measurement and perceived violation of every reasonable precept of contractual law, leaving aside the explicit residential tenancy and owners' corporation provisions, these practices appear to not only be driving unacceptable market conduct, but need in their own right to be examined as to validity legal and technical sustainability.

Disconnection, which means disconnection of energy under specified circumstances as a last resort is now taken to mean disconnection of water supplies, threatened in coercive efforts to secure explicit contracts because of misguided perceptions of deemed contractual status.

Through the BHW provisions, these misconceptions are supported by the authorities and complaints schemes, giving the green light to suppliers of energy to act any way they please

The terms premises and supply address have become confused in the energy lexicon.

The latter has a technical meaning and implies an energy connection point, not a hot water flow meter water meter designed to withstand heat but not to measure gas or electricity of heat (energy).

The correct term is premises and in order for supply and sale to be effected of energy, the flow of energy must be facilitated to the premises in question. In the case of the existing jurisdictional BHW provisions in three States, the energy is supplied to a single energization point on common property infrastructure – to the Landlord or Owners' Corporation by mutual agreement with the supplier.

The CAV have apparently ceased to deal directly with complaints about energy supplier conduct, but apparently deal with conduct issues under the *FTA*. This body is busy enough with 40+ enactments to administer; the policy and educative responsibilities that they carry; and the tension between their administrative and regulatory responsibilities, besides involvement in the policy debate and consultative processes that make extraordinary demands on all stakeholders in all jurisdictions.

The *"independent"* and apparently unaccountable Victorian energy regulator, a perception supported by the statutory authority Department of Primary Industries (DPI) and by the Regulator, similar believes that it has no obligation to deal with individual complaints, and that the co-regulatory complaints handler EWOV using the rather misleading title of *"Ombudsman."*[49]

In the case of those who receive heated water from communally heated water tanks on common property infrastructure, the energy is transferred in gas transmission pipes to a communal water tank on common property. After being heated that water is reticulated to individual premises, mostly apartments and flats. The unjust imposition of contractual status on the wrong parties for the sale and supply of energy has caused expensive complaints handling and debate.

The central contention in this submission is about inaccurate interpretation by policy-makers, regulators and complaints schemes as to the applicability of the deemed contractual provisions for *"delivery of electric bulk hot water"* and *"delivery of gas bulk hot water."* These terms are misleadingly and meaningless. Energy suppliers do not deliver water. They do not deliver energy either to the individual premises of occupants of multi-tenanted dwellings.

The retailers are threatening and/or effecting disconnection of heated water supplies to these tenants, whereas the cost of such a commodity in the circumstances is Landlord/Owner responsibility.

The TUV has advised that in their experience of representations before VCAT, the Tenant's position has been invariably upheld where utility providers of one description or another, licenced or unlicenced have endeavoured to sell energy as part of the composite product heated water reticulated in water pipes to individual premises.

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[49] Which to the general public implies a statutory authority with direct accountability to Parliament. It does not suggest a co-regulatory self-funded, mostly self-managed industry scheme with limited jurisdiction, funded by industry participants, with no powers to deal with matters related to policy or tariffs, or indeed the conduct of statutory authorities. The binding powers of EWOV in certain limited matters are exceptionally weak, limited to those issues where there is consent from the scheme member, and only unilaterally binding. There has been a total of 36 such decisions in 12 years and none in the past six years. EWOV does not mediate or arbitrate. Its staff are not trained or authority deal with complex matters related to legislative interpretation, policies and tariffs.
The VESC has substantial control over EWOV under the terms of its Charter and Constitution published online. The DPI appears to have nominal control over both bodies, but despite is compliance enforcement policies little real involvement in the decision-making processes that appear to be unaccountable.

It is my contention that on the basis of misguided interpretations of existing energy provisions, inconsistencies and new definitions of the term *"meter"* discrepant to that contained within the *GIA* and the *Gas Code*, residential tenants are receiving less than their enshrined rights and many are unable to work out that they do not have to become contractually bund to energy suppliers purporting to sell energy. I have provided an extensive deidentified case study of this matter within this component.

In some cases material detriment is resulting from threats of disconnection of heated water inappropriately being issued by energy suppliers, facilitated by policies seen to be seriously flawed.

The current Regulator is planning to consolidate the BHW provisions, repeal some components which will make transparency less available, and transfer most components into the *Energy Retail Code* (VERC). I believe this is a misguided plan whilst holding end-users of heated water in multi-tenanted dwellings contractually responsible for a commodity that they do not receive from energy suppliers. The correct contractual party is the Landlord and/or Owners Corporation.

It is not the Landlords rendering demands for payment in most cases, but energy suppliers presumably in collusive arrangements with the Landlords, and facilitated by explicit provisions and also loopholes within current provisions. I have made an extended submission directly to the VESC Regulatory Review. Having said that there some situations in high rise blocks where "exempted small scale operators" are represented by Owners' Corporations, and/or their servants contractors and billing agents. Amongst these are providers with energy-related names like EnergyPlus (Australia) Ltd acting for certain central Melbourne OCs such as Docklands apartment blocks and Blue Towers Melbourne.

At any rate most arrangements appear to be collusive arrangements between energy providers and Landlords or Owners' Corporations, with the direct and explicit sanction of jurisdictional regulators in three States, Victoria, South Australia and Queensland with the risk of the arrangements being carried over into the new national laws and other provisions.

This component 2A has been substantially expended since that submission and is intended for multiple MCE parties, the Productivity Commission, ACCC and AER as well as the NMI.

My aim is to widely expose these matters for public airing in the hope that new improved regulations and the move to nationalization will ensure that these anomalies and consumer detriments do not become enshrined in the proposed Laws and Rules.

The AER will have a direct regulatory role from 2010 for all energy regulation. That is why I believe that both the ACCC and AER should be taking an interest in this issue. In Victoria some 26,000 individuals are impacted. Some of these are in public housing where an arrangement already exists to directly bill the Owners' Corporation, who in those instances is permitted under tenancy laws to apportion some costs as a composite service fee for multiple services rendered. For those in the private rental market different rules and protections apply. Those protections have become increasingly inaccessible.

Despite the existence of energy-specific protections and generic laws, residential tenants are receiving a very poor deal and compromised consumer protection besides having to pay for utilities the cost of which is already incorporated into mandated lease arrangements.

Suppliers endeavouring to claim contractual relationship on the basis of ownership of hot water flow meters that measure water only not gas or electricity or heat. For many there are no authorities from Water Authorities or oversight of meter maintenance for the hot water flow meters. The water is sold to Landlords who arranges with an energy supplier for heat to supply a communal water tank and then has the heated water reticulated to individual flats.

There are many other considerations concerning inappropriate trade measurement practices that will soon become illegal under Part V 18R of the *National Measurement Act 1960*.

I have already sent considerable written material earlier this year, specifically targeting amongst others, the previous Deputy Chair, and also the current Deputy Chair before he left CHOICE. Therefore the issues are not new, but I hope to continue to raise awareness through this submission and seek policy consideration at all levels considering the detriments.

Suppliers of goods and services are expected to abide by all laws. They should not be expected to choose between them, to deviate from best practice or to compromise moral and social obligations. The current provisions are creating confusion, debate and expensive complaints handling with the potential for litigation also.

The CAV has raised the issue of avoidance of regulatory overlap and conflict with the VESC and EWOV during 2007, and undertook a revised Memorandum of Understanding on 18 October 2007 which reminded the VESC of its own obligations under s15 of the *Essential Services Commission Act 2001*.

These provisions appear not to have been taken seriously in the interpretation of current gas legislation and in aiming to match these with the BHW provisions. The DPI now has policy control over the BHW provisions.

Despite Memoranda of Understanding that exist between prescribed bodies and in the spirit of prescribed bodies, these instruments appear to have structural limitations and weak legal strength. Unless they are followed as 'statements of intent" by more formal contractual agreements, they are likely to be worth little more than the paper they are written on if organizational cultural attitudes chose to ignore their effect. Since few of these instruments provide for more than "best effort endeavours" to resolve issues, and since no arbitration is in-built into any potential conflict between the parties who are signatories, it does not take much to envisage what may happen when disagreement results.

This is a fundamental flaw in most of these pseudo-agreements.

Having said that the provisions of s15 and s16 of the Essential Services Act 2001 are unambiguous.

The provisions of the tenancies, owners' corporation and unfair provisions (under generic laws) are also clear.

Certain provisions under current jurisdictional arrangements cannot claim the same level of unambiguity.

Indeed in terms of the BWH arrangements the conflicts within and outside energy provisions are so acute as to have given rise to unacceptable levels of confusion for both consumers and providers of energy and other utilities and have actively opened up the floodgates for abuse and unacceptable market conduct, including unconscionable conduct and violation of the *FTA* provisions.

The fact that the policies in place have substantive components that would be considered unfair were they commercially adopted practices is diluted because they are in fact intrinsic in unacceptable statutory policy seen to be legally and technically entirely unsustainable.

These issues are explored in considerable detail within this component submission.

Lip-service to unacceptable conduct and unfair practice is pointless if statutory provision facilities and encourages this implicitly or explicitly.

The ACCC, AER and CAV need to revisit the implications of existing provisions in three jurisdictions and consider whether the Australian public will continue to accept the detriments imposed and the outcomes of direct and significant dilution of their enshrined rights under multiple provisions.

Convenient re-direction to pragmatic solutions under s55 of the Victorian *Residential Tenancies Act 1997* and equivalents in other jurisdictions, which addresses cost-recovery at a high cost in terms of filing fees, time, stress, and other intangible costs is not a good enough solution or excuse for inaction and failure to uphold existing generic laws or indeed to intervene over unacceptable statutory policy.

The considerable extent of dilution of consumer protection occasioned by the existing economic and non-economic implications of the existing Bulk Hot Water Arrangements (VESC Guideline 20(1) BHW Charging, about to be cosmetically repealed and incorporated into the *Energy Retail Code*, should be of immediate and serious concern to all authorities with the power to influence or effect current and future public policy.

I urge the ACCC and AER to look into this matter since I believe that the both bodies should be proactively involved in the debate over these provisions and provide guidance in the interim till energy retail regulation is entirely under the AER.

Equally, I urge the CAV and other bodies to take this matter seriously.

These matters are not of new concern. The issues have been repeatedly aired for decades and pressure placed on the Victorian Government in particular has been evidenced in the efforts made by community organizations for years without outcomes.

Perhaps it is more than time to ask for resurrection of the Senate Select Committee to examine why energy policy needs to be the subject of repeated intervention every few years, and why in particular these unacceptable policies have not been re-examined as to their validity and consumer detriment values.

That in a nutshell is the central theme of this dedicated component submission, though other issues are also addressed in passing.

What action will the ACCC, AER, CAV, CEO Arenas and jurisdictional authorities do to address these issues and restore community confidence?

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

Please see conclusions and recommendations

CAV has a revised Memorandum of Understanding dated 18 October 2008 with *Essential Services Commission*[50] which was put in place following a range of enquiries and challenges to the current provisions for BHW.

That MOU reinforces the provisions now contained and expanded within s15[51] of the *Essential Services Act 2001* particular those pertaining to avoidance of regulatory overlap.

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

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

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

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

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

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

Matters of interest to Essential Services Commission Victoria (VESC)

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

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

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

In deciding terms and conditions that specify the circumstances in which the supply of gas to premises may be disconnected,[52] *the Commission must have regard to—*

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

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

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

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

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

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

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

Please see conclusions and recommendations; Parts 2A and 2B, and all previous supporting material sent during 2007 concerning policy matters and impacts, illustrated by case study example in a particular matter that remains unresolved after 20 months[53] and contested, with similar potential impacts on some 26,000 Victorian consumers of utilities.

Matters of relevance to VENCorp, Distributors and Energy Retailers

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

In that case a particular inarticulate, vulnerable and disadvantaged end-consumer of heated water was threatened with disconnection of heated water services if he failed to provide identification and contact details and form an explicit contract with a supplier of energy unable to demonstrate that gas had been supplied using a meter as defined in the *GIA*, but instead had, under policy instructions used a water meter to measure water volume allegedly used from a communal water tank heated by a single energization point on common property infrastructure. No water dial readings were provided.
No justification as to why supply as defined in the *GIA* was not demonstrable. No explanation as to calculations and how derived; redirection to complaints redress or hardship policies if required; no rationale basis upon which deemed status was imposed.
In a particular vulnerable state soon after hospitalization for incurable mental health conditions and a past history of suicide, the pressure of such demands were instrumental in triggering an explicit suicide plan, the execution of was narrowly averted. Now that the matter is closed the supplier claims the right to continue with issuing *"vacant consumption letters"* warning of disconnection if conditions precedent or subsequent are not met. The supply is to the Landlord/Owner not Tenant. The Tenant receives a composite water product reticulated in water service pipes. That water is certainly heated – by arrangement with the Landlord, who takes supply at a single energization point on common property at the only supply address associated with that supply point with an MIRN number. Other tenants on the same block have received similar demands, many with language barriers or other impediments to understanding their rights and options. The residential tenancy provisions are explicit as to Landlord responsibilities if there is no meter (as defined in the GIA) through which energy consumption can be measured through legally traceable means. The Law needs to include re-clarification

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

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

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

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

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

Matters of relevance to National Measurement Institute

Please refer to previous extensive written submissions to the Discussion Paper and directly to the NMI. The NMI regulations and in particular Part V 18R are of particular note.

Some utility exemptions have already been effected. There is some urgency to consider prioritizing hot water flow meters given the ongoing consumer detriments. I recognizing that patenting and standards take time and there is a backlog.

A supplementary submission (2A), which was principally prepared for energy arenas state and federal and for the National Measurement Institute, extensively discusses anomalies and concerns about trade measurement practices and how this may be sitting uncomfortably with the existing philosophies of the NMI to seek commitment to legally traceable means of measuring goods and services and achieving accountability. The BHW provisions appear to contravene at least the spirit and intent of the legislation. There are equity issues and regulatory overlap with other schemes including the NMI provisions and residential tenancy provisions.

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

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

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

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

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

SECTION 2
SUMMARY OF PRIMARY CONTENTIONS
AND CUROSRY RECOMMENDATIONS

Some general considerations:

It is my frank contention within this and other component submissions current past and intended to multiple arenas, that such goals are rendered well nigh impossible to attain because of the following:

1. Policies and regulations that may fail to meet obligations that are inherent in the enactments under which they are created, normally as separate corporate legal structure as a philosophical approach to re-badging of regulators and complaints scheme;

2. Policies and regulations that may overlook some of the fundamental principles of accountability, including the requirement to be bound by Crown and avoid regulatory overlap with other regulatory schemes and provisions in the unwritten laws, including the rules of natural and social justice;

3. Policies and approaches that may demonstrate poor evaluative design; and dare I say, governance and leadership gaps; evaluation is the first not the last step in a proper strategic intervention plan – see collated Evaluative Best Practice Tips in Appendices

4. Policies and regulations that are often poorly designed, with little knowledge or acceptance of other regulatory schemes;

5. Policies and regulations designed that may demonstrate poor understanding of the provisions of the Criminal Code**;**

6. Policies and regulations may be designed with little understanding or even philosophical acceptance of provisions within the unwritten laws;

7. Policies and regulations designed that may fail to meet minimal standards of general regulatory consistency within and outside the energy provisions;

8. Policies and regulations that may pay no more than lip-service allegiance to best practice policy and regulatory benchmarking principles;

9. Policies and regulations that may fail to allow sufficient lead-time and adequate quality opportunities for wide stakeholder input, which includes a willingness to publish and make readily accessible all deliberative and consultative documentation and to notify stakeholders in a timely manner of all new material that relates to decision-making and consultative processes;

10. Policies and practices that may fail to adopt effective Memoranda of Understanding that lead to more formalized legally-binding contractual agreements between relevant entities, including prescribed authorities; prescribed bodies and entities; public entities and the like, regardless of corporate legal structure or statutory identity;

11. Policies and practices that may fail to allow enough flexibility to keep up with market changes and community expectations; but enough certainty within the Law to avoid uncontrolled hurtling into regulatory change based on an ad hoc approach;

12. Policies and regulations that may demonstrate inadequate technical knowledge of a specialist field;

13. Policies and practices that are adopted on an ad hoc basis with minimal far-reaching strategic planning;

14. Policies and regulations appear to be frequently formed without sufficient technical knowledge of a specialist field and are undertaken on an ad hoc basis with minimal far-reaching strategic planning;

15. Consumer Advocacy and Funding Models[54] that may not reflect the theoretical scope for independence combined with appropriate governance, training and realistic budgets;

16. Stakeholder consultation that may not be effectively and proactively sought and encouraged beyond lip-service;

Some issues relate to more timely strategic planning; effective evaluative models remembering that evaluation does not begin at the end of a study or review, but is a strategic exercise that requires sophisticated pre-planning, pilot testing and modeling that is geared to short-term; mid-term and long-range outcomes.

Better accountability, transparency, publication of all working documents, codes guidelines and deliberative documents; and consultant reports in a timely manner; policies that are not elitist in scoping for wider debate about public policy initiatives

Such policies and regulations inevitably lead to market failure; confusion for both consumers and market participants, expensive complaints handling and sometimes litigation, private or regulator led under generic laws.

The Productivity Commission is well aware of this, hence the current Regulatory Benchmarking Review, with tight deadlines for response to their Draft Report. I am yet to read it and endeavour to respond.

Whilst this may not be the place to explore lofty philosophical ideals I pose some teaser questions without discussion in this particular component submission, with the intent of returning to selected issues in due course of a more general nature.

- Is the tail wagging the dog?
- Are market power imbalances cause for current concern?

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[54] Refer for example to some of the formal submissions made by Energy Action Group (EAG) to MCE and other arenas, including the submission to the *MCE 2006 Legislative Package; the EAG ESC-EWOV Retailer Compliance Report (2004)* obtained after FOI access to records, Appendix 1 with that package

- Is policy and regulation for utilities sufficiently fine-tuned, or will it be before new Laws and Rules are adopted?
- Is there room for enhanced governance and accountability at all levels of government policy, regulation and complaints management
- Is the price of *"independent"* economic regulation too high?" What checks and balances are needed to restore appropriate levels of consumer protection?
- Do all economic regulators fully appreciate and disclose their accountabilities to government and to the Australian electorate?
- How can a balance be obtained between encouraging and facilitation competition within the market between providers of goods and services and adequate effective government policy and regulatory control such that consumer needs are not sacrificed[55]
- Is the federalism and anti-federalism debate adversely contributing towards appropriate levels of cooperation in the increasing trend towards nationalization in most arenas

I deal overleaf more specifically with a handful of issues that are by no means meant to be exhaustive.

[55] See for example the views of Kildonian Child and Family Services submission 065 to Productivity Commission's review of Australia's Consumer Policy Framework (2008)

Regulatory Overlap

That there is weak, if any, demonstrable adherence to mandated provisions within enactments binding regulators and other parties, specifically the binding provisions, and the requirement to avoid overlap and conflict with other schemes present and future.

It is implicit also that such conflict must also be avoided with the provisions of the unwritten laws, including the general and specific rights of individuals under common law contractual provisions; the and rules of natural and social justice.

For example, The *Essential Services Act 2001* (ESC Act), s6 provides that the Crown is Bound, as shown below.

7

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

In relation to regulatory overlap, s15 of the *Essential Services Commission Act 2001* specifically disallows overlap with other schemes present and future. This has been disregarded in certain provisions, including the Bulk Hot Water Charging Arrangements, which are also echoed in South Australia and Queensland. This is discussed in great detail in Part 2A, a brief version of which has been published on the ESC website as a component submission to the current VESC Regulatory Review.

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

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

Recommendation

That in the interests of best practice all new laws and rules, including the proposed national energy provision explicit refer to the obligation of policy markers and regulators to adhere to the requirement to avoid regulatory overlap with other schemes present and future and with the provisions of the written and unwritten laws

Memoranda of Understanding

1. That there are intrinsic structural and legal weaknesses in Memoranda of Understanding between prescribed agencies and other bodies, or those between bodies as between prescribed agencies, such that until or unless such instruments as statements of intent are either structured at the outset as legally binding; or else superseded by more formally binding instruments, their value has to be considered carefully in terms of desirable outcomes.

These instruments stop at commitment between the parties to adopt *"best endeavours"* to resolve matters of dispute between those parties; in the event that those endeavours fail, most such instruments fail to clarify at all what arbitration can be sought in resolution, if any.

That being the case, it is not uncommon for these instruments to be undertaken spuriously or else effectively disregarded as instruments capable to achieving the processes and outcomes for which they were originally designed.

2. Organizational cultural matters may play a role in determining how seriously these instruments are taken in any case; but looseness in wording and failure to specify hierarchal processes for resolution of differences services to compound these issues so as to render the instruments of minimal value

Recommendation

One solution would be to mandate for more formalized agreements to follow up on original good faith statements of intent, bearing in mind that good faith only has so much mileage.

General Regulatory Design Issues

Policy and regulatory design principles often fall short of optimal outcomes because of:

- complacency; deficient technical or legal understanding of the principles underpinning the processes and decisions made
- failure to keep up with community expectations and changing market and consumer needs;
- inadequate accountability parameters in place including accountability to the wider community (the taxpayer), coupled with sub-threshold commitment to embracing accountability principles as part of an organizational cultural attitude
- governance and leadership shortcomings;[56]
- compromised understanding of and adoption of best practice evaluation modeling and practices;[57]
- failure to adequate examine the internal market[58]
- failure to assess sustainability factors
- failure to balance allocative efficiency goals against moral and social values, principles and recognition that it is the responsibility of the community as a whole to address these factors and in particular protect the interests of those who may be inarticulate, and or vulnerable and/or disadvantaged; whilst at the same time recognizing the needs of other classes of consumers and market participants, including small businesses and their representatives.
- Inadequate risk mitigation strategies, which according to *Jamison et al* applies a set of institutional and financial instruments to make risks and rewards commensurate with each other, in order to enable good performance.[59]

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[56] See Appendix 14 (pp1018-1023) briefly outlining some best practice leadership principles and attributes

[57] See Appendix 13 (pp1003-1017) outlining some best practice theory models for evaluation, which does not begin with assessment of information gathered, or at the information gathering stage; but rather as a first step strategic planning stage to determine desired outcomes, how these will be achieved at short-medium and long-term intervals; what and how data will be gathered and how longitudinal data gathering may help inform policies

[58] See Appendix 10 (pp950-969) discussing some aspects of perceived failure to adequately assess the internal market and the extent to which competition in Victoria's gas and electricity retail markets may have failed the *"effectiveness"* test

[59] Asian Development Bank, Japan Bank for International Cooperation, The World Bank, 2005, "Accountability and Risk Management," In *Connecting East Asia: A New Framework for Infrastructure*. c/f Jamison, M. A. et al (2005) in Mechanisms to Mitigate Regulatory Risk in *Private Infrastructure investment: A Survey of Literature*,. (For World Bank) Public Utility Research Centre, University of Florida
Note Jamison's theories are referred to in Attachment X providing headings only from the literature review cited. Jamison and co-authors believe that a regulator's ability and flexibility to institute policies that increase the predictability of cash flow for investors. Arguably, corruption levels and pro-poor mechanisms are frequently considered features of the regulatory design

- Failure to adopt sound price setting regimens *(Jamison et al* see ref below)
- Attempts by regulators to operate in vacuum conditions within the regulatory system

  Jamison et al (2005) suggest proper governmental checks and balances, including the judicial and legal systems, systems for regulating the financial sector; environmental policies; and the country's conflict resolution mechanisms; political system and relationships with other countries and with multilateral institutions

  Failure to adopt regulatory design within the regulatory system and the regulatory entity in ways that match the country's institutional endowment *(Jamison et al 2005)*
- Compromised belief and acceptance of operators, customers, foreign governments and multilateral organizations (such as The World Bank) that the regulatory agency is legitimate and capable *(Jamison et al 2005).* [60]
- For utilities *"unforeseen shock making existing utility policies ineffective, counterproductive, or even unsustainable" (Jamison et al), 2005).*
- An unsustainable regulatory system *(Jamison et al 2005)*
- Adverse outcomes from trade-offs between instruments that have conflicting effects, the dynamic process of policy development tradeoffs (Jamison et al 2005) (for example predictability and flexibility tensions)
- Failure of literary contributions to build on each other because of lack of access or availability (or time) *(Jamison et al 2005)*
- Lack of synergy in research
- political interference;

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[60] Mark A. Jamison, 2005, *"Leadership and the Independent Regulator,"* Public Utility Research Center, University of Florida, Gainesville, Florida.
Mark Jamison as Director of the Public Utility Research Centre Florida, USA was one of the speakers at the Ninth ACCC regulatory Conference in Queensland
Dr. Jamison is the former associate director of Business and Economic Studies for the UF Center for International Business Education and Research and has served as special academic advisor to the chair of the Florida Governor's Internet task force and as president of the Transportation and Public Utilities Group
Previously, Dr. Jamison was manager of regulatory policy at Sprint, head of research for the Iowa Utilities Board, and communications economist for the Kansas Corporation Commission. He has served as chairperson of the National Association of Regulatory Utility Commissioners (NARUC) Staff Subcommittee on Communications, chairperson of the State Staff for the Federal/State Joint Conference on Open Network Architecture, and member of the State Staff for the Federal/State Joint Board on Separations. Dr. Jamison was also on the faculty of the NARUC Annual Regulatory Studies Program and other education programs
Dr. Jamison serves on the editorial board of *Utilities Policy*. He is also a referee/reviewer for the *International Journal of Industrial Organization*, *The Information Society*, *Telecommunications Policy*, and *Utilities Policy.*

- Ineffective company internal controls and systems accompanied by audit panic because of in-house systems that need updating (PriceWaterhouseCooper – the Sarbanes-Oxley blues – see lyrics from song Sarbanes-Oxley blues *"oh for the days when the company director told me what to do")*[61]
- Level playing field issues; impacts of vertical integration and a host of other competition factors
- Unwillingness to challenge conventional ideas about the process of government and public sector management[62]

Recommendations:

In relation to complacency; deficient technical or legal understanding of the principles underpinning the processes and decisions made

- make sure that adequate training, up-skilling and proper support is offered to those responsible for decision-making
- make sure that complacency is addressed in a variety of ways, including pro-active corporate culture re adjustment through training; persuasive techniques; re- recruitment through attritional means; improved recruitment techniques; enhanced leadership techniques

In relation failure to keep up with community expectations and changing market and consumer needs:

- Enhance public consultative processes
- Follow best practice stakeholder consultative
- Adopt evidence-based practices and avoid decision-making based on generalizations and extrapolations;

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[61] Section 404 of the Sarbanes-Oxley Act, which requires chief executives and chief financial officers to certify the adequacy of their internal controls. Then outside auditors must attest to that opinion
The idea is to find problems while there is still time to fix them without getting a bad audit report
See also The Pentana Audit Work System (PAWS) risk management software corporate governance

[62] See for example University of Melbourne Public Policy Teaching Program

- Increase skepticism about rosy-self-perception of performance parameters. It is not always good enough to "conceal" gross regulatory inadequacy by "averaging" techniques
- Insist on the most stringent parameters of transparency and accountability; review efficacy of parameters adopted every 3-5 years
- Gain a thorough understanding of evaluative processes in order to structure from scratch theoretical benchmarking criteria, regardless of the absence of data at the outset
- Re-evaluate evaluative processes on a regular basis
- Adopt "listening ear" techniques
- Seek to enhance possibilities for "stitch-in-time" stakeholder input regardless of whether the narrow terms of any particular review or intervention allows for extraneous material
- Pro-actively invite stakeholder input by regular invitation to identify areas of concern regardless of current project parameters
- Adopt strategies that involve all stakeholder inputs that are not restricted to 'expert" viewpoints
- Enhance understanding of the complexities of behavioural economics

In relation to inadequate accountability parameters in place, coupled with sub-threshold commitment to embracing accountability principles as part of an organizational cultured attitude:

- Legislate to ensure that accountability parameters are no longer blurred
- Close legislative loopholes; enhance strength of MOUs; insist on contractual agreements following adoption of MOU's as statements of intent
- Enhance powers of State Ombudsmen

In relation to gaps in governance and leadership shortcomings:[63]

1. Refer to Section 4 116-121
2. Enhance recruitment strategies
3. Provide opportunities for up-skilling and professional development

In relation to compromised understanding of and adoption of best practice evaluation modeling and practices;[64]

Refer to collation of evaluation best practice models Section 3 p100-115

In relation to failure to adequate examine the internal market[65]

Refer to checklist of gaps in internal market assessment (energy) by the AEMC in relation to effectiveness of retail competition in the gas and electricity retail markets in Victoria (similar parameters for South Australia allowing for jurisdictional differences)

Other parameters

In 2004 in a Submission to the Productivity Commission, a joint submission by VCOSS, Brotherhood of St Laurence and the University of Melbourne Centre for Public Policy made a submission to the Review of National Competition Policy arrangements.[66]

I support the recommendations made in that submission included:

Assisting and working with those who experience disadvantage in community based ways

- Developing and piloting innovative programs

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63 See leadership principles and attributes P116-121

64 best practice theory models for evaluation pp100-115, which does not begin with assessment of information gathered, or at the information gathering stage; but rather as a first step strategic planning stage to determine desired outcomes, how these will be achieved at short-medium and long-term intervals; what and how data will be gathered and how longitudinal data gathering may help inform policies

65 See Appendix 10 (pp950-969) discussing some aspects of perceived failure to adequately assess the internal market and the extent to which competition in Victoria's gas and electricity retail markets may have failed the *"effectiveness"* test

66 Joint Submission, VCOSS, Brotherhood of St Laurnce, Centre for Public Policy, University of Melbourne, to Productivity Commission's Review of national Competition Policy Arrangements

- Advocating on behalf of and with those who are vulnerable and / or who experience social, economic and cultural disadvantage without fear of government reprisals.
- Creating deliberative forums
- Representing those who are vulnerable and / or experience disadvantage or marginalization that otherwise have no public voice
- Providing opportunities for those most affected by governmental decisions to be involved in policy formation and evaluation
- Providing an effective channel for consultation and engagement with communities
- Contributing to ensuring governments are accountable to the wider community
- Counterbalancing the influence of corporate organizations over government decision making

Public Interest Test

The Public Interest Test is one of the focal points of the joint submission mentioned above, and speaks of encompassing a broader definition of sustainability – incorporating social, environmental, cultural and economic sustainability, apart from such issues as climate change.

Social cohesion and the contribution of social organizations and their values are discussed by the submission partners.

I referred to these in my submission to the Productivity Commission subdr242part1 and examined in some detail the findings of the Senate Select Committee of 2000 *"Riding the Waves of Change."*

Beyond the extremely valuable contribution made and available to be made to public policy by community organizations, particularly those with a client base, I also support the value of seeking other inputs from a wide range of stakeholders who have direct experience if how public policy affects them and those nearest to them.

CHOICE (ACA) has supported combined administration of competition and consumer policy. The existence of the first Federal Minister for Competition Policy and Consumer Affairs (The Hon Chris Bowen) demonstrates that this philosophy has been upheld.

Porras (2001) in his presentation to the European Commission on behalf of the Directorate General for Energy and transport posed the vexing question is

> *"Should consumer policy be administered separately from competition policy or should institutional arrangements reflect the synergies between the two?"*[67]

[67] The issue is synergies has been a contentious one, though at present this model has been recommended

I refer to the Directive 96/92/EC of the European Parliament and of the Council of 1996-12-19 concerning common rules for the internal market in electricity, has made significant contributions towards the creation of an internal market for electricity. Experience in implementing this Directive shows the benefits that may result from the internal market in electricity, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness.

Industry-specific Complaints Redress

Structure and administrative law coverage

- That the overall structure of these schemes and their scope, training, skills, jurisdictional limitations and real rather than apparent levels of independent decision-making, have significant implications for regulatory policy making and therefore cannot be taken in isolation from regulatory design.

  I quote from Professor Luke Nottage's submission 114 to the Productivity Commission's Review of Australia's Consumer Policy Review

> *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.*
>
> *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."*

- That in particular, the current structure and accountability parameters of industry-specific complaints schemes generally. In a *"bourgeoning industry"* are such that in addition to more general concerns about the structure of industry-specific complaints schemes; the current legal structure of such schemes gives rise to perceptions of unaccountability. In particular, grey areas of accountability under administrative law necessitate third party accountability through economic regulators (who also believes that is externally unaccountable); or through a statutory authority with overseeing responsibilities only.

  An example is Victorian's energy-specific complaints scheme EWOV who is adamant about its independence and alleged unaccountability (because of legal structure and support in this perception from its so-called overseeing entity VESC).

  It seems that EWOV has the right to commission feasibility study about expansion of role for example without publishing results that would help inform public policy decisions (see for example small scale licencing and EWOV's response to the VESC SSSL Review discussed elsewhere).

Whose interests were EWOV representing in taking such a stance and how does it balance its perceived conflicts of interest?

- The general community?
- End-users of utilities whether or not actually receiving energy to their respective premises?
- Landlords/Owners' Corporations? Small Scale Licencees?
- The overseeing entity the current energy regulator (state or federal)?
- Their own legal identity and more insular interests in case of litigation because of the scope for them to be sue and be in sued their own right?
- The politicians of the day?
- How many years will the energy debacle continue without appropriate intervention in terms of complaints redress and energy policy generally?
- What lessons have been learned?

- That the current structure of industry-specific complaints schemes often fall short of community expectation in terms of standards and scope of provision;
- That the current structure of industry-specific complaints schemes have jurisdictional powers that are exceptionally limited; with policy matters tariffs and a host of issues entirely outside their scope; their binding powers are even more limited, with binding decisions obtainable only with the participant's agreement, which is rarely obtained. There have been a total of 36 decisions in 12 years, and none during the past six years.

  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.

  See full discussion elsewhere in Part 1, 2A and 3 (PC)

Naming conventions for complaints schemes

- That the public deserves to know more transparently 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. The presumption of public gullibility is no excuse either.

The public may gain an erroneous impression through repeated use of the term *"independent"* when this merely applies to legal identify structure (corporate re-badging), but to the degree of true independent decision-making without regulatory or policy-maker intervention on most matters

Such schemes are normally under regulator thumb and are set up ender 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.

Recommendation

Revert to calling a rose by its name and be more transparent about the nature and limitations of industry-specific complaints schemes commonly but misleadingly known as *"ombudsmen."*

It is a mistake to give the public such little credit. The persistence with calling these schemes "ombudsmen" will not restore public confidence.

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. They are hardly *"ombudsmen;"* do not have the same, experience, training or status in public perception; and should never be permitted to use a term so misleading in its application.

Recommendation:

That consideration is given to bringing these schemes under the umbrella of administrative law at commonwealth and jurisdictional levels through revised legislation, since

"the Courts have not given us a clear ruling on such a hugely busy dispute resolution sector legislative intervention is necessary here too[68]

[68] Nottage, Prof Luke, Sydney University Submission 114 to Productivity Commission's Review of Australia's Consumer Policy Framework

Standards of service delivery and training

- That "despite the growing number of consumers ….*likely to turn to the burgeoning industry-association based "ombudsman" dispute resolution scheme, (these schemes) are not designed to efficiently aggregate collective interests*

- That industry-specific complaints schemes are not designed to efficiently aggregate collective interests[69]

  I refer to and quote again to Professor Luke Nottage's[70] concerns in original May submission to the Productivity Commission's Issues Paper and attached also to his submission to the PC Draft Report[71]

> *"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.*

- That industry-specific complaints schemes often have resources unable to meet demands in timely manner or to evaluate complex complaints that cross several jurisdictions (for example the bulk hot water arrangements and small scale licencing framework issues)

  Whilst many complaints handlers have gained experience in hardship matters, even when outcomes are achievable by agreement between the parties through the intervention of such a scheme, in the case of EWOV, it is frequently the case that the terms of such agreements for repayment of debt by installment plan place end-users of utilities in spiraling debt because of unaffordable installment plans. Therefore community obligations in terms of effective hardship programs are not normally met in terms of optimal outcomes. See for example Andrea Sharam's *Power Market and Exclusions* cited elsewhere and Energy Action Group's disturbing 2004 ESC-EWOV Retailer Non-Compliance Report reproduced in its entirety as an appendix and discussed elsewhere.

  Training support, up-skilling and knowledge base can often be deficient in relation to both energy-specific and non-energy-specific provisions that need to be taken into account in decision-making.

  The high turnover of staff in such schemes for a variety of reasons limits continuity of case management.

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69 Refer to views of Professor Luke Nottage, Sydney University Submission 114 to productivity Commission's Review of Australia's Consumer Policy Framework

70 Associate Professor University of Sydney Co-Director Australian Network for Japanese Law

71 Nottage, Luke (2007) and (2008), Submissions to Productivity Commission's Issues Paper and Draft Reports respectively Australia's Consumer Policy Framework. SUB114

It is not uncommon for complaints to take months to resolve. Delays are conveniently concealed in reporting data (EWOV Resolution Reports) by merely referring to complaints that took longer than 3 months to resolve or close. Reliance may be placed on attrition rates and withdrawals because of delays.

In the case of those with hardship issues, perhaps they move on to professional financial counsellors; perhaps they just fail to thrive because of suspension of essential services.

Inadequate checks and balances make proper assessment of detriments impossible to evaluate.

In the case study cited it was 18 months before the books were closed on a complaint that was not resolved in any way to the satisfaction of any of the parties involved, despite protracted input by the overseeing entity Essential Services Commission. That matter was doubly complicated by policy provisions (bulk hot water arrangements) that made resolution extremely difficult because of the attitude of policy-makers and/or regulators defending policies that appear to be legally and technically unsustainable and in contravention of the explicit requirement to avoid regulatory overlap and conflict with other schemes. This forms a substantial focus in Component submission 2A which in a more abbreviated form is already published on the VESC website as part of his 2008 regulatory review.

The case study is cited and attached to both Part 2A and Part 3, the latter dealing more generally with deficiencies in complaints handling

Regulations that have failed to take into account the requirement to avoid regulatory overlap with other schemes create problems in complaints handling, besides lack of adequate levels of knowledge and understanding of other schemes and the rights of individuals under those schemes. The Bulk hot Water arrangements are a classic example, and the Small Scale Licencing provisions another.

Despite EWOV's extremely reluctance to be allocated dispute resolution responsibility for small scale licencing for reasons that included complexity and overlap with other schemes; staffing levels; and possible conflicts of interests (fairness to existing members; small scale licencees and the public at large), the Victorian regulator has insisted that EWOV assume more responsibility than they appear to be either willing or able to take on.

This is yet another example of deficiencies in decision-making and complaints handling structure.

It also means that accountabilities become blurred and no single body takes overall charge of progressing matters of redress that belong to more than one regulatory arena.

This supports the view that regulatory overlap and conflict with other schemes should be specifically forbidden and that the written laws must also be taken into account

Consultative Processes

The quality of consultative processes is sub-standard in most arenas

Please refer to specific recommendations in dedicated section

I reproduce three pertinent comments from one or two serious stakeholders not afraid to speak their minds:

I cite below from a 2005 letter from EAG to the MCE Market Reform Team regarding NEM Rules and National Electricity Law.[72] Failure to consult with stakeholders in an appropriate way has resulted in an expression of outrage. Other stakeholders have been more polite, but continue to express disappointment at the poor levels of meaningful consultation in all energy arenas where changes and reforms are being considered.

> ***Excerpt from EAG letter to MCE Market Reform Team November 2005***[73]
>
> ***Lack of meaningful consultation***
>
> *The EAG would like to express outrage about the timeframes for, and timing of, public/stakeholder consultation. EAG believe there are major issues of substance and not just process that need to be addressed in the new NEL/NERs. We strongly recommend that more work and public discussion needs to occur before they are finalised and enacted. The holiday months of December and January (for most of government and industry) are not the time to be 'tackling' these crucial reforms.*
>
> *EAG is distressed to see that the current draft NEL/NER legislation fails to address several significant issues like Merits Review in the package. The SCO has failed to show why we only have the current incomplete package when with some more time (at least 6 months) we could have a complete reform package. At this stage there is an implicit "Trust Us Approach" EAG doesn't!*

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72 EAG (2005) Submission to Ministerial Council on Energy Market Reform Team re EAG Initial Submission on National Electricity Law & National Electricity Rules Found at *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroupNELsubmission20050105111827.pdf*

73 Energy Action Group is a 30-year of non-profit organization focussed in the main on energy issues relating to small consumers (less than 160 KWh/a and less than 10TJ/a (major users). Members determine EAG policies and directions. EAG activities cover both national and sub-national issues for the social action component of our work see http://www.vicnet.net.au/~eag1/. EAG has a policy of trying to work collaboratively with market participants and other consumer groups (like EUAA) on issues of common interest

As far back as 2005, in their submission to the National Energy Market Branch of the Department of Industry, Tourism and Resources, the Energy Action Group (EAG)[74] had observed that

> *"Prudent regulatory and parliamentary practice requires either adequate time for affected parties to fully assess and consider proposed regulatory amendments."*

Alternatively EAG suggested that *"regulatory impact statements"* (RIS) be made available to assist affected parties quickly to understand the affects of the proposed changes."

This is from Robin Eckermann Principal, Eckermann & Associates, Adjunct Professor (Network/Communication Technologies), University of Canberra[75] regarding the smart meter rollout:

> *I appreciate the pressure to meet tight deadlines – and recognise the possibility that this submission will be set aside because it does not conform to the relatively specific guidelines within which feedback has been invited. However, in the words of Lord Chesterfield "Whoever is in a hurry shows that the thing he is about is too big for him." There is no better time than right now to pause and check that nationally we are setting our sights on the right goals.*
>
> *The health of the planet that we will leave to our children and to our grandchildren depends on seizing every opportunity – especially the big ones such as are on offer through the overhaul of ageing electricity supply networks.*

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74 Submission to Department of Industry Tourism and Resources *"EAG Initial Submission on National Electricity Law and National Electricity Rules"* 5 January 2005

75 Eckermann, Robin (2007) Principal, Eckermann & Associates, and Adjunct Professor (Network/Communication Technologies), University of Canberra Found at *http://www.mce.gov.au/assets/documents/mceinternet/Eckermann%5Fand%5FAssociates20071119104053%2Epdf*

Section 2B

SOME MORE NARROWLY FOCUSSED STATEMENTS OF CONTENTION AND RECOMMENDATIONS – ENERGY RELATED

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

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

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

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

Apart from the deemed provisions, existing and proposed jurisdictional contractual arrangements and trade measurement practices for *"delivery of bulk gas hot water"* or *"delivery of bulk electric hot water"* (BHW) are inconsistent with all other existing energy legislation and other provisions for the supply of energy facilitating flow of energy to premises using a distribution method as contained within the *GIA* and *EIA*.[76]

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

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

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

Use of *gas service pipes* or *transmission pipelines* facilitating the flow of gas in effecting the alleged distribution of gas conveyed in gas service pipes, transmission pipes; or for electricity, as conducted by electrical lines

Use of a *gas fitting* to the premises in question, including a gas meter as defined within the *GIA* as shown below

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

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

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

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

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

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

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

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

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

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

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

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

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

Gas supply through the physical connection of gas from the distribution network to allow *the flow of energy between the network and the premises of end-users as occupants of flats and apartments*[77]

this means supply of gas using a supply point/supply address (synonymous technical terms denoting connection not the living space of an occupier's abode); or alternatively a transmission pipe connecting a network to the said premises (of individual occupants in multi-tenanted dwellings receiving BHW heated in a communal tank delivered in water service pipes).[78]

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

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

Gas supply as defined under the *GIA* place as defined under the *GIA*[79] applying the definitions of *"customer;" "gas distribution company";*[80] *"distribute" "transmission"; "service pipe"* "*transmission pipeline"; apparatus and works;" "meter" (facilitating flow of gas; capable of measuring gas volume consumption)*[81]

Gas supply through the *"physical connection that is directly activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energization' of the connection)*[82]

Gas supply through facilitation of the *flow of gas (or electricity) between the network and the premises through the connection; and services relating to the delivery of energy to the (alleged) customer's premises, using a gas fitting that "includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas"*[83]

Connect in the ERC and in the proposed NECF means

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

(b) for gas, the joining of a ***natural gas installation*** *to a distribution system* ***supply point*** *to allow the flow of gas.*[84]

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

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

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79 *Gas Industry Act 2001* Version v36, No. 31 of 2001 with amendments to 25 July 2008 *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

80 *"gas company"* means a gas distribution company, a gas retailer or a gas transmission company; *"gas distribution company"* means a person who holds a licence to provide services by means of a distribution pipeline; Both definitions are from the *GIA* v36 above

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

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

83 Definitions, *Gas Industry Act 2001*, v36, No 31 of 2001

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

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

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

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

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

Gas supply under the meaning applied in the GIA for supply and sale contract[85] – applicable to gas provision through the gas distribution system or gas transmission system involving a physical connection permitted the flow of gas to the premises deemed to be receiving gas.

That existing and proposed jurisdictional arrangements for *"bulk hot water"* (BHW) contractual model and policy provisions for derived costs (regardless of actual formulae and actual derived rate determined by the DPI from time to time), based on water volume calculations and conversion to gas and electricity rate tariffs are inconsistent with NECF governance contractual model for connection and supply of energy facilitating flow of energy to premises.[86]

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

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

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

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

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

That specifically the authority of Essential Services Commission Victoria (VESC) under existing energy legislation[87] is limited to disconnection of energy and does not extend disconnection of heated water services receiving water reticulated in water pipes in the absence of any energy connection point or transmission pipes facilitating the flow of energy in the premises alleged to be supplied with energy.

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

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

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

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

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

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

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

SECTION 3

SOME BURNING EVALUATION PRINCIPLES

CONVERTING THEORY INTO PRACTICE[88]

The following principles may assist with general evaluative and record-keeping best practice principles – for all policy, regulatory and other entities working in the public policy arena

Recommendations: General evaluative principles

1. What was the evaluand *{Funnell and Lenne 1989}* at several levels, mega, macro and micro, since different stakeholders will have different concerns at each of these levels *{Owen (1999:27}.*

2. In choosing design and methods, were any cautions used against replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}.*

3. What external threats were identified and considered before the data gathering exercise was undertaken?

4. What comparisons were used?

5. What were the boundaries and objectives?

6. Was an evaluability assessment undertaken to more precisely determine the objectives of the intervention, the different possible ways in which the item could be evaluated and the cost and benefits of different evaluation designs[89]

7. What were the implied or explicit criteria used to judge the value of the intervention?

8. Which evaluation design was employed was employed, since a decision on this issue would impact on the data-gathering measures?

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[88] How many of these principles were adopted in the various evaluative processes undertaken by those guiding or undertaking major or minor policy reform in various State, Commonwealth or advisory arenas

[89] Wholly (1977) *"Evaluability assessment"* in L Rutman (ed.) Evaluation Research Methods: A Basic Guide, Beverly Hills, CA: Sage
Wholey JK (1983), "*Evaluation and Effective Public Management",* Boston: Little, Brown c/f Ovretveit Evaluating Health Interventions. Open University Press. McGraw-Hill (reprinted 2005), Ch 2 p 41

9. Was the evaluative design in this case case-control, formative, summative, a combination of process (formative) and summative; cost-utility or audit? Will assessment of the data gathered be contracted out to an informed researcher or research team with recent professional development updates and grasp of the extraordinary complexities in the evaluative process?[90]

10. How was the needs assessment conceptualized?

11. Was the program design clarifiable?

12. How was the formative evaluation undertaken?

13. What are or were the Program Implementation process evaluation parameters?

14. What measures will be in place for evaluating the "settled program" (or policy change proposed)?

15. How were short term impacts by conceptualized and identified for the proposed changes?

16. What definitive outcomes are sought and how will these outcomes be determined by follow-up?

17. Was/will there be time to activate the evaluation's theory of action by conceptualizing the causal linkages?[91] Whilst not ideal, if no theory of action was formulated, perhaps it is not too late to partially form a theory of action plan.

18. Was there be room or time in the data-gathering exercise to probe deeper into the answers provided by the people whose lives will be affected by any decision the Government may make to deregulate within the energy industry? The skilled questioner knows how to enter another's experience?[92]

19. As Eyler (1979) said *What are figures worth if they do no good to men's bodies or souls?*[93]

20. What was be done do assess the intended impacts of the studies undertaken.

21. Before the data-gathering exercise was undertaken, and considering the time constraints were these factors considered: feasibility, predictive value; simulations; front-end; evaluability assessment?

22. What processes will be undertaken to ensure added-value components to the evaluation?

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[90] Patton, M. Q. (2002) "*Qualitative Research & Evaluation Method"* Sage Publications

[91] Patton, M. E. "*The Program's Theory of Action"* in *Utilization Focussed Evaluation*, Sage, Thousand Oaks, 1997, pp 215-238

[92] From Halcom's *Epistemological Parables* c/f ibid *Qualitative Research and Evaluation Methods,* Ch 7 *Qualitative Interviewing*

[93] c/f Ovretveit (1997) *"Evaluating Health Interventions".* Open University Press. McGraw-Hill (reprinted 2005), Ch 1

23. How will the agencies/entities utilize case study example in augmenting the existing relatively generic study undertaken addressing standard demographics over a large sample without sub-segmentation of more vulnerable groups (such as residential tenants or regional consumers) with more in-depth evaluation?

24. How carefully will the agencies/entities in their parallel Review/Inquiry review in tandem program documentation, especially where there is overlap; or examine complaints and incident databases; form a linkage unit for common issues.

25. To what extent have the following evaluative process been undertaken[94] by both bodies, and all Commonwealth and State bodies including the MCE and COAG Teams, policy advisers and policy-makers regulators:

- Strongly conceptualized parameters
- Descriptive
- Comparative
- Constructively skeptical
- Positioned from the bottom up
- Collaborative

- Does all of the government, quasi-government, regulators and others a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?"[95]
- How will the success of the policy changes ultimately effected be monitored and re-evaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?
- What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?
- Generic protections such as those afforded by trade practices and fair trading provisions are currently insufficient and not quite as accessible as is often purported.
- Within an industry that represents an essential service and where large numbers of vulnerable and disadvantaged consumers (not just on financial grounds) are under-represented how will the Government ensure that the rights of specific stakeholder groups are not further compromised?
- How accessible will Rule Changing be?

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94 Centre for Health Program Evaluation, Melbourne University

95 Funnell S, Program Logic (1997): *"An Adaptable Tool for Designing and Evaluating Programs"* in Evaluation News and Comment, V6(1), pp 5-17

- How will the success of the policy changes ultimately effected by monitored and re-evaluated and how often. Specifically, will there be a second phase of evaluation as one of accountability to managers, administrators, politicians and the people of Australia?
- In choosing design and methods, what will be done about replacing indifference about effectiveness with a dogmatic and narrow view of evidence *{Ovretveit, 1998:}.*
- What will be the rule change policy that will be transparent and accountable not only internally but to the general public as stakeholders?
- How accessible will Rule Changing be?
- Perhaps the agencies and entities would consider seeking specialist evaluation input with further evaluation of data when making major regulatory reform decisions
- Does Government have a plan by which program analysis can be undertaken formally, and by which success criteria can be measured as the desired features of the outcomes represented in the outcomes hierarchy, defining more precisely the nature of the outcomes sought and the link between the stated outcome and the performance measures for that outcome in terms of both quantity and quality?"[96]

Evaluation is a sophisticated and scientific professional challenge. It is not just a trade, though compromises often make it so. Professional evaluators are humble people. They make no pretenses. Regardless of reputation or status, they are never too humble to ask for collaborative input and peer opinion and suggestion. Evaluation is a continuing process and does not start and end with data gathering. They recognize the challenges of best practice data gathering and evaluation and do not pretend to have all the answers.

For instance, check out the University of Alabama's EVALUTALK facility. American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]. This group is the cutting edge of evaluative practice. The rest of the world respects the results this group achieves.

One such evaluator could be Bob Williams a highly respected NZ evaluator with an international reputation and particular expertise in public policy evaluation. He is a frequent visitor to Australia, and is a fairly well known figure in Australasian evaluation, through evaluations, his work within the Australasian Evaluation Society (AES) (which merged with Evaluation News and Comment under Bob Williams' supervision) and his contributors to the two Internet discussions groups Evalutalk and Govteval. He has vas experience of Governmental evaluations.

On the online Evaluator's Forum, EVALUTALK, Bob Williams responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen as craftspeople with a pride in their work and the outcomes of their findings long after the consultative process is over.

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[96] Funnell, S, (1997) *"Program Logic: An Adaptable Tool for Designing and Evaluating Programs"* in Evaluation news and Comment, V6(1), pp 5-17

Williams' specialty is evaluation, strategy development, facilitating large-group processes and systemic organizational change projects. He has his own website under his name. Reviews books for Journal Management Learning, writes for Australasian Evaluation Society's Journal. He wrote the entries on *"systems" "systems thinking" "quality"* and planning Encyclopaedia of Evaluation {Sage 2008) and co-written with Patricia Rogers in *"Handbook of Evaluation" {Sage 2006}.*

There is a great deal of valuable consultative evaluation advice out there for the asking. Lay policymakers are not normally trained in this area.

Bob Williams, has commented as follows on EVALUTALK:

> *"The Ministry of Education here in New Zealand has been doing something very interesting for the past four or five years. The policymakers along with teachers university researchers and others have been developing a series of "best evidence syntheses". The concept of "best evidence" is fairly comprehensive with a set of agreed criteria for what constitutes "best" and "evidence". As each synthesis is developed it is opened up for discussion with practitioners and academics - and placed on the Ministry of Education's website. I was involved in some of the early discussions (as a facilitator rather than evaluator) and was impressed by both the method and the content of the syntheses. What I found most impressive was that the policymakers were brave include evidence that challenged some of the assumptions that have dominated education policymaking in the past few decades (e. g. the extent to which socio-economic status effects student performance)."*
>
> *"The 2006 edition of the World Education Yearbook describes the BES Programme "as the most comprehensive approach to evidence" and goes on to say: "What is distinctive about the New Zealand approach is its willingness to consider all forms of research evidence regardless of methodological paradigms and ideological rectitude and its concern in finding...effective appropriate e and locally powerful examples of 'what works."*

Bob Williams suggests that before data gathering is undertaken the underlying assumptions must be made, followed by identification of the environment and environmental factors that will affect the way in which the intervention and its underlying assumptions will interact and thus behave.

A recent dialogue between evaluators on that Discussion List produced a useful list of criteria that would cover the processes that should ideally be undertaken.

Though the inputs came from a number of Discussion List members, I cite below how Bob Williams[97] a respected New Zealand evaluator with an international reputation summarized as follows inputs from various evaluators participating on the Discussion List [98]:

Position the evaluation – that is, locate the evaluation effectively in its context, in the broader systems.

MK Comment:

This is impossible to achieve without a comprehensive informed SWOT analysis that goes well beyond background reading of other components of the internal energy market –a highly specialized exercise, especially in an immature market. Prior to undertaking the survey mentioned to ascertain market awareness, what steps were taken to mount a strengths and weakness analysis (SWOT).

If undertaken, where can the results be located? This type of exercise is normally undertaken prior to the gathering of data so that the survey data is meaningful, is robust to address a range of relevant factors; and not simply narrowly focused on data-gathering that may yield compromised results if the goals and parameters that could have been initially identified in a SWOT analysis were not clearly identified and addressed in the study design.

1. *Clarify the purpose and possibilities, etc (design phase – why do it)*
2. *Plan the evaluation (design phase) (what do we want to know)*
3. *Data Gathering (how will we find out what we want to know)*
4. *Making meaning from the data (e.g. analysis; synthesis; interpretation (how can we get people to be interested in the evaluation processes/results*
5. *Using the results (shaping practice) (what would we like to see happen as a result of the evaluation and what methods promote that?)*

Stanley Capella on the University of Alabama Online Evaluation Discussion Group EVALUTALK has whether evaluators should push for program decisions based on evaluation, or is this an advocate's role.

Bob Williams a New Zealand Evaluator on the same discussion group has responded that evaluators should not been seen as mere technicians doing what they are asked to do, but should be seen as craftspeople with a pride in their work and the outcomes of their findings.

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97 *http://www.eval.org*

98 Bob Williams, Discussion List Member Evalutalk

As suggested by *Ovretveit*[99]

> *"Design is always balancing trade-off." "Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives." These parameters cannot be decided "without some consideration of possible designs and the answers they could give" (since) planning is an interaction between the possible design and the questions and purposes."*
>
> *"Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention."*
>
> *"Randomized experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable comparisons. There is not a staggering number of opportunities for its use*[100]
>
> *"Politicians often do not examine in detail the cost and consequences of proposed new policies, or of current policies."* [101]

In discussing better informed political decisions *Ovretreit* noted, for example, the lack of prospective evaluation or of even small scale testing of internal market reforms in Sweden, Finland and the UK. Whilst he did not infer that all new policies should be evaluated or that the results of an evaluation should be the only basis on which politicians decide whether to start, expand or discontinue health policies, just that politicians could sometimes save public money or put it to better use if they made more use of evaluation and of the *"evaluation attitude."*[102]

Ovretreit[103] embraces six evaluation design types: descriptive (type 1); audit (type 2) outcome (type); comparative (type 4); randomized controlled experimental (type 5) and intervention to a service (type 6) Each of these six broad designs can and have been successfully used in a variety of interventions targeted at examining policies and organizational interventions, depending on which of the four evaluation perspectives have been selected: quasi-experimental; economic; developmental or managerial.[104]

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99 Ovretreit (1997) *Evaluating Health Interventions.* Open University Press. McGraw-Hill (reprinted 2005), Ch 6

100 Webb et all 1966 c/f Ovretveit Evaluating Health Interventions, *"Evaluation Purpose Theory and Perspectives"* Ch 2, p31

101 Ibid, Ovretveit Ch 2, p 27

102 Ibid, Ch 2, p27

103 Ibid Ovretveit , Ch 3 *Evaluating Health Interventions Six Designs*

104 Ibid Ovretveit's Ch 3 Model Evaluating Health Interventions, p73

In recent years there has been increasing pressure on all scientists to communicate their work more widely and in more accessible ways. For evaluators, communication is not just a question of improving the public image of evaluation, but an integral part of their role and one of the phases of an evaluation. It is one of the things they are paid to do. Here we consider evaluators' responsibility for communicating their findings and the different ways in which they can do so.

The following is an abstract from Edmund Chatto's 1995 Research Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme.[105] The paper

> *"……addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained.*
>
> *The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations. This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development."*

Daniel L Shufflebaum's Program Evaluations Metaevaluation Checklist is worth looking at.[106]

Michael Scriven's Key Evaluation Checklist is a useful resource[107]. Scriven's Checklist poses some challenging questions that are touched on here in good spirit:

- *Can you use control or comparison groups to determine causation of supposed effects/outcomes?*
- *If there is to be a control group, can you randomly allocate subjects to it? How will you control differential attrition, cross-group contamination, and other threats to internal validity.*
- *If you can't control these, what's the decision-rule for aborting the study? Can you single or double-blind the study.*

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105 Chattoe, E. (1995) *"Can Sociologists and Economists Communicate?"* Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Department of Sociology, University of Surrey, Guildford, GU2 5XH (plus an impressive array of reference on Consumer Behaviour)

106 Shufflebeam, D. L. (1999) *"Program Evaluations Metaevaluation Checklist",* based on The Program Evaluation Standards (University of Michigan)

107 Michael Scriven's *Key Evaluation Checklist* <www.evaluation.wmich.edu>

- *If a sample is to be used, how will it be selected; and if stratified, how stratified?*
- *If none of these apply, how will you determine causation (the effects of the evaluand)*
- *If judges are to be involved, what reliability and bias controls will you need (for credibility as well as validity)?*
- *How will you search for side effects and side impacts, an essential element in almost all evaluations*
- *Identify, as soon as possible, other investigative procedures for which you'll need expertise, time, and staff in this evaluation, plus reporting techniques and their justification*
- *Is a literature review warranted to brush up on these techniques?*

Texts such as *Schiffman and Kaunk's* Consumer Behaviour[108] may provide some useful insights during the evaluative process.

As previously mentioned, The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols o Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

"Logic models can be described as frameworks for thinking about (including evaluating a program in terms of its impact

Stakeholders processes inputs etc. Typically these run from inputs through activities/processes to outputs/products outcomes/results and impact including beneficiaries"[109]

In response to Fred Nichols comments, Sharon Stone on the same EVALUTALK, comments on the assumptions that include program theory and external conditions (meaning factors not included that could affect positively or negatively the hypothesized chain of outputs, outcomes.

Stone[110] poses two questions:

[108] Schiffman, Leon G and Kanuk, Leslie Lazar Consumer Behaviour. (1994) Prentice-Hall International Editions

[109] Fred Nichols, Senior Consultant, Distance Consulting on EVALUTALK, American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU]; on behalf of; nickols@att.net

[110] Sharon Stone, Evaluator, on EVALUTALK, University of Alabama September 2007

> *"Are these just "logical chains" – or are these cause the effect"*
>
> *Either way – are things really that simple – or do we need to pay more attention to those 'external' factors" – and how they are identified as external*

Patton (1980)[111] has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.

Patton claims:

> *"One reason why evaluation can be confusing is that there are so many types of evaluation. Case- control, formative, summative, process, impact, outcome, cost-utility, audit evaluations."*[112]

Funnel (1996) has some views on Australian practices in performance measurement. Her 1996 article in the Evaluation Journal of Australasia[113] provides broad-brush review of the state of evaluation for management in the public service.

Funnell provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as 'managerial accountability p452).

As well *Funnell* explores the impact of cutbacks on the conduct of evaluations, the levels of evaluation expertise available and on evaluation independence and rigor. Her arguments on the impact of market-based policies imply there could be both benefits and dangers.

Hawe and Degeling (1990)[114] have some ideas of survey methods and questionnaire design. These authors describe random, systematic, convenience and snowballing sampling and look at questionnaire layout and presentation; the need for piloting and some simpler basic description analysis of quantitative and qualitative data. Fore more sophisticated analysis such as may be warranted before any decision is made by the Government to deregulate in the energy industry may warrant the employment of a highly trained researcher, recently trained.

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111 Patton (1980) *"Qualitative Evaluation Methods",* London Sage, c/f Evaluation Purpose and Theory in Evaluating Health Interventions

112 See Patton, M. Q. (1997) Utilisation Focused Evaluation. The new Century text 3rd edn.

113 Funnell S (1996): *"Reflections on Australian practices in performance measurement",* 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

114 Hawe, P., Degeling D., & Hall, J (1990) Evaluating Health Promotion, Ch 7 Survey Methods and Questionnaire Design, Sydney, McLennan & Petty

These authors examine a) the types of items; (b) questionnaire layout and presentation; (c) the need for piloting (this is often overlooked by evaluators undertaking small-scale evaluations; d) maximizing response rates.

Note their comments on the analysis of quantitative and qualitative data. These comments describe simple, basic descriptive analysis. For more sophisticated analysis evaluators should employ a trained researcher.

Funnel (1997)[115] has discussed program logic as a tool for designing and evaluating programs. This is simply a theory about the causal linkages amongst the various components of a program, its resources and activities, its outputs, its short-term impacts and long-term outcomes. It is a testable theory, and must be made explicit as a first step to testing its validity.

The process by which this is achieved is program analysis. This is a job for an expert in evaluation where major government policy is being reexamined.

As *Funnell*[116] points out, the many models of program theory

> *…. "date back to the 1970s and include amongst others Bennett's hierarchy of evidence for program evaluation within the context of agricultural extension programs and evaluability assessment techniques developed by Wholey and others."*

A typical program logic matrix may include a grid that includes ultimate and intermediate outcomes, and immediate impacts, with success criteria being measurable and specific in accordance with the SMART principles.

One theme in the responses (TO EVALUTALK) as summarized by Johnny Morrell), is that

> *"…..logic models can be seen as constructions that can be used to test key elements of a program's functioning.*[117]
>
> *Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms.*
>
> *To me, this gets at the notion that while there is a useful distinction between "design" and "logic model", the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.*

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115 Funnel S (1997) *"Program Logic: An adaptable tool for designing and Evaluating Programs"* in *Evaluation News and Comment* v.6(1) 1997 pp 5-17. Sue Funnell is Director of Performance Improvement Pty Ltd and chair of the AES Awards Committee.

116 Ibid Funnell Program Logic, p5

117 American Evaluation Association Discussion List [EVALTALK@BAMA.UA.EDU] as summarised by Johnny Morrell, PhD, Senior Policy Analyst, Member American Evaluation Association EVALUTALK Discussion Group

> *From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference. But the distinction is not clean.*
>
> *Related to 1.1 is the notion that logic models can be seen in terms of path models in analytical terms. To me, this gets at the notion that while there is a useful distinction between "design" and "logic model", the distinction is a bit fuzzy. Presumably, if one had enough data, on enough elements of a logic model, one could consider the logic model as a path model that could be tested.*
>
> *From a practical point of view, I still see logic models as guides for interpretation, and design as the logic in which we embed data to know if an observed difference is really a difference.*
>
> *But the distinction is not any given logic model is never anything more than a work in progress that has to be updated on a regular basis. With this approach, logic models (and the evaluation plans they drive), can be updated as the consequences of program action evolve.*[118]
>
> *The major point in this category is that "design" means a lot more than a logic for looking at data. According to this view, "design" includes procedures for gathering data, schedules for doing evaluation tasks, and so on*

Johnny Morrell calls this:

> *"an evaluation plan and reserve the term 'design' for the logical structure of knowing if observations have meaning."*[119]

There is a consensus amongst EVALUTALK members that:

> *"the use of logic models (may be seen as) a consensus building tool. The notion is that logic models come from collaborative cross- functional input from various evaluator and stakeholder groups. Thus, the act of building a logic model works toward common vision and agreed upon expectations."*

Swedish evaluator *John Ovretreit (1987, reprinted 2005)*[120] has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.

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118 Johnny Morrell on EVALUTALK, American Evaluation Association

119 Ibid Johnny Morrell

Rossi's' evaluation theory[121] is about whether the intentions of the program were effected by delivery to the targeted recipients.

This task is typically undertaken by independent evaluators and can be a stand-alone evaluation if the only questions addressed focus on operational implementation, service delivery and other matters. This form of evaluation is often carried out in conjunction with an impact evaluation to determine what services the program provides to complement findings about what impact those services have.

One example of a combined process and summation evaluation is shown in the study reported by *Waller, A. E et al (1993)*[122]

In that study, the summative component was inbuilt into the original program design. The findings were inclusive and relatively useless primarily because of flaws in conceptual assumptions made. However there were lessons to be learned in designing other similar studies, so the pilot study was not entirely wasted.

Rossi examines outputs and outcomes as distinct components of an evaluative program, with the former referring to products or services delivered to program participants (which can be substituted for end-consumers) and with outcomes relating to the results of those program activities (or policy changes).

Program monitoring can be integrated into a program's routine information collection and reporting, when it is referred to as MIS, or management information system. In such a system data relating to program process and service utilization is obtained, compiled and periodically summarized for review.

The University of Alabama's EVALUTALK site has a host of useful insights about evaluation design. As discussed by Fred Nichols of Distance Consulting, Recent discussions are focused on Roger Kaufman's mega-planning model, based on his notion of needs assessment.

Patton (1980)[123] has estimated over a hundred approaches to evaluation. He describes four major framework perspectives – the experimental, the economic, the developmental and the managerial.

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120 Ovretreit (1997) *Evaluating Health Interventions*. Open University Press. McGraw-Hill (reprinted 2005)

121 Rossi, P., Freeman and Lipsey, M. (1995) *"Monitoring Program Process and performance: Evaluation: A Systematic Approach"* (6th edition) Sage, pp 191-232

122 Waller, A. E, Clarke, J. A., Langley, J. D. (1993). An Evaluation of a Program to Reduce Home Hot Water Temperatures. *Australian Journal of Public Health (17(2), 116-23.*

123 Patton (1980) Evaluation Purpose and Theory

Patton claims:

> *"One reason why evaluation can be confusing is that there are so many types of evaluation. Case control, formative, summative, process, impact, outcome, cost-utility, audit evaluations."*[124]

Funnel (1996) has some views on Australian practices in performance measurement. His 1996 article in the Evaluation Journal of Australasia[125] provides broad-brush review of the state of evaluation for management in the public service.

Funnell provides explanations of jargon such as benchmarking, TQM, quality assurance and she also explores issues relating to the current political climate of progressive cutbacks and how these have affected the use of process evaluation. The form of process evaluation she is examining is seen as 'managerial accountability p452)'.

Swedish evaluator *John Ovretreit (1987, reprinted 2005)*[126] has written a classic text on evaluative intervention. Though focused on health interventions, the principles are as relevant to other areas.

As suggested by *Ovretveit*[127]

> *"Design is always balancing trade-off." "Inexperienced evaluators are sometimes too quick to decide design before working through purposes, questions and perspectives." These parameters cannot be decided "without some consideration of possible designs and the answers they could give" (since) planning is an interaction between the possible design and the questions and purposes."*
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> *"Ideas which are fundamental to many types of evaluation are the operational measure of outcome, the hypothesis about what produces the outcome, an open mind about all the (factors) that might affect the outcome and the idea of control of the intervention and variable factors other than the intervention."*
>
> *"Randomised experimental designs are possible for only a portion of the sittings in which social scientists make measurements and seek interpretable comparisons. There is not a staggering number of opportunities for its use*[128]

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124 See Patton, M. Q. (1997) *"Utilisation Focused Evaluation."* The New Century Text 3rd edn.

125 Funnell S (1996): *"Reflections on Australian practices in performance measurement",* 1980-1995. Evaluation Journal of Australasia 8(1), 36-48

126 Ovretreit (1997) *Evaluating Health Interventions.* Open University Press. McGraw-Hill (reprinted 2005)

127 Ibid Ovretreit (1997) (reprinted 2005), Ch 6

128 Webb et all 1966 c/f Ovretveit *Evaluating Health Interventions, Evaluation Purpose Theory* and perspectives Ch 2, p31

Of quality assurance *Davey and Dissinger* said

> *"Quality assurance (QA) and evaluation are complementary functions which collect data for the purpose of decision- making. At the process level, quality assurances provides both a system of management and also a framework for consistent ser4vice delivery with supporting administrative procedure. When implemented appropriately QA methods provide rapid feedback on services and client satisfaction, and a means to continuously upgrade organizational performance.*
>
> *Despite client feedback being part of QA, it lacks the depth provided by evaluation in determining individual client outcomes from a person centered plan for service delivery.*[129]

Bill Fear[130]/[131] recently wrote to EVALUTALK, the American Evaluation Association Discussion Group on the topic of self-efficacy. His insights are topical so I quote them below:

> *Why do policy makers make such bad policy most of the time? Why is good policy so badly implemented most of the time? Why don't policy makers listen to honest evaluations and act on the findings? And so on.*
>
> *Could we actually bring about meaningful changes by giving people the tools to think things through and act accordingly? Does empowerment actually mean anything? (Well, yes, but it seems to lack substance as a term in its own right.)*

---

[129] Davey, R. V. and Dissinger, M (1999) *"Quality Assurance and Evaluation: essential complementary roles in the performance monitoring of human service organisations."* Paper presented at Australasian Evaluation Society Conference, Melbourne 1999, p 534-550

[130] Bill Fear Online contribution to EVALUTALK, the American Evaluation Association Discussion Group April 2008

[131] Bill Fear, BA (Education) MSc (Social Science Research Methods), PhD (Cognitive Psychology). Member UK Evaluation Society. He sits on the UKES council, and the American Evaluation Association. He has excellent research and evaluation experience, as well as solid grounding in PRINCE project management. He has attended top level training programs in the US with both Michael Scriven and Michael Patton. Recent experience include working for the Office for National Statistics where he led a large index rebasing project, and helped set up the development of both a banking and insurance index for the corporate sector. He is currently running the Investing in Change project (a Wales Funders Forum project). This project is using an evaluation framework to explore funding of the voluntary sector from a funders perspective. A recent achievement in this includes building a partnership with the Directory of Social Change to deliver a Funding Guide for Wales. He presents workshops on the emerging findings of this project to a wide range of policy makers. He is frequently asked to comment on evaluation methodology and proposals

Does anybody ask these questions? Or is everybody just concerned with the latest methodology which will always be historic not least because it can only be applied to the past (there is an argument there).

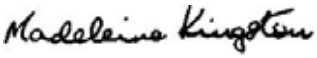
I digress. The point is, to my mind at least, the importance of self-efficacy in the field of evaluation has been overlooked at our expense.

The Companion Wallis Consulting Retailer and Consumer Surveys identified fairly well matched perceptions according to the summary comparative findings. Awareness levels amongst consumers besides knowing of the ability to choose, as clearly extremely low. Energy is a low engagement commodity/service, active marketing is necessary with product differentiation and attractive offers including a range of convenience options or discount packages.

MK Comment:

Evaluation and analysis factors impacting on market failure. Interpretations that switching conduct is predictive of real outcomes in an unstable market are yet to be substantiated. Much discussion on the Productivity Commission site and in responses to AEMC and other consultative processes has focused on behavioural economics and the value of superficial evaluation of switching conduct. I will not repeat those arguments here, save to say that the data relied upon does not appear to robustly embrace these principles.

Prepared and collated by



Madeleine Kingston

SECTION 4

SOME PERTINENT LEADERSHIP THEORY MODELS

On 18 October 2006 on EVALUTALK Michael Patton said:

> *Successful leaders must be able to identify clues in an environment and adapt their leader behavior to meet the needs of their followers and of the particular situation. Even with good diagnostic skills, leaders may not be effective unless they can adapt their leadership style to meet the demands of their environment.*
>
> *Also true for evaluators, where situational recognition and responsiveness are critically needed, and where an appropriate and useful design emerges through an active-reactive-adaptive process. While Bob Williams laments that "this is so much an ignored issue within leadership - which tends to focus on personality traits and organisational features," in evaluation the primary barrier to situtaional adaptation, in my judgment, is methodological narrowness and gold standard nonsense.*
>
> *But staying with leadership, Bob writes:*
>
> *A person who in my opinion was way ahead of the pack on this was the (sadly) late Bob Terry... I don't think he ever got around to publishing this material in any formal way.*
>
> *Happily, he did. The material Bob Williams found so provocative was published in "Seven Zones for Leadership: Acting Authentically in Stability and Chaos" (2001). He examines the major leadership models and shows how each fits a particular situation (zone) and then offers his own model, "authentic leadership," as the integrating approach.*

I start with referring to selected theory models of best practice leadership embraced by *Jamison (2005)*[132] will the politicians and bureaucrats of Australia recognize that the foremost leadership skill recommended is the ability to:

> *"get on the balcony and see what is really going with operations, politicians, consumers and others a meaningful engagement with all stakeholders."*

Jamison (2005) discusses a world trend wherein current strategies in heralding reform measures are thought by many to be lacking in the department of meaningful dialogue. Not that the dialogue is not occurring, but there are queries about how meaningful that dialogue is; how well the consumer voice and other voices are being heard; the extent to which airing and meaningful reciprocal dialogue is occurring with stakeholders in time to make a difference before new regulations are put in place.

In a climate of rushed policy change such as is envisaged, and in the light of the tensions and apprehensions apparent on both sides of the fence, all stakeholders are begging for more certainty and stability that they perceive to be offered, improved meaningful dialogue and longer timelines to give effect to the theory of stakeholder consultation.

In a recent two recent postings on the American Evaluation Association's Discussion Group "Evalutalk) definitions of leadership were discussed as follows:

Evaluator Brad Rose (28 Sept07) commented on the social contexts of leadership:

> *"Leaders are not just born they are situated in systems of authority (legitimate power in which followers believe that leaders have the moral political right to lead others). They hold or occupy social positions inside organizations or in relationship to organizations and typically are embedded in elaborate social networks (i.e. relational positions) that make it possible for personal characteristics and features to make leading others possible."*

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132 Jamison, MA, Holt, L, Ber, SV, (2005) *"Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank."* The Electricity Journal Vol 18(6) July; pp 36-45
Though this thorough and informative literature review by Jamison et al are largely focused on energy regulation and associated risk in the world of best practice, many of the general principles of leadership are applicable in any regulatory and policy context

The same views were embraced by Francis J. Schweigert,[133] However, he qualified this by commenting that a follower-based understanding of leadership is more applicable to communities than to organizational bureaucracies.

> *"where leaders can wield power through fairly well defined structures of rewards and penalties, including membership itself (hiring and firing)*[134]

Schweigert (2007) believes that:

> *If leadership is contextually defined and situationally exercised (Blanchard) (it may be) a distinct category for study? (But)…. Certainly it is a topic and literature but perhaps it can only be studied meaningfully as a feature of social structures or social dynamics."*

On 2 October 2007 Stanley Capella a member of the American Evaluation Association Discussion Group 'EVALUTALK" provided a list useful leadership attributes as listed below[135].

Perhaps it is a reasonable public expectation that some of these attributes become incorporated into desirable attributes in selection criteria for the appointment of government official and others who have the power to impact on the nation's entire economy; to effect irreversible decisions, good or bad; and who may often believe that the principles of public accountability are optional requirements in the performance of public duty.

> ***Visioning**: leaders have the ability to see the long term vision of the organization or their group and get their team to buy into it. They also need to be able to identify the specific goals, objectives and tasks that need to be accomplished to achieve the vision.*
>
> ***Creating culture**: leaders create the culture in their organization or work group by establishing beliefs and behavioral norms.*

---

133 Francis J. Schweigert, PhD. Assistant Professor Public and Non-profit Management Programs, College of Management Metropolitan State University. See his published paper *("Learning to Lead: Strengthening the Practice of Community Leadership"* as refe3rred to in his online dialogue on EVALUTALK (AEA)

134 Schweigert, Francis (Frank), PhD. On EVALUTALK, American Evaluation Association 1 October 2007

135 Reproduced from Stanley Capella's (Heartshare) EVALUTALK dialogue on leadership 2 October 2007 American Evaluation Association Discussion List [EVALTALK.BAMA.UA.EDU]

Performance management: *leaders hold themselves and their people accountable for performance and work hard to make sure people understand what is expected of them, how their performance is measured and rewarded, celebrate successes, and help everyone learn from mistakes.*

Self awareness*: leaders work hard at being aware of both their strengths and weaknesses and continually work on improving themselves.*

Developing others: *leaders must be adept at assessing the development needs of each member of their team, identify ways to help individuals develop required competencies, and recognize leadership ability in others. They help people grow and stretch by challenging them appropriately. Succession planning would also fall under this category.*

Professional distance: *leaders must maintain a professional distance from their staff while balancing that with the need to still be approachable.*

Risk mitigation: *leaders must protect the interests of their organizations by being adept at recognizing and mitigating risks.*

Strategy formulation and implementation: *leaders must understand how to formulate strategy and create pragmatic implementation plans to execute strategy.*

Personal integrity: *leaders only earn the trust of their team members by the consistent demonstration of personal integrity. They need to understand their value system and how it impacts their leadership approach.*

Decision making: *leaders need to develop solid decision making skills that take into consideration the need of the task, the team, and the individual.*

Effective leaders are able to maintain objectiveness under pressure*. They also solicit input and value the viewpoints of others.*

Courage: leaders have the courage to go against the stream when necessary and stand up for what they believe to be important. *They are honest and direct In their communications.*

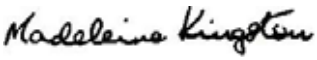
Reproduced from Stanely Capella's EVALUTALK dialogue on leadership 2 October 2007 American Evaluation Association Discussion List [EVALTALK.BAMA.UA.EDU]

The consuming society and the public at large have become more discerning and demanding of better standards of accountability and performance and this may be one area that would benefit from ongoing input from the Productivity Commission or the Office of Best Practice Regulation in the interests of improving the overall effectiveness of public administration service delivery. It has not been my perception that desirable standards are being consistently adopted.

Dr Charles Albano[136] uses a chameleon for his logo to symbolize adaptive leadership. He describes adaptation as "a dynamic process of mutual influence. All creatures act on their environments and their environments, in turn, act on them." He claims that organizations are capable of intelligent, purposeful, collective action, those taken to influence their environments in desired directions. Other examples are poor accessible to deliberative documents and all of the thinking, evidence and material that guides government decisions.

[136] Albano, C (Dr.) *Leadership Skills – What is Adaptive Leadership?* 22 April 2007 found at *http://www.selfgrowth.com/articles/calbano.html*

COMPARING MECHANICAL AND ADAPTIVE VIEWS	
Mechanical	**Adaptive**
Attention is focused on activities.	Attention is focused on value-added outcomes
Job descriptions are long, detailed and constraining	Job descriptions are intentionally broad-based to allow for flexibility
Role expectations are narrow and rigid.	Roles are fluid. Within limits, people are expected to substitute for one another.
Contacts are confined and communication is channeled by higher management.	Contacts are open and networks are encouraged to form.
Policies are mostly oriented toward control, what people can't do.	Policies encourage people to take a *"can do"* mindset to find solutions
The organizational structure is bureaucratic and fragmented into many departments	The structures are more fluid and of shorter duration. Changes in design are aimed at enhancing flexibility and responsiveness
Authority is based on rank, and it is expected that influence will equate with formal authority.	Authority is accorded a place, but reliance on it is played down. Greater influence is accorded people who demonstrate ability to add value.
Efficiency and predictability are sought and reinforced.	Achievement, innovation and change are sought and rewarded.
Cooperation among departments is subject to a lot of formalization and clearances. Turf guarding prevails.	Cooperation is a highly regarded value in the organization and is far more easily gained.



Collated and prepared by Madeleine

SECTION 5

SOME GENERAL CONSULTATIVE PRINCIPLES

1. To achieve national consistency ensure that all agencies, complaints schemes, regulators, and other entities offer web facilities whereby stakeholder registration for email alerts is possible and that each and every change or update or submission is notified to registered interested parties on an automatic email list (such as that used by ACCC, AER, MCE, Productivity Commission)

2. Adopt a corporate cultural attitude of transparency and disclosure

3. Provide timely notice of future consultative processes, proactively seeking the input of all known stakeholders and making sure that consultative processes and public meetings are advertised openly also in a transparent way

Three weeks to a month is far too short. many deadlines fall concurrently and may be of interest to the small number of stakeholder participants involved. If three months is available, give that and subsequent reminders

4. Acknowledge each and every submission automatically and publish promptly

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

6. Publish Working Paper outcomes for further public input

7. Publish online all Issues Papers in a timely manner

8. Publish online all Consultants Reports in a timely manner, at the outset of a consultative period not a few days before responses are due

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

10. Adhere to the principles of consistency with legislation current and proposed[137]

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

11. Adhere to principles of avoidance of regulatory overlap with other schemes and the provisions within the unwritten laws, including the rules of natural and social justice[138]

12. Where possible use a standardized template for tables for recommendation, using similar terminology and layout for both jurisdictional and federal purposes. This may mean that a single form or single set of headings may be used where there is overlap. For example, if the issue is obligation to supply, the matching jurisdictional provisions should use the same terminology. With creative adaption and collaboration, the same Table of Recommendations template form may be useable in both arenas so that burdens on stakeholders is reduced.

13. Collaborate with federal timetabling for stakeholder responses to consultations to minimize burdens on stakeholders so that clashes in deadline burdens are minimized. It is unreasonable to expect stakeholders to read what may be hundreds of pages and commissioned consultant reports for two arenas with similar deadlines aiming.

14. Adopt a proactive referral stance in relation to referrals to the Victorian Government (CAV) or ACCC in relation to breaches of the *FTA* and *TPA*.[139] The VESC needs to recognize his information gathering powers, as contained within the ESC Act and in retail licences and not simply rely on EWOV as the sole body through which complaints investigation may be handled.[140] Weak compliance enforcement commitment does not provide consumer protection or confidence. Compromised consumer confidence means compromised consumer protection.

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

139 See for example the governance model suggested by EWOV in 2003 regarding the role of the Market Code Advisory Committee cited elsewhere with the flow chart. Submission by EWOV to Review of MCAC November 2003

140 It is in fact a breach of human rights to mandate for conciliation. EWOV is a conciliatory co-regulatory complaints scheme run funded and managed by industry participants, but also significantly accountable to the VESC under the terms of their Charter (Jurisdictions) and Constitution, as published on their website. They were set up under enactments administered by the VESC and DPI, and have mandated requirements to abide by the Federal Benchmarks for Industry-Specific Complaints Handling. Such expectations should be incorporated into the new consumer protection laws applicable to whichever body is responsible for complaints handling.

SECTION 6

FEDERALISM AND ANTI-FEDERALISM – SOME REFLECTIONS ON VERTICAL FISCAL IMBALANCES AND IMPLICATIONS

This section briefly discusses the impacts of federalism and anti-federalism with mention of reform initiatives, vertical fiscal imbalances and the impacts of government political structure. The views of David Adams and or Roger Wilkins are put forward for consideration in a climate where nationalization is bound to create tensions between governments and raise issues of accountability also.

Wikipedia discusses the term federalism as one used to:

> *"…Describe a system of the government in which sovereignty is constitutionally divided between a central governing authority and constituent political units (like states or provinces). Federalism is the system in which the power to govern is shared between the national & state governments creating what is often called a federation. Proponents are often called federalists.*
>
> *Advocates of a weaker federal government and stronger state government are those that generally favor confederation often related to "anti-federalists". The state or regional governments strive to cooperate with all the nations. The old statement of this position can be found in The Federalist which argued federalism helps enshrine the principle of due process by limiting arbitrary action from the state.*
>
> *First federalism can limit government power and infringe rights since it allows the possibility that a legislature wishing to restrict liberties will lack the constitutional power. The level of government that possesses the power lacks the desire. Second the legalistic decision making processes of federal systems limit the speed with which governments can act."*

Roger Wilkins[141] discusses a form of federalism that is better described as co-operative federalism in the following words:[142]

> *"Federalism which accommodates 'diversity within unity' is the type of system that can deal with the dual challenges of globalization on the one hand and the demand for greater local autonomy on the other. Accordingly 'co-operative federalism' is a better approach to the division of labour in a modern federal system where both the federal government and state governments will have different responsibilities for the same area of policy say in health education or Aboriginal affairs.*
>
> *There could be a national agreement for example between the states and the commonwealth government on the outcomes or basic standards to be achieved by states in different policy areas.*

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[141] Roger Wilkins is Head of Government and Public Sector Group Australia and New Zealand with Citigroup. Dr. Wilkins was the Director-General of The Cabinet Office in New South Wales from 1992-2006. During his time in the Cabinet Office he played a leading role in areas of reform in administration and law, in corporatisation and micro-economic reform, in Commonwealth-State relations including the negotiation of agreements on Hilmer, international treaties, mutual recognition, electricity, the environment and health reform Mr. Wilkins chaired a number of national taskforces and committees dealing with public sector reform, including the Council of Australian Government Committee on Regulatory Reform, the National Health Taskforce on Mental Health and the National Emissions Trading Taskforce. He was New South Wales' representative on the Senior Officials Committee for the Council of Australian Governments (COAG) which advises and works up proposals for the consideration of Heads of Government. Mr. Wilkins was also the Director-General of the Ministry for the Arts from 2001 to 2006. Mr. Wilkins is an Adjunct Professor in the Graduate School of Government at the University of Sydney
Biography of Roger Wilkins
<*http://www.insurancecouncil.com.au/Roger-Wilkins-Biography/default.aspx* and
http://www.aimnsw.com.au/about-aim/board-of-directors/board-of-directors_home.cfm

[142] Wilkins, Roger, Election 2007 Australian Review of Public Affairs Found at <*http://www.australianreview.net/digest/2007/election/wilkins.html*>

Dr. Wilkins holds that federalism is not an end in itself and cautions against ad hoc federalism. He refers to the real forces at play which are breaking down traditional boundaries between commonwealth and states, including the *"sheer complexity of issues,"* and the way in which international, national and local aspects are now enmeshed. In view of this, he believes that the whole concept of federalism needs to be re-defined.[143][144]

Dr Wilkins emphasizes that

> *"Going back to the division of responsibilities implicit in the Australian Constitution before it was reinterpreted by the High Court is not practical. The thought that the commonwealth government could or would relinquish its emerging interest in education for example is simply unrealistic and may be undesirable. The issue for the future is how state and federal roles are structured so that they are clear and separate and work well underpinned and driven by the right incentives. The Principles set out (in his paper)…will not deliver an answer to that question—nor should they. But they do provide a framework for investigating and deliberating about options."*

Wilkins suggests that the key reform is obtaining clarity about the resolves and responsibilities of states, territories and commonwealth best on

> *"…a rational analysis of what works best rather than in an ad hoc way that is dominated by political considerations.*"

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143 Federalism is defined in Encarta Dictionary as a political system in which several states or regions defer some powers, e.g. in foreign affairs, to a central government while retaining a limited measure of self-government

144 See Federalism and Economic Reform: International Perspectives, edited by Jessica S. Wallack and T. N. Srinivasan. Cambridge and New York: Cambridge University Press, 2006, 526 pp. Refer also to Federalism and the Market: Intergovernmental Conflict and Economic Reform in the Developing World, by Erik Wibbels. Cambridge and New York: Cambridge University Press, 2006, 288 pp.
See also Hamilton's Paradox: The Promise and Peril of Fiscal Federalism, by Jonathan Rodden. Cambridge and New York: Cambridge University Press, 2006

He identifies critical areas of government where the responsibilities are either unclear or inappropriate as follows:

- human services, including health, aged care, child care, disability care, housing and education
- the planning, provision and regulation of infrastructure, including rail, road, ports, water, and energy
- the whole area of Aboriginal policy and programmes.

Extract from Roger Wilkins 2007 Annual Review of Public Affairs[145]

"Clear roles and responsibilities for commonwealth and state levels of government are a pre-condition for democratic accountability, for, to put it bluntly, knowing who to blame.

Clear roles and responsibilities are a pre-condition for good policy—if you are clearly accountable then the onus is on you to sort out the problems.

Clear roles and responsibilities are a pre-condition for efficient government. Perhaps we should add that the assignment of roles and responsibilities also needs to create the right incentives, unlike the situation currently prevailing in the health area.

Clear roles and responsibilities are also a pre-condition for sensibly determining the allocation of revenue. There has been too much futile debate about fiscal federalism.

Although important, it should be obvious that the first thing we need to know is what expenditure responsibilities governments have, before we can figure out how much money they should raise or get."

In his paper Roger Wilkins explains why clarity matters in defining those roles and responsibilities as referred to below with direct quotes.

145 *<http://www.australianreview.net/digest/2007/election/wilkins.html>*

It is a fact that Commonwealth expenditure is far lower than its income whereas the opposite is true of the States and Territories. This is discussed further shortly in referring to Roger Wilkins' views on federalism.

> *The current situation where the commonwealth raises 80 per cent of total revenue in Australia but is only responsible for 60 per cent of expenditure is and for political accountability. There is a massive transfer of money from the commonwealth to the states and territories.*
>
> *This means that the states and territories are not answerable to the electorate for the taxes raised to support their expenditure. And the commonwealth, which raises the taxes, is not accountable for the way the money is spent.*

Author Dollery, Stewart and Worthington published a paper on Australian fiscal federalism[146] highlighting some of the issues of ongoing debate and concern. These authors refer to the current discontent and speculate whether this:

> *"…stems from the inevitable ebb and flow of power between the different tiers of government in a federation and its impact on various interest groups or whether it has exogenous origins"*

Similar concerns are crystalized in the paper published by Roger Wilkins, head of Government and Public Sector Group, ANZ and Citigroup and Adjunct Professor in the Graduate School of Government at the University of Sydney Australian Review of Public Affairs.[147]

To use the eloquent words of David Adams

> *"…..even the deserving poor can be disenfranchised because of the greater good of the economy"*

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[146] Dollery, Brian and Stewart, Mark and Worthington, Andrew (2000) *"Australian fiscal federalism: An empirical note on long-term trends in state and local government finance, 1969/70 to 1994/95."* *Economic Papers* 19(3):pp. 16-27. Manuscript version found at http://eprints.qut.edu.au/archive/00002652/01/2652.pdf

[147] Wilkins, Roger, Election 2007 Australian Review of Public Affairs Found at <*http://www.australianreview.net/digest/2007/election/wilkins.html*>

Dr Christine Parker[148], whose views are discussed in considerable length later has expressed concerns about meta-regulatory style developments in the law because they:

> *"will focus on corporate responsibility processes in a way that allows companies to avoid accountability for substance."*

Dr Parker[149] [63] says that

> *"Meta regulatory law runs the danger of hollowing itself out into a focus merely on corporate governance processes that avoid necessary conflict over the substantive values that should apply to corporations."*

148 Christine Parker is Associate Professor and Reader, University of Melbourne Law School

149 The critique from the other side (those who are less sympathetic to CSR obligations, and also those who are wary of rule of law values being undermined) is that meta-regulation will appear to focus on allowing companies to set processes that meet their own needs, but so much unaccountable power and discretion will be given to regulators and other stakeholders (who might be given the right to participate in or influence corporate decision-making) that inappropriate and illegitimate substantive values will in fact be imposed on corporations in ways that would not be possible under more traditional legal regulation. See, for example, K. Yeung, "*Securing Compliance – A Principled Approach"* (Oxford: Hart Publishing, 2004), pp. 204-14. See Lobel, 'Interlocking regulatory and industrial relations', for an examination of the way in which US meta-regulatory initiatives in OHS have been stymied by administrative laws that impose unsuitable regulatory accountability requirements on them. I have previously addressed Yeung's critique in Parker, 'Restorative justice in business regulation?' (2004). c/f Parker C, Meta-Regulation: Legal Accountability for Corporate Social Responsibility Introduction to chapter, ibid

Finally in this preamble section I proffer further provocative comment in the words of David Adams[150]/[151]

> *"The mixed economy of the welfare state armed with the new science of public administration was going to eradicate poverty. But it hasn't and the policy influence of the idea of poverty has fallen away. I explain this by looking at the conditions under which good ideas are likely to make it to policy status.*
>
> *Good ideas tend to be simple to understand; resonate with people's experiences of life; 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. Out of the muddle I suggest a way forward to make the idea influential again. For example, having some national goals and agreeing some basic language and targets would be a good start." (abstract)*

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150 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*

151 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

> *"…..even the deserving poor can be disenfranchised because of the greater good of the economy" (p92)*

As asked by David Adam in his award-winning essay cited above

> *"has poverty disappeared from the agendas of ministerial councils?"*

Adams has referred to the new buzz words of the nineties

> *"competition" "productivity" "new public management"* and *"mutual obligation."*

Adams believes that federalism is a barrier to *"joined-up"* ways of working and that Painter's collaborative federalism (1999) is still a way off.

Finally I quote from the address given by the Prime Minister Wayne Swann on 27 March on federalism and the Future[152]. Let us hope that with modernism of the federal principles the new architecture for "modern federalism will deliver what the community expects and has been long-overdue in coming – better cooperation between States and Territories and the Commonwealth, improved accountability and enhancement of consumer protections and prosperity.

> ***Federalism and the Future***
>
> *In finally getting federation right, after more than a hundred years of trying, we are giving this nation every chance of creating a new generation of prosperity for the future.*
>
> *All of us here today know the economic challenges that we face are difficult, and that it will take years of foresight, and dedication to the modernization task, for us to prevail. But we also know this: individual governments, whether Commonwealth or State, cannot tackle all of these issues acting alone.*
>
> *I am confident that, through a reinvigorated COAG process, we can unlock the benefits of Modern Federalism, and as partners overcome these challenges. There are significant gains to be won.*

[152] Swann, Wayne, (2008) *"Modern Federalism and Our National Future."* Address to the 2008 Economic and Social Outlook Conference 27 March

> *The new financial architecture announced yesterday provides the States with the flexibility and the incentives they need to deliver the quality of services that Australians deserve. And I expect significant economic benefits to flow from the increased inter-jurisdictional competition and innovation that the financial reforms will encourage. The new architecture also provides the platform from which to launch a new wave of economic and social reform, to enhance our human capital and build a stronger nation.*

Perhaps we can all be encouraged by these assurances that the States and Territories will find a way to work more cooperatively with the Commonwealth and vice versa in order to achieve a truly join-up Government in the public interest.

SECTION 7

DISCUSSION OF MPACTS SELECTED 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 Report.[153]

The issues raised here cut across several the Productivity Commission's Consumer Policy Framework Recommendations including [Refer to 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.[154]

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.

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153 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

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

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.

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.[155] Speaking of the new agenda of micro-economic reform for Australia, Mr. Rudd has made the following observations:

> ***Extract from Speech Prime Minister Kevin Rudd Australian Melbourne Institute Conference March 2008***
>
> *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:*

[155] 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 Cabinet[156] 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.*

[156] 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.[157] 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.*

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[157] 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).*[158]

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.*

[158] 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 speech[159], during which he analyzed 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.

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[159] 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)*.[160] Adams talks of *"deliberative democracy"* techniques for engaging these issues, referring to the Canadian Policy Research Networks 2001 *(Adams (2002), p97).*

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[160] 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 of[161]

> ***Extract from David Adams' George Murray Essay (2002)***
>
> *"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.*

[161] 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 Adams[162] 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*

[162] 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 particularly on those most affected by the power imbalances that exist – the *"inarticulate, vulnerable and disadvantaged."*

I repeat the findings of the Senate Select Committee's 2000[163] 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"*

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: [164]

> *"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 Costelo 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)"*

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163 Ibid SCC (2000) *"Riding the Waves of Change"*

164 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*

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"*

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 wards 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:[165] 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*

[165] 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
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http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%2854+KB%29&doi=10.1111%2F1467-8500.00305

> *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 t 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*

Adams 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).[166]

> *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.*

[166] Department of Consumer and Employment Protection WA (2008) Submission to Productivity Commission's Draft Report Sub 248 4 April 2008

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.

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 Kell)*[167]

Peter Kell has questioned 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 regulation[168]. 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 speech[169]:

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167 Ibid Kell, Peter (2005) NCC 2005

168 Kell, Peter (2006) *"Consumers, Risk and Regulation."* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006
Found at http://www.choice.com.au/files/f124236.pdf

169 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.

"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.

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.

SECTION 8

OVERVIEW OF REGULATORY REFORM PHILOSOPHIES

I start with referring to how Allens Consulting Group and its affiliated Centre for Corporate Public Affairs describes public affairs management and stakeholder engagement[170]

> *The Allen Consulting Group and its affiliated Centre for Corporate Public Affairs have led the modern conception of public affairs management and stakeholder engagement in Australia and are at the frontier of international public affairs research and practice.*
>
> *Public affairs involves designing and implementing management strategies that align the goals of organisation with the needs and expectations of multiple stakeholders. Strategies employed to achieve these goals may include political and regulatory risk mitigation, issues management and public policy advocacy, stakeholder research and engagement, internal and external communication and corporate social responsibility and sustainability.*
>
> *Understanding the key drivers of the market and non-market environment has become a core competency of contemporary management in light of changing community and stakeholder expectations, globalisation and the information and technology revolution. The consequent focus on accountability, transparency and sustainability has increased the value of intangibles such as reputation and culture in achieving organisational objectives. This has increased the strategic input of public affairs professionals to the planning and strategy process and has expanded the role of senior and line management in issues management and stakeholder engagement.*

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[170] Allens Consulting Group Public Affairs. Industries
http://www.allenconsult.com.au/experience/industries.php?id=19

I refer to the topical published speech by Peter Kell[171] at the National Consumer Congress in March 2006[172],, referring to a number of important publications concerning regulation, including 2005 published public lecture presented Gary Banks at the ANU on the topic of regulation-making in Australia.[173]

Peter Kell's talk at that NCC (2006) presents some provocative concerns about the philosophy of consumer protection and the extent to which it may be inappropriate for such philosophies to shift regulatory risk from government and/or corporations to individuals. He refers to PC's Regulation and Review 2004-05 as part of its Annual Report series.[174]

Kell cites two examples where such risk is explicitly shifted in such a way – compulsory superannuation and high education costs, now borne through loan schemes provided to tertiary students in the higher education sector.

We are now seeing such shift of risk within the energy sector, an essential services without which daily living requirements cannot be met in a modern society. A study of the energy retail market in isolation without realizing the impacts that wholesale and distribution prices have on the market is to fail to undertake a robust study is a flawed analysis by any standards. This is discussed in detail elsewhere and in a separate submission.

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171 Peter Kell was until July 2008 the Chief Executive Officer of Choice (Australian Consumers' Association), having joined on 11 March 2004. ACA is Australia's leading consumer organization, and the publisher of CHOICE magazine. Prior to joining ACA, 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 programs, and developed policy and approval standards for consumer dispute resolution schemes. Peter was also responsible for establishing ASIC's Consumer Advisory Panel.
Since July 2008 Peter Kell has held the position of Deputy Chair at the ACCC, taking over from Louise Sylvan, who joined the Productivity Commission as a full-time Commissioner.

172 Kell, Peter, (206) Australian Consumers Association. *"Consumers, Risk and Regulation."* Speech delivered at National Consumer Congress 17 March 2006

173 Banks, Gary, (2005) *Regulation-making in Australia: Is it broke? How do we fix it?* Presented by Chairman of Productivity Commission at a public lecture. This lecture was given as part of a Public lecture Series of the Australian Centre of Regulatory Economics (ACORE) at the Faculty of Economics and Commerce, ANU, Canberra, 7 July 2005
Found at *http://www.pc.gov.au/__data/assets/pdf_file/0020/7661/cs20050707.pdf*

174 Productivity Commission (2005) Regulation and its Review 2004-05 Annual Report Series. Online *http://www.pc.goiv.au/research/annrpt/reglnrev0405/reglnrev0405.pdf* c/f Published speech delivered by Peter Kell at the National Consumer Congress 2006, p 12 References.

In Section 5 of his provocative paper about regulatory policy and reform, Peter Kell discusses the importance of effective regulators in a regulatory structure offering

> *"Properly resourced and independent regulators with a clear brief to address the most significant risks in the sectors they regulate, will ensure that the burden of regulation falls more heavily on non- compliant firms. Poorly resourced regulators, agencies that face constant political pressure, and those that do not have adequate powers will only frustrate businesses and make markets less efficient."*

Mr. Kell had stressed that the successes of aspects of current consumer protection need to be acknowledged. For example Peter Kell, formerly CEO CHOICE (ACA), now Deputy Director ACCC, has referred to less sensible arguments used to justify less regulation. He discussed in his published speech to the 2006 National Consumer Congress the key arguments underpinning the 'red tape' debates are misconceived.

Peter Kell, since July 2008 Deputy Chairperson ACCC, believes that there is a

> *"…. A need to address some of these misdirected arguments before we can start the important positive task of looking towards the consumer protection framework that we need for the future."*

Kell argues eloquently against the tendency to shift risk away from consumers or households onto business or governments. His published speeches from both the 2005 and 2006 National Consumer Congresses provided a provocative starting point from which to examine the current Review of Australia's Consumer Policy Framework.

Peter Kell's findings and conclusions are further discussed in the body of the submission.

Another extremely valuable contribution made in the Queensland government's submission to the current Inquiry is the endorsement of the principle that governments have a responsibility to ensure that ultimately the option adopted must generate the greatest net benefit for the community. Having said that the submission points out that:

> *Present COAG guidelines do not ensure that the allocative and distributive effects are articulated sufficiently to enable informed decision making about shifting the cost of risk"*

What is certain is that existing confusion about roles and responsibilities has allowed significant gaps in consumer protections to develop and it is more than time for these gaps to be addressed, responsibilities unambiguously clarified, even if existing state responsibilities remain in place for the foreseeable future.

There is also room for federal responsibilities and accountabilities within generic provisions so heavily relied upon in the context of the Productivity Commission's recommendations, whilst significantly demolishing *"unnecessary regulatory burden."*

The public remains very concerned about the unburdening part. There are certain industries that will receive particular attention, and it is of great comfort to know that these will include the energy, financial and telecommunications industries.

However, merely putting alternative community service obligation provisions in place by shifting shared responsibility between private enterprise, state and federal governments, other stakeholders and the community at large, to government agencies either assuming direct responsibility or contracting such responsibility out may not address all needs and concerns.

A similar viewpoint is expressed by Gavin Dufty, currently Manager Social Policy and research at St Vincent de Paul Society. Mr. Dufty is also given to sharp and eloquent critical analysis also of the regulatory landscape.

With his permission, I reproduce shortly excerpts from Gavin Dufty's VCOSS Congress Paper presented in 2004 as a critical examination of the paper presented the previous year by John Tamblyn, currently Chairperson of the Australian Energy Market Commission, but at the time Chairperson of the Essential Services Commission. Mr. Dufty analyses the philosophies of the ESC apparently startlingly similar to those of the AEMC) in relation to Universal Service Obligations (USOs)[175] Dufty also deals with the hairy issue of shifting responsibility from corporations and government to consumers; or from corporations to government, a process that he refers to as "gaming" though that term is also used the context of this submission in referring to misuse of market power.[176]

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[175] Dufty, Gavin *"Who Makes Social Policy – The rising influence of economic regulators and the decline of elected Governments."* VCOSS Congress Paper 2004 Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn's PowerPoint presentation at the World Forum on Energy Regulation, Rome Sept 2003. Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004 in a presentation entitled "The Right to Service in an Evolving Utility Market. (Are Universal Obligations compatible with

[176] 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?"*

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Rather than explain this here, I urge interested readers to read the whole paper presented by Gavin Dufty to gain an understanding of philosophical dichotomies that may have given risen to much debate within the context of this Consumer Policy Review.

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177 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?"*

178 Dufty, Gavin *"Who Makes Social Policy – The rising influence of economic regulators and the decline of elected Governments."* VCOSS Congress Paper 2004 Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn's PowerPoint presentation at the World Forum on Energy Regulation, Rome Sept 2003. Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004 in a presentation entitled *"The Right to Service in an Evolving Utility Market.* (seemingly a revamp of "Are Universal Obligations compatible with effective energy retail market competition? Tamblyn World Form of Economic Regulators Rome 2003)

179 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?"*

In his 2004 analysis of the Essential Services Commission's philosophies and approaches, Gavin Dufty, now Manager Social Policy and Research St Vincent de Paul Society said.[180]

> *In all of these models the ESC[181] 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[182]".*
>
> *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.*

As observed by Mr. Dufty, The model proposed

> *".....creates the opportunity for private companies to 'game'[183] 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.*

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

180 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.

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

182 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.

183 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.

Gavin Dufty highlights inequality issues, questions how the needs of the vulnerable and disadvantaged can be addressed within energy policy and suggests that there may be a role of universal service obligations for essential services.

Those issues have become topical once again in the light of proposals by the Government to allow price deregulation in the entire Australian energy market, barring Western Australia, as part of the current Review of the Impact of Competition in the Gas and Electricity Retail Markets.

In raising significant social policy issues that have arisen during the review of effectiveness of retail competition in the Victorian energy market and review of the Victorian gas and electricity code, that paper explores:

> *"The potential and real impact economic regulators have on shaping and redirecting elected governments' social policy objectives."*

Mr. Dufty notes that:

> *"There is lack of awareness of and respect for the role and mandate of the State Government in setting and delivering social and other objectives within the democratic process."*

His VCOSS paper analyses the hidden agenda in policies adopted by the Essential Services Commission, resulting in withdrawal from the traditional basic protections delivered via universal service obligations.

The scheme adopted was to fall back on *"residual markets"* through retailer of last resort arrangements {RoLR} whereby a retailer opts to inherit vulnerable consumers where no one else would, or in the event of market failure. The RoLR would be financially compensated in such circumstances but the universal safety net protections would become obsolete and inaccessible.

Mr. Dufty eloquently attacks a conceptualized approach by the Essential Services Commission that is used merely to address market failure instead of maintaining overall consumer protections for Victorian consumers. The risks to consumers of such a strategy are enormous and encourage retailers to abandon all but the *"most profitable customers."*

Explains Mr. Dufty:

> *"In effect the ESC is proposing to increase costs for many who are already disadvantaged purely to stimulate competition with little to no regard for the social impacts."*

The idea was for the regulator to increase default prices (the safety net) to stimulate competition and address the needs of the vulnerable and disadvantaged especially those with financial hardship by shifting responsibility to charity organizations or government agencies, leaving the retailers to make high profit margins in the interests of competition.

Such an imbalance cannot be in the interests of achieving equity or to meet minimal social justice goals.

This approach was supported by John Tamblyn, then Chairperson of the ESC, and now chairing the Australian Energy Market Commission's Review of the Impact of Competition on Retail Gas and Electricity Markets.

Gavin Dufty's VCOSS Paper in 2004, exposes the rationale behind Mr. Tambyln's PowerPoint presentation at the World Forum on Energy Regulation in Rome in 2003 as referenced above.

I quote more fully from that paper with the author's consent – as an important public document that deserves to be read – and re-read in the public interest, more especially at a time of major energy regulatory reform and other major consumer protection reforms in the context of the Productivity Commission's current enquiry.

In Gavin Dufty's 2004 VCOSS Congress Paper, through case study of the Victorian energy market he powerfully illustrates significant social policy issues that have arisen during the review of the effectiveness of retail competition in the Victorian energy market and the review of the Victorian gas and electricity retail code.

Since the issues impact on the role of safety net arrangements; eligibility for government assistance and the potential for universal service obligations for essential services, these issues are as pertinent today in the light of imminent price deregulation in the energy industry, substantial lightening of the regulatory burden to the extent that may occasion detriment to the low-income groups and others with a range of vulnerable and disadvantaged conditions.

Though I cite elsewhere in a separate submission, Gavin Dufty's findings in relation to Universal Service Obligations and examples from government attitude, notably within the energy area, I isolate here what is relevant to regulatory shift of responsibility.

The views of Gavin Dufty, Social Scientist and Manager Social Policy and Research at the St Vincent de Paul Society raise concerns about:[184]

> *".....significant issues for elected governments the community and other individuals and organizations involved in the development and delivery of social policy and associated programs. This paper will conclude that governments must legislate to ensure that regulators and other instruments act within the social and environmental framework mandated through the democratic process."*

As noted by Mr. Dufty, it is of substantial community concern that regulators can

> *"propose and implement programs that are contrary to elected governments' policy statements and the ability of regulators to involve third parties such as the not for profit sector in being responsible for assessing utility customers' entitlements for waivers of penalties or eligibility for assistance.*

As far back as 2004 Mr. Dufty summed up the beliefs of the ESC as follows:

> *"Competition will not only deliver the best outcomes for domestic energy consumer but it will also serve to protect them from abuse by companies operating within this market*
>
> *There is a need to strip away Universal Service Obligations (the safety net) as they undermine the benefits of competition."*

[184] Dufty, Gavin *"Who Makes Social Policy – The rising influence of economic regulators and the decline of elected Governments."* VCOSS Congress Paper 2004 Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn's PowerPoint presentation at the World Forum on Energy Regulation, Rome Sept 2003. Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004 in a presentation entitled *"The Right to Service in an Evolving Utility Market.* (Are Universal Obligations compatible with effective energy retail market competition Rome 2003 – a similar talk with a changed title

That is now exactly what is about to happen. Quoting directly from segments Mr. Dufty's 2004 VCOSS Congress Paper which dissects the paper delivered by John Tamblyn, (then Chairperson of the Essential Services Commission Victoria) now Chairperson Australian Energy Market Commission (AEMC):

The Commission's objectives also include a requirement to

Promote a more certain and stable regulatory framework that is conducive to longer-term infrastructure investment and to maintain the financial viability of regulated utility industries.

In seeking to achieve its primary objective, the Commission must have regard to the following:

(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 nontransitory 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

In this paper Dr. Tamblyn proposed three options for reconciling the perceived dichotomy of universal service obligations and competition.

Firstly, "raise default price level/restrict price rebalancing/target CSOs to vulnerable users. Increase default margins above supply costs

In this option the Regulator proposes to increase default prices (the safety net) to stimulate competition, give people more information about the market and target government funded CSO, (concessions) to unprofitable customers to compensate for market failure.

Secondly "Market prices for majority of users/target default prices/CSOs to vulnerable users.

In this option the Regulator proposes that customers, who accept a market offer, should not be eligible for the full safety net protections. Market offers will have basic protections (e.g. under existing contract protections such as those offered by the Trade Practices Act), more information provision would be provided and retargeted CSO's (concessions) to act as a subsidy provided to those that the market is failing (in lieu of market contracts.)

Thirdly:"Improve Retailer of Last Resort (RoLR) arrangements.

Concerns about credit risk/retailer failure can undermine retail competition & consumer benefits

In this option the ESC is proposing the establishments of clear guidelines for a retailer of last resort (i.e. a retailer that will provide energy retail functions where no other will). This retailer would then be responsible for unprofitable customers. They would be financially compensated for the cost of these customers.

The ESC goes as far as suggesting that

"In considering the causes of vulnerability that contribute to the difficulty that some customers have in participating in the competitive retail market, consideration will also have to be given to whether the most appropriate way for addressing them will involve changes to the energy policy and regulation framework and/or the broader welfare, health and regional policy frameworks."[185]

In all of these models the ESC 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.[186]*"*

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

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185 ESC, (2003) *Review of the effectiveness of retail competition and the consumer safety net for electricity and gas,* Issues Paper, December 2003, p18

186 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.

2.0 Regulation and social policy

During the past twelve months the ESC has undertaken two reviews that have resulted in their entry into the arena of social policy making; in both cases the proposals by the ESC have the potential to detrimentally impact upon low income and disadvantaged Victorians and directly contradict the policy direction and programs of the elected State Government.

2.1 Review of the effectiveness of retail competition and the consumer safety net for electricity and gas.

The ESC from time to time undertakes reviews into various matters. In late 2003 it undertook a review into the effectiveness of retail competition. In this review the commission identified that there were some areas where competition was not effective and was failing particular households.

In particular the ESC concluded that low volume energy consumption households (with bills of under approximately $980 per annum) and households that take electricity on an off peak tariff were effectively being excluded from market offers by energy retailers[187]*.*

In response to this, the ESC proposed that the state concession framework be reconceptulised to address these issues of market failure[188]*. John Tamblyn, Chairperson of the Essential Services Commission, proposed the question in a world energy forum on regulation: Are universal service obligations compatible with effective energy retail market competition?*

In this paper Dr. Tamblyn proposed three options for reconciling the perceived dichotomy of universal service obligations and competition.

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187 Energy retailers are private companies that sell energy to households.

188 Ibid Tamblyn J, (2003).
See also Tamblyn J (2004) *"The Right to Service in an Evolving Utility Market.* (Are Universal Obligations compatible with effective energy retail market competition Rome 2003 –Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004

The Commission also has objectives under the Electricity Industry Act 2000, which are:

- *to the extent that it is efficient and practicable to do so, to promote a consistent regulatory approach between the electricity industry and the gas industry; and*

- *to promote the development of full retail competition.* [189] *There are also numerous regulatory instruments that the ESC has at its disposal; these include licenses, codes, guidelines and determinations. It is via these regulatory instruments that the ESC can determine how the providers of these essential energy services operate within Victoria. This includes not only pricing and service quality but also practices and procedures that are to be adopted by the companies when dealing with customers.*

It is important to note when reading through the objectives of the ESC that the major focus is the promotion of a competitive energy market. The ESC position on such matters can be summed up as follows "as in any industry competition is designed to bring consumers long-term benefits as a result of retailers competing to provide the best combination of products, service and price."[190] *The ESC also believes that competition will serve to protect small energy users from detrimental activities undertaken by companies: "Effective energy retail competition can protect the interests of most consumers."*[191]

The ESC even goes as far as believing that "Market-wide USOs (Universal Service Obligations[192]*) can inhibit development of competition & limit public & consumer benefits.*[193]*"*

The implications of the AEMC's decision to recommend price deregulation to follow on from the introduction of full retail competition FRC are far-reaching.

The AEMC's appears to have and entrenched philosophical belief about the dichotomy between perceived "competition" and "non-competition" instead of seeing these issues as two sides of the same coin.

/[189] ESC, regulatory framework, www.reggen.vic.gov.au/electricity136.html

[190] ESC, (2001) *Power of choice, All about your new power a step-by-step guide,* Leaflet page 4

[191] Tamblyn J (2003) *"Are Universal service obligation compatible with Effective energy retail market competition? Victorian experience to date"* PowerPoint presentation World Forum on Energy Regulation, Rome Italy October 5-9 2003 (John Tamblyn is now Chairperson AEMC, previously Chairperson ESC) See also his published presentation to the 2004 National Consumer Congress along similar lines

[192] Universal service obligations are defined minimum service standards (including price) that are available to all customers, regardless of whether or not they are on a contract

[193] Ibid Tamblyn J, (2003) and Tamblyn J (2006)

Notwithstanding that the Australian Energy Market Commission (AEMC) does not appear to uphold the concerns expressed in submissions to and findings of the Senate Select Committee's Report (2000) on the socio-economic impacts of competition discussed elsewhere, there are long-standing concerns that:

> *"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."*

I refer to and endorse wholeheartedly the arguments presented to the *Review of the ESC Actw2001* by the VCOSS as shown below:

> ***"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. [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," [2] has a number of key shortcomings: it confuses the means with the end; it emphasizes 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.*

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."

On Page 8 of its Second Draft Report, the AEMC states that:

"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 the direct marketing techniques favoured by energy retailers."

The current consumer protection framework is not believed to be sound by many, including silent stakeholders either not aware of, or for whatever reason unable to participate in consultative processes such as the Productivity Commission's (PC) Review of Australia's Consumer Policy Framework or any other arena in which to make their concerns known.

There is significant dissatisfaction with current protections, and in particular compliance enforcement. The mere existence of regulatory protections is insufficient. Market failure through inappropriate conduct is unquestionable, to the detriment of the entire community and those who are inarticulate and disadvantaged in particular.

The PC has found that in two areas of current State and Territory responsibility including aspects of energy services – the case for a national approach is well established, hence the transfer of responsibility to the national level should occur without further review.

If the effect of that transfer mere introduces new tools within generic laws without proper compliance enforcement, consumer protection will be diluted not enhanced.

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.

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

> *"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."*

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 deal first with enforcement issues, and quote below directly from the Gavin Dufty's VCOSS submission

> *"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

Consumer protection has never been as compromised as at this crucial time of policy and regulatory change within the energy industry. It may be timely for these considerations to be aggressively addressed before another decade of poor protection is heralded. Compromised consumer confidence of compromised consumer protection.

Fundamental to any critique of consumer policy is the philosophical dichotomy between regulators, policy-makers and advisory bodies (such as the Productivity Commission) and those who are associated with the consumer movement.

Edmund Chattoe[194] has asked whether sociologists and economics can in fact communicate at all, not only because of language differences and interpretations, but on the basis of fundamental and perhaps irreconcilable philosophical differences.

At the Consumer International (CI) World Congress in October 2007[195], Peter Kell referred to the need to ensure that markets are fair, efficient sustainable and equitable. These central requirements to an effective consumer policy framework are echoed by David Tennant as Director of Care Financial and Chair of the Consumers' Federation of Australia.

Peter Kell has referred to the need to put pressure on industry sectors to clean up their act, treat consumers fairly across borders, and raise minimum standards. And we will work with governments, putting strong pressure on when necessary, if markets do not deliver fair results. At times regulation will be needed to protect consumers or to ensure competition works for consumers.

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

195 Consumers International Conference (2007) *Holding Corporations to Account* Luna Park, Sydney Australia 29-31 October

That is not all that is required. Nigel Waters, Privacy International and Peter Kell, CEO Australian Consumers Association (CHOICE), of Consumers International have referred to the need to ensure that government agencies are also held more directly accountable through measures that will ensure compliance monitoring. There is little point in having legislation and regulation and advocacy in place unless provisions are upheld.

In Victoria and perhaps in other states also it has been demonstrated very clearly that upholding of existing provisions by agencies responsible is less than optimal. Accountability by government agencies and their affiliated bodies such as industry-specific complaints schemes, notwithstanding there *"separate legal identity"* as companies with limited guarantee without share portfolio) is a huge gap in current consumer protection and is not adequately covered in the PC's Draft recommendations.

The Productivity Commission has identified and discussed some examples of the shortcomings in the current arrangements (Box 2, Summary, p 9) further discussion in the main body of the Draft Report (Volume 2)

1. *Regulatory complexity*
2. *Costly variation in regulation with few or no offsetting consumer benefits*
3. *Perverse outcomes for consumers*
4. *Lack of policy responsiveness to emerging needs*
5. *Problems relating to contract terms and information disclosure*
6. *Complex redress arrangements for consumers wishing to pursue complaints*

The Commission has recognized that there is scope to do much better and has predicted that addressing the identified impediments

> *"could deliver sizeable benefits for consumers and the community."*

and also that

> *"…the changing nature of consumer markets and the growing expectations of consumers themselves mean that in the absence of remedial action the costs of the deficiencies in the current policy framework will almost certainly grow.*

On that basis the Commission has concluded that aspects of the framework are in need of an overhaul. The PC has also recognized that:

> *"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 Productivity Commission has made a number of worthy recommendations for which full credit is deserved. These are discussed under Strengths of the Draft Report recommendations in its Consumer Policy Review (2008). In particular the Commission has made a strong case for standardization, removal of duplication and inconsistency and updating of regulation more responsive to emerging needs and expectations. Recognition that deficiencies in the current policy framework will grow unless addressed is a great starting point.

Presumably because of lack of appropriate funding, unfortunately the Commission's work has been restricted to quantitative work in seeking to assess current impediments and made recommendations

Turning to a single technical example within the energy industry of the consequences of light-handed regulation I quote directly from an EAG PowerPoint Presentation at the International Metering Conference in October 2007[196]

> ***One important side effect of "light handed regulation" is poor information***
>
> *How can you model AIMRO without the appropriate data, analysis and information! There are a number of important deficiencies in the current MCE papers out for consultation as a result.*
>
> - *What reliable data is available on heating and cooling one of the largest component of small business and residential consumption patterns!*
> - *How many a/c's and what size and star rating?*
>
> *EAG aware of a/c units of sizes up to 50 KW are being installed in Qld., while 30 KW units are becoming common in NSW.*

[196] Energy Action Group (John Dick President) *Allocating Risks in a Gross Pool Market* Presentation at Metering International Conference 24 October 2007

Some further Regulatory Design Principles

ACCESSIBILITY ISSUES

Wikipedia discusses public service as follows:[197]

> ***Excerpts from Public Services - Wikipedia***
>
> *Public service tend to be those considered so essential to modern life that for moral reasons their universal provision should be guaranteed and they may be associated with fundamental human rights (such as the right to water).*

> ***Public services** is a term usually used to mean services provided by government to its citizens either directly (through the public sector) or by financing private provision of services. The term is associated with a social consensus (usually expressed through democratic elections) that certain services should be available to all regardless of income. Even where public services are neither publicly provided nor publicly financed for social and political reasons they are usually subject to regulation going beyond that applying to most economic sectors*

I support the position of Consumer Law Centre Melbourne (now CALV) in 2006 as follows:

> ***CLCV submission to ESV Small Scale Licencing Framework Issues Paper 2006***
>
> ***Overview of CLCV's position***
>
> *The CLCV believes that all Victorian residential consumers, whether they are customers of licensed energy businesses or customers of embedded networks, should have access to the full suite of consumer protections that apply to the energy market. These include the Energy Retail Code, the regulated safety-net tariff, the wrongful disconnection payment, the ban on late payment fees and the proposed requirement to have the protection of hardship policies. We are particularly concerned that these protections be afforded to residents of caravan parks and retirement villages who may be customers of embedded networks.*

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197 *http://en.wikipedia.org/wiki/Public_services*

From cursory glance at the status of consultation papers being reviewed by the MCE Retail Policy Working Group it would seem that a model that includes proposed approaches in relation to specific legislation rather than under the umbrella of an overall national consumer policy independently administered, the latter being recommended by CHOICE (ACA) and other community agencies as the preferred model for consumer protection.

In my opinion, these principles should be embraced in overall regulatory design across the board. No attempt should be made to bargain away the right of any aggrieved individual or other stakeholder to be stripped of the right of appeal at the highest level. However, in the case of private individuals their access to resources is extremely limited.

The current generic process are deficient for a host of reasons discussed elsewhere specifically under Consumer Protection deficiencies.

The public at large is also looking for improved transparency, such as publishing of all external reports relied upon, whether or not specifically commission for this current Retail Review, but as long as they give a more complete picture of the market and its performance. Other examples are poor accessible to deliberative documents and all of the thinking, evidence and material that guides government decisions.

This would indicate that if benchmarking principles are not included transparently and robustly in the design stage market failure may result with band aid solutions developing in much the same haphazard manner in which regulation has developed to date.

As noted in the theory model section above, *Burns and Riechman's (2004)* conceptual study examines key drivers of investment behavior of regulated infrastructure companies under performance-based regulation. It uses a case study of Railtrack in the U.K. to illustrate a situation where in the early stages of privatization, the incentives to improve quality were extremely weak and the incentives to cut costs and distribute profits to shareholders were stronger.

Getting the conceptual framework right takes time and effort. It cannot be rushed if best outcomes are to be achieved. The Australian public at large believes that decisions and processes have been consistently too rushed for these outcomes to be optimal. Scanty data has been relied upon. Decisions need to be balanced and take into account all stakeholder input, with appropriate time-lines allowed, and opportunities for regular review and rule change that fair, equitable, transparent and accessible.

Burns and Riechman's (2004) as analyzed by *Jamison et al (2005)* acknowledge that the cost:benefit ratio for establishing quality indicators can be difficult to determine for both current and expected future output performance. Negotiations should not be left to the end of a price review period.

Jamison et al (2005) recommend this paper as one that offers a number of practical suggestions regarding benchmarking under performance-based regulatory principles. These are discussed in detail in the theory model section.

Regulatory System

In discussing regulatory systems *Jamison et al (2005)* direct attention to *Baldwin and Cave's (1999)*[198] overview of legislative bodies, courts, central government departments and local authorities.

Another pertinent choice by Jamison is *Heniszm Witold and Zelner's (2004)* paper[199] of political economy of private electricity proviso in Southeast area.

Comment

Though focused on ASEAN countries, the value of this paper in the current regulatory review may be examination on how difference in policy credibility affected government opportunism and investor's choices of strategic safeguards.

Of equal importance may be the examination of how strong political ties between government agencies weaken formal checks and balances. Another *Jamison* choice is that of the same authors[200] in 2005 regarding political risk in infrastructure investment.

Corruption (broadly defined)

Comment:

Jamision et al (2005) discuss corruption in their literature review as broadly defined. Whilst this can seem a loaded term, it is used in this discussion more broadly to include misleading conduct or unethical, policy or terminology, intentional or otherwise that can lead to consumer detriment, and not intended to offend any individual or agency.

Corruption is a matter of degree and whilst in the context of developing countries may imply a certain meaning in terms of illegal corruption (bribery), it is used here in a broader sense where

> *"legal corruption as a result of legal political financing or undue influence of political firms on policymakers."*

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198 Baldwin, R., and M. Cave. 1999. "*Understanding Regulation: Theory, Strategy, and Practice,*" Oxford: Oxford University Press, Chapter 5 c/f Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.* The Electricity Journal Vol 18(6) July 2005 pp 36-45

199 Henisz, Witold, and Bennet Zelner. 2004. *"The Political Economy of Private Electricity: Provision in Southeast Asia,"* Reginald H. Jones Center for Management Policy, Strategy and Organization, University of Pennsylvania.

200 Henisz, Witold, and Bennet, Zelner. 2005. *"Managing Political Risk in Infrastructure Investment,"* Reginald H. Jones Center for Management Policy, Strategy and Organization, University of Pennsylvania. c/f Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.* The Electricity Journal Vol 18(6) July 2005 pp 355-356

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 Inquiry would be redundant. 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.

Refer, for example, the Victorian Essential Services Commission (ESC)[201] *Bulk Hot Water Guideline 20(1) 2005*[202] that allows for magical algorithm formulae through which water meters posing as either gas or electricity meters are used to calculate water volume and then by conversion factor converted into deemed gas or electricity usage, and charges expressed in cents per litre.

This is despite the fact that energy suppliers are licenced to sell gas or energy not value-added commodities such as *"hot water products"* and that gas is measured in either cubic meters or megajoules, and electricity measured in KW/h. these arrangements are discussed in considerably further detail elsewhere in a dedicated submission but is cursorily mentioned here in the context of reduction of regulatory burden or inappropriate regulation.

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201 Victorian Essential Services Commission, the current regulator

202 ESC Guideline 20(1) (2005) Bulk Hot Water Charging Guideline and Bills Based on Interval Meters. Found at
http://www.esc.vic.gov.au/NR/rdonlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf
See also all associated deliberative documents on ESC Website consultations/submissions, the apparently collusive efforts of policy-makers, regulators, energy-providers and owners Corporations as well as complaints schemes to support the unsupportable with policy provisions that strip end-consumers of their enshrined contractual rights; rights to information that is clear and devoid of misleading terminology and implications; and consistent with their rights under multiple arenas of the written and unwritten law
Final decision (2005) FDD-Energy retail Code – technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August) found at
Found at
http://www.esc.vic.gov.au/NR/rdonlyres/37078658-5212-4FA7-8A8E-AC42AB12BDDC/0/DDP_EnergyRetailCodeTechAmend20050810_CommissionPap_C_05_8007.pdf
Draft Report Review of Bulk Hot Water Billing Arrangements (2004) found at
http://www.esc.vic.gov.au/NR/rdonlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf
Response from TXU (now TRUenergy)
http://www.esc.vic.gov.au/NR/rdonlyres/CD7E8430-868E-4C42-A937-08E7082F57CA/0/Sub_TXU_BulkHotWaterJuly04.pdf
Final Review of Bulk Hot Water Billing Arrangements (September) found at *http://www.esc.vic.gov.au/NR/rdonlyres/20C3454F-0A47-428B-845B-1D7D85FBE572/0/FinalReviewBulkHotWaterBillingSept04.pdf*

In a real-life case example included in that separate energy-focused submission, I discuss how the current bulk hot water arrangements represent an excellent example of inappropriate regulation that needs to be amended to bring provisions in line not only with proper trade measurement practice, but consistent with existing enshrined protections under multiple provisions that cannot simply be re-written by energy policy makers and regulators, without due regard to confliction provisions elsewhere.

There are other concerns with metering proposals, including advanced metering infrastructure roll-out issues; pre-payment metering; transmission issues and other more general consumer, advocacy and consultative issues that serve also to illustrate poor regulatory practice.

A study of the retail market in isolation without realizing the impacts that wholesale and distribution prices have on the market is to fail to undertake a robust study.

Governance, Accountability Leadership Professional Development Issues – further discussion

These issues are central to effective government, the proper functioning of competitive markets and consumer welfare generally.

Many believe that current standards of governance, accountability, leadership and professional development are not measuring up to expectation.

I remain gravely concerned about eroded public confidence in some of the general and specific areas of public accountability by government agencies and advisers.

In particular I share the concerns of many stakeholders about the governance, accountability, leadership, and dare I say required skills of the new energy Rule Maker the Australian Energy Market Commission (AEMC), to meet current demands and expectations, and undertake dedicated and extensive discussion of their decisions regarding energy reform. Much of this will be discussed in my companion submission of the same date addressing 5.4 and related issues within the energy market.

At the brink of nationalization in many policy and rule-making arenas, consumer protection measures should be accompanied by absolute confidence in transition and ongoing arrangements, appeal processes where government decisions, policies and actions can be effectively and swiftly met.

Regulators need to be made more accountable for regulations that compromise consumer rights or have been misguidedly adopted.

This matter is aired extensively within these companion submissions to the PC's Draft Report with particular reference to provisions for the trade measurement, calculation, pricing and charging and deemed contractual issues impacting on end-users of energy whose energy consumption cannot be properly measured with instruments designed for the purpose.[203]

Little attention has been given to regulations that are misguided but have the direct or indirect effect of making inaccessible enshrined consumer rights under other provisions. This matter is aired extensively within these companion submissions to the PC's Draft Report with particular reference to provisions for the trade measurement, calculation, pricing and charging and deemed contractual issues impacting on end-users of energy whose energy consumption cannot be properly measured with instruments designed for the purpose.[204]

Leadership

The body of the submissions discusses selected theory models of best practice leadership embraced by *Jamison (2005)*[205] will the politicians and bureaucrats of Australia recognize that the foremost leadership skill recommended is the ability to:

> *"get on the balcony and see what is really going with operations, politicians, consumers and others a meaningful engagement with all stakeholders."*

Some leadership theories are alluded to and discussed and some suggestions made in the body of the submission.

Effective Markets

Competitive markets can do better also. And so can government policy.

The consequences of wrong decisions will have irreversible consequences not just for the inarticulate, vulnerable and disadvantaged, but for the entire nation, including businesses, and in the case of energy, smaller retailers unable to withstand market conditions, rules, vertical integration, inability to physically procure gas or contracts and a host of other deterrents to an effective sustainable competitive marketplace.

Energy issues are high on my list of priorities to address and though I have peppered this separate submission with references to those matters, I have also ensured that there is available to those interested a more detailed document extensively citing the concerns of a range of stakeholders.

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[205] Jamison, MA, Holt, L, Ber, SV, (2005) *"Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank."* The Electricity Journal Vol 18(6) July; pp 36-45
Though this thorough and informative literature review by Jamison is largely focused on energy regulation and associated risk in the world of best practice, many of the general principles of leadership are applicable in any regulatory and policy context

I cite the strong views of those who are particularly concerned about the rise of economic regulators and the decline of elected governments, with particular reference to the published concerns of Gavin Dufty, Manager, Social Policy and Research, St Vincent de Paul Society. With Mr. Dufty's kind permission I have reproduced in its entirety his PowerPoint VCOSS Congress Paper (2004) on that very topic.[206]

It would be hard to beat the eloquence with which Mr. Dufty has summed up concerns shared by many stakeholders. I add by support for those concerns, which are no less valid today than they were when written.

I also cite Andrew Nance's[207] concerns when analyzing outcomes in South Australia a year after full energy retail competition was introduced in that state. Victoria represented the guinea pig for energy reform, but the next target for policies and reform that may not demonstrate wise choices.

I strongly disagree with the PC's view that

> *"In many respects Australia's current consumer policy framework (Fig 2) is sound*

I strongly disagree the PC's perception that the current regulatory framework is largely performing adequately. I believe that the deficiencies are extensive in most areas, and that without a mandate for compliance enforcement, proper consumer protection may never occur.

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206 Dufty, G (2004). *"Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments." VCOSS Congress Paper 2004*
Refutation of the philosophical position of the Essential Services Commission in Dr. John Tamblyn PowerPoint presentation World Forum on Energy Regulation, Rome September 2003 "Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition"
John Tamblyn (then) Chairperson Essential Services Commission Victoria. Now Chairperson AEMC
See also Tamblyn J (2004) "The Right to Service in an Evolving Utility Market", PowerPoint presentation at National Consumer Congress 15-16 March 2004 Melbourne

207 Nance, Andrew (2004) Personal Submission to MCE SCO National Framework for Electricity and Gas Distribution and Retail Regulation – Issues Paper October 2004
Found at
http://www.mce.gov.au/assets/documents/mceinternet/AndrewNance20041124123357.pdf

The deficiencies of the existing generic provisions have been discussed by in many articulate and informed criticisms made of both these provisions in many of the submissions already made to the PC during this inquiry to date. I will refrain from repeating these but call particular attention to the following submissions:

- Caroll O'Donnell[208] Sub001 and Sub020; SubDR115 1 and 2
- Laurie Malone, FIAM, Sub004
- Dr. Michelle Sharpe[209] Sub005
- Dr Leslie Cannold, Ethicist, Reproductive Choice Sub006
- John Firbank Sub013
- Lynden Griggs[210]Sub018
- Hank Speir[211], Sub019
- Deborah Cope, Principal PIRAC Economics Sub106
- I. F. Turnbull, Barrister
- ANZ Working Group on Trans-Tasman Competition & Consumer Issues (ANZ Leadership Forum

Other important references include the work of Christine Parker[212] who has co-authored a number of academic papers with Michelle Sharpe.

The reforms required are not superficial. There will be little gained by simply attending to the unburdening of regulation angle, diluting the unfair contract provisions, introducing safe-harbour provisions (to which several objections have been raised, even by the proposed national regulator and enforcement agency, the ACCC, and by FEAMGC. I add my support to those objections.

CHOICE has supported safe-harbour provisions with suggested modifications to allow for some flexibility and unforeseen circumstances.

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208 Dr Carroll O'Donnell, PhD, Med (Hons), BA Lecturer in Sociology Faculty of Health Sciences University of Sydney

209 Dr Michelle Sharpe is at the Victorian Bar. She has a PhD from the University of Melbourne. In 2007 she took up at an appointment as Lecturer at the Law School, University of Melbourne.

210 Mr. Lynden Griggs is Senior Lecturer in Law at the University of Tasmania. He teaches in areas that include Competition Law, Property Law and Corporations Law. Research areas are primarily in competition, consumer and property law. He has taught at the University of Tasmania since 1988 when he began as a tutor

211 Hank Spier was, for 17 years, CEO of the ACCC and, before that, the Trade Practices Commission. He has managed many cartel cases to a successful conclusion either through the courts or in negotiated outcomes. With over 30 years experience at the ACCC and TPC, Hank Spier's knowledge of the *Trade Practices Act*, case management and compliance is unparalleled. Hank is also a regular contributor to the Trade Practices Law Journal.

212 Christine Parker is Associate Professor and Reader, University of Melbourne Law School

It is not an easy challenge to addressing the logistics of satisfying the needs of proper protection; servicing of multiple "safe harbour" applications that may over-burden the regulator; and considering reasonable requests to stay within an acceptable framework of contractual obligation to consumers

Nevertheless in general I oppose dilution of the existing protections under Unfair Contracts and in particular do not believe that individual detriment needs to be shown

I believe that a framework that addresses issues prospectively in order to minimize expensive conflict and litigation later is desirable.

The *Residential Tenancies Act 1997* is a reasonable example of pre-empting difficulties, though the issue of addressing conflicts between co-tenants is a gap causing much angst and many unfair outcomes if both parties do not act in a fair and reasonable way.

I support Dr. Sharpe's conclusions in her Working Paper suggested that ACCC enforcement of section 51AB, and consequently the protection of consumers. Specifically, I repeat and uphold to Michelle Sharpe's point that

> *"Section 51AB can be enforced by consumers against unscrupulous corporations through the institution of legal proceedings.*[213]
>
> *However, the provision is of little assistance if the consumer is ignorant of the existence of section 51AB and/or lacks the resources to engage in litigation.*
>
> *That the success of the ACCC has been limited in contribution to developing the law on unconscionable conduct and sending out a clear message about what amounts to acceptable or unacceptable business conduct in this area.*
>
> *"…adopting a different, harder approach when dealing with corporations who are deliberately breaching the TPA and that this may mean parliament may have to empower the ACCC with a greater range of civil and criminal penalties for such conduct; adopting a clear coherent case theory when commencing proceedings against a corporation and that this might involve seeking the advice or assistance of lawyers or counsel external to the ACCC."*

Suppliers of goods and services must think Christmas is here already with proposals to largely rely on existing generic provisions, since access to legal redress is normally too expensive an option for most consumers. However, I am relieved to know that the PC has proposed to seek the imposition of civil pecuniary penalties; ban activities found to be breach of consumer law; issue notice substantiate the basis of claims; and issue infringement notices for minor contraventions of the law (Section 10 Enforcement).

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213 Under the TPA consumers may obtain an injunction or damages or any other order the court considers appropriate to enforce the TPA under sections 80, 82 and 87.

I also believe that adoption of guidelines for conduct by the enforcement agency should be desirable though there have been some issues raised about this proposal. I vigorously support Dr. Sharpe's recommendation that there should be:

> *"development of some kind of policy with the ACCC as to when, and to what extent, it may be appropriate to negotiate or mediate with corporations alleged to have contravened the TPA."*[214]
>
> *Education of the ACCC of the public about rights and obligations and taking enforcement actions"*

This should be done consistently and without prevarication were warranted to provide a clear message. If feasible, the powers of the chosen enforcement agency should be extended to allow for continuance of investigation once proceedings have been filed.

Existing consumer protection framework some general considerations

David Tennant[215] believes that there is room for a Commission for Effective Markets. He describes effective as efficient, sustainable and fair. The Australian Consumer Association shares that definition of an effective market, as do many stakeholders, myself included.

I strongly support such a proposal.

CHOICE has clarified that:

> *"The super complaint mechanism is not intended for complaints about matters that can be handled directly by existing enforcement powers particularly single firm conduct. In that regard super complaints neither replace nor crowd out standard complaint processes."*

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214 *ACCC Enforcement and Compliance Project,*[214] *a working paper was delivered to the ACCC assessing the impact of the ACCC's enforcement of Part IVA of the TPA ("the Working Paper").*[214]

215 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

I believe there is a strong case for reconsideration of the super-complaints option for the reasons suggested.

I support the view of CHOICE that skewing the prioritization of the regulator's workload is not in issue, but rather another means is provided to ensure that

> *"Analysis of demand side or consumer problems takes place as part of an effective competition regime."*

It is not public opinion that current markets are effective, especially the energy market, notwithstanding the findings and conclusions of the Australian Energy Market Commission (AEMC), the new National Rule Maker for Energy, or that proposed energy reform measures will achieve that goal.

Extensive challenge to the AEMC's finding that the electricity and gas markets in Victoria are effective is provided in a companion submission with some highlights in this one. Many stakeholders have challenged the basis on which the AEMC has made its findings and recommendations. 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.

I have alluded to compromised consumer confidence in certain arenas and to leadership, competence, governance and accountability and competence issues and stakeholder consultation that is meaningful. These concerns are not limited to one arena, and apply across the board to government and government-funded or contracted services and advisory bodies.

I believe that an effective consumer policy needs to address such issues since poor confidence in government operations, regulatory decisions, performance measures and the like make for shaky ineffective markets as a whole and inevitably impact on consumers at large as well as other stakeholders.

With regard to energy issues, these matters are more fully discussed with considerable supportive material and citations and technical data in the companion submission addressing PC Recommendation 5.4 and related energy market matters.

However, I have retained some components of those concerns within this document selected a handful of issues to pinpoint and hopefully promote wide consideration and debate.

In this climate of uncertainty and change, where far-reaching inter-related decisions are being made, often without due regard to reciprocal impacts of one decision on another; and in an environment where multiple agencies and reform initiatives are being undertaken in silo mode, it does not surprise me at all that public confidence generally has become so eroded.[216]/[217]/[218]

The detail of provision is yet to be formulated, but why should the public have any confidence that the arrangements will be any more effective now in a climate of uncertainty, rising prices and cutbacks. Social security agencies are already taking up the option of bundling relief provisions but expecting vulnerable consumers to make a choice as to which service they wish to use subsidies for. Just how service guarantees will be made for essential services is yet to be outlined.

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[216] See for example the concerns expressed by stakeholders about disturbing reliance by the AEMC on information directly impacting on assessment of effective sustainable retail energy competition as influenced by statutory market rules; difficulties with the physical procurement of gas; the influence vertical and horizontal integration; alleged market power issues. What other misinformation of like calibre has been relied upon in the assessment of effective competition in the gas and electricity markets? Refer to submissions to AEMC's current retail review by Victoria Electricity Nov 2007 and February 2008 respectively;
Refer to JackGreen's Annual Report as a Tier 2 Retailer (2007)
"The ACCC the master of the new National Regulator confirmed that they would review the performance of individual companies in the market with a view to determine if any "gaming" of wholesale prices had occurred. It's clear to Blind Freddy that it had occurred; the question was who caused it and who benefited from it? Again the market activity is fairly transparent and somewhere north of the Murray and south of the Brisbane River will find those most active."
Refer to numerous submissions to many arenas including ERIG by Energy Action Group;
Refer to submissions by Australian Conservation Foundation; by numerous community agencies, including PIAC; by Alan Pearce regarding environmental and sustainability issues
Refer to *"Far-reaching impact of complex interrelated decisions around the future structure of the national transmission system*[216] *(EAG submission to* the ACCC SP/PowerNet Revenue Cap Association
"The ACCC Electricity Group is currently faced with a complex number of interrelated decisions around the future structure of the National transmission system. The failure to consider each decision in relation to the others will cause problems well into the future for the transmission asset owners and the market" (EAG Oct 2007)
"The challenge facing the ACCC is to make the right decision. This decision has to ensure that SPI PowerNet can make a sufficient return on investment and at the same time ensure that there is capital investment to the forecast load growth over the r)
There are many concerns about the current marketplace, in a climate of vertical and horizontal integration with market dominance perceived on many grounds by a select few whose power and vertical structures may make it exceedingly difficult for new entrants to survive in an open fully deregulated market

[217] See for example the process followed by the AEMC regarding Section 107 NEL rule changes. On 11 October 2007 AEMC published a notice under Section 107 of the NEL extending the period of time for publishing its Draft Rule determination on the Registration of foreign based persons and corporations as Trade Class Participants Rule by a further three weeks to 1 November 2007. It seems that the Rule will be in place before those inputs are considered at all

[218] See for example

In terms of risk-shifting, those corporations who enter the energy industry enter with full theoretical knowledge of the risks to be borne. Retailers in fact occupy the principle role of managing risks through appropriate hedging instruments. They have far less control over actual prices than do wholesalers. A study of the retail market in isolation without realizing the impacts that wholesale and distribution prices have on the market is to fail to undertake a robust study. In Section 5 of his 2006 provocative paper about regulatory policy and reform[219], Peter Kell discusses the importance of effective regulators in a:

> *Properly resourced and independent regulators with a clear brief to address the most significant risks in the sectors they regulate, will ensure that the burden of regulation falls more heavily on non-compliant firms. Poorly resourced regulators, agencies that face constant political pressure, and those that do not have adequate powers will only frustrate businesses and make markets less efficient.*

As pointed out by PILCH

> *Less than 10 per cent of corporations demonstrate a developed understanding of the relationship between corporate social responsibility and business.* [220].

In his concluding paragraphs of his published 2006 speech, Peter Kell provokes debate in the following words:

> ***Conclusions***
>
> *The debate we need to have on consumer protection regulation in Australia is yet to come. A proper evaluation of the aims and structure of consumer protection is needed, so that regulation better serves consumers today and into the future. But this won't occur if we start from positions that suggest that consumers are already over-protection, and that regulatory developments in recent years are unreasonable attempts to further reduce the risks they face.*

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

220 PILCH (2005) Submission to the Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility (July), Executive Summary Overview (cited in my Part 2 submission to the PC DR) Found at *http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/submissions/sub04.pdf*

We also won't see key consumer protection regulators given the right tools and objectives.

As part of my review of consumer protection there is certainly scope to have a debate about the appropriate level of risk that consumers should carry in different circumstances. Indeed this should be one of the key questions that anyone with an interest in consumer policy needs to address. But this needs to be informed by a realistic assessment of the types of risks that consumers face today in an increasingly globalized financial system, as well as an assessment of the impacts of these risks – both positive and negative.

It also needs to be informed by a more sober assessment f the way in which a range of major regulator developments in recent times actually shift risks to consumers away from government and firms. We've yet to see this work take place in the current round of regulatory review.

In the previous year Peter Kell provided another provocative speech, also at the NCC[221]. Mr. Kell stressed that the successes of aspects of current consumer protection need to be acknowledged. For example Peter Kell, CEO ACA has referred to less sensible arguments used to justify less regulation. He discussed in his published speech to the 2006 National Consumer Congress the key arguments underpinning the 'red tape' debates are misconceived. He believes that there is a

"…A need to address some of these misdirected arguments before we can start the important positive task of looking towards the consumer protection framework that we need for the future."

One concern about the current proposals may be that in a desire to reduce regulatory burden along the lines and for the reasons presented by Peter Kell referred to here, is that consumer protection could be diluted through reliance on the "lowest possible denominator approach."

It is difficult to tell without the detail how the protection framework will actually work and how accessible redress and enforcement will be in the real world.

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[221] Kell, Peter (2005). *"Keeping the Bastards Honest – Forty Years on, Maintaining a strong Australian Consumer Movement is needed more than ever. A Consumer Perspective"* Published speech delivered at the National Consumer Congress 2005 March 2005

I quote from Peter Kell's 2006 Speech at the NCC[222]

> *"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.*

Jamison (2005) claims that

> *"regulators are sometimes scapegoats for unpopular policies and unavoidably become involved in shaping the policies that they are supposed to implement. As a result of such frictions regulators are sometimes removed from office or marginalized in some way."*

He recommends strategies by which adaptive leadership can be used to help constitutes to adapt to new policies and changing situations, whilst still staying in the game. The foremost leadership skill recommended is the ability to

> *"get on the balcony and see what is really going with operations, politicians, consumers and others a meaningful engagement with all stakeholders."*
>
> *How do political party personal and informal relationships affect the effectiveness of formal policies on regulatory systems regulatory agencies and corruption?*

These considerations should be paramount in the minds of those formulating reforms and consumer policy frameworks, more especially in the essential services arena.

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222 Kell, Peter (2006) *"Consumers, Risk and Regulation."* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006, p 2. Peter Kell is CEO of the ACA, publisher of CHOICE magazine and peak consumer advocacy body.
Prior to joining ACA, Peter was Executive Director of Consumer Protection, and NSW Regional Commissioner, at the Australian Securities and Investments Commission (ASIC).

"Competition goals" and fiscal economic ideologies will not in themselves serve to appease community anxieties. What is more, measures to meet fiscal goals and economic reforms based on reducing regulatory burdens at all costs will quite simply not serve to engage community support for policies that may be transparently ignoring community need, expectation and proper access to justice.

With that in mind, I highlight sections of the publication authored by the then Victorian Treasurer John Brumby, now Premier of Victoria.

> ***Reducing the Regulatory Burden***[223]
>
> ***Foreword***
>
> ***Reducing the Regulatory Burden***
>
> *The Reducing the Regulatory Burden Initiative (the initiative) was announced by the Victorian Treasurer in May 2006. The initiative is focused on reducing the administrative and compliance burden of state regulation on business and the not for profit sector by;*
>
> - *ensuring the administrative burden of any new regulation is met by an 'offsetting simplification' in the same or related area; and*
> - *reducing the overall compliance burden through funding of a programme of reviews.*
>
> *Under the initiative the Government has committed to:*
>
> - *reducing the administrative burden of State regulation as at 1 July 2006 by 15 per cent over three years and 25 per cent over five years.*
> - *reviewing key areas of compliance burden*
> - *offsetting simplifications to any new or additional administrative or compliance burdens imposed by regulations made after 1 July 2006.*

[223] Brumby, John (2006) *"Reducing the Regulatory Burden: The Victorian Government's Plan to Reduce Red Tape."* John Brumby was the then Victorian Treasurer, but now Premier of Victoria. About DPI Reducing the Regulatory Burden *http://www.dpi.vic.gov.au/DPI/dpincor.nsf/childdocs/-7F1041F3C997FDDCCA256DB00021E202-085E15DDD84DD27ACA2573590017BC4B?open*

The Department of Primary Industry is committed to the efficient development of regulation. The Department has prepared a detailed Three Year Administrative Burden Reduction Plan to address the administrative burden imposed on business by its stock of regulation. The Department is also undertaking a programme of reviews to identify the necessary actions to reduce compliance burdens.

The reviews and the initiatives outlined in the Three Year Administrative Burden Reduction Plan are focused on the identification of areas of regulation which impose significant cost to business as well as those that are scheduled for review through the normal operation of legislative process.

I show below the Context of the Victorian Reduction of Regulatory Burden statement of in terms of Reducing the Regulatory Burden[224], with reference to National Competition Policy.[225]

Context p2

(1) "The Victorian Government recognises that good regulation will protect the community and the environment, while underpinning efficient and well functioning market economies.

(2) Conversely, ineffective regulation can both hinder economic activity and defeat the intended objectives of the regulation.

(3) The Victorian Government also recognises that the cumulative impact of regulation may affect business investment decisions.

(4) The Government is aware that the burden of much regulation falls disproportionately on small organisations. Reforms that reduce burdens, without compromising policy objectives, are good for all Victorians.

(5) Our aim is to find the simplest and most effective means of achieving the Government's intended policy outcomes. This approach is not about changing Victoria's regulatory objectives - rather it is about ensuring that regulation is achieving its outcome in the most efficient manner."

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[224] Brumby, The Hon John *"Reducing the Regulatory Burden, The Victorian Government's Plan to Reduce Red Tape"* ISBN 920920921B26 State of Victoria. Found at *http://www.dpi.vic.gov.au/DPI/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3e8ccc079f7b914dca2573d2001fbf82/$FILE/reducing_reg_burden%20brochure.pdf*

[225] The principles of National Competition Policy have been incompletely understood by many politicians, bureaucrats, policy-makers and regulators. In 2000 the Senate Select Committee

(6) "Through the Reducing the Regulatory Burden initiative the Victorian Government will continue, as a priority, to review the regulatory environment over which it has control and will continue to set a standard for other jurisdictions.

(7) Only by continuing this commitment to the reform agenda will Victoria and Australia, as a nation, be prepared for the significant social and economic challenges ahead."

(8) Statement of Commitment, p 3

(9) Reducing the Regulatory Burden affirms the Victorian Government's on-going commitment to regulatory reform and builds on our national leadership in implementing the National Competition Policy reform initiatives.

(10) The Victorian Government recognises that regulation is an important tool for achieving policy objectives. However, this initiative seeks to minimise any unnecessary burden on businesses, not-for-profit organisations and the community at large.

(11) Reducing the Regulatory Burden commits Victoria to a specific and ambitious target for reducing the administrative burden of State regulation, and to a program of reviews aimed at identifying where there is scope for simplifying and streamlining regulation.

(12) In August 2005, the Victorian Government further strengthened its position as a national leader on regulatory reform with the release of its proposal to COAG, A Third Wave of National Reform.

(13) The proposal received significant support from the business community which had for some time been calling for regulation reform to encourage a more productive and competitive business environment.

(14) The February 2006 meeting of COAG recognised that regulatory reform was a key issue and, although it did not adopt Victoria's proposals in their entirety, it agreed to a priority list of regulation reviews.

(15) Although Victoria remains committed to a co-operative and concerted national approach, it cannot allow the lack of national agreement to delay a reform agenda which is essential if the social and economic challenges facing Australia are to be addressed.

(16) In developing the Reducing the Regulatory Burden, Victoria has drawn on international best practice in regulatory reform.

(17) This initiative positions Victoria as a leader in tackling the reforms which will be the foundation for our future economic growth and prosperity.

(18) *John Brumby MP Treasurer*[226]

The Context of the Victorian Government's Plan for reduction of regulatory burden was described in the same publication authored by the then Victorian Treasurer, John Brumby, now Premier of Victoria since July 2007.

The Victorian Premier in the same publication discusses how review and reform of existing areas of undue burden may be achieved under the Victorian Plan for Reduction of Regulatory Burden.

P8

(19) In addition to targeting reductions in the administrative burden of regulation, the Government will reduce the compliance burden imposed by State regulation.

(20) Compliance burden is the additional cost incurred by organisations in order to adhere to legal requirements. For example this could include the purchase of additional equipment to comply with food safety regulation or to meet environmental standards for the disposal of industrial waste.

(21) The Government believes there is scope to simplify and streamline regulation while at the same time ensuring that its policy objectives continue to be achieved.

[226] The Honourable John Mansfield Brumby since 30 July 2007 has been Premier of Victoria, Minister for Multicultural Affairs and Minister for Veterans' Affairs
Ministerial Appointments: Minister for Finance and Assistant Treasurer October 1999-May 2000. Minister for State and Regional Development October 1999-December 2006.
Treasurer 22 May 2000-August 2007. Minister for Innovation February 2002-August 2007. Minister for Regional and Rural Development December 2006-August 2007. Premier since 30 July 2007. Minister for Veterans' Affairs, Minister for Multicultural Affairs since July 2007.

> *(22) The Government is committed to identifying priority areas for review and establishing timelines for completion of these reviews.*
>
> *(23) The reviews will be undertaken and specific reforms developed to reduce the burden of regulation.*
>
> *(24) As with the National Competition Policy, some reviews will be done in-house while others may be undertaken through a public process.*
>
> *(25) This program of reviews will be combined with incentive payments to reward outcomes which reduce the regulatory burden.*
>
> *(26) In some cases, such as particularly complex areas or those which involve multiple departments, it may be more appropriate for the Victorian Competition and Efficiency Commission (VCEC) to undertake the review.*

To what extent have past infrastructure reforms in developing countries improved access of the poor to utility services?

The concepts are still applicable to countries like Australia that are not termed *"developing."*

Jamison et al (2005)[227] cite a selection of authors who have written in the relationship between the urban poor to private infrastructure.

These include *Cowan and Tynan (1999)* whose conceptual paper recommends that:

> *"policymakers consider the market structure and potential for entry before entering into privatization contracts."*

Though not the focus of this submission, there are many concerns about the current marketplace, in a climate of vertical and horizontal integration with market dominance perceived on many grounds by a select few whose power and vertical structures may make it exceedingly difficult for new entrants to survive in an open fully deregulated market. I have alluded to these concerns in my companion submission addressing 5.4 but the smogaarsboard of market intelligence available cannot be properly addressed in the context of a submission predominantly focused on consumer policy.

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[227] Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.* The Electricity Journal Vol 18(6) July 2005 pp 355-35

Cowan and Tynan (1999)[228] as cited by *Jamison et al (2005)* that contracts need to achieve the following:

> ***1)*** *"Ensure that the privatization agreement does not cut off service options for the poor or reduce choices."*
>
> ***2)*** *"Contractual provisions should focus more on output standards (quality of service) and less on input standards, such as standards based on an international company's technology."*
>
> ***3)*** *"Other items to consider include: alternative interconnection arrangements for the poor, subsidies that are targeted and not tied to one supplier, and changes in the regulatory process to improve service for the poor and gauge willingness to pay."*
>
> ***4)*** *"Policy decisions made during the transition to a concession will likely need to be made sequentially."*
>
> ***5)*** *"Once a contract is finalized, it is difficult to change entry and competition rules, provide for alternative supplies, and stipulate lower technical standards."*

Another paper cited by *Jamison et al (2005)* The paper examines and explains the macroeconomic and microeconomic linkages between infrastructure reform and the poor, with focus on priority setting. These issues are discussed by the authors:

> ***1.*** *Macroeconomic and microeconomic linkages between infrastructure reform and the poor and discusses setting priorities*
>
> ***2.*** *Describes reforms' impacts on access and affordability for the poor;*
>
> ***3.*** *Discusses approaches for improving access for the poor, including operator obligations, connection targets, low cost technologies, subsidies and cross-subsidies, and open entry;*
>
> ***4.*** *Describes approaches for improving affordability, including lifeline subsidies, means-tested subsidies, vouchers, balancing connection and usage charges, billing options, and prepaid service.*

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228 Cowen B, Tynan P & N . 1999. *"Reaching the Urban Poor with Private Infrastructure, Finance, Private Sector, and Infrastructure Network",* Note No. 188, Washington, D.C.: The World Bank.

If these issues can be sensibly targeted through such reviews we will all be better off. But in the current climate it is all too common to see less sensible arguments used to justify less regulation. Instead of a constructive evaluation of different regulatory options and their potential outcomes, we get undifferentiated attacks on regulation and regulators, often driven by barely concealed self-interest.

We also see the inevitable return of the simplistic 'quantity theory of regulation." Where the desirability of regulation is simply related to the question of 'how much' rather than whether it is effective.

This is disappointing. We need a rigorous debate around consumer protection in Australia. We need to look at whether out 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.

However, 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.[229]

Kell goes further, suggesting that

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

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.

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.

[229] Ibid Kell (2005) "*Keeping the Bastards Honest – Forty Years on….*" NCC

I refer again to the speech delivered by Peter Kell[230] as CEO of the Australian Consumer's Association at the National Consumer Congress in Melbourne in 2005[231]

In that speech, Peter Kell discusses 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."*

He quotes directly from that PC Draft Report a component of which is reproduced below and cited from Peter Kell's 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.*

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230 Peter Kell is the Chief Executive Officer of Choice (Australian Consumers' Association), having joined on 11 March 2004. ACA is Australia's leading consumer organisation, and the publisher of CHOICE magazine. Prior to joining ACA, Peter 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 recognised consumer education and financial literacy programs, and developed policy and approval standards for consumer dispute resolution schemes. Peter was also responsible for establishing ASIC's Consumer Advisory Panel.

231 Ibid Kell Peter (2005). "*Keeping the Bastards Honest ....*" Speech delivered by Peter Kell, CEO ACA at the National Consumer Congress 2005

In his 2005 speech Peter Kell examines the (then) proposed review and asks whether a review of consumer protection along the lines proposed was warranted[232] Peter Kell's words were[233]:

> *Now, at the outset, let me say that ACA supports a review of consumer protection policy and we support it, I hasten to add, despite the fact that we see some significant risks associated with such an exercise. Some of those risks are already apparent in the way that the Productivity Commission talks about this issue and I am sure some of you have seen their report.*
>
> *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. 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.*

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232 Do we need a review of consumer protection regulation along these lines?, p2 Peter Kell's speech at the 2nd National Consumer Congress Melbourne March 2005

233 Ibid Kell, Peter (2005) *Keeping the Bastards Honest – Forty years on…."* Speech at 2005 National Consumer Congress March, p2

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.

Kell argues eloquently against the tendency to shift risk away from consumers or households onto business or governments. His published speeches from both the 2005 and 2006 National Consumer Congresses provided a provocative starting point from which to examine the current Review of Australia's Consumer Policy Framework.

I now refer to the topical published speech by Peter Kell[234] at the National Consumer Congress in March 2006[235], , referring to a number of important publications concerning regulation, including the 2005 published public lecture presented Gary Banks at the ANU on the topic of regulation-making in Australia.[236]

Kell refers to PC's Regulation and Review 2004-05 as part of its Annual Report series.[237].

That 2006 NCC talk by Peter Kell presents some provocative concerns about the philosophy of consumer protection and the extent to which it may be inappropriate for such philosophies to shift regulatory risk from government and/or corporations to individuals.

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234 Peter Kell is the Chief Executive Officer of Choice (Australian Consumers' Association), having joined on 11 March 2004. ACA is Australia's leading consumer organisation, and the publisher of CHOICE magazine. Prior to joining ACA, 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 recognised consumer education and financial literacy programs, and developed policy and approval standards for consumer dispute resolution schemes. Peter was also responsible for establishing ASIC's Consumer Advisory Panel

235 Kell, Peter, (206) Australian Consumers Association. *"Consumers, Risk and Regulation."* Speech delivered at National Consumer Congress 17 March 2006

236 Banks, Gary, (2005) *Regulation-making in Australia: Is it broke? How do we fix it?* Presented by Chairman of Productivity Commission at a public lecture. This lecture was given as part of a Public lecture Series of the Australian Centre of Regulatory Economics (ACORE) at the Faculty of Economics and Commerce, ANU, Canberra, 7 July 2005
Found at http://www.pc.gov.au/__data/assets/pdf_file/0020/7661/cs20050707.pdf

237 Productivity Commission (2005) Regulation and its Review 2004-05 Annual Report Series. Online http://www.pc.gov.au/research/annrpt/reglnrev0405/reglnrev0405.pdf c/f Published speech delivered by Peter Kell at the National Consumer Congress 2006, p 12 References.

He cites two examples where such risk is explicitly shifted in such a way – compulsory superannuation and high education costs, now borne through loan schemes provided to tertiary students in the higher education sector.

We are now seeing such shift of risk within the energy sector, an essential services without which daily living requirements cannot be met in a modern society. A study of the energy retail market in isolation without realizing the impacts that wholesale and distribution prices have on the market is to fail to undertake a robust study is a flawed analysis by any standards. This is discussed in detail elsewhere and in a separate submission.

Within the energy sector such a shift of risk is seen which is expected to borne by consumers. When such a shift relates to essential services, without which daily living requirements cannot be met in a modern society and when the burden is forced upon those who are vulnerable and disadvantaged not only because of financial hardship, but for a host of other reasons that may preclude active choice and participation in the market, questions need to be asked about how the acceptability of such shifts.

Kell argues eloquently against the tendency to shift risk away from consumers or households onto business or governments. His published speeches from both the 2005 and 2006 National Consumer Congresses provided a provocative starting point from which to examine the current Review of Australia's Consumer Policy Framework.

A similar viewpoint is expressed by Gavin Dufty, currently Manager Social Policy and research at St Vincent de Paul Society. Mr. Dufty is also given to sharp and eloquent critical analysis also of the regulatory landscape.

With his permission, I reproduce will shortly reproduce Gavin Dufty's VCOSS Congress Paper presented in 2004 as a critical examination of the paper presented the previous year by John Tamblyn, currently Chairperson of the Australian Energy Market Commission, but at the time Chairperson of the Essential Services Commission.

For the moment I will turn attention to discussion of the philosophies that have been published in relation to the Victorian initiatives to reduce administrative and compliance burdens on businesses and not for profit sector.

Whilst supporting the need to review regulation that is truly unnecessary, is duplicated, confusing or inappropriate I am most concerned that often misguided interpretations of the original intent of National Competition Policy goals do not become again lost in the eagerness to reduce burdens, with the possible unintended consequence of increasing market power imbalances and compromising consumer protections.

In Section 2 of my Part 2 Submission to the PC's Draft Report I discussed in some detail overarching objectives and their relationship competition policies and the various interpretations applied to them.

The findings of Senate Select Committee[238] in relation to NCP impacts on social services were not shown to improve during NCP. Ethical and sustainability, and socially responsible and financial considerations. Expressly, proper regard for local, social, community and environmental interests and financial considerations.

Competition policy issues are discussed in considerable detail in the body of this submission but are raised here in passing only under key points for immediate highlighting.

Universal service obligations, their role and implications are discussed in detail in the body of the submission later, with particular reference to the findings and views of Gavin Dufty, Manager Social Policy and Research, St Vincent de Paul Society in his VCOSS Congress Paper in rebutting the views of John Tamblyn as the then Chairperson of the essential Services Commission, now Chairperson of the AEMC.

Andrew Nance's views and findings[239] (at the time with South Australia Council of Social Services (SACOSS) are also extensively cited and relied upon in the body of the text.

Nance's full submission to the MCE SCO National Framework for Electricity and Gas Distribution and Retail Regulation – Issues Paper 2004 is discussed and reproduced elsewhere in a dedicated submission on energy.

Extract Submission by Andrew Nance MCE SCO National Framework for Electricity and Gas Distribution and Retail regulation

"While reforms continue to ignore the existence of a group of consumers and target the average consumer these vulnerable households will continue to be failed by the market and many families will continue to suffer unnecessarily. As the Issues Paper acknowledges and then seems to forget, electricity and gas are essential services

We have such little information on what is happening to residential customers and vulnerable consumers in particular, it is impossible to offer any support outside the state to what appears to be an unelected unaccountable bureaucracy. It is recommended that the SCO enquiry into residential disconnection rates n SA since the introduction of full retail contestability on 1 January 2003. Further it is suggested that the SCO enquire into why, over 18 months alter, no meaningful data has been released into the public domain.

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238 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

239 Nance, Andrew (2004) Personal Submission to MCE SCO National Framework for Electricity and Gas Distribution and Retail Regulation – Issues Paper October 2004
Found at
http://www.mce.gov.au/assets/documents/mceinternet/AndrewNance20041124123357.pdf

Further it is suggested that the SCO enquire into how many fatal housefires have occurred in SA homes disconnected from electricity for inability to pay since FRC and then maybe enquire why there have been no inquires or actions in response" There has been no convincing argument that this latest attempt to rearrange the deckchairs will actually provide any tangible benefit to consumers"

SECTION 9

SELECTED GENERAL REFLECTIONS ON PUBLIC ACCOUNTABILITY ISSUES

Some general accountability issues

In other submissions to the PC and elsewhere, I have suggested 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 2007[240] as was chosen by Chris Field in his concluding remarks in his own presentation to the Western Australian Chapter of Administrative Law the following month[241]

> *"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.*

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".*

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240 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)

241 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

And later on page 3:

> *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."*
>
> *"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 5 of this submission 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 appear to be in 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:[242]

> *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.*

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."* [243]

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[242] 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

[243] CUAC Quarterly Newsletter AEMC *"Review of Effectiveness of FRC,"* p. 4.

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."*[244]

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.

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[244] CUAC September Quarterly *"AEMC Review of Effectiveness of FRC"*

Though repeated and discussed at more length in a dedicated submission dealing with philosophical considerations, I discuss a handful of accountability issues here to support my concerns about existing provisions, including complaints handling, compliance enforcement and general perceptions by complaints schemes and *"independent"* economic regulator(s) of the absence of external accountabilities.

They are included here because they are directly pertinent to considering the particular matters that are addressed here narrowly focused on certain contractual governance issues, trade measurement and economic regulatory principles in a particular instance.

In addition, the perceived shortfalls in structure, funding, governance, accountability, transparency and efficiency and effectiveness of industry-specific schemes is discussed briefly in an appendix this submission, and in more detail in a companion submission

I appreciate that not all those interested in those matters will be concerned about the broader more philosophical issues discussed in more detail in another component submission. Therefore I have selected a few pertinent matters that will also be included in that component.

As mentioned above, the ACCC has a responsibility to consumers and works with the CAV and AER under Memoranda of Understanding. These issues are being drawn to ACCC and AER attention again. Though re-badged and with a separate corporate identity, the AER is an integral part of the ACCC with a number of accountabilities that include the ACCC, the Commonwealth Ombudsman, Parliament – and hopefully the Australian taxpayers.

By contrast the current Victorian Energy Regulator, Essential Services Commission, and its associated co-regulatory Complaints Scheme EWOV also with a separate corporate identity, but fulfilling a public role in the fielding of complaints and limited jurisdiction on certain matters, both believe themselves to be externally accountable. This is unacceptable in terms of taxpayer management of essential services.

I am most concerned that the current Victorian Regulator, VESC, its associated complaints scheme EWOV, and the Victorian Department of Primary Industries all hold the view that VESC and EWOV are *"independent"* bodies and therefore unaccountable externally.

The practice of re-badging arms of government services with corporate legal identify is intended to minimize liability but not accountability. The ACCC openly admits that the AER is an integral part of that federal body, but that it does have a corporate legal structure of its own. The AER is accountable to the ACCC, Parliament and the Commonwealth Ombudsman.

The same principles should apply to the jurisdictional regulators, including the Essential Services Commission. This should be more explicitly spelled out and made publicly known on all relevant websites, including VESC, EWOV and DPI.

The processes for appeal of regulatory or administrative decisions should be transparently available on the website.

Note the comments such as those of Adjunct Professor Alan Pears[245] in his submission: National Frameworks for Distribution Networks Network Planning and Connection Arrangements. Though these comments were addressed in another context the insights are relevant to all consultative processes:

> *"Given the urgency driven by climate change policy and the need to aggressively respond to growing peak electricity demand it is critical that this process delivers real outcomes quickly. Good intentions are no longer sufficient. Fines and incentives should be applied to ensure action.*
>
> *The outcomes of this process are critical to overcoming the barriers to demand-side action and distributed generation that have marred the energy market since its inception. Indeed the fact that it has taken this long to address these issues indicates a serious failure of public policy process."*

[245] Submission National Frameworks for Distribution Networks Network Planning and Connection Arrangements. Alan Pears is an engineer and educator who has worked in the energy efficiency field for twenty years. He is Senior Lecturer in Environment and Planning School / Work Unit, Global Studies, Social Science and Planning

SECTION 10

SELECTED GENERAL CONSIDERATIONS INDUSTRY SPECIFIC REGULATION ENERGY

With some dedicated focus on trade measurement practices deemed to be contrary to the spirit and intent of national provisions

DRAFT RECOMMENDATION 5.1 (Ch 5) Industry specific consumer regulation

COAG should instigate and oversee a review and reform program for industry-specific consumer regulation that would:

- *Identify and repeal unnecessary regulation, with a particular focus on requirements that only apply in one or two jurisdictions;*
- *Drawing on previous reviews and consultations with consumers and businesses, identify other areas of specific consumer regulation that apply in all or most jurisdictions, but where unnecessary divergences in requirements of lack of policy responsiveness imposed significant costs on consumers and/or businesses; and*
- *Determine how these costs would be best reduced, with explicit consideration of the case for transferring policy and regulatory enforcement responsibilities to the Australian Government and how this transfer might be best pursued*

Comment:

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.[246]

I refer to and support the broader philosophical arguments presented in the submission by the Victorian Aboriginal Legal Service Cooperative (VALS) regarding the proper definition of vulnerable and disadvantaged consumers in response to the Issues Paper scoping question posed by the PC.

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

VALS has suggested a particular interpretation of the terms vulnerable and disadvantaged for the purposes of consumer policy:

> *"people of low socio- economic status and at risk of not having their consumer rights respected. Also, vulnerability should be interpreted as a condition, not a person (ie: stigmatization of an individual)"*

Therefore selection of the right phrasing is importing when new laws and other regulations are formulated.

The terms vulnerable and disadvantaged should be interpreted in the following manner for the purposes of consumer policy:

[246] VALS (2007) Response to PC Issues Paper May, p4

> *The needs of vulnerable and disadvantaged consumers are best met through both generic approaches (ie: approach that applies to all people) that provide scope for discretion in application and more targeted mechanisms (ie: mechanism that targets a particular group such as Indigenous Australians).*

I would go further with the definition, and as mentioned elsewhere would like to see a more inclusive term.

> *"inarticulate, vulnerable and disadvantaged"*

Such a phrase would encompass those with psychiatric or intellectual impediments; cognitive distortion; language or cultural barriers (in terms of proactively seeking assistance) and would not be limited to traditional perceptions of financial hardship.

I support the argument of VALS that there is

> *"a need for 'both and', not an 'either or' approach to rights protection. Proponents of the 'either/or' approach argue that protection is best advanced through laws that are applicable to everyone (formal equality) and this is used as a rationale for excluding Indigenous Australian specific measures (substantive equality). They argue that formal and substantive equality cannot coexist and you can only either have a formal or substantive equality approach (ie: 'either/or' approach). Proponents of the 'both/and' approach, which VALS is, argues that there is a place for both formal and substantive equality and these they can co- exist. VALS adds that cultural awareness training should be delivered to mainstream organisations as to why there is need for a 'both and' approach and why special treatment has to offer vulnerable consumers."*

The opportunity exists with changes to regulation and standardization to have ambiguities ironed out whilst exercise caution about regulations deemed to be unnecessary.

In his speech at the National Consumer Congress on 17 March 2006, Peter Kell, speaks of the ACA's perspective on reducing regulatory burdens while still ensuring good market outcomes. Significant segments of his speech are reproduced with citations in Part 4. Some of these quotes are retained here for completeness and where particularly relevant to the issues raised in this component.

It is important to head Peter Kell's that a position that starts with the conclusion that consumers are already over-protected and that regulatory developments in recent years are unreasonable attempts to further reduce the risks they face, is a view point that will fail to better serve consumers today and into the future, and will also ensure that regulators with key roles in consumer protection will not be given the right tools and objects.[247]

A key point in his paper is about how complex regulation in Australia has become. He shows that risk-shifting is doubled-edged – whilst much 'red tape' actually shifts risks to consumers; but also that such regulation shifts risks away from businesses and governments. He says:

> *"Consumers don't benefit from poorly directed regulation or complicated rules that aren't enforced"* (provided that) *"these issues can be sensibly targeted through such reviews"*
>
> *"Reducing regulation that unnecessarily restricts market competition will also generate better outcomes for consumers."*

However, those regulatory reductions need to be sensibly undertaken. Kell also recognizes that:

> *In the current climate it is all too common to see less sensible arguments used to justify less regulation. Instead of a constructive evaluation of different regulatory options and their potential outcomes, we get undifferentiated attacks on regulation and regulators, often driven by barely concealed self- interest*

[247] Paraphrased from Kell, Peter (2006), *"Consumers, Risks and Regulation"* Speech given at National Consumer Congress March 2006

He claims that it is not a question of simplistic *"how much regulation"* but rather whether it is effective. In acknowledging that, Peter Kell urges consideration of the right premises from which to build "red tape" debates. He believes many such debates are misconceived. He starts by referring to the flawed argument put forward by some commentators that:

> *"too much regulation reflects unreasonable attempts to shift risks away from consumers or households onto business or governments."*

Kell believes that this view of *'risk-shifting'* is the wrong way to view market regulation because:

> *"The first is that much of the growth in regulation has shifted risks to households and away from businesses or government*
>
> *"A quick look at many major regulatory initiatives of recent years will demonstrate that much of the growth of 'red tape" has arisen to shifts risks to consumers rather than the other way round."*
>
> *Further a wide range of regulation shelters businesses from risks especially the risks that arise through market competition.*

> *The second is that to the extent that regulation does reduce consumer risk it is often an important positive response to market developments and new technology*
>
> *To the extent that regulation does reduce risk for consumers the critics of regulation implicitly or explicitly suggest that this is generally a bad thing. This approach is based on a poor and static understanding of the ways in which the risks facing households have changed and developed over the past 10-20 years*

Peter Kell cautions against developing policies on the basis of

> *"a hopeless over- simplification of the current market and regulatory framework (by adopting). The notion that much regulation has simply involved shifting risk away from consumers and households"*

Kell is convinced that such a rationale will only worsen market outcomes for consumers, and in many cases, for businesses as well. He says that

> *"Most would regard the reduction of unnecessary risks as a sign of progress in any society"*

Regulation that shifts risks to consumers

Kell cites but two examples of shifts of risk from government and/or corporations to individuals. He claims that there is evidence of:

> *"…significant regulatory infrastructure in Australia that has had the outcome of shifting risks to consumers. (p5-6 Kell, NCC 2006)*
>
> - *Compulsory superannuation – cited as a one of the most burdensome and radically intrusive regulatory programs to ever have been implemented in Australia – shifting investment and longevity risk to individuals and away from government and firms*
> - *Major changes to the funding requirements for high education, leaving individuals to bear the risks of financing their education, for example through*
> - *loan schemes, where as this cost was previously endured by government.*

Shifting risk away from business

Other examples given in Peter Kell's 2006 NCC speech including shifting of risk from corporations to individuals in the from of anti-competitive regulations,, meaning blocking competition from new entrants, such as the decision to protect Qantas on the key Los Angeles route.

Other such shifts are inadvertent. Kell refers, for instance to the Commonwealth Treasurer's Financial Service Reforms *"Refinements Paper"* of 2005 *(p6 Kell's speech NCC 2006).*

Kell qualifies that some regulations allow businesses to use disclosure documents, ostensibly to help consumers, but in effect place assist businesses to shift risk to consumers against contingencies that might arise, by putting in place a range of legal qualifies, exemptions and other mechanisms.

Next, in the same paper, Kell discusses regulation and risk aversion. He holds the view that there is a massive growth in unwarranted regulation that reduces consumer risk, ignoring the wider economic and social context in which consumers participate in the marketplace. He points out that

> *"the argument may therefore led to a confused approach to new regulatory initiatives"*

Kell says this is understandable given technological economic demographic and policy changes that have impacted on altering of the risk profile faced by households.

He goes on to discuss the way in which society and economy have managed risk in the last 20-30 years (p7), transferring risk onto household[248]. He speaks of the substantial shift to risk that is increasingly individualized with exposure to economic shocks as never seen previously[249]. Kell acknowledges that

> *"the scope for considering whether regulations have become outdated and the risks they address are no longer relevant.*

However, Peter Kell is concerned about how easy it is to scapegoat consumers and households. He cautions against criticizing the form of regulation to lead to the overall goal of making markets better for consumers.

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[248] One example given by Kell (2008:7) is the International Monetary Fund (IMF) Financial Stability Report (IMF, 2005) noting from that report that "….the household sector has increasingly and more directly become the 'shock absorbers of last resort" in the financial system (IMF, p5) c

[249] Kell gives as examples households indirectly insulted from investment risk, whilst banks absorbed these risks and paid nominal returns on simple deposit products; many life insurance investment options containing guaranteed returns; defined benefit pension [provisions in retirement products.

Moving on to the role of regulators, Kell discusses the role of effective regulations for effective regulation (p9). Proper resourcing and independent regulators with clear roles to address the most significant risks

> *"will ensure that the burden of regulation falls more heavily on non compliant firms."*

> *"poorly resourced regulators agencies that face constant political pressure and those that do not have adequate powers will only frustrate businesses and make markets less efficient.*

So he suggests that regulator attention should be allocated by effective regulators in such a way as to meet the joint goals of focusing significant risks to consumersand competitors from illegal behaviour, whilst allowing legitimate commercial activity. (p9)

Thus clear limits in applying reasonable flexibility is the key, according to Kell (p9)

Next, on p10, Kell discusses the policy implications that

> *"arise from the view that too much regulation overprotects consumers."*

The consequences of such an approach may be that

> *"regulators are less well equipped to deal with the genuine risks of non compliance (p10)*

He specifically points out that light touch regulation, generally mean information disclosure, has failed to improve market outcomes in many financial services areas. He claims that using information disclosure alone as a tool is inadequate to meet the goal.

The self-interest of industry will govern whether businesses will argue for less discretion – if decisions are made in their interests; or conversely, more discretion if the agency cannot seek relief from regulatory burdens[250]

[250] Safe harbour provisions are an example

Finally he warns of the risks of regulators *"taking the eyes of the ball"* in their role to administer and enforce the law.

Of significant concern in the shift towards an individuals risk regime is described by Kell as significant and pervasive including:

- *The winding back of applicability to quality for State payments;*
- *The elimination o defined benefit plan occupational pensions towards pay-as-you-go pension plans, increasing exposure to investment risk and longevity risk;*
- *The shift to private health schemes to cover the cost of the health system, thus increasing exposure to investment risk and longevity risk.*

Kell emphasizes that one does not have to accept these developments as either positive or negative to recognize that they represent a *"shift of risk to consumers"* (p8)

Having said that Kell notes that the dangers of risk-shifting to households, imply that regulation should be in place to ensure that the household sector can better manage such risks. In particular Kell criticizes a view that paints

"…such policy processes as the crude response to unreasonable consumer demand"

Peter Kell believes that such a stance misses the point very badly and is not conducive to constructive policy debate.

Whilst consideration is being given to *"identify and real unnecessary regulation"* (p65 PC DR 5.1) with particular focus on requirements that only apply in *"one or two jurisdictions."*

This component highlights some of the implications for consumers of diluting unfair contracts provisions. I refer to selected impacts of diluted unfair contract terms, and strongly support the protections theoretically offered under the current Victorian Unfair Contract provisions without dilution, as a model to adopt at national level.

Without the Unfair Contract provision as adopted by the Victorian Government, consumer protections in this particular area (and in many others) will become seriously compromised. Therefore I oppose the suggested changes to the new national generic consumer law (p67 PC DR).

PC DR 7.1 – brief comment

I vigorously oppose the proposal that unfair terms would be voided for the contracts of those consumers subject to detriment with suppliers also potentially liable to damages for that detriment. I also oppose the safe harbour contract terms proposals and discuss this elsewhere in a separate submission covering other broader issues relating to the Productivity Commission's Consumer Policy Framework Draft Report.

I feel strongly that energy-specific regulation needs to remain in place, whilst standardization and rationalization and consistency across states appears to be warranted. I remain unconvinced by all of the arguments presented in favour of price deregulation.

I also believe, along with many others, including some of the second-tier retailers, that price deregulation is premature and there are numerous submissions to support that view, including one from a second-tier retailer.

In 2003, in discussing infrastructure projects, emerging economies and Government reneging, author Ravi Ramamurti, of the Department of Business Administration, Northeastern University, Boston, USA summarizes his paper as follows[251]:

> *"Based on the literature*
>
> *I propose three explanations for government reneging:*
>
> *(1) economic uncertainty which necessitates contract renegotiation*
>
> *(2) the logic of the "obsolescing bargain v*
>
> *(3) political change which puts new leaders in charge with incentives to renege on old promises*
>
> *I assert that these risks can be contained respectively through contract design investment."*

[251] Ramamurti, R (2003) *"Can governments make credible promises?"* Journal of International Management 9(3) 2003, pp253-269 Insights from infrastructure projects in emerging economies institutions and international business.

Adjunct Professor Alan Pears[252] said:

> *"Given the urgency driven by climate change policy and the need to aggressively respond to growing peak electricity demand it is critical that this process delivers real outcomes quickly. Good intentions are no longer sufficient. Fines and incentives should be applied to ensure action."*

As far back as June 2002, The EAG cautioned the ACCC on matters that would significantly impact on energy reform over the next few years.[253] Those cautions are discussed elsewhere with direct quotes from various submissions made.

Whilst it is clear the current review aims to examine the success or otherwise of retail competition in Victoria since FRC was introduced, without examining the range of factors impacting on cost control by retailers and consumers, and considering in detail the entire marketing distribution chain, a slanted and narrow view of competition factors will be gained.

Market dominance and market share imbalances must surely have some meaning and must surely inject some cautions.

Since this view is widely shared amongst stakeholders, I conclude this section with an extract from a 2007 submission from Energy Action Group about complex far-reaching decisions and future NEM structure.[254]:

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252 Alan Pears (2007) Submission National Frameworks for Distribution Networks Network Planning and Connection Arrangements. Found at <http://www.mce.gov.au/assets/documents/mceinternet/Alan_Pears20071019124200.pdf>
Alan Pears is an engineer and educator who has worked in the energy efficiency field for twenty years. He is Senior Lecturer in Environment and Planning School / Work Unit, Global Studies, Social Science and Planning

253 EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association October 2007

254 EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association October 2007

Complex far reaching interrelated decisions.

The ACCC Electricity Group is currently faced with a complex number of interrelated decisions around the future structure of the National transmission system. The failure to consider each decision in relation to the others will cause problems well into the future for the transmission asset Owners' and the market.

This Determination, coupled with the ElectraNet Determination and the NECA Hybrid Interconnector Determination, provides the opportunity to ACCC to reduce market complexity. There is a common myth held by economists that all functions of the NEM need to be subjected to competitive pressures. The SPI PowerNet application shows that there are a number of projects, particularly the introduction of several independently owned and dispatched hybrid interconnectors and dynamic capacitor banks that are argued (wrongly in our view) to enhance the NEM transmission system.

Conclusion

The challenge facing the ACCC is to make the right decision. This decision has to ensure that SPI PowerNet can make a sufficient return on investment and at the same time ensure that there is capital investment to the forecast load growth over the regulatory period as well as ensuring the refurbishment of an aging asset base."

SPI PowerNet owns but does not control the asset base.

The SPI PowerNet Determinations need to make a strategic set of decisions

- *ensure that minimum changes occur to the WACC equation and the methodology for determining WACC is consistent across the Commonwealth*
- *ensure that newly discovered assets are not rolled into the asset base and that easements are excluded from the asset base.*
- *reject any attempt by the proponent to adjust the initial RAB*
- *minimize market complexity and possible 'gaming' opportunities that will be created by the move to introduce hybrid interconnectors and other exotic transmission arrangements into the NEM. A single asset owner in each region simplifies the management of transmission assets.*
- *assess the costs and benefits of integration the system planning function back into the transmission businesses.*

- *address the problems evident in both Victoria and South Australia jurisdictions where the only viable solutions to transmission augmentation Load Management, Demand Management and embedded generation are discounted as the market based solution. Currently in both Victoria and South Australia there are minimal mechanisms that can facilitate either Demand Management or ensure that embedded generation can compete with transmission augmentation as an option for system development Load Management, Demand Management and embedded generation need to be treated in an equal manner to transmission augmentation in meeting load growth requirements.*

- *make provision for SPI PowerNet to develop and sustain an employee and industry skills base.*

A mechanism needs to be developed to ensure that all 4 options can compete equally. Currently the only viable option is transmission augmentation.

The Energy Action Group, as a membership based, not-for-profit incorporated association representing the interest of less than 160MHh consumers across the National Electricity Market, in its Submission on the AEMC Scoping Paper on Transmission and Pricing Rules Initial Consultation Scoping Paper (funded by an NEM Advocacy Panel Emergency Grant).

"The national electricity market objective is to promote efficient investment in, and efficient use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability and security of supply of electricity and the reliability, safety and security of the national electricity system."

> *It is important for the AEMC to recognize that the overwhelming majority of transmission revenue comes from electricity consumers. EAG has significant concerns that the AEMC, the MCE and the Reliability Panel are in the process of running a number of reviews concurrently. Further, that a number of these reviews interact with each other and that this convoluted process may lead to very poor policy and rule making. It is EAG's contention that the AEMC has an extremely busy work plan: that the time frame provided for in Diagram 1₂ and the AEMC web site is far too ambitious to carry out this joint review. We have made a series of comments in the second part of the submission to illustrate this point.*
>
> *There have been a number of attempts to address transmission pricing issues by both the NECA and the ACCC. To date, all the work by these bodies appears to have failed to deliver the desired outcome. It is likely that this review process will do the same if the time frame continues to be unduly compressed. The process runs the risk of following the badly flawed ACCC Regulatory Test consultation process.*
>
> *One of the implicit objectives of this revenue/pricing review and possible Rule reset should be the minimization of regulatory uncertainty for the transmission businesses so that they can continue investing in new and replacement infrastructure with minimal dislocation to their work programs."*

Each time that I try to get into the present and look at the current agendas for reform and approaches being adopted, I slide back into a de ja vu mode looking backwards and finding how little things have changed; how valid earlier predictions were; and how much balance appears to be missing from the optimistic forecast of competition impacts and future successes.

Again, as observed by the EAG in the same paper[255]

> *"EAG has significant concerns that the AEMC, the MCE and the Reliability Panel are in the process of running a number of reviews concurrently. Further, that a number of these reviews interact with each other and that this convoluted process may lead to very poor policy and rule making.*

[255] Energy Action Group Submission to the ACCC SP/PowerNet Revenue Cap Association

It is EAG's contention that the AEMC has an extremely busy work plan: that the time frame provided for in Diagram 12 and the AEMC web site is far too ambitious to carry out this joint review. We have made a series of comments in the second part of the submission to illustrate this point.

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I quote directly from EAG's 2005 Submission to the AEMC Scoping Paper and Pricing Rules Initial Consultation Scoping Paper, as below:

"This submission makes some broad policy recommendations then reviews the recommendations of the ACG/NERA report of August 2007." [256]:

"EAG has further concerns relating to the emphasis of the process on strictly economic outcomes. Electricity is pivotal to the workings of our society with the power industry relying on a highly trained technical skills base to develop the system to its current level of complexity. Prior to market start the interconnected transmission system was designed for reinforcement i.e. supplementation of energy supply between jurisdictions in times of shortage.

The move to the NEM has converted the purpose of the transmission system to carrying energy flows for market trading and in a manner not originally intended. That is not to say that inter-regional energy flows shouldn't occur. However in this review process the AEMC must accept the needs for a vision for NEM transmission. Further this vision should incorporate a long term view of market development. In theory the vision is currently provided by the Annual National Transmission Statement (ANTS)."

[256] EAG (2005) Submission to AEMC Scoping Paper and Pricing Rules Initial Consultation Scoping Paper

Many pertinent reports are not included or cross-referenced at all in the material shown on the AEMC's Retail Competition Review website. Yet they need to be taken into account, even if not commissioned for the Retail Competition Review.

A thorough scoping exercise should involved looking backwards over at least the last five years to pre-full retail competition days. Collecting robust comparative data is a first essential step and being prepared to undertake a professional analysis based on best practice evaluative process.

Other similar pertinent material is included in the extensive Part 7 which primarily challenges the validity of the conclusions drawn by the AEMC that retail competition in Victorian gas and electricity markets has been successful and demonstrates in considerable detail why it is believed that a proper assessment of the internal energy market has simply not been undertaken or that credible decisions have been made that will have an impact on the nation's entire economy, leaving aside the plight of the inarticulate, vulnerable and disadvantaged altogether for the moment.

These issues are raised here of implications for specific and general consumer issues, including the proposed removal of the regulated default offer upheld up the Productivity Commission and finalized as a recommendation by the AEMC.

It is surprising that the starting point for assessing energy market competition impacts over the last three years has focused on the mid-point of the market distribution chain.

The National Transmission Planning Objective (NTP) has been announced as follows[257]:

National Transmission Planning Objective (NTP)[258]

To promote the development of a strategic and nationally coordinated transmission network

Having regard to

- *Best practice transmission planning*
- *Developments in technology that affect transmission*
- *Competitiveness and feasibility that fuel sources for generation*
- *Government policies*
- *Demand Side embedded generation and fuel substitution alternatives*

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257 National Transmission Planning Objective (NTP) Cited from Public Forum 2 April 2008. Found at *http://www.aemc.gov.au/pdfs/reviews/National%20Transmission%20Planner/FINAL%20NTP%20Public%20Forum%20-%20NTP%20role%20and%20governance%20presentation.PPT#320,4,NTP Objective*

258 Note the Australian Energy Market Operator Board is the NTP

The AEMC Public Forum presentation on 2 April 2008 advised as follows regarding the COAG Policy Framework for national transmission planning.

What is covered:

The National Transmission Planner is located within the AEMO[259]

- *Is tasked with publishing an annual strategic plan*
- *Will replace the Annual Transmission Statement*
- *Will outline the long-term efficient*[260] *development of the power system*
- *Will provide information to the market to guide efficient transmission and generation investment*

The AEMC Public Forum presentation on 2 April advised that the NTP **WILL NOT**

- *Replace local planning*
- *Alter accountability for network investment decisions*
- *Bind network transmission providers or the AER*

[259] Australian Energy Market Operator, a term that the TEC believes to be confusing, overly general and too close to NEMMO "National Energy Market Management Corporation" (NEMMCO). The AEMO Board IS the NTP and responsible for all functions *"to ensure effective accountability"*

[260] A recent submission to the Productivity Commission has suggested better clarity with the use of the terms efficient and effective which may mean different things to different stakeholders.

SECTION 11

DISCUSSION OF SOME SPECIFIC PUBLIC EXAMPLES OF COMPROMISED ACCOUNTABILITY AND TRANSPARENCY AND COMPLAINTS REDRESS

The Objects of the (Victorian) *Public Administration Act 2004* (s3) include

Extract Public Administration Act 2004 (Victoria) Objects[261]

3. Objects

The objects of this Act are—

(a) to ensure the maintenance of an apolitical public sector;

(b) to foster a public sector that—

(i) responds to government priorities in a manner that is consistent with public sector values;

(ii) provides effective, efficient and integrated service delivery;

(iii) is accountable for its performance;[262]

(c) to establish values and principles to guide conduct and performance within the public sector;

(d) to ensure that employment decisions in the public sector are based on merit;

(e) to promote the highest standards of governance in the public sector;

(f) to promote the highest standards of integrity and conduct for persons employed within the public sector;

(g) to strengthen the professionalism and adaptability of the public sector;

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261 *Public Administration Act 2004* (Victoria) Objects, s3. Found at *http://www.findlaw.com.au/Legislation/docs/43427.doc*

262 The VESC apparently believes it has no external accountabilities. A similar belief is also held by of its own accountabilities by the industry-specific co-regulated complaints scheme EWOV overseen by the Victorian economic energy regulator VESC. Such a perception cannot be consistent with community expectations or specific provisions.

(h) to promote knowledge and understanding of good public administration within the Victorian community.

The Victorian Public Sector values, echoed also in the State Services Authority core values are as follows:

PART 2—PUBLIC SECTOR VALUES AND EMPLOYMENT PRINCIPLES

7. Public sector values

(1) The following are the public sector values—

*(a) **responsiveness**—public officials should demonstrate responsiveness by—*

(i) providing frank, impartial and timely advice to the Government; and

(ii) providing high quality services to the Victorian community; and

(iii) identifying and promoting best practice;

*(b) **integrity**—public officials should demonstrate integrity by—*

(i) being honest, open and transparent in their dealings; and

(ii) using powers responsibly; and

(iii) reporting improper conduct; and

(iv) avoiding any real or apparent conflicts of interest; and

(v) striving to earn and sustain public trust of a high level;

*(c) **impartiality**—public officials should demonstrate impartiality by—*

(i) making decisions and providing advice on merit and without bias, caprice, favouritism or self-interest; and

(ii) acting fairly by objectively considering all relevant facts and fair criteria; and

(iii) implementing Government policies and programs equitably;

*(d) **accountability**—public officials should demonstrate accountability by—*

(i) working to clear objectives in a transparent manner; and

(ii) accepting responsibility for their decisions and actions; and

(iii) seeking to achieve best use of resources; and

(iv) submitting themselves to appropriate scrutiny;

*(e) **respect**—public officials should demonstrate respect for colleagues, other public officials and members of the Victorian community by—*

(i) treating them fairly and objectively; and

(ii) ensuring freedom from discrimination, harassment and bullying; and

(iii) using their views to improve outcomes on an ongoing basis;

*(f) **leadership**—public officials should demonstrate leadership by actively implementing, promoting and supporting these values.*

(2) Subject to sub-section (3), a public sector body Head must promote the public sector values to public officials employed by or in the body and ensure that any statement of values adopted or applied by the body is consistent with the public sector values.

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.

I disagree with CALV that IS-EDR[263] 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.

As to effective, Andrea Sharam (2004)[264] reported that:

> *"……that taking complaints to the EWOV frequently leaves the customer in the position of having an unaffordable instalment plan.*

263 A term which I believe is better described as IS-CS (for industry-specific complaints scheme)

264 Sharam A (2004) *"Power Markets and Exclusions"* Financial and Consumer Rights Council, Melbourne
Found at http://www.vcoss.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/pdflib.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 retailer Non-Compliance Victoria 2004 as for citation 66

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).

It seems to me that f EWOV is to be the first point of contact for all energy related complaints and that there are goals to avoid duplication of investigation, they need to be far better informed and more proactive about redirection or direct referral where indicated.

I refer to a detailed case study which outlines the position of a victim of the bulk hot water policies as a tip of the iceberg example impacting in Victoria on some 26,000 Victorians.

This is followed by an equally detailed examination of perceptions of case handling by EWOV and by the VESC.

Whilst this complaint is specific and relates to an individual the wider implications affect the entire community and I should not have been left unsupported with all of this in terms of input and referrals given the impacts, in the case of bulk hot water on over 26,000 Victorians.

Neither EWOV nor the VESC had any perception of any external accountabilities and refused to identify any. This was on the basis of their respective corporate structures.

EWOV's legal structure as a company limited by guarantee without share portfolio does not exempt it from accountability at least through the statutory bodies to whom it is directly accountable.

1. It is quite clear from the information below also contained in the document sent to EWOV on 16 May 2008 that EWOV is fulfilling a public role and was set up under statutory provisions with considerable accountability to statutory authorities.

2. The combined considerations below and the involvement of the ESC in the operational, accounting and reporting responsibilities of EWOV either render this body a public entity, or indirectly accountable through its associated statutory authority(ies) under the *Public Sector Administration Act 2004.*

3. Energy and Water Ombudsman (Victoria) Ltd (EWOV), *(ABN 57 070 516 175),*

(a) was established under a statutory enactment (and is accountable for gas under the s36 of the *Gas Industry Act 2001 (GIA)* and s28 of the *Electricity Industry Act 2000 (EIA).*

(b) has a co-regulatory public function on behalf of the State; has written terms of reference guiding its operation; *(Refer to EWOV's Charter and Constitution; the MOU between ESC and EWOV; MOU between EWOV and DPI' MOU between EWOV and CAV, as some* examples*)*

(c) is required to provide the advice or report to the Government *(ESC, DPI and CAV - see EWOV's Charter and Constitution)*

(d) must consult with the statutory authority, ESC regarding consumer representatives on the Board, and any additional directors and the independent Chairperson of the Board

(e) must liaise with the ESC and other relevant government authorities, in consultation with the Board, developing working procedures with these bodies where appropriate. The working procedures developed will, amongst other things, define the respective areas of responsibilities of those authorities under applicable legislative and regulatory instruments *(7.1(d) EWOV Charter)*

(f) must allow the direct involvement of the ESC and others in processes and nominations relating to the appointment of the independent Chairperson of the Board

(g) receives most funding from industry scheme members, though it appears that EWOV also receives direct support from the CAV, and has a MOU with the CAV as well as with the ESC in the spirit of a prescribed agency; and more recently with the ACCC

(h) Pursuant to s15 of the ESC Act it could be argued that EWOV *"has functions or powers under relevant health, safety, environment or social legislation applying to a regulated industry."*

Despite is corporate structure, since EWOV, must in making its determinations have regard to the health, social, safety needs of consumers and the need for continuity of essential services, it could be argued that for the purposes of the ESC Act that it has a public authority or entity.

The same considerations apply to ESC despite its corporate structure.

In any event, regulators and complaints handlers however structured have moral and social responsibilities whether or not these are explicitly iterated within the law

It is misguided to hold any perception of absent external accountability when any entity or individual is fulfilling a public role

In the case of the VESC, its decisions can be challenged through VCAT under s56 of the ESC Act

4. Therefore, all circumstances considered despite its separate legal identity as an incorporated company with limited guarantee without share portfolio, EWOV has public accountabilities and for all practical purposes can be considered to be a public entity.

5. In any case, the statutory authorities under whom EWOV was established under statutory enactments have direct responsibility for the conduct, performance, reporting and accountability requirements and cannot escape this by reference to the separate legal identity structure of industry-specific and industry-based complaints schemes operating in a co-regulatory role to provide a public service.

6. Refer to EWOV's Constitution[265] and to its Jurisdictional Charter[266]

7. Refer also to *Public Administration Act 2004,* Part 5 as cited above

8. Any entity, regardless of legal structure of funding parameters has an inherent accountability to government in their public role of providing a complaints service as a first point of contact. These schemes need to embrace the fundamentals of public expectation and provision in acknowledging their public accountability. In the case of EWOV mandated benchmarks are included reflecting those adopted under the Federal Benchmarks for Industry-Specific Complaints Handling.

9. These benchmarks are specifically mandated under both the *Gas Industry Act 2001* and the *Electricity Industry Act 2000*, but not mentioned in the new generic laws. Neither is mandatory membership of a complaints scheme, whichever form or funding formulae are intended in the proposed national generic law. This was pointed out by the South Australian Energy Ombudsman in its recent submission to the Ministerial Council on Energy Consumer Regulation Framework.

Transparency and accountability are key expectations of public administration at all government levels. Respect for the explicit and implicit provisions of the statutory enactments under which entities are created, regardless of corporate structure (for example independent regulators)

During the 20 months of my battling with specific issues as a member of the community and a self-directed grass-roots advocate for classes of consumers less able to find their way around the system, I was concerned to learn of the self-perceptions of the Essential Services Commission, and the complaints scheme that it oversees. Energy and Water Ombudsman (Victoria) Ltd (EWOV) that neither body has external accountabilities.

I digress here to reproduce a short section from a protracted discussion on small scale licencing and selected proposal made by the VESC in their Final Recommendations March 2007 and EWOV's responses.[267]

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265 EWOV's Constitution 30 May 2006 found at *http://www.ewov.com.au/pdfs/Organisation/Constitution%2030%20May%202006.pdf*

266 EWOV's Charter (Jurisdiction) found at *http://www.ewov.com.au/pdfs/Organisation/Charter%2030%20May%202006.pdf*

267 Essential Services Commission (2007) Small Scale Licencing Framework Final Recommendations

My focus for the purposes of this accountability section is how consumer protections will be enhanced and who will deliver it.

I am concerned about comments regarding the complexities of broader tenancy disputes and complex tenancy law. I note EWOV's comment that matters will be decided on a *"case-by-case"* basis, with right reserved to refer the matter to other bodies if deemed appropriate. This means EWOV's Charter will allow decision-making on matters under other regulatory schemes for which EWOV staff have no training. They take direction from the VESC or DPI on matters of complexity. This one raises issues of philosophical beliefs vs consumer protection under other regulatory schemes.

My direct experience has been that EWOV (p7 Response to VESC SSL Issues Paper) does not always make robust identification of systemic issues or refer them. The disturbing EAG (2004)[268] cited elsewhere and reproduced within this Component submission testifies to paucity of identification of systemic issues; referral and transparency.

These are not matters for which EWOV has any training or expertise. It has not been my direct experience that these complexities were understood or correctly interpreted by either EWOV or VESC, or indeed the DPI. The matter, which was about bulk hot water arrangements squeezed into energy laws and equally force-fitted philosophically into the *"embedded network"* parallels, in the absence altogether of a shred of evidence that anything at all was being delivered.

All sorts of strategies, including the attractive *"look through tax entity"* incentives may well have been at play. The VESC and DPI may have favorable inclinations towards the rosy concepts they present. Are these schemes compatible with best practice avoidance of in regulatory overlap? Is their perpetuation robbing end-consumers of their enshrined rights.

From a public perspective it is of concern that the energy policy-maker and regulator in Victoria have not been able to distinguish the rights and entitlements of renting tenants from those of the retailers enjoying rewarding collusive arrangements with Owners' Corporations or Landlords.

The fact of the matter is that many of these issues overlap and conflict between schemes, protracted football games of accountability are played between agencies, and renting tenants caught in the cross-fire between jurisdictions generally turn out to be the casualties, whilst the rest of the world holds the belief that the consumer protection framework is generally working quite well.

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[268] *http://www.esc.vic.gov.au/NR/rdonlyres/3C7C9D7C-457F-45D1-9749-318D0DDE1713/0/SBN_EWOV_SmallScaleLicensingFramework_C_06_14042.pdf*
Energy Action Group (2004) Essential Services Commission Energy and Water Ombudsman Retailer Non-Compliance Report. Prepared by EAG after FOI access to records

Whilst it is well and good to have a co-regulatory scheme that is self-funded, there are many concerns about governance and conflicts of interest that are not normally raised in forms seeking feedback on a limited range of issues the is raised on public consultative forums.

I entirely agree that consumer protections should be extended to all recipients of energy – which includes those in embedded situations.

My concern is the degree of control that the VESC has over EWOV, and what may be seen as "conflicts of intensity if EWOV's income and very existence depends on its scheme members Stakeholders in other arenas have commented that many outcomes in self-regulated and co-regulated schemes frequently resulted in decisions favourable to scheme participants.

My own experience with advocating for 18+ on behalf of a particularly inarticulate, vulnerable and disadvantaged end-consumer of heated water services in a residential apartment unjustly imposed with contractual status was extremely negative – see case studies in appendices.

My view was that EWOV took on matters of policy out of jurisdiction, was dependent on the policy-maker and regulator to provide interpretative and philosophical guidance, and the outcomes were less than satisfactory.

The Merits Review process is cumbersome and only available at the discretion of the decision-maker, who made it a point of conveying her right to refuse Merits Review before it was contemplated.

In its submission to the VESC Small Scale Licencing Review, EWOV felt it should, relying on its Charter reserve the right to evaluate each matter on its merits and refer to other bodies matters of complexity, including the complexities of residential tenancy laws for which EWOV staff are provided with no training or regulatory backing. It was my direct experience in advocating for a particular matter on behalf of a tenant, that neither EWOV nor VESC were prepared to be influenced by direct advice from the peak Victorian body that the party held contractually responsible for energy costs for "bulk hot water" provision was not the relevant customer. The Relevant Entity (RE) was the Landlord/Owner.

The matter ran on for over 18 months. The VESC made the final decision about contractual matters which remains in dispute. Their views were startlingly similar. The requirement for the VESC to avoid regulatory overlap with other schemes was not considered to be of much importance in weighing up the issues involved.

Having now read in more detail of VESC's philosophical views in the matter of *"user-pay"* for energy, regardless of whether energy is actually delivered to the pre4mises of an end-user of utilities; and regardless of how that deemed energy usage, sale or supply is apportioned or calculated, or whether an appropriate measuring instrument is used through which energy passes at all, I am concerned about equitable outcomes.

The DPI's and VESC's philosophical beliefs are openly available with regard to BHW arrangements. The obligation to uphold s15 of the *Essential Services Act 2001.*

All I can do is to repeat my view that until or unless industry-specific complaints schemes are governed differently away from direct regulator control and funding and more distanced from dependence of scheme participant membership, at the very least public perceptions of conflict of interest will be difficult to allay.

I was also concerned about the initial responses that I had received from the DPI, and have resumed dialogue through the Ministerial Office on issues of accountability, governance and legislative and policy interpretation, more particularly as the DPI has since 1 January 2008 had policy responsibility for the BHW arrangements in place that are seen to be falling short of community expectation, specific legislative requirements to avoid regulatory overlap with other schemes, or to conflict with the *Gas Code*.

I would make similar observations about any Commonwealth entity that did not embrace accountability principles, or see themselves as accountable externally.

The Chairperson of the Essential Services Commission and any nominated delegate, Deputy or Acting Chairperson is directly accountable under the *Public Service Administration Act 2004* (Victoria), the objects of which are cited above.

In its Corporate Plan and Priorities 2008-2009 publication, the ACCC makes the following statements about its role and association with the AER

> ***Extract ACCC Corporate Plan and Priorities 2008-2009 (10 October 2008)***
>
> *Further reforms by COAG resulted in the establishment under the Act of the Australian Energy Regulator (AER) on 1 July 2005. The AER is Australia's independent national energy market regulator. To assist in providing a broad competition perspective the AER is part of the ACCC although it is a legal entity in its own right.*
>
> *The ACCC is charged with administering the Act and associated legislation without fear or favour. As competition and consumer protection policy and law continues to evolve we are committed to meeting the challenges it presents for promoting and encouraging competition and fair trading in the interests of all Australians*

On the issue of corporate re-badging, it is encouraging that the ACCC is prepared to openly admit to its association with the AER as an integral part of the ACCC, despite its legal entity in its own right.

It has long been my view that *"independent"* regulators, despite corporate structure should be covered directly and without reservation by State or Commonwealth Ombudsman.

Om addition, all statutory authorities and regulators should be accountable to the taxpayer for decisions made. Consultative initiatives in the past have been less than optimal. Perhaps we are beginning to see a turnaround in some arenas, but there is a long way to go.

The ACCC has confirmed its affiliations and accountabilities in this way, in its Corporate Plan and Priorities 2008-09 publication.

> ***Extract from ACCC Corporate Plan and priorities 2008-09, sec1:8, p13 of 15***[269]
>
> *The AER board members make decisions arising from their statutory functions. The Australian Government is responsible for funding the AER. The ACCC is responsible for ensuring that the AER has the resources (including staff) it needs. The AER Board advises the ACCC on its requirements.*
>
> *A variety of mechanisms ensure that the ACCC and AER are accountable for their actions. These include the Commonwealth ombudsman, tribunals, courts and parliament.*

Neither the Department of Primary, nor the Essential Services Commission was willing to admit to the direct accountability of the VSEC under its own enactment, the *Public Administration Act 1994* or the values of the State Services Authority, reflecting the values within the PAA.

Repeated direct oral and written enquiry to the VESC and DPI, including through the Victorian Minister or Energy and Resources failed to elicit clarification of VESC's external accountabilities.

It was something of a shock to discover what the current Victorian energy regulator appears to believe about its own accountabilities and the accountabilities of the industry-specific co-regulated complaints scheme EWOV under its direct supervision, also despite of its separate corporate identity as a company with limited guarantee without share portfolio fulfilling a public role.

Instead of clarifying what I wished to know about external accountabilities, I was directed to EWOV's internal Merits Review Scheme in terms of any plan to challenge components of a decision that was not even under their jurisdictional powers to determine, being matters related primarily to policy, derived costs and tariffs and policies for BHW arrangements, for which they relied on contractual models contained in deliberative documents of no legal weight, which will not gain improved legal or technical sustainability if transferred from Guidelines and deliberative documents to Energy Codes; or indeed to orders in Council; or any legislative provision.

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269 ACCC (2008) Corporate Plan and Priorities 2008-09 (10 October) found at *http://www.accc.gov.au/content/item.phtml?itemId=845527&nodeId=925d10dd5b31bfa060f4b834dc467c5a&fn=Corporate%20plan%20%20and%20priorities,%202008%E2%80%9309.pdf*

I have explained my reasons for believing this to be the case in the context of this dedicated component submission.

Meanwhile, whilst on the topic of accountability I believe there are strong grounds for questioning the perception of any statutory authority, regulator, irrespective of corporate identify, or complaints scheme fulfilling a public role, however legally structured and despite a co-regulatory structural model or governance.

If there are flaws in existing provisions giving rise to doubts about accountability these need to be addressed and correct including within any proposed provisions.

To that end I urge peak consumer bodies at both state and federal level to examine this misleading perception so that the public at large may be able to regain some modicum of confidence in the system.

Matters become very complicated when the central issues are not just about market conduct, but about the very regulations that are seen to be driving such conduct.

Despite the direct involvement of Consumer Affairs Victoria (CAV) in 2007 and the weeks and months that it took to achieve any meaningful direct dialogue with both EWOV and the VESC in terms of the BHW provisions and their respective interpretations of the policies and legislation in place; no positive outcomes resulted for the parties in dispute about contractual liability.

Twenty months later the matter remains unresolved and contested, with the same policies in place, whilst the authorities seek not re re-examine those policies but somehow to seek to validate them despite their apparent legal and technical sustainability; despite seeming to represent gross regulatory conflict and overlap with other schemes; and despite being seen to be patently unfair.

The public is disillusioned enough with energy provisions, perceptions of diluted protection and certain policies that are not seen to be fair, equitable or responsive to community needs and expectations. The BHW provisions are amongst those provisions. They need to be examined in the light of these concerns.

In addition, the public at large, and the energy market participants are confused and concerned about the implications of being required to uphold policies that do not appear to stand up to close scrutiny on any grounds at all, and which have the potential to leave them vulnerable.

Besides all of that, a climate of change can have unpredictable impacts on consumer behaviour that can serve to compromise market stability and confidence all round.

Therefore these issues are raised in some hope that the anomalies and concerns raised about certain policies and accountability parameters generally will be urgently addressed.

Meanwhile, I comment in passing that for any change to be effected and sustainable the right corporate culture must exist.

As explained by the ACCC in the Corporate Plan and Priorities 2008-9 publication:

> ***Extract from ACCC Corporate Plan and priorities 2008-09,***[270]
>
> *"…. the AER regulates gas and electricity transmission and distribution networks and enforces compliance in the wholesale energy market with the National Electricity Law and National Electricity Rules and the National Gas Law and National Gas Rules.*

The AER is soon to take over all regulatory and enforcement functions for energy. Till that happens, and given the delay till 2010, there are some immediate issues to attend to and to take into account in providing advice for future reform and legislative change generally. That is why these matters have been highlighted for ACCC and AER attention as well as state jurisdictions and the MCE SCO arenas through the Department of Energy, Tourism and Resources.

The ACCC claim as follows about their own culture, also in the Corporate Plan and Priorities 2008-09 publication (10 October)

> ***Extract from ACCC Corporate Plan and priorities 2008-09, sec1:4, p7***[271]
>
> *Culture of compliance It is the aim of the ACCC that all businesses comply with the Trade Practices Act. We foster a culture of compliance by having an integrated approach to the administration and enforcement of the law.*
>
> *Depending on the circumstances, we choose from a range of compliance strategies: court action, court endorsed and administrative settlements, education and liaison programs, media communications, and by working with business (both big and small) on specific programs to bring about a change in conduct.*
>
> *The ACCC contributes to the development of federal and state policies and procedures that promote compliance with competition, fair trading and consumer protection laws. We provide guidance to industry about trade practices compliance initiatives, in particular voluntary industry codes of conduct.*

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270 ACCC (2008) Corporate Plan and Priorities 2008-09 (10 October) found at *http://www.accc.gov.au/content/item.phtml?itemId=845527&nodeId=925d10dd5b31bfa060f4b834dc467c5a&fn=Corporate%20plan%20%20and%20priorities,%202008%E2%80%9309.pdf*

271 ACCC (2008) Corporate Plan and Priorities 2008-09 (10 October) found at *http://www.accc.gov.au/content/item.phtml?itemId=845527&nodeId=925d10dd5b31bfa060f4b834dc467c5a&fn=Corporate%20plan%20%20and%20priorities,%202008%E2%80%9309.pdf*

In the same publication, the ACCC makes these statements:

> ***Extract from ACCC Corporate Plan and priorities 2008-09, sec1:3, p8***[272]
>
> *We take pride in our people and the way we perform our role. We adhere to the Australian Public Service Values and Code of Conduct. We produce results in the public interest by:*
>
> - *being accessible, transparent, independent and fair in our dealings with the community—including consumers, business and governments*
> - *performing our role in a timely, effective, efficient and consistent manner that respects the confidentiality of information provided to assist us*

These values are commendable. The public will look forward to relying on all of these approaches. Meanwhile there needs to be a culture fostered at all jurisdictional and federal levels that will adopt and proactively embrace such principles.

The Attorney General's Statement of Justice Core Values cited elsewhere seem to have been forgotten. They need to be resurrected.[273]

In its Corporation Plan and Priorities 2008-9, the ACCC has published these as key focus areas:

1. Promote vigorous, lawful competition and informed markets

The market cannot be informed if jurisdictional or federal policy documents are cosmetically repealed, with components providing proper explanation of those policies, including calculation methodologies, the basis of reasoning for imposing deemed contractual status; the original deliberative documents; and the introduction, purpose and authority for provisions that appear not to be obsolete but alive and kicking in metamorphosed form by transfer from guidelines and deliberative documents to Codes, Licence Provisions or any other instrument claiming to legitimize the arrangements or make them more sustainable.

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272 ACCC (2008) Corporate Plan and Priorities 2008-09 (10 October) found at *http://www.accc.gov.au/content/item.phtml?itemId=845527&nodeId=925d10dd5b31bfa060f4b834dc467c5a&fn=Corporate%20plan%20%20and%20priorities,%202008%E2%80%9309.pdf*

273 Attorney General (Victoria) (2004) New directions for Victoria's Justice System. Statement of Justice May 2004

The BHW provisions are seen to be unfair and unjust, legally and technically sustainable, Repeal by transfer to other instruments and concealment of crucial components will not provide an environment for an informed market, more so when the provisions represent direct and indisputable conflict with other regulatory schemes and the rights of individuals under written laws.

Bearing in mind its future role, the AER and ACCC should immediately take on board advice on this issue such that consumer protection and rights do not become further eroded.

2. Encourage fair trading and protect consumers

This is to be achieved through:

> ***Extract from ACCC Corporate Plan and priorities 2008-09, sec1:7, p12 of 15)***[274]
>
> *Identify(ing) and focus effectively on national and cross-border (including international) consumer protection and product safety issues.*
>
> - *Pursue(ing) and achieve appropriate remedies (including criminal penalties) for false and deceptive conduct, particularly if the conduct is detrimental, blatant or widespread.*
> - *Facilitate and encourage fair trading conditions between big and small firms.*

These are worthy ACCC priority goals and strategies

Missing from the facilitating objectives is direct mention of services, though it is implied generally under consumer protection.

The provision of energy and fair and just measurement of thereof, with fair and just allocation of contractual status is the absolute minimum that the community expects and demands.

This should be addressed and factored into goals. The BHW provisions represent what the community believes to be blatantly unfair and unsustainable policy seen to be driving unacceptable market conduct. (please refer to case study and all other arguments and facts herein).

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274 ACCC (2008) Corporate Plan and Priorities 2008-09 (10 October) found at *http://www.accc.gov.au/content/item.phtml?itemId=845527&nodeId=925d10dd5b31bfa060f4b834dc467c5a&fn=Corporate%20plan%20%20and%20priorities,%202008%E2%80%9309.pdf*

3. Regulate national infrastructure services and other markets where there is limited competition

This is to be achieved through the following strategies:

> ***Extract from ACCC Corporate Plan and priorities 2008-09, sec1:7, p12 of 15***[275]
>
> *Work cooperatively with the AER to provide a single consistent and independent regulator of the energy sector that encourages competition within and between the gas and electricity markets to benefit industry, consumers and ultimately the nation.*
>
> - *Regulate industries where market structures are changing including where the market structure challenges effective regulation.*
> - *Use sound methodologies when undertaking price inquiries and monitoring.*
> - *Achieve consistency in regulatory outcomes, as far as possible, across industries, between firms and over time.*

These goals are admirable. They will represent a huge challenge. I am concerned about the pace at which decisions are being made and how robust evaluation has been of jurisdictional provisions that may be used for modeling in other jurisdictions.

I believe there to be gaps in the contractual governance model proposed by the NECF and am in the process of responding to a range of issues impacting on this. However, what is contained in this already lengthy submission will go some of the way to identifying a selection of these.

I ask that they are taken into account. The plight of residential tenants and their eroded rights and redress options is not a new topic. The advent of mushrooming metering and billing agent business under the umbrella of energy provision has given rise to anomalies, and practices, policies and regulations that are seen by many to be blatantly unjust and unfair.

The mere existence of generic laws does not always make them accessible or affordable. There are gaps in access to redress on substantive grounds. Where the substantive unfair provisions are seen to be driven by statutory policies, it is these that need to be addressed.

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275 ACCC (2008) Corporate Plan and Priorities 2008-09 (10 October) found at *http://www.accc.gov.au/content/item.phtml?itemId=845527&nodeId=925d10dd5b31bfa060f4b834dc467c5a&fn=Corporate%20plan%20%20and%20priorities,%202008%E2%80%9309.pdf*

I gave a few examples, but the bulk of this submission is about the BHW provisions, with some reference also to embedded network and small scale licencing provisions. It is my understanding that the Network Policy Working Group in the MCE SCO arena has not yet made firm decisions about some of these maters.

However, I stress that there are misconceptions about embedded networks that may be leading Policy Working Groups to consider the BHW arrangements to come under that heading. Those receiving heated water that is communally heated on common property infrastructure are not embedded network customers.

The term *"embedded"* applies to electricity only and to direct provision of electricity to the premises deemed to be receiving it through an electrical line, facilitating the flow of energy, and regardless of network ownership and operation.

Those receiving heated water (BHW) that is communally heated receive no energy at all.

The contractual governance model, calculation and trade measurement practices have economic policy implications and are also closely associated with the non-economic governance model, so raised here with the aim of highlighting all of these closely inter-related matters.

The impacts are widespread on a huge range of conceptual models to be adopted into the new national energy laws.

This component submission with relatively narrow goals is not the place to discuss competition issues in detail.

However, as an appendix which will also be relevant to future submission I attach a checklist of issues that appear to have been entirely overlooked in the premature assessment of Victoria's gas and electricity energy markets in the process of examining the internal energy market.

In addition, also as an attachment, and more relevant to a future submission is a brief discussion of price and profit margin parameters, with particular emphasis on the CRA findings used by the AEMC to justify their findings about the effectiveness of competition in Victoria within both gas and electricity markets.

Much has happened since the publication of the useful AER State of the Energy Market. The market is volatile and a climate of regulatory instability and compromised consumer confidence does not help. The AER provided its own cautions within that publication as to the attributions that should be made to any assessment as to the barriers to retail competition.

One concern is the decision made to assess the market in the middle of the distribution chain, without fully recognizing that retailers merely hedge and manage risks. They do not set prices. A robust examination of the wholesale markets, despite commissioning of Consultants' Reports, and a robust assessment of the impacts of vertical integration, including gentailer activity, mergers and acquisitions may have missed the mark in terms of the minimal requirements for SWOT assessment of the market.

There are many who believe that philosophical beliefs and approaches have driven many of the decisions seen to be premature. There is a difference between heading for a competitive market and achieving it. See for example the views expressed by The Hon Patrick Conlon for the South Australian Government. See the views expressed by some of the second-tier retailers.

Complaints figures have risen. EWOV in Victoria as the industry-specific co-regulatory scheme has been taxed beyond its limits and has also faced high staff turnover and instability. An interim process has been adopted ongoing whereby complainants who have taken up complaints at least twice with the providers, are encouraged to take up the option of a last chance to deal directly with a provider before EWOV formally addresses a complain.

Months of delays occur. Elsewhere I discuss gaps in complaints handling generally; jurisdictional limitations and failure to properly identify and refer systemic issues. Robust systemic identification and referral management have been long-standing concerns with EWOV and the current Victorian regulator. See for example the disturbing report by EAG (2004) ESC-EWOV Retailer-Non Compliance Report reproduced in full here as an appendix and discussed in more detail elsewhere.

In any case, these issues are peripheral to the central thrust of this submission, so I will avoid more detailed discussion, save to say that the state of competition

Turning now to other issues, legal compliance requirements and standards are a consideration also.[276]. The laws governing legal compliance have implications for the use of the internet for commercial or government purposes, including the validity of electronic transactions.

Amongst the provisions of such laws are those that regulate the claims made by or about web-based content and services. This includes laws that prohibit misleading or deceptive conduct in trade which establish liability for the provision of negligent advice or information.

Various laws can impose liability on the operators of a web site, including laws relating to negligent statements and laws that prohibit misleading and deceptive conduct.

It is postulated in this component submission that provision of information to the public on the websites of complaints schemes, regulators, government bodies and commercial operators could be construed as inaccurate and/or misleading if it is alleged that residential tenants must relinquish their enshrined rights under tenancy laws or other provisions regarding liability for utility costs, including consumption, supply, commodity and/or other non-energy costs, bundled or others.

This concern is discussed further elsewhere.

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276 Legal compliance found at *http://www.egov.vic.gov.au/index.php?env=-innews/detail:m1421-1-1-8-0-0:n-385-1-0--*

For example EWOV, using the title of *"Ombudsman"*[277] advises the general public on its *"Frequently Asked Questions"* (FAQ) web screen that although no separate gas meters exist for *"bulk hot water"* (meaning provision of gas for communally heated water in blocks of apartments and flats), residential tenants must expect to pay gas retailers for (alleged) gas consumption by individual tenants, and may therefore receive two lots of gas bills.

Similar information is or was published by VESC, and is implied in the existence of the Bulk Hot Water provisions, currently contained in the VESC Guideline 20(1) Bulk Hot Water Charging. Policy provision for this has been under DPI control since 1 January 2008.

Those unaware of their tenancy rights for whatever reason, receiving such advice from a body called "ombudsman" would normally not think of pursuing the matter.

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[277] A term that may mislead the public into believing that such a body has statutory special body status with direct accountability to Parliament, as in the case of State and Commonwealth Ombudsman; and levels of independence beyond mere legal structure that these bodies do not enjoy. They are co-regulated industry-based complaints handlers with no mediation functions powers or skills; exceptionally limited binding powers rarely used, unilaterally binding on scheme members in a limited range of case types; and normally only possible with the consent of the scheme member. Only 36 binding decisions have been made in total, and none at all in the past six years. Refer to the disturbing report by Energy Action Group (ERAG) (2004) Essential Services Commission Energy and Water Ombudsman Retailer Non-Compliance Report cited in full in Appendix 6 (pp907-927) with this submission. See also figures shown on EWOV's website.
EAG report found at
http://www.chronicillness.org.au/utilitease/downloads/Enery%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc
See also Appendix 1 to EAG Submission to MCE 2006 Legislative Package.
http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf
EWOV is an industry-based scheme, run funded and managed by industry but substantially accountable to the economic regulator, Essential Services Commission under the terms of its Charter, Constitution and Memorandum of Understanding dated 21 April 2007 with the Essential services Commission
The terms of the Memorandum of Understanding between Essential Services Commission and Energy and Water Ombudsman (Victoria) Ltd [277] Updated by Memorandum of Understanding dated 21 April 2007 between Essential Services Commission and Energy and Water Ombudsman (Victoria) Pty Ltd, the latter being a company limited by guarantee without share portfolio with a public role representing the interests of consumers and users, and thus for the purposes of s16 of the *Essential Services Act 2001*, a prescribed body holding MOUs also with CAV the DPI and more recently the ACCC, and AER.
The terms of the MOU between VESC and EWOV specifically states that though that "*…. memorandum does not deal with constitutional, governance or scheme operational issues, for the Commission has regulatory responsibility under EWOV's Constitute or Charter.*[277]
Despite this EWOV, VESC and the DPI persist in claiming that EWOV is independent and has no external accountabilities, nominating its Internal Merits Scheme as the only appropriate appeal mechanism against decisions in relation to energy suppliers; with other matters relating to performance governance and accountability being the sole province of the Scheme Ombudsman; of in relation to broader aspects of the operation of the scheme, the EWOV Board.

They are likely to implicitly believe that somehow they tenancy rights have been removed and they must accept alleged measurement of water volume using meters that are unlikely to have been approved for use by the water authority to calculate their alleged gas consumption for the communal heating of water.

Though EWOV must abide by the policies adopted by jurisdictional energy authorities, and appear to be substantially under the control of the policy maker and regulators despite their protests about independence, providing this type of inaccurate advice about the legal liabilities of residential tenants on a website or in other dialogue with consumers contributes towards undermining the enshrined rights of individuals.

It also makes it less likely that those accessing the information online will lodge complaints, thus keeping awareness down; complaints figures distorted; and the rights of individuals distorted and made further inaccessible.

Provision of such advice by complaints schemes, policy-makers and regulators disregards the enshrined rights of tenants; decisions by VCAT, the provisions and definitions of the *Gas Industry Act 2001* and the *Gas Code*, wherein a meter is an instrument through which gas flows and supply and sale of gas means facilitation of flow of gas to the premises supplied.

In my direct dealings with EWOV, policy-makers and regulators I was informed that these practices were commonplace and it was implied at one stage that they represented *"best practice."*

There are serious implications in

- effectively stripping end-users of utilities of their enshrined and mandated provisions under other schemes;
- Leaving such parties at risk of coercion, harassment and/or intimidation by way or endevouring to force an unjust deemed contractual status on those receiving not energy, but a composite water product in water pipes for which the energy suppliers are not licenced to sell, restrict or disconnect; also leaving such parties at risk of threat and/or actual disconnection not of energy but water products on the basis of refusal to comply with alleged conditions precedent and subsequent in connection with alleged deemed contracts with energy suppliers.
- Publishing online information that may have the effect of distracting residential tenants or other members of the public from clarifying their rights.

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

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

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

The *Essential Services Commission Act 2001* s15 specifically forbids overlap and conflict with other regulatory schemes. It is implicit also that regulators and policies in place do not adversely impinge on the rights of individuals under the provisions of the unwritten laws (common law), including the rights of natural, social and moral justice.

Though the Crown is Bound by the *ESC Act*, and though the provisions of s15 and s16 of the *ESC Act* are clear enough, these provisions appear to have been disregarded, as have the reinforced provisions of the Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria and Essential Services Commission, triggered by the particular matters highlighted within this dedicated component submission.

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

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

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

It is not the prerogative of policy-makers, rule makers and regulators to re-write contractual law. Those parties have a legal compliance obligation also, including with regard to compliance with any legislation or provision that requires avoidance of overlap with other schemes, proposed. Such an obligation exists within s15 of the *Essential Services Act 2001* (ESC Act) and the terms of a Memorandum of Understanding (MOU) dated 8 October 2007, between Consumer Affairs Victoria and Essential Services Commission Victoria (VESC). These issues are discussed in some detail under the heading *"Regulatory Requirement"*[278] and Regulatory Overlap.[279]

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

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

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

In Queensland and South Australia similar provisions apply. Common practice does not make for good business practice or acceptable regulation, or even compliance with specific legislated provisions governing regulation and regulators with corporate identities under the Corporations Act or Commonwealth equivalent provisions.

Regulatory overlap with other schemes is specifically disallowed under s15 of the *Essential Services Commission Act 2001*.

The BHW provisions represent gross overlap with other schemes and have eroded the enshrined rights of consumers of utilities and their private contractual relationships with Landlords/Owners under lease terms that are mandated and enshrined within residential tenancy provisions.

Owners' Corporation, Unfair Contract provisions under the *FTA,* and the philosophies and provisions of the National measurement Institute (NMA) under the terms of the *National Measurement Act 1960* (the default in Victoria) are also provisions that have been disregarded by current energy economic regulators and policy-makers in three jurisdictions, Victoria, South Australia and Queensland. Common practice does not make for acceptable business practice. Flaws regulations and policies cannot be disguised as anything less. They need therefore to be reviewed not reinforced. The New Laws needs to take this into account and be far more explicit.

I have been pursuing these specific issues for 20 months with no satisfactory outcomes to date. I have taken the matter up again with the Victorian Minister for Energy and Resources.

I am therefore with characteristic bluntness, beginning to question the value of complaints schemes, however legally structured and despite corporation with minimal jurisdictional powers and apparently no perception of external accountability; and in addition the value of independent regulators who have the same opinion of themselves and of the accountabilities of the complaints scheme that under its Constitution and Charter.

The adoption of a water-tight contractual governance model is therefore crucial and is discussed at some length elsewhere

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

It has not been my direct experience over a protracted period in endeavouring to advocate for the position of those who are particularly inarticulate, vulnerable and disadvantaged *(with these terms no restricted to financial hardship),* that appropriate responsiveness is obtainable in relation to concerns about policies that fall short of explicit requirements under statutory enactments (e.g. s15 of the ESC Act); of the explicit provisions Memoranda of Understanding with prescribed bodies; and including those undertaken in the spirit as between prescribed bodies.[280]

If well-informed individuals with articulate skills, persistence are facing insurmountable barriers in achieving appropriate responsiveness, where does that leave the rest of the community, and particularly those who cannot readily defend themselves; who do not know their way around the system; who may be resistant to third party representation; who because of their condition(s) may not have the insight or cognitive skills, or be able to surmount language or cultural barriers; lack of local knowledge.

For a proportion of these marginalized groups the stresses of merely lodging complaints or instructing third parties represent too much stress and pressure. Equally these individuals often do not have the capacity to face tribunal or court settings and the stresses that they bring.

The mere existence of retrospective redress such as through s55 of the *Residential Tenancies Act 1997* (Victoria) and equivalents in other states, enabling individuals to recover costs that properly belong to Landlords/Owners, does not render these pragmatic solutions focused on cost recovery suitable, fair or equitable in such cases. In any case, cost-recovery options are not cost-free in terms of filing fees, and often negate any benefit from such recovery. Such a solution does not solve the fundamental policy flaws; unacceptable market conduct.

As raised by many community organizations in numerous submissions, the mere existence of generic laws does not produce equitable or even accessible outcomes for the vast majority of those seeking redress. For example, PIAC has expressed serious concerns and cynicism about the value and accessibility of generic laws for the vast majority of individual cases.

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[280] See for example Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria and Essential Services Commission, which served to remind the VESC of its own obligations under the *ESC Act*, s15 concerning regulatory overlap, and additional, pursuant to the provisions of s16 of that Act, additional matters that including the requirement to adopt best practice.
This MOU was formed as a direct result of matters brought to the attention of the CAV concerning policy gaps, regulatory flaws and specific issues of complaint causing consumer detriment as a result of regulatory overlap represented by the provisions of the bulk hot water arrangements. The CAV's involvement was focussed on a policy perspective.
Both the VESC, EWOV declined to accept CAV's advice that the end-user of heated water products communally heated by a single supply/address point is not the *"relevant customer"* referred to under the deemed provisions of the *GIA* and *EIA* and not contractually obligated for the sale and supply of energy.

The Tenants Union has expressed concerns about inequity for residential tenancies in catering for their rights within energy-specific laws. For example, the requirement for residential tenants in meeting conditions precedent or subsequent in the obligation to supply are seen by many to be unjust since these parties normally have no control or access to any meters behind locked doors.

Perhaps it is time that independent regulators and industry-specific complaints schemes are made more aware of their public roles and accountabilities, and perhaps there is further room for tightening up of provisions that may leave any room for doubt on these issues. The climate is ripe particular in view of the Productivity Commission's current Review of Regulatory Benchmarking.

Though repeated elsewhere in more detailed discussed, I now show below an extract from the current version of the *Essential Services Act 2001.*

Gas Industry Act 2001[281]

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 follows[282]. 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

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281 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

282 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*

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:

1. *developing policy and governance arrangements to deploy advanced metering infrastructure in Victoria • developing a framework for energy consumer hardship with consumer organizations and energy retailers in Victoria*

2. *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 users of "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 current Victorian 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 and contested 20 months on.

I quote below from s15 of the Essential Services Commission Act 2001, focusing on the requirement to avoid regulatory overlap

Version No. 030[283]

Essential Services Commission Act 2001

No. 62 of 2001

Version incorporating amendments as at 1 July 2008

15 Consultation

(1) This section applies to the Commission and to prescribed agencies for the purpose of ensuring that—

(a) the regulatory and decision making processes of the Commission and prescribed agencies are closely integrated and better informed; and

(b) overlap or conflict between existing and proposed regulatory schemes is avoided.

(2) In this section ***prescribed agency*** *means a person, body or agency which—*

(a) has functions or powers under relevant health, safety, environmental or social legislation applying to a regulated industry; and

(b) is prescribed for the purposes of this section.

283 Extract from *Essential Services Commission Act 2001* No 62 of 2001 Version 30 incorporating amendments to 1 July 2008 (VESC)
http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/9E90F948BEAB65E9CA2573B700229938/$FILE/01-62a021.doc

(3) the Commission must as early as practicable consult with a relevant prescribed agency—

(a) in the making of a determination; and

(b) in the conduct of an inquiry, after first consulting with the Minister; and

(c) in preparing and reviewing the Charter of Consultation and Regulatory Practice.

(4) If requested in writing to do so by the Commission, a prescribed agency must consult with the Commission—

(a) in relation to any matter specified by the Commission which is relevant to the objectives or functions of the Commission under this Act and under relevant legislation; or

(b) in respect of a matter specified by the Commission which may impact on a regulated industry.

(5) A prescribed agency must ensure that consultation occurs as early as practicable in the regulatory, advisory or decision making processes of the prescribed agency.

(6) The requirements under this section are in addition to any other requirements or processes under any other legislation or regulatory scheme.

16 Memoranda of Understanding

(1) In this section ***prescribed body*** *means— s. 16*

(a) a person, body or agency which—

(i) is a prescribed agency; or

(ii) represents the interests of users or consumers; and

(b) is prescribed for the purposes of this section.

(2) The Commission and a prescribed body must enter into a Memorandum of Understanding by a date determined by the Minister.

(3) A Memorandum of Understanding—

(a) must include such matters as are prescribed; and

(b) may include any other matters that the parties consider appropriate.

(4) The Commission must ensure that a Memorandum of Understanding is published—

(a) in the Government Gazette; and

(b) on the internet.

s. 16

I repeat the provisions of s6 of the ESC Act below

Extract from ESC Act 2001, s6, v30 amendments to 1 July 2008

Crown to be bound

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

The VESC may be structured as an *"independent regulator"* from a legal structure perspective in terms of incorporated (as is the complaints scheme EWOV with whom it is so closely aligned and for whom it has direct responsibility though refuses to admit to it.

This is a re-badging strategy extremely common in government operations. This does not make these regulators except from the reach of the *Public Administration Act 2004* (PAA) or any other accountabilities. The Chairperson of the ESC and any delegate acting in that position has express responsibilities to the *PAA*.

In addition, the DPI has oversight over the *Gas Industry Act 2001* (GIA) and the *Electricity Industry Act 2000* (EIA) which both fall under the ambit of the Victorian Regulator VESC.

EWOV the Victorian industry-specific complaints scheme has particular accountabilities under s36 of the *GIA* and s28 of the *EIA* to uphold the *Federal Benchmarks of Industry-Specific Complaints Handling,* more especially given their public role in operating effectively as a public body or prescribed body in having functions or powers under relevant health, safety, environmental or social legislation applying to a regulated industry. This relates to their front-line role in fielding complaints against providers of energy and participating in the public policy debate about reform measures that have impacts on consumers. In that role EWOV requires adequate support from the statutory authorities to whom it has accountabilities under its Charter and Constitution and various Memoranda of Understanding undertaken in a spirit as between prescribed bodes.

Whilst perceptions of accountability may well become blurred through re-badging strategies involving incorporation of components of statutory authorities, the definitions of prescribed authorities, and of prescribed entities or bodies is clear within various statutory enactments, and embraced also within the values of the State Services Authorities.

The VESC's most recently Retailer Compliance Report of 10 October 2008[284] identifies its objectives as follows.

> ***1.1 The role of the Commission***
>
> *In the Essential Services Commission Act 2001, the Commission's primary objective is to protect the long-term interests of Victorian customers with regard to the price, quality and reliability of essential services.*
>
> *In achieving its objectives, the Commission performs the following functions:*
>
> • *reviewing distribution prices and service standards;*

[284] Essential Services Commission (2008) Compliance Report for Victorian Energy Businesses (3 July 2008, published online 10 October 2009) *http://www.esc.vic.gov.au/NR/rdonlyres/F5162918-1C7A-4FA9-8F37-18855C77B36A/0/RPT200708ComplianceReportforVictorianEnergyRetailBusinesses20080703.pdf*

> • *responding to customer enquiries and complaints on regulatory matters;*
>
> • *investigating matters referred by Ministers;*
>
> • *monitoring and reporting on regulated businesses' performance; and*
>
> • *conducting public education programs on the regulatory framework and ensuring that the framework offers adequate consumer protection.*

I will leave more detailed discussion of these considerations for another component submission, but for the purposes of this contained response to the MCE SCO Table of recommendations and the VESC Regulatory Review, I include these as passing observations, since it is important for existing new legislators, policy-makers, rule-makers and regulators to be clear about their responsibilities and accountabilities.

In addition it is important for statutory authorities and their associated regulators and complaints schemes to be aware of the risks of ignoring the terms of the enactments under which they operate, including the requirement to avoid regulatory overlap current and future.

These principles, as a matter of best practice must be incorporated into the new energy Laws and regulations, reinforced and monitored in the interests of best practice governance and accountability – an area of particular interest and inquiry for the Productivity Commission, who has been asked to provide advice to the government about how regulatory benchmarking parameters can be enhanced.

Since this submission is intended for multiple parties, I hope inclusion of these comments will be seen in the spirit intended and also to remind all stakeholders of the importance of accountability and regulatory benchmarking generally.

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.

I raise here one further issue. The Essential Services Commission expect a formal written referral from EWOV in order to provide written advice to EWOV Otherwise more general information is provided for EWOV to rely upon. EWOV's consistent identification and reporting of systemic issues has not been found to robust in the past, and that has been my direct experience.

It is not always the case that a large number of complaints needs to be lodged in order for a matter to be seen as systemic. A comparatively low percentage of consumers actually complain. Where they may be unaware of their rights or that breaches have occurred they are less likely to do so still. When, for example they receive letters from retailers claiming ownership of meters, and identifying a right to bill, many consumers would not think of questioning this, even if they have been provided with advice about their residential tenancy rights.

The manner in which information is conveyed by providers of goods and services and how such information is processed by consumers is crucial to determining what complaints or other action may be taken.

It is not difficult to establish that if policies exist to pursue perceived rights by suppliers, they are likely to be system. It is equally not difficult to see that if statutory policies and regulators are adversely affecting some consumers they are likely to be systemic policy issues.

For those reasons robust reporting to statutory authorities and regulators is indicated just as soon as such problems arise. I can testify to how very poorly these matters are handled at the best of times, and even when reports are made to VESC, compliance enforcement is often shown to be weak. This remains a concern.

This is illustrated in the disturbing EAG Report[285] that is discussed in another submission. That report was prepared as far back as 2004 following FOI access to records. Nothing much has changed since then.

I can testify from my own experience of advocating for those requiring third party representation and for my efforts to become transparently involved in the consultative debate that disclosure, transparency and a genuine commitment to receive inputs here challenge is expected to existing policies or approaches has not characterized my interactions with jurisdictional energy bodies.

It seems to be that controversial matters or working documents are not routinely published online, even to the extent of omitting to openly publish Issues Papers and

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[285] 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/Enery%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc*
See also Appendix 1 to EAG Submission to MCE 2006 Legislative Package.
http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf
This report is included within this Submission in its entirety as Appendix 6 (pp90-927)

Working Papers directly relating to public consultations such as the current VESC Regulatory Review. Elsewhere I have discussed also the failure to place the BHW deliberative, decisional documents online till well over a year after implementation, and then only after some pressure had been placed in terms of disclosure. Upon direct request for these documents, regulatory staff had been instructed to refrain from disclosure or discussion.

These are not issues that enhance confidence in accountability and transparency by economic regulators and others with a public role.

In 2000 the Property Council a research based organization prepared a report on the establishment of an Essential Services Commission.[286]

Perhaps it is time to remind the community of the recommendations made in that report

In one of its many recommendations, the Property Council recommended that the ESC be independent from, but accountable to Government. s56 of the ESC Act allows for ESC decisions to be appealed.

I wholeheartedly support the philosophies embraced by the Property Council recommended in the same report that

> *It may be necessary to establish another arm of the Victorian Civil and Administrative Tribunal (VCAT) with sufficient resources and expertise to hear appeals from decisions made by the ESC and other bodies with decision-making powers which relate to essential services.*
>
> *There should be legislative requirements that procedural fairness is accorded in any hearing and to ensure that judicial review of decisions made by the ESC is accessible.*

[286] Property Council of Australia. (2000) Establishment of an Essential Services Commission. A submission prepared by the PCA Victorian Division September 2000 Found at *http://www.dtf.vic.gov.au/dtf/rwp323.nsf/0/5908d74cdb91d9794a2569e400259e84/$FILE/ATT27YO8/sn22.pdf*

I again quote from the 2000 Property Council report and recommendations concerning the establishment of the Essential Services Commission.

Extract from Property Council's Report and recommendations 2000

Achievement of broader Government objectives of utility regulation best left to existing specialist bodies

- *The current regulatory regime involves a number of authorities and regulatory bodies having jurisdiction that overlap. The system requires a level of understanding as to who controls the issues. In establishing the ESC the opportunity must be taken to define the interface between the other jurisdictions to avoid confusion and waste of resources.*

- *To some extent interests of consumers are best assured where specialists are available to comment on and consider pertinent issues* ***but*** *there must also be a central organization which has control of broader issues and is able to see the broader picture, for example a formalized regulator forum.*

Changes required to the role or powers of these organizations

As a result of the clarity that should come about by the establishment of the ESC the role and powers of other organizations should be refined accordingly.

While we are looking at changes being defined though the equivalent of VCAT, Property Council believes there is a need to define which body is the single or final point of reference. We have concerns that the number of parties involved could dilute the effectiveness of the decision making process.

I could not agree more that lack of understanding at all levels as to who controls the issues and proper definition of the interface between the other jurisdictions to avoid confusion and waste or resources is crucial.

The Property Council believed there was a need to define which body is the single or final point of reference. I could not agree more than in my direct experience, the number of parties involved diluted the effectiveness of the decision-making processes and made it possible for a protracted and expensive accountability shuffle to occur.

There was much to be learnt from the experiences that I attempt to cursorily relate – for those concerned with regulatory benchmarking such as the Productivity Commission perhaps the opportunity should be seized not only to resurrect original recommendations that seem to have been forgotten, but with eight years of hindsight since those recommendations were made, there is room to reconsider how enhanced functioning may be achieved at regulatory level and within government departments to improve consumer redress, enhanced regulatory outcomes and ultimately reduction of the burden on business through achieving enhanced consumer satisfaction, more effective regulation and reduced market failure.

Selected discussion of Review of Essential Services Act 2001

I begin by citing without comment from selected submissions to the 2007 Review of the Essential Services Act 2001, starting with the one from Consumer Action Legal Centre (CALV) addressed to Tim Holding, MP, and (Victorian) Minister for Finance.[287] The submission speaks for itself and it reproduced here from pp2-7, page one being a description of the services offered by CALV

CALV (2007) Govt Response Review of ESC Act 2001 (29 June)

2 New objective and pricing principles

2.1 New objective

Consumer Action strongly supports the current objectives of the Act and does not agree with the recommendation of the Review to amend the primary objective in section 8(1) of the Act and remove the facilitating objectives in section 8(2). We note that the review did find that the objectives of the Act are being achieved by the Commission, and that service, reliability and customer responsiveness of regulated industries has improved under the regulatory regime administered by the Commission.

In the second reading speech introducing the Act into the Victorian Parliament, Treasurer Brumby stated that the aim of the Act and associated reforms was 'to protect the interests of all consumers in relation to reliable supplies of gas, water and electricity.'[288]/[1] Treasurer Brumby identified the following key features of the Commission:

- *a focus on achieving triple-bottom line outcomes through more effective integration of economic regulation with broader environmental and social objectives;*
- *a regulatory approach that provides strong incentives for optimal long-term investment in infrastructure;*

[287] Consumer Action Legal Centre (CALV) (2007) Submission to Review of Essential Services Commission Act 2001 (29 June) pp1-7. Found at *http://www.consumeraction.org.au/downloads/SubtoGovtResponsetoReviewofESCAct29.6.07.pdf*

[288] John Brumby MP, *"Essential Services Commission Bill 2001 – Second reading speech"* (Victorian Parliament, 23 August 2001) c/f CALV Submission to Review of Essential Services Commission Act 2001; citation 1, p1

- *more effective regulatory oversight over reliability of essential services as they affect Victoria; and*

- *enhanced accountability and transparency of regulatory decision-making.*[289] /[2]

With respect, it appears to us that the Review's analysis of the Act's objectives focuses on the second dot point above, and the need to ensure that there are incentives to improve productivity and investment in infrastructure, without adequately considering the other key features identified in the second-reading speech. While we agree that regulatory decision-making should promote improved productivity and efficient outcomes, we are concerned that the Review's recommended objective focuses on efficiency to the neglect of consumer outcomes.

The Review argues that social and environmental outcomes should be dealt with through independent regulatory or other mechanisms. While this may be possible in some circumstances, such an approach denies the significant impact that economic regulation can have on environmental and social outcomes. The fact is that economic, environmental and social aspects of essential service delivery are inter-related and the regulator's decision-making role will always be a matter of balance, judging competing interests, and promoting outcomes that further the public interest. It is our view that the 'laundry list' of facilitating objectives provides important guidance to the regulator in achieving such outcomes.

The Review discusses the 2005 Productivity Commission (PC) Review on National Competition Policy, a policy which was an important precursor to the independent economic regulation of essential infrastructure. As discussed in the Review, the PC did outline a number of key benefits of Australia's micro-economic reform program for consumers, including improved productivity, sustained economic growth and increased consumer choice.

The PC noted, however, that 'experience with NCP reinforces the importance of ensuring that the potential adjustment and distributional implications are considered at the outset.'[290] /[3]

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289 Ibid Brumby John, ESC Bill (2001) c/f CALV (2007) Submission to Review of Essential Services Commission Act 2001; citation 1, p2 (June)

290 Productivity Commission, *Review of National Competition Policy Reforms (Report No 33)*, April 2005, p 150. c/f CALV Submission to ESC Act Review, citation 3, p2 (June)

Additionally, the PC noted the 'mixed impacts' of reforms on regional communities and adverse impacts on the environment (such as increased greenhouse gas emission from the reform-related stimulus to demand for electricity). It is our view that the Review's recommended objective will entrench a failure to consider adjustment, distributional and equity impacts of regulatory decision-making. This is because it will focus the regulator on supply-side efficiency and investment matters only.

Consumer Action believes that economic growth exists to serve not just the majority of Australians, but all of them. Public policy programs should not place such an emphasis on wealth creation that we pay insufficient attention to how we distribute wealth. Considering this, it is our view that the facilitating objective of the Act that ensures users and consumers, including low-income and vulnerable consumers, benefit from the gains from competition and efficiency, is an important and progressive inclusion that should be maintained.

2.2 Pricing principles

Consumer Action broadly supports the Review's recommendation relating to pricing principles to guide the Commission's determinations relating to price determinations. We recognise that these pricing principles are in accordance those developed as part of the national energy regulatory framework and reflect good practice for economic regulatory pricing determinations.

We would not support, however, these pricing principles replacing the facilitating objectives of the Act. As outlined above, we believe that facilitating objectives assist with guiding the regulator, and such guidance should apply to all of the Commission's activities, and not be limited to pricing determinations.

We also do not support the removal of section 33(4) of the Act, which requires the Commission to ensure that, wherever possible, the costs of regulation do not exceed the benefits, and that decisions take into account and clearly articulate any trade off between costs and service standards. It is a good regulatory principle to ensure the costs of regulation, costs which are ultimately borne by consumers through the prices of essential services, do not outweigh benefits. Further, pricing determinations, both in energy and water, are critical to determining adequate standards of service are delivered.

We also have concerns about the recommendation requiring the Commission to consider form of regulation factors when it determines the form of, or need for, regulation. While the factors listed are useful in determining whether a particular service is competitive, we're not convinced that this should be the limit of the Commission's regulatory functions. In our view, the Commission should have ambit to regulate where it identifies consumer detriment (subject to a comprehensive and consultative cost-benefit analysis).

It is in the consumer interest for the Commission's determinations to clearly explain the trade off between costs and service standards, which should also improve transparency of decision-making.

3 Providing the Commission with code-making powers

Consumer Action broadly supports the recommendation to provide the Commission with a general power to make codes, as well as appropriate penalty provisions for their breach. We note that the Commission has, to date, made extensive use of codes under energy and water industry legislation, to define the obligations of regulated entities. We agree that the current reliance on licence revocations to enforce such obligations is insufficient, and would welcome a civil penalty regime. Such a regime would provide a better incentive for regulated businesses to comply with their obligations.

We also broadly support the recommendation that the process for creating a code should be consistent with the Subordinate Legislation Act 1994 (Vic) requirements that statutory rules are subject to regulatory information statement (RIS) processes, and that codes are disallowable by Parliament. We agree that there should be appropriate regulatory gate-keeping to ensure that regulatory burdens do not outweigh benefits, noting that any costs associated with regulation are ultimately borne by consumers through increased prices.

We note, however, that current RIS processes are ineffective at assessing the benefits of applying interventions to address problems affecting consumers. For example, the Victorian Competition and Efficiency Commission's Annual Report 2005-06 noted that improvements could be made in the quality of regulation through improving the quantification of the extent of problems that regulation is addressing, and the costs and benefits of proposed options for addressing these problems.[291] /[4]

[291] Victorian Competition and Efficiency Commission, *Annual Report 2005-06*, Sept 2006 at 63.

In detailing its work in these areas, it highlighted that quantification of the problem to be addressed in Victorian RISs improved in 2005-06, as did cost quantification.[292] */*[5] *However, in contrast, quantification of the benefits of proposed regulation in Victorian regulatory impact statements actually declined in 2005-06. It reported:*

> *"Improvement in quantifying benefits, however, has not progressed from 2004-05 where 64 per cent of RISs contained some type of quantification. This compares to 50 per cent of United Kingdom RISs that quantified benefits to businesses and 32 per cent that quantified benefits to consumers and the environment…"*[293] */*[6]

> *"In terms of measuring the benefits of regulation, the Victorian Competition and Efficiency Commission noted that '[i]t is widely recognised that it can be more difficult to estimate the value of benefits…Some regulatory proposals impose benefits that are not amenable to quantification or that can be difficult to quantify…'"*[294] */*[7]

We do note that the Commission's current processes for developing codes are consultative and we are concerned to ensure that any extra requirements on the Commission do not mean that it is unable to quickly respond where consumer detriment is identified.

Considering this, and the problems identified with RIS processes above, it is our view that the Government should undertake an overhaul of the RIS processes, to ensure consumer interests are appropriately identified and quantified, before proceeding with the recommendation.

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292 As above at 64 – 67. Regarding problem quantification, it reports: 'In 2005-06, 73 per cent of RISs assessed had some quantification of the extent of the problem requiring regulatory action, unchanged from 2004-05. The proportion of RISs that comprehensively quantified and monetised the problems however, increased from none in 2004-05 to 17 per cent in 2005-06.' Regarding cost quantification, it reports: 'The proportion of RISs that contain some quantification of the predicted costs of the proposal has increased from 88 per cent in 2004-05 to 93 per cent in 2005-06…Further, half the RISs included a comprehensive quantification of direct costs, and 3 per cent included a rigorous quantification of all direct and indirect costs, a significant improvement on last year when only 27 per cent of RISs quantified direct costs and none quantified indirect costs.'

293 As above at 67

294 As above. Citation 7 c/f CALV Submission (2007) to Review of ESC Act 2001, citation 7, p5

3 Improving the Commission's access to information

Consumer Action strongly supports the Review's recommendation that the Act be amended to enable the Commission to obtain information from any person who may be able to provide information relevant to the functions of the Commission. We have become increasingly concerned about regulated businesses contracting out services (often to related entities) and then attempting to use the contract price to over recover in the context of a price determination, rather than allowing the ESC to determine whether the proposed costs are efficient.

The recommendation states that improved information gathering powers could be achieved by amending section 37(1) to state that the entities the obligation applies to 'includes, but is not limited to, all regulated entities, and associates of regulated entities'. This was said to be consistent with the draft National Gas Law (NGL) which was first released for consultation in November 2006.

Consumer Action notes that since the release of the draft NGL, the Ministerial Council on Energy (MCE) Standing Committee of Officials (SCO) has released its response to issues raised in submissions. The MCE SCO, noting that the concept of 'associate' is perhaps too broad, state that:

A separate concept from that of an 'associate' will be used to target the scope of information gathering powers to appropriate entities (i.e. persons who significantly contribute to the provision of pipeline services…..

… The NGL will be amended so that the AER can issue regulatory information instruments to service providers (of covered pipelines) and other persons who significantly contribute (either as an individual or group of related companies) to the provision of pipeline services. Rules may be used to clarify the circumstances in which persons are considered to 'significantly contribute'. MCE will have no ability to prescribe persons by regulation to which the instruments will apply.

The key protections will be that the AER, in exercising its discretion whether to issue a regulatory information instrument:

- *· may only issue instruments 'reasonably necessary' for the relevant AER function; and*
- *· in addition to the 'reasonably necessary' test, when issuing an instrument to a person other than the service provider is required to take into account:*

- *whether the service provider is able to provide sufficient and timely information to address the reasons for issuing the instrument (i.e. whether there is a need to apply the instrument to the other person), and o the extent to which the AER considers the services provided by the other person are provided on a genuinely competitive basis having regard to:*
    - *- the competitiveness of the market in which the person provides services to the service provider;*
    - *-whether and how the arrangements were market tested; and*
    - *- any relationship of ownership or control between the parties.*

Consumer Action generally supports this approach, but notes that much will depend upon the legislative drafting, given that previous experience suggests that this is likely to be a highly litigated clause. (The Essential Services Commission is currently involved in extensive litigation with Alinta about the scope of essential services regulation). Before supporting any amendments regarding the Commission's access to information powers,

Consumer Action would need to view the precise words to be used in the legislation.

Consumer Action also supports the recommendation in relation to the release of commercial-in-confidence information. It is our view that there should be a presumption in favour of disclosure, and for it to be the Commission's policy that all submissions and information provided to it be publicly available.

We agree that in some circumstances there are commercial reasons why information should be kept confidential, but we believe that it should be incumbent on the regulated businesses to demonstrate why the Commission should not publicly release the information.

4 Review of regulatory decision-making

Consumer Action does not support the recommendations relating to a limited merits appeal.

The Commission's price determinations, in particular, are extensive processes, in which widespread consultation is undertaken. We do not believe that a limited appeals panel can effectively replicate this process in a short space of time. Nor do we believe that, due to resourcing constraints, consumers and consumer representatives can effectively participate in such appeals processes. Finally, we are concerned that the merits review process being considered is open to risks of gaming by regulated businesses.

In our submission to the Review, we supported the recommendations from the independent report, Grounds for appeal – representing the public interest in the review of regulatory decision making in the energy market. [295] *[8] That report recommended against any form of merits review, and concluded that judicial review alone provides the greatest likelihood of participation by public interest organisations, as well as promoting public interest outcomes.*

It states that judicial review involves more limited grounds upon which review may be sought and that the nature of the grounds available under a judicial review model focus on the legal correctness and process of decision-making. This limits the ability of regulated businesses to game the process by picking and choosing elements of a decision to appeal. In addition, the issues canvassed in a judicial review application more clearly relate to public interest considerations, focusing on issues of process.

I am extremely concerned, though not surprised about reports by EAG in 2004 obtained upon FOI access to records that no minutes were taken of monthly meetings between EWOV/EIOV concerning discussions about hardship, retailer compliance and affordability.

I quote from the EAG Report, which was provided as an attachment to EAG's submission to the MCE 2006 Legislative Package[296] and is also attached in its entirety with this submission.

Extract from EAG Retailer Non-Compliance Report 2004, also attached as Appendix 1 to EAG (2007) Submission to MCE 2006 Legislative Package and attached with this submission as an Appendix also in its entirety

Following this meeting the Energy Action Group requested under Freedom of Information legislation documents held by the ESC relating to matters brought to it by the EWOV/EIOV that concerned hardship, retailer compliance and affordability.

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295 Lowe, Catriona and Nelthorpe, Denis, (20066) *Grounds for appeal: representing the public interest in the review of regulatory decision making in the energy market*, September c/f CALV Submission to Review of ESC Act 2001, (June), citation 8, p7

296 Ibid Energy Action Group (2007) Submission to MCE 2006 Legislative Package and Advocacy Arrangements found at (January) *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf*

The ESC and the EWOV have a Memorandum of Understanding and meet monthly. The ESC does not take formal minutes of these meetings. The FOI officer advised EAG that

> *"I have been advised that no minutes per se are taken at these meetings between the ORG/ESC and EWOV. However, at each meeting, these agendas are updated under the "Outstanding actions/issues" column to reflect discussions at the previous meeting. You are in receipt of all agendas which contain these updates" (Taft, 15 July 2004)*

"Your request was for documentation related to "hardship", "affordability" and "retail compliance with the capacity to pay provisions of the Electricity Retail Code and the Gas Retail Code". The material sent to you covers these areas" (Taft, 21 September 2004).

The EAG was seeking to understand whether or not 'hardship', 'affordability' and/or more formally retailer non- compliance with the incapacity to pay provisions of the Retail Codes was reported by the EWOV to the ESC and whether the EWOV reported these as a 'systemic' issue which then would have then required the ESC to act.

I quote again from the EAG 2004 Report:

What did EAG learn?

The following excerpts show that the ESC was made aware five years ago that there was a problem with disconnection relating to handling of the 'incapacity to pay' provisions of the Codes. Whilst the EWOV was inconsistent in the way it handled the matter it did alert the regulator to the systemic nature of the problem – widespread retailer non-compliance with the Retail Code – and kept putting it on the agenda. The ESC apparently would never acknowledge that there was a systemic problem.

ESC Response

The ESC has reviewed its performance monitoring and reporting processes to assess the adequacy of his 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 organizations has been ignored.

Discussion (EAG Report 2004)

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)[297] *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.*

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[297] Updated by Memorandum of Understanding dated 21 April 2007 between Essential Services Commission and Energy and Water Ombudsman (Victoria) Pty Ltd, the latter being a company limited by guarantee without share portfolio with a public role representing the interests of consumers and users, and thus for the purposes of s16 of the Essential Services Act 2001, a prescribed body holding MOUs also with CAV the DPI and more recently the ACCC, and AER.
The terms of the MOU between VESC and EWOV specifically states that though that "…. *memorandum does not deal with constitutional, governance or scheme operational issues, for the Commission has regulatory responsibility under EWOV's Constitute or Charter.*[297]
Despite this EWOV, VESC and the DPI persist in claiming that EWOV is independent and has no external accountabilities, nominating its Internal Merits Scheme as the only appropriate appeal mechanism against decisions in relation to energy suppliers; with other matters relating to performance governance and accountability being the sole province of the Scheme Ombudsman; of in relation to broader aspects of the operation of the scheme, the EWOV Board.

EAG 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
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.vcoss.org.au/images/reports/Full%20Report.pdf*

As far back as 2003, EWOV had expressed concerns about the lack of clarity or agreement as to what constitutes a systemic issue. EWOV believed that this had had the effect of constraining the capacity of the Review of Market Code of Conduct Committee. The terms of reference (1) of that Committee include *"providing expert advice to the ESC on systematic or material breaches of the Marketing Code of Conduct."*

Extract from EWOV's submission 2003 to VESC Review of Market Code of Conduct Committee, p1 24 November 2003

The committee has a range of input from key stakeholders who are members and observers of the committee and this advice has been forthcoming on systemic or material issues as they have been brought before the committee. EWOV has been able to contribute to the work of the committee by bringing anonymous case examples both individual and systemic to the committee for consideration. There still appears to be a lack of clarity or agreement about what constitutes a systemic issue and this has constrained the committee's capacity to fully provide the advice that it could have

EWOV observed on p3 of the 2003 submission to the Review of Market Code of Conduct Committee as follows.

> ***Extract from EWOV's submission 2003 to VESC Review of Market Code of Conduct Committee, p3 24 November 2003***
>
> *As mentioned earlier, the ERAA's advice to the Commission of 23 September 2003 makes it clear that the Marketing Code is no longer a co- regulatory Code, as it does not have the input of industry. Therefore, it clearly falls to the ESC to effectively enforce the Code. There should also be a clear differentiation between the fact of Consumer Affairs Victoria enforcing the Fair Trading Act, as opposed to ESC's responsibility to enforce its own Code. I believe it is important for the ESC to now accept a responsibility for enforcement of the Marketing Code and spell out its methods and processes for such enforcement.*

I agree with EWOV's view that it is important for the ESC to now accept responsibility for enforcement of the marketing Code and spell out its methods and processes for such enforcement. More details of the views expressed by EWOV in 2003 is shown under Selected Consumer Impacts, which also includes the appendix as a flow chart of suggestions made by EWOV for a model of Governance regarding the role of the MCCC in assisting the ESC and CAV with their future investigations of market conduct issues.

Whilst those offered or subject to market contracts, there is insufficient protection for those who are unjustly imposed with the perception of deemed contractual status, particularly where the proper contract lies with the Landlord or Owners' Corporation. It is preposterous for authorities, including regulators and complaints schemes; or for energy providers to consider disconnection of heated water services on the basis of misguided perception that those receiving heated water as an intrinsic part of their mandated residential lease terms may be taking unauthorized or illegal supplies of energy.

The conditions precedent and subsequent have been used in a way such as to distort their intent and the intent of the deemed provisions. An analysis elsewhere of the *Gas Industry Act 2001* illustrates this. Suffice it to say here that in order for a customer contract for sale and supply of energy to be established under deemed or other provisions, the energy must by supplied directly to the premises of the deemed recipient in such a manner as facilitates the flow of energy to those premises. A car park, boiler room or other common property infrastructure are not the premises (abode) of individual occupants in multi-tenanted dwellings.

Water authorities or utility providers energy public lighting in such properties don't attempt to impose unwarranted contractual status on individual occupants, but properly send their bills to the Landlord or Owners' Corporation. So should those supplying energy for the heating of a communal water tank, from which heated water is ultimately reticulated to end-users in water pipes, not gas service pipes, gas transmission pipes, or electrical lines, regardless of network arrangements.

Recipients of communally heated water are not *"embedded customers"* in terms of energy. They receive no energy at all to their individual premises in connection with their heated water supplies. The terms supply point and supply address are mistakenly used and applied in relation to bulk hot water. They are synonymous terms denoting physical connection of energy and unrelated to the meaning of the term premises. Therefore supply address is not a postal term and has nothing to do with the four walls occupied by an end=-user of heated water where no physical energy connection or flow or energy is demonstrable.

I remain concerned that it is not uncommon for the VESC to leave it to individuals to suffer the accountability shuffle; fail to make direct reports about conduct issues directly to the Victorian Government, and the CAV in particular.

Nothing much seems to have changed for years in terms of governance, accountability or compliance enforcement.

Concerns about weaknesses in generic laws and enforcement were identified during the Productivity Commissions review of Australia's Consumer Policy Framework, and also weaknesses with consumer protection, with a recommendation in the Draft Report that energy protection be nationalized immediately without further discussion. Impediments associated with the debate over federalism vs anti-federalism and constitutional issues have delayed this happening.

In any case, if nationalism has the effect of weakening rather than strengthening consumer protection, this would be falling short of community expectation and moral and social responsibilities.

However, whatever action may have resulted or may in the future result from such discussions, there appears to be no recognition that the potential for exploitation of those *"deemed"* to be receiving energy as recipients of *"heated water reticulated in water pipes."*

The market power imbalances are even greater than for those who choose their own providers and face unacceptable market conduct.

In the case of those receiving heated water products as an integral part of their residential tenancy leases, they do not get to chose who provides energy to the Landlord at a single energization point which serves to heat a communal water tank.

They are stuck with whichever party the landlord chooses or who is normally the *"local"* retailer for provision of energy to bulk hot water services. For VENCorp purposes a single supply point/supply address/energization point exists in such properties with BWH systems (communal water storage tanks).

They receive inadequate information, demands for contractual compliance, and threats of disconnection that could be covered under FTA and TPA provisions and also the criminal code, since it is an offence to coercively threaten parties however politely the threat is phrased.

These parties are not empowered to take an action, and are entirely inadequately supported in their complaints to either EWOV or ESC because the [policies in place tacitly sanction conduct and wrongful disconnection of water products where no contract exists or ought to exist with the end-users of heated water.

Though EWOV has tried to argue for improved policies in their various formal submissions, at the end of the day, they are governed by regulatory control and policy-maker or regulator stances and advice.

They are not equipped to deal with issues of complexity such as described in this. They do not have the jurisdiction to deal with matters of policy, tariffs, legislation.

There are published reports, such as from EAG that EWOV is inconsistent in its decision-making processes, and that the system, especially with regard to systemic issues is inadequate. That has been my direct experience also.

Both EWOV and VESC are apparently reluctant to report unresolved cases for fear of attracting adverse attention. This has been demonstrated in the EAG 2004 report included in its entirety as an appendix with this submission.

Until or unless complaints schemes are distanced from regulatory control and are able to operate more independently, with well-trained staff, different accountabilities, structure and funding, true independence in decision-making will not result.

It is not uncommon for policy-makers and regulators to persistently attempt to defend flawed policies and provisions rather than re-examine whether they are actually meeting community needs or accurately interpreting the legislative and other provisions in place.

In addition, regulators are often scapegoated for unpopular policies, as observed by Peter Mair in his submission to the Productivity Commission's review of Australia's Consumer Policy Framework (2008) submission 112.

I also refer to the views of Professor Luke Nottage in his submission to the same review sub 114 concerning the burgeoning industry-specific ombudsman schemes, and my own multiple-part submission, but notably within subdr242part4 and subdr242part5, some of which is echoed here.

Though perhaps somewhat out of context here, I am concerned about some of the issues raised by EAG in its submission to the MCE on advocacy issues.

Time constraints prevent me from comment on this submission, save to quite a single paragraph about paltry enforcement commitment, and minor tweaking of the Rules and Codes shown below.

I agree with EAG that there is more to consumer representation than the 5% of those experiencing hardship, though I am extremely sympathetic to this class of utility consumers.

Representation for those who are unfairly and unjustly threatened with disconnection of heated water products; or for that matter of energy is hard to come by even if one can legitimately claim hardship.

Most advocacy that is available is available for particular hardship agendas. Whilst the case study cited by me liberally in this submission is one that includes hardship as one of the many parameters of disadvantage, but concerns about representation of the wider community are not diminished by bringing forward that particular example.

Representation for small business is hard to come by. Their needs require protection also.

The enshrined rights of the rest of the community should not need to be backburner issues for consumer protection. There are issues of parity and reasonable and equitable distribution of proper.

The principle of unwarranted disconnection is as important to those without hardship as others.

The contractual governance issues deserve intense reconsideration at jurisdictional levels regardless of hardship. Most jurisdictional and proposed consumer protection provisions still appear to be focused on hardship and ability to pay, with the consequences that there appear to be enormous gaps in consumer protection in other arenas, and also for small businesses who meet the *"small customer"* definition on consumption threshold alone.

I agree with most of the recommendations made by EAG, though I have not had time to critically study and respond to the comments made.

For the purposes of discussing disconnection issues here prior to delving more deeply into contractual governance issues as they impact on BHW provisions, I comment that it has been my direct experience that adequate interpretative skills, proper understanding of the technical issues and the and poor compliance enforcement

I reflect EAG's concerns about Advocacy Panel operations and the claim that it is not subject to direction by the AEMC o MCE in its performance of functions, which may be belied by the fact that the Panel is in fact directed in respect of how it is to perform its functions in allocating funds to small consumers. It is extremely unclear what happens with gas advocacy, available funds or processes. Perhaps the MCE could clarify this.

> ***Excerpt from EAG's submission to the MCE 2006 Legislative Package and the Consumer Advocacy Arrangements***[298]
>
> *EAG has a long history of being actively involved in a number of jurisdictional licensing rule and code changing consultations. The major point of difference between EAG and the Round Table participants is that our views have been formulated from experience and case work. It is EAG's basic contention that un-enforced licences rules and codes are worthless to consumers and that an emphasis on the minor tweaking of the Rules and Codes without enforcement doesn't particularly help consumers deal with utilities. Attachment 1 a 2004 EAG investigation into the relationship between the Victorian Ombudsman scheme and the Essential Services Commission of Victoria demonstrates that many systemic problems do not get addressed by the statutorily responsible organization. Unfortunately for Victorian consumers this position has not changed since Attachment 1 was written.*
>
> *EAG is aware that in several jurisdictions market participant retailers and distribution companies are having difficulties in billing customers have customers on the wrong "use of system" charges or fail to comply with the relevant codes relating to estimated billing procedures*

As noted above I am concerned about the findings of Energy Action Group in 2004 that identification and reporting of systemic issues represented a significant gap. I do not believe that much has changed since that time.

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[298] Ibid Energy Action Group (2007) Submission to MCE 2006 Legislative Package and Advocacy Arrangements found at (January) *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf*

I further reflect general concerns about accountability and transparency and disclosure, and in support quote again from EAG's submission to the MCE SCO 2006 Legislative Package[299]

> *EAG is also sensitive to the issue of very poor quality explanations and information disclosure in many of the jurisdictional reports required by jurisdictional regulatory requirements. It is almost impossible to assess how any distribution business across the NEM sets up their tariffs and charges. Ongoing work by the AER or a delegated jurisdictional regulator needs to be carried out on issues around the quality of supply and the regulatory reporting requirements and retail and distributor market processes. The best approach to date across the market has been work by the Essential Services Commission Victoria on the NEMMCo MSATS Customer Transfer arrangements. If consumers are to have any faith in the AER/AEMC regulatory arrangements then the AER needs to develop a skill set and a quality control regime to examine a range of NEM and gas market practices and procedures over time.*
>
> *As a further precaution EAG suggests that the MCE require that the AER provide resources for a non legislated trial period of time (say three years), where any valid comments made by consumers about deficiencies, oversight or poor behaviour by market participants are investigated and publicly reported on a regular basis (say half yearly) by the AER over the funded period.*
>
> *EAG has a number of important reservations around implementation of the regulatory accounting guidelines approach under the Australian light handed incentive regulation. The various jurisdictional regulators, ESC (V), IPART and the ACCC, have had considerable difficulties in developing a common data set to compare information across two regulatory cycles. This problem makes it very difficult to compare regulatory determinations. It is almost impossible to compare the two ACCC Transgrid transmission determinations or the 1999 and 2005 ESC of V Electricity Distribution pricing determinations. One of the objectives of the legislative package should be the development of data sets that allow the assessment of the effectiveness of the regulatory regime.*

[299] Ibid EAG (2006) Submission to MCE SCO 23 January 2006 found at *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf*

I have no connection with the EAG, or major or minor user groups, beyond being an independent stakeholder prepared to read and assimilate when time permits submissions from various stakeholders to the energy and other arenas and to form a personal opinion about matters brought to the attention of public authorities in consultative dialogue with stakeholders.

What concerns me most is the principle of exclusionary practices that appear also to be either implicitly endorsed by the Essential Services Commission.

For example there is the question of the practices and processes that are adopted in consumer consultative initiatives, which I touch only briefly in the section on VESC Consultative Processes.

Suffice it to say here that I experienced considerable difficulty, despite being an entirely independent registered stakeholder in effectively participating in the consultative process in the current Regulatory Review conducted by the VESC. Though registering my serious interest in participation in time to be included in all public forums and meetings, I was disabled from doing so, and from an early stage that policies were exclusionary and less than optimally transparent. I discuss this further in the section of VESC consultative processes.

Suffice it to say here that policies that include tabling of Issues Papers for the use of those on the large but elitist Consumer Consultative Committee (CCC), but not publishing such a document online. Worse than that the Victorian *"Independent Regulator",* when sending me a personalized copy of the May Issues Paper too late to take into account in time during response to the Regulatory Review held the perception that the Paper was privileged and therefore could not be cited or disseminated.

This makes a nonsense of public consultation. No public consultation documents can possibly be regarded as privileged or exempt from citation with that forum or others, provided proper acknowledgement is included.

The May Issues Paper for the current VESC Regulatory Review is still inaccessible online, as are all of the Working Paper documents.

The MCE has a policy of publicly disclosing its Working Paper documents for further public comment. This is as it should be, and represents the minimal public expectation. The gap in jurisdictions should be immediately corrected so that transparency, disclosure and accountability principles are upheld and seen to be upheld.

I do not believe I am the first to comment on these issues, and in support of my impendent views have cited EAG's views above from a publicly available document to the MCE arena.

The matter is not about supporting any one agency individual or group, whether or not deemed to be a *"consumer"* representative, but simply about exclusionary principles and the degree of control that should be permissible when publicly funded agencies are participating in capacity building, consultative processes or any other activity.

Therefore I am concerned to hear from reading certain submissions of practices that exclude consumer representatives of any description, whether supporting business or individual consumers, should be excluded from any such process.

I will refrain from explaining this, as I have attached as an Appendix the entire submission made by EAG to the MCE SCO 2006 Legislative Package to support my independent view concerning exclusionary practices in general as a policy, without delving into the specifics.

For example the meeting publicly advertised online for 17 June 2008 was one that I wished to attend, and registered my interest in time to be included. I was informed by e-mail that that meeting and others similar were exclusive to a Consumer Consultative Committee comprising representatives from government organizations, industry and nominated consumer groups, some without any member-base at all, involved solely in policy and research activities.

The response to my request to participate publicly in the current public consultation for the current 2008 Regulatory Review was to invite me to a private meeting behind locked doors with regulatory staff. No agenda was set for that meeting and I had no access to any documentation associated with the Review beyond the initial letter inviting public interest generally without specifying any issues parameters. Personal commitments precluded attendance. However, in principle I felt that I would prefer to participate more publicly and transparently and preferably by submitting written material.

I was assured that despite being excluded from participation in what I took to be a public meeting in June following engrossment of but not transparent publication of the May Issues Paper (tabled for the elitist stakeholders on a list), there would be ample opportunities for participation since this was only the first round of consultations.

My enquiry about the next advertised “Public Meeting” on 5 August, which I heard about by accident rather than through automated communication as a registered participant

The next I heard was publication of the Draft Decision, before I had any access to the issues Paper, with a 3-week deadline for response during a time when VESC was facing considerable difficult with its IT system for dispatch or receipt of material. That communication impediment is on the brink of being addressed from a technical standpoint. Attempts to make submissions to the Stage 1 review bounced back with a cursory automated electronic message about non-receipt by some or all recipients without further explanation.

The long and the short of it is that as a serious individual registered stakeholder, I wished my views to be publicly heard or read and to actively participate in the Regulatory Review in a transparent manner. At the time of expressing an interest I was led to believe that there would be ample further opportunities to participate in such a way down the track as this was merely the first round of public consultative opportunity.

I was not notified of the next public meeting in August making an accidental discovery too late; nor did I receive confirmation that the August meeting was indeed to be as public as it sounded, given the previous experience for the June meeting, that turned out to be for the elitist invited Consumer Consultative Committee.

I am wary about rosy self-perceptions of functioning levels. If external audits are done, the identity and full report should be made transparently available,

In addition all Memoranda of Understanding between prescribed bodies and other entities should be made transparently available online.

The MOU between ESC and DPI for example does not seem to be so available.

It is encouraging however, to see in the published ESC Compliance Report published on 8 October 2008 that a link for the MOU with the ACCC us made available. This is a step towards improved disclosure and transparency.

There appears to be much confusion and denial as to public accountability and transparency. I have expressed strong views about regulatory accountability because I believe there are significant gaps in both perception and delivery of these. Corporate structure should never be an excuse to evade public accountability. In any case the VESC is accountable for its decisions through s56 of the *Essential Services Act 2001*, and its Chairperson accountable under the *Public Administration Act 1994*. These bodies fulfill a public role. No perception should ever exist that suggests no external accountabilities.

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

Transfer to the *Energy Retail Code* of the BHW provisions from the existing Guidelines and deliberative documents will not validate the provisions further. In terms of trade measurement, calculation processes or contractual concepts.

Alternatively transferring the existing Rules for BHW arrangements from retailer licencing requirements to Codes, such as the Victorian *Energy Retail Code* or anywhere else by Regulators, Policy-Makers and Ministers through whatever means will not in law have the effect of removing enshrined consumer rights or overlap with other regulatory schemes, as is emphasized under the terms of the Memorandum of Understanding between Consumer Affairs Victoria and the Essential Services Commission (VESC), which perhaps now belongs also the DPI with current policy control over BHW matters.

Therefore the question of legal and sustainability needs to be examined as a first principle and implications for both end-consumers of energy or heated water, especially residential tenants in rented apartments and flats without separate relevant energization points through which legally traceable calculations can be made and apportioned.

In the absence of such energization points or calculation methods, the contract, under residential tenancy laws lies with the Landlord for provision of energy to heat communal boiler tanks on common property infrastructure. These principles are examined in more detail shortly.

The functions of the Essential Services Commission include but are not limited to the following obligations, as reiterated in all of its Memoranda of Understanding with other bodies, including with prescribed agencies for the purposes of the ESC Act and others in the spirit of a prescribed agency.

It is a contention within this submission that these obligations have not always been met in a manner that is consistent with community expectation.

In relation to a specific matter that is the subject of a lengthy deidentified case study report, is a contention also that neither the economic regulator ESC; nor its associated complaints scheme EWOV, which has obligations under the GIA and the *EIA*; and fulfills a public role as a co-regulatory complaints handler commonly but misleadingly known as an industry-specific "ombudsman;" nor the Department of Primary Industries (DPI) who has since 1 January 2008 had policy control over the BWH arrangements have all failed to take appropriate policy, regulatory and complaints management decisions that are consistent with the goals stated below for reasons detailed elsewhere (please see in particular the case study material in the appendices).

> *Ensure that regulatory decision making has regard to the relevant health, safety, environmental and social legislation applying to the regulated industry;*
>
> *To ensure that users and consumers (including low-income or vulnerable customers) benefit from the gains from competition and efficiency;*

I quote below directly from the explanatory notes at last available transparently online regarding the application of s16 of the *Essential Services Commission Act 2001* regarding the requirement to enter into Memoranda of Understanding with a number or prescribed agencies.

> ***Memoranda of Understanding***
>
> *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*[300]

[300] The processes are prescribed. However, a best efforts approach to resolution, including up to involving the Chairperson of the VESC is included, but not how a dispute should be resolved beyond that. In practice it has been my direct experience that both parties conduct business as if there were no accountabilities at all externally, and the VESC purports to have no control over EWOV, its performance and accountability. This is extraordinary. Again the pointed gap in most MOUs is their weak legal standing as statements of intent. They are not legally binding or enforceable and one has to wonder whether goodwill alone is sufficient in these matters. There should be a requirement to formalize such agreements by legally binding contractual arrangements, particular when the matters may have impacts social, environmental, health and welfare impacts, especially but not limited to vulnerable consumers.

In its latest Compliance Report dated 8 October 2008,[301] the ESC claims as follows:

> *Broadly, the objectives of the ESC Act require the Commission to promote efficiency, financial viability and effective competition in the regulated industries, with the goal of ensuring that the users and consumers derive a tangible benefit.*
>
> *The Commission has a wide range of enforcement measures available to it when responding to allegations of non-compliance with licence obligations. These measures range from less formal and administrative options to progressively more substantive statutory-based responses. The Commission may proceed with more significant enforcement actions where required, or where other measures have been ineffective, to address and rectify non-compliance.*
>
> *Further details on the Commission's monitoring compliance role can be found in the Commission's Compliance Policy.*

Prior to that ready accessible access to the links identifying the relationship between the ESC and other agencies has been less transparently available and has required tedious search through other sources.

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[301] Essential Services Commission 2008, Compliance Report for Victorian Retail Energy Businesses 2007-08 9 October 2008 Found at *http://211.27.124.45/NR/rdonlyres/F5162918-1C7A-4FA9-8F37-18855C77B36A/0/RPT200708ComplianceReportforVictorianEnergyRetailBusinesses20080703.pdf*
See also MOU between VESC and EWOV dated 21 April 2007 found at *http://www.esc.vic.gov.au/NR/rdonlyres/D2670BDF-80FC-4713-AC86-A8F155D46CAF/0/MOUEWOV.pdf*
See also Revised MOU between CAV and VESC dated 18 October 2007 found at *http://www.esc.vic.gov.au/NR/rdonlyres/5CF8C62C-0314-4FD3-B792-FA8E6520769F/0/MOU_CAV_Oct07.pdf*
This MOU between CAV and VESC was triggered by a specific complaint the subject of a case study report in the Appendices regarding BHW provisions and their implications for consumers. It reminded the VESC of their legal obligations under s15 and s16 of the *Essential Services Commission Act 2001* especially with regard to the obligation to avoid conflict and overlap with other regulatory schemes; adoption of best practice, and consultation procedures. This is reiterated in all the MOUs between the VESC and other bodies.
See also MOU Between VESC and Department of Human Services dated 20 June 2007 found at *http://www.esc.vic.gov.au/NR/rdonlyres/01530137-F254-4300-9D89-2BF761E6A831/0/dhs_20071024155022.pdf*
See also MOU between VESC and VENCorp dated 15 May 2007 found at *http://www.esc.vic.gov.au/NR/rdonlyres/BAE2B89C-1469-4C9E-90BA-ACEB17EE360F/0/vencorp_20071024155048.pdf*
Other MOUs to which VESC is a party. Emergency Services, Energy Safe; Environment Protection; Links found at *http://www.esc.vic.gov.au/public/About+ESC/Memoranda+of+Understanding/*

Still missing is clarification of the precise relationship between the VESC and the DPI. Neither party has been forthcoming about this about direct and persistent written enquiry over several months, both reiterating the "independence" of the regulatory solely based on the corporate structure of the Essential Services Commission. This surely cannot be used as a pretext through which to escape accountability to the taxpayers and to Parliament, regardless or other implicit or explicit accountabilities.

I am concerned about claims of a wide range of enforcement measures available that may not be utilitized as often is indicated, and about real commitment to compliance enforcement or to identification of material or systemic issues that require investigation and action.

When a matter that is complicated as the one cited in the case study reported in the Appendices,, which relates to market failure and conduct that appears to have been triggered by statutory and regulatory policy, the matters become more complex and clouded.

One of the many functions of the ESC is to administer the *Essential Services Commission Act 2001*.

It is one of the contentions of this lengthy component submission that the VESC appears to have failed in its obligations pursuant to that enactment, in particular s15 and st6 of their own enactment regarding avoidance and conflict with other regulatory schemes and consultation and reporting as discussed at length here and elsewhere

It is also a contention that the Memoranda of Understanding between the VESC and other agencies that are prescribed agencies for the purposes of the ESC Act, or undertaken as in the spirit of the ESC Act have not been upheld and could be interpreted as having been spuriously undertaken.

Whilst the BHW provisions were put in place on 1 March 2006, it is the intent of the VESC to undertake cosmetic repeal of these provisions and transfer the essence of these provisions to the *Energy Retail Code* in an attempt to somehow validate the legally and technically unsustainable provisions that were authored, engrossed, sanctioned and adopted by the VESC after several deliberative discussions during 2004 and 2005.

Repeal of essential components providing clarification and some measure of transparency could be interpreted as means through which to conceal the detail of the rationale and the application of the BHW provisions.

It is one of the contentions of this component submission that the BHW provisions could be seen as an embarrassment to governments generally and to regulatory provisions for a number of reasons not restricted to legal and technical unsustainability; conflict with other regulatory schemes and detriment to consumers at large, to say nothing of conflict with the spirit and intent of national trade measurement laws.

It is one of the contentions of this submission that if statutory policy is flawed in the fist place, and unacceptable market outcomes result, aside from the substantive issues related to the policies themselves, the issues become clouded. It may be extremely difficult for policy-makers and/or regulators to admit to misconceived, flawed or even harmful policies, even when they represent clear regulatory conflict and overlap with other schemes, fail to meet community expectations or minimal best practice parameters.

The BHW provisions appear to fall into that category, hence the depth of treatment here. These provisions have been the subject of angst debate and lobbying efforts without success for many years. Ill winds blow no good. These provisions are ripe for re-examination as to their legal and technical sustainability and in view of the detriments generally to end-users of utilities and the uncertainty that the provisions bring to the industry and its participants.

Failure to address the injustices now and in the future will be seen by the community at large as failure to uphold the principles and rules of natural and social justice and best practice – at the very least; followed by failure to uphold best business and regulatory practices; trade measurement provisions; and the mandated obligation with energy legislation and in multiple Memoranda of Understanding with other agencies to avoid overlap and conflict with other schemes and implicitly also with the fundamentals of the provisions of unwritten laws. The current BHW arrangements fail on all counts and represent legally and technically unsustainably provisions, as well as unfair contract provisions that violate the essence, spirit and express provisions of unfair contract laws and precepts.

I give below extracts from selected Memoranda of Understanding between Essential Services Commission with the CAV[302] and with VENCorp[303]

As noted in the MOU between the ESC and VENCorp dated 15 May 2007 under Clause 4.2. For the purposes of the ESC Act VENCorp is a prescribed agency as noted under "Background (a) in the MOU of that date.

That MOU, under (B) Background entered into that memorandum of understanding to provide for consultation between them and the integration and co-ordination of the regulatory and other activities, in accordance with sections 15 and 16 of the ESC Act.

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[302] Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria Essential Services Commission found at *http://www.esc.vic.gov.au/NR/rdonlyres/5CF8C62C-0314-4FD3-B792-FA8E6520769F/0/MOU_CAV_Oct07.pdf*
This MOU between CAV and VESC dated 18 October 2007 was triggered by a specific complaint the subject of a case study report in the Appendices regarding BHW provisions and their implications for consumers. It reminded the VESC of their legal obligations under s15 and s16 of the Essential *Services Commission Act 2001* especially with regard to the obligation to avoid conflict and overlap with other regulatory schemes; adoption of best practice, and consultation procedures. This is reiterated in all the MOUs between the VESC and other bodies

[303] Memorandum of Understanding dated 15 May 2007 between Essential Services Commission and VENCorp found at *http://www.esc.vic.gov.au/NR/rdonlyres/BAE2B89C-1469-4C9E-90BA-ACEB17EE360F/0/vencorp_20071024155048.pdf*

It is one of the central contentions of this component submission that the fundamental principles of avoidance of regulatory overlap with other schemes, as agreed under the respective MOUS' between the ESC and CAV (18 October 2007), and with VENCorp (15 May 2007) has not been taken seriously either by the VESC or the DPI, despite the express provisions of s15 and s16 of the ESC Act.

In particular there is direct conflict and overlap between the provisions of the BHW arrangements adopted and implemented on 1 March 2006, including the contractual and economic provisions using algorithm fixed conversion factor principles based on water volume readings to calculate gas and electricity usage for heating of communal water tanks and the provisions of the Residential Tenancies Act 1997 (Victoria); the Owners Corporation Act 2006 (Victoria); Fair Trading provisions, (Unfair Contract Provisions); the rights and rules of natural and social justice, including common law contractual provisions

In relation to VENCorp, the definitions and proposed definitions for the BHW provisions, especially in relation to *"meter", "supply point/supply address"* (gas connection point); *"delivery of gas bulk hot water;" "delivery of electric bulk hot water"* disconnection and decommissioning definitions and principles are discrepant to those within the VENCorp MSO Rules and Retail Market Rules and the *Gas Distribution System Code* as discussed in detail elsewhere.

Conflict with the Gas Code is expressly disallowed under the GIA.

Beyond that, the definitions and proposed definitions for the BHW provisions, are contrary to the intent, spirit and express and implicit provisions of the *Gas Industry Act 2001 (GIA)*, s46 deemed provisions; and of the *Electricity Industry Act 200 (EIA)*, s39 in relation to supply and sale of energy (since heated water delivered in water pipes and estimation by rule-of-thumb, imprecise legally and technically unsustainable methodologies are in use); in relation to interpretations of *"relevant customer."*

The Objectives and purposes of the MOU between the VESC and VENCorp are 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;*
>
> *(d) Promote the adoption of a best practice approach to regulation; and*

> *(e) Assist the Commission and VENCorp in:*
>
> - *Performing respective functions under the relevant electricity and gas legislation; and*
> - *In their decision making in relation to regulated industries.*

The specific functions of VENCorp are set our in the GI Act and the EI Act and include:

> *(b) specifying security standards for the gas transmission system*
>
> *(c) control of the security of the gas transmission system*
>
> *(d) control of the operation of the gas transmission system;*
>
> *(e) collection of information about the gas transmission system;*
>
> *(f) monitoring and reviewing the capacity of the gas transmission system and the trends for demand for the injection of gas into, and the withdrawal of gas from, that system;*
>
> *(g) provision of information and other services to facilitate decisions for economically efficient investment and use of resources in the gas industry;*
>
> *(h) coordination of the interaction of gas production, gas storage, transmission pipelines and gas distribution and supply facilities for the purpose of ensuring a secure and efficient gas transmission system;*
>
> *(i) operation and administration of a market and facilitation of trading arrangements for the operation of the gas transmission system;*
>
> *(j) collection of information about delivery of gas by gas retailers and recommendations to the Commission of standards in relation to the reliability of the supply of gas to classes of customers;*
>
> *(k) Facilitation of the implementation and operation of, and provision of services in connection with, arrangements for competition –*
>
> *(i) in the retail gas market in Victoria; or*
>
> *(ii) with the approval of the Minister, after consultation with the Treasurer, in a retail gas market elsewhere outside Victoria*

(l) trading in gas

(a) for the purpose of discharging its functions relating to the security or administration of the gas transmission system, to the extent it is permitted to do so under the MSO Rules; or

(b) in an emergency

(m) planning and direction of the augmentation of the electricity transmission system;

(n) provision of information and other services to facilitate decisions for investment and the use of resources in the electricity industry;

(o) facilitation of the development of arrangements relating to the management of electricity demand;

(p) entry into agreements and arrangements relating to the development and implementation of proposals for the management of electricity demand.

(q) For the purposes of the National Electricity Law, entry into agreements with the holders of licences to distribute and supply or sell electricity to determine the arrangements to apply in respect of customer load shedding in circumstances where the available supply of electricity is, or is likely to become, less than is sufficient for the reasonable requirements of the community

(r) Informing the community in such manner is it thinks fit about any shortfall in electricity supply

(s) Subject to the directions of NEMMCO, directing a licensee to shed customer load in accordance with the arrangements applying to that licensee; and

(t) Subject to the regulations, giving any information it receives from a licensee about any past or likely future insufficiency in the supply of electricity by the licensee to the Minister and to any other prescribed person.

I now give an extract of the revised Memorandum of Understanding between Consumer Affairs Victoria (CAV) and Essential Services Commission (VESC) in relation to the objectives and purpose. The CAV is a prescribed agency for the purposes of the ESC Act.

It is a contention within this submission that the VESC, and subsequently the DPI, who took over control of the BHW provisions on 1 January 2008, has failed to uphold the spirit and express provisions of the objectives of the MOU between the CAV and VESC, in relation to provisions and decisions made regarding the application of energy provisions, in particular the deemed provisions of the *Gas Industry Act 2001*, despite explicit advice and guidance from the CAV, solicited as a consequence of a specific complaint about policies and their application, in addition to the conduct of an energy retailer endeavouring to impose contractual status on vulnerable and disadvantaged end-users of heated water unjustly imposed with contractual status.

It is a further contention that the value of Memoranda of Understanding as effective instruments needs to be questioned if there are no more than spurious statements of intent between parties, and not followed up with more formalized legally binding arrangements that have the force of contract.

What good is there for a peak consumer body to have no more theoretical influence in enforcing consumer policy and endeavouring to negotiate with "independent" economic regulators who see no reason to accept the requirement to be accountable under the terms of their own enactment or the Memoranda of Understanding that they take with bodies that are prescribed bodies for the purposes of the ESC Act, or undertaken in the spirit of prescribed agencies. This is not a rhetoric philosophical question. It is serious challenge to current arrangements.

One of the flaws within existing MOUs is that they do not specify what should happen in the vent of disagreement over interpretation and application of provisions and decisions other than referral to a Chairperson or best endeavors to resolve a matter.

Therefore I raise these issues under the heading of accountability as certain philosophical issues arise generally and specifically in relation to these matters and specifically with regard to consumer protection.

Reliance on retrospective pragmatic cost-recovery solutions for the sake of convenience, expediency or to serve political agendas is not sufficient in terms of community expectation or best practice.

Future laws need to be quite explicit about the need to avoid regulatory overlap and conflict with other schemes and with the fundamentals of the written and unwritten laws, including the rules of natural and social justice.

In particular the NECF needs to be not only more explicit about proper contractual governance issues, especially in relation to BWH arrangements, but to ensure that the philosophies of avoidance of regulatory overlap and conflict with other schemes and the unwritten law do not become overlooked in the rush to formalize contractual governance matters.

I now provide the relevant extract from the revised MOU between CAV and VESC which was triggered by the specific matter brought before EWOV, CAV, VSEC and the DPI during 2007 and again in 2008. That matter is the subject of the reported deidentified case study in the appendices.

It remains unattended, unresolved and contested despite the apparently pointless involvement of several statutory and quasi-government agencies and entities with a specific role and responsibility for the provision of essential services, its regulation, complaints handling, and an obligation to ensure that regulatory decision-making has regard to the relevant health, safety, environment and social legislation applying to the regulated industry; and to ensure that users and consumers (including low-income or vulnerable customers) benefit from the gains from competition and efficiency.

Extract from MOU between CAV and VESC revised 18 October 2007[304]

Objectives and purpose of this memorandum

This memorandum seeks to

Ensure that the regulatory and decision-making processes of the parties in relation to regulated industries are closely integrated and better informed;

Avoid overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries;

Provide for sharing information between the parties in the context of their respective roles in relation to regulated industries; and

Promote the adoption of a best practice approach to regulation.

304 Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria Essential Services Commission found at *http://www.esc.vic.gov.au/NR/rdonlyres/5CF8C62C-0314-4FD3-B792-FA8E6520769F/0/MOU_CAV_Oct07.pdf*

I cite the functions of the peak consumer body for Victoria, Consumer Affairs Victoria (CAV) as iterated within the Memorandum of Understanding between CAV and the VESC dated 18 October 2007.

Despite the explicit role of dealing with complaints from persons under *FTA provisions*, it is now apparently CAV policy now to leave complaints handling in relation to energy suppliers to EWOV, the industry-specific complaints scheme with exceptionally limited jurisdiction.

Therefore it is no longer CAV's position in practical terms to field complaints about breaches of the FTA, but they have an enforcement role.

This means a huge burden of responsibility on EWOV with its limited jurisdiction, and reliance on the VESC as current economic regulator on matters of policy and legislation. In turn the VESC relies on the DPI for guidance on legislative interpretation, especially in relation to the BHW arrangements which reverted to DPI control on 1 January 2008.

There is reason to challenge the interpretations made of the deemed provisions under the *GIA* and *EIA* in relation to bulk hot water provisions, no matter which body is making these. This has the effect of compromising consumer protection.

The new energy Laws need to clarify contractual matters beyond doubt, making sure to avoid regulatory overlap and conflict with other schemes, and ensuring that those receiving water products in water pipes are not held contractually obligated for energy sale and supply unless it can be shown that a physical connection of exists to the premises deemed to be receiving energy that can demonstrate the flow of energy to those premises. In addition, proper use or energy jargon is essential to avoid confusion.

Premises mean abode. This is term used under s46 of the *GIA* in relation to sale and supply of gas.

Supply address and supply point are synonymous and are technical terms meaning energy connection, not the living quarters of the recipient of utilities. Using these terms interchangeably creates confusion and misinterpretation of the rules and laws.

I now quote from the MOU in relation to CAV's functions:

Extract from MOU between CAV and VESC dated 18 October 2007

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 the 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

(h) To report to the Minister of any matter in relation to fair trading which CAV has investigated, either on CAV's own motion or at the request of the Minister

(i) To educate and inform people on fair trading issues

(j) Any other function conferred on CAV under the FTA or any other Act

I give below the background section only of the MOU between the VESC and EWOV which was entered into as in the spirit of an MOU between prescribed agencies, despite EWOV's legal structure as a company limited by guarantee without share portfolio fulfilling a public role.

Extract from MOU between VESC and EWOV dated 21 April 2007

BACKGROUND

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)

The parties have entered into a memorandum of understanding to provide for consultation between them and the integration and coordination of their regular activities, in the same spirit as memoranda of understanding entered into between the Commission and 'prescribed agencies: under the ESC Act

This memorandum does not deal with constitutional, governance or scheme operational issues, for the Commission has regulatory responsibility under EWOV's Constitution or Charter.[305]

[305] Despite this unambiguous statement in the MOU between VESC and EWOV and the explicit provisions within EWOV's Charter and Constitution discussed elsewhere, it was VESC's position and EWOV's that EWOV was an independent body not externally accountable. The only option referred to was the internal Merits Review process and internal discussion of issues relating to performance through the Ombudsman. The Board can also be approached on more general matters of operation. The erroneous view that VESC and DPI have no direct control over EWOV provides a misleading impression to the public. This perception was challenged in the course of a specific complaint that remains unresolved and contested. See case studies in appendices for details.
Over-reliance is placed on EWOV's powers and role. Their jurisdiction is exceptionally limited. Binding Decisions can only be made with the supplier's consent in a limited number of cases. There have been no such decisions in 6 years. The total number of Binding Decisions is 36. EWOV cannot deal with policies, legislative interpretation, tariffs and a number of other matters. Yet a football-style dialogue is undertaken between EWOV-VESC-DPI on matters impacting on these issues with nothing appropriately resolved because of the numbers of parties involved and confusion over who should make final decisions. These concerns were expressed by the Property Council in their 2000 Report on the setting up of the Essential Services Commission. Refer to discussion elsewhere.

I also provide a further extract from the MOU between VESC and EWOV dated 21 April 2007 concerning systemic issues and how these are to be handled.

Elsewhere I discuss significant concerns about the identification, reporting and managing of systemic issues or emerging systemic issues. It was my direct experience for over 18 months in dealings with both bodies and with the4 DPI that these matters were not attended in a proactive.

Elsewhere I have referred to similar concerns expressed by Energy Action Group (EAG) in its disturbing Essential Services Commission's Energy and Water Ombudsman r=Retailer Non-Compliance Report 2004.

This report made findings upon FOI access to records that highlight a number of significant deficiencies that deserve to be resurrected. I provide the entire report, which was also an attachment to the EAG submission to the MCE SCO 2006 Legislative Package (see appendices in this submission)

Extract from MOU between VESC and EWOV 21 April 2007[306]

By way of specific commitment:

Representatives of the Commission and EWOV will meet monthly to discuss matters of mutual interest and, in particular, the regulatory or systemic issues related to EWOV complaints;

To enable to Commission to deal with any systemic complaints or other matters that may need to be addressed by way of licence, code or guideline amendment or by way of action under the ESC Act, EWOV will provide the Commission reports concerning emerging, systemic or regulatory complaints issues; EWOV will, prior to the release of its complaints reports, provide to the ESC and the ESC's Customer Consultative Committee confidential briefings on those reports including advance copies of the reports.

[306] Found at *http://www.esc.vic.gov.au/NR/rdonlyres/D2670BDF-80FC-4713-AC86-A8F155D46CAF/0/MOUEWOV.pdf*

Whilst somewhat outside the narrow parameters of the focus of Component Submission 2A, the following considerations may be pertinent in terms of general regulatory provisions, given pending hand-over to the AER.

I quote from a somewhat provocative section of EAG's Submission to the MCE SCO 2006 Legislative Package also included in its entirety with Appendix 1[307] as an Appendix to this submission.

Extract from WAG (2004) Submission to MCE SCO 2006 Legislative Package

If consumers are to have any faith in the AER/AEMC regulatory arrangements then the AER needs to develop a skill set and a quality control regime to examine a range of NEM and gas market practices and procedures over time.

As a further precaution EAG suggests that the MCE require that the AER provide resources for a non legislated trial period of time (say three years), where any valid comments made by consumers about deficiencies, oversight or poor behaviour by market participants are investigated and publicly reported on a regular basis (say half yearly) by the AER over the funded period.

EAG has a number of important reservations around implementation of the regulatory accounting guidelines approach under the Australian light handed incentive regulation. The various jurisdictional regulators, ESC (V), IPART and the ACCC, have had considerable difficulties in developing a common data set to compare information across two regulatory cycles. This problem makes it very difficult to compare regulatory determinations. It is almost impossible to compare the two ACCC Transgrid transmission determinations or the 1999 and 2005 ESC of V Electricity Distribution pricing determinations.

One of the objectives of the legislative package should be the development of data sets that allow the assessment of the effectiveness of the regulatory regime.

[307] Appendix 1 is the EAG (2004) Essential Services Commission Energy and Water Ombudsman Retailer Non-Compliance Report prepared after FOI access to records. It deals with governance, accountability, transparency and proper identification and reporting of system issues, seen to be a weakness of the current regulatory regime. It is highly pertinent to many of the issues raised in this submission, and should be read in the light of the case studies in the appendices in part 2A

I quote from the EAG submission to the MCE 2006 Reform Package also attached as an Appendix in this submission in its entirety with selected components included under specific headlines.[308]

> *EAG has a number of important reservations around implementation of the regulatory accounting guidelines approach under the Australian light handed incentive regulation. The various jurisdictional regulators, ESC (V), IPART and the ACCC, have had considerable difficulties in developing a common data set to compare information across two regulatory cycles. This problem makes it very difficult to compare regulatory determinations. It is almost impossible to compare the two ACCC Transgrid transmission determinations or the 1999 and 2005 ESC of V Electricity Distribution pricing determinations.*
>
> *One of the objectives of the legislative package should be the development of data sets that allow the assessment of the effectiveness of the regulatory regime.*

Also, in the same submission:

> *There is also a strong relationship between information disclosure requirements and the form of regulation. If the information disclosure requirements are weak then informed consumers will have little faith in the regulatory regime.*

[308] EAG (2006) Submission to MCE SCO Legislative Reform Package. Found at *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf* See also attached Appendix 6 (pp907-927)

Validity of BHW provisions generally

Within the existing and proposed BHW arrangements to be adopted by the DPI the VESC, the presumption is that by transferring from guidelines and deliberative documents to the *Energy Retail Code* (Victoria) instructions to energy providers, including retailers under licence provisions; or for that matter to any other instrument, will validate those provisions and make them more legally or technically sustainable. Even provisions under an enactment can be challenged within the common law if the premises upon which they are made defy proper practice, represent regulatory overlap or else do not measure up to legal scrutiny on a number of grounds.

Regulatory overlap is expressly disallowed under the provisions of the *Essential Services Commission Act 2001*. The BHW provisions appear to represent such overlap, both with regard to current and proposed legislation. The COAG commitment requires not only harmonization but due regard to other laws and provisions in the effort to achieve national consistency within and outside the energy industry.

Retailers and distributors need to feel secure that the instructions that they are given are not producing the intended or unintended outcome of expecting them to choose which laws they are expected to uphold; to undertaken practices that fall short of best practice, including trade measurement practices; and will not in the future because of breach of trade measurement provisions leave them open to criminal charges and penalties; and that the disconnection processes that they undertake will not also leave them vulnerable to private litigation and/or criminal charges.

Any instructions through licence, code, Ministerial Order or legislation to rely on metering data that is not based on a meter that can calculate the quantity of gas that is used for any purpose; and my implication within the arrangements tacitly or explicitly sanctioning the imposition of contractual status on the wrong parties, using trade measurement practices that cannot show legally traceable consumption of contractual status, can ultimately be shown to be invalid and legally sustainable.

In addition, the contract terms that include safe unhindered and convenient access to such meters as reside behind locked doors encapsulated within the arrangements also represent unfair and unjust terms, since for residential tenants, notably those in apartment blocks, access to keys or meters behind locked doors is simply not feasible as the landlord does not normally allow this.

In the original adoption of, and proposed retention of much of the content of the Bulk Hot Water Charging Guideline by transfer to other provisions, there appears evidence of poor understanding by policy makers and regulators across the board of the legal and technical issues that invalidate the policy standpoint current and proposed, leading to distortions as to the proper contractual party.

A good starting point for this discussion is proper application of the term deemed supply arrangements.

This is the premise which has been used to establish the perception in the minds of policy-makers, regulators and retailers alike of a *"retailer right"* to unilaterally and retrospectively impose contractual obligation for consumption and supply charges and meter access on innocent residential tenants who have not taken unauthorized supply of heated water, but rather have rightly relied upon their enshrined rights under other regulatory schemes.

This is discussed elsewhere and also in some detail in Part2B in direct response to the Table of recommendations under the headings provided and the Glossary of Terms in the Policy Paper.

The central issue in this submission is inappropriate application of the deemed provisions to the class of utility consumers provided not with energy through demonstrable flow of energy and use of appropriate metering equipment, but with heated water products from which the heating component cannot be separate or measured.

These are termed BHW provisions, and relate to heating through a single supply point/supply address/energization point on common property infrastructure where the energy is supplied to the landlord/Owner, used to heat a communal water tank, and heated water then reticulated in water transmission pipes to individual apartments.

The arrangements have turned energy suppliers into billing agents for Landlords/Owners, and have effectively rendered inaccessible enshrined rights under other regulatory schemes.

Missing from explicit mention in the proposed National Energy Consumer Framework and glossary under the TOR provisions is mention that regulatory requirements mean:

> *"Any applicable Commonwealth or Jurisdictional or local law; subordinate legislation legislative instrument or mandatory regulatory requirement including industry, codes and standards*.[309]

Having said that, it is inappropriate for there to be conflict between energy codes, guidelines, standards and licence provisions and between those instruments and the Law. This is currently the case within the Victorian energy provisions, such as to cause confusion, expensive complaints handling and debate as to the effect of current energy provisions as well as their direct and indisputable overlap with other regulatory schemes.

In addition, omitted from explicit mention in the proposed NECF is the expectation that there be no overlap with other regulatory schemes.

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[309] As explicitly iterated within the existing (Victorian) *Gas Distribution System Code, Definitions*. found at *http://www.esc.vic.gov.au/NR/rdonlyres/EE2CCEFC-E57E-40A1-A6C6-4C570DAD49D3/0/CorrectNewMarkuptobeincludedGDSC_version90__NR020708.pdf*

This is the minimum expectation that consumers should have so that their general and specific rights under multiple provisions do not become further diluted or made inaccessible as is currently the case, and despite specific provisions with the (Victorian) *Essential Services Commission Act 2001* and the explicit terms of their revised Memorandum of Understanding dated 18 October 2007 with the Victorian consumer protection body Consumer Affairs Victoria (CAV).

The absence of mention of this crucial point in the proposed Law is a significant gap in the provisions and should be addressed as a matter of urgency in the interests of best practice and at least adequate consumer protection.

The proposed Rules governing the roles of distributors, retailers and customers in relation to the retail supply of energy to customers explicitly relate to gas or electricity, not water.

See appendix for current explanations for calculation methodologies.

The explanatory notes and Appendices are to be repealed but it is unclear where they will reside in the future or whether they will be at all accessible for scrutiny and clarification.

The DPI has policy control now for these provisions, except for what is retained on the bills which is still under the control of the Essential Services Commission.

A more detailed discussion of the obligation to avoid conflict and overlap with other regulatory schemes is discussed elsewhere, noting the provisions of s15 and s16 of the updated *Essential Services Commission Act* v30 to 1 July 2008.[310]/[311]

Deemed supply arrangements in the proposed National Energy Consumer Framework Law refers to:

> *"any circumstance where a customer is taking a supply of energy from a retailer without the customer and retailer having agreed to enter into a standard retail contract or market retail contract."*

This broad definition will leave open a minefield of debate and confusion to consumer detriment and energy provider uncertainty.

A just and proper definition of *"taking supply of energy"* needs to be determined as well as a determination of the proper contractual party.

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310 *Essential Services Commission Act 2001*, v30 found at *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/9E90F948BEAB65E9CA2573B700229938/$FILE/01-62a021.doc*

311 See also published revised Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria and Essential Services Commission referred to above

These matters in a nutshell represent the focus of this submission, discussing in great deal the various jurisdictional definitions adopted in Victoria; demonstrating inconsistencies with *Gas Code* provisions and with specific definitions and provisions within the *Gas Industry Act 2001*, especially in relation to definitions (for example meter) and the deemed provisions under s46 of the Act.

Instead of recognizing existing flaws and correcting them to reflect proper business practice, trade measurement practice and contractual governance models, the DPI and VESC are endeavouring to validate the existing provisions.

Alternative interim arrangements need to be considered in the public interest.

The new Laws and Rules need to appropriately reflect and clarify what needs to be done to ensure that there is no regulatory overlap with other schemes, the provisions of the unwritten laws; and no confusion in the minds of energy suppliers and the public at large as to which laws need to be upheld – energy suppliers are required to abide by them all.

The penalties applicable under Part V 18R of the *National Measurement Act 1960* will apply to individual tradesmen or persons failing to embrace those laws. Already some utility exemptions have been effected.

Regulations associated with that Act, viz, *National Measurement Regulations Statutory Rules 1999 110*[312] currently exempt utility meters providing gas and electricity, but not cold water meters (with qualifying clauses) in all circumstances but there are future goals to remove such exemptions when the infrastructure is in place to accommodate such changes. State legislation in Victoria has not caught up with national standards and provisions,[313] 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*[314] 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."*[315]

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312 *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*

313 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

314 Ibid *National Measurement Regulations 1999 Statutory Rules 1999 110.*

315 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)*

> ***9.Supplying incorrect measuring instrument***
>
> *(1)For the purposes of this section, a measuring instrument is unacceptable for trade use if it is incorrect or is not of an approved pattern.*
>
> *(2)If a measuring instrument that is unacceptable for trade use is used for trade, a person who sold, leased, hired or lent it to the person who used it for trade is guilty of an offence. 200 penalty units.*

Using a hot water meter, however well maintained and calibrated, to give a measurement that is used to calculate gas or electricity usage cannot possibly be seen as appropriate trade conduct. That policy-makers and regulators have chosen to sanction these practices do not make their application more valid, legally or technically sustainable.

Failure to consider these matters, simply because submissions to date have not sufficiently argued against them, or at all, does not validate their continued adoption.

I have for the best part of 20 months being endeavouring to call attention to these matters.

I urge both economic and non-economic streams of MCE and other arenas to consider these mattes urgently before the proposed laws are finalized and also to consider influencing interim jurisdictional arrangements to reflect best practice at the minimal lest the detriments not only impact on consumers, who may be accustomed to being considered last; but also on the energy providers whose interests are so carefully guarded in the current climate of promoting economic efficiency sometimes at the cost of social and moral obligations, the specific and general rights of consumers and adoption of practices that cannot be upheld as legally or technically sustainable or sound.

The existing economic model for pricing and charging of *"electric bulk hot water"* and *"gas bulk hot water"* holding contractually responsible end-users of water products reticulated in water pipes are considered to have these impacts:

1. Adoption of practices that appear to be **legally and technically unsound and unsustainable**;

   At present under 3.3 of the ERC there is a requirement that a retailer must issue bills to a customer for the charging of energy used in the delivery of bulk hot water in accordance with the Commission's Energy Industry Guideline 20 – Bulk Hot Water Charging. This clause is to be retained to reflect repeal of Guideline 20. The VESC has clarified that it relates to billing not pricing

   4.3.2 of the VESC Draft Decision describes the BHW Guideline as specifying the requirements for energy retailers charging for delivery of electric bulk hot water or gas bulk hot water to customers from gas or electrical distribution systems. In particular, the guideline prescribes the formulas which must be used by retailers to calculate the energy used by customers consuming bulk hot water.

There are several fundamental flaws in the description given above of what retailers do. They do not deliver *"electric bulk hot water"* or *"gas bulk hot water"* from gas or electrical distribution systems. The heated water is delivered in water pipes belonging to common property infrastructure that have no connection or ancillary connection with the gas or electrical distribution systems. There is no energization point other the single energization point on common property infrastructure that is on properties with bulk hot water tanks that are centrally heated.

The water is supplied by a water authority to a water mains to the Landlord who is obliged to pay for that water; it is then reticulated in water pipes to a boiler tank on common property infrastructure belonging to the Landlord or Owners' Corporation.

The energy is supplied to a single energization point to the Landlord on common property infrastructure. It is used to heat the boiler tank that then reticulates in water pipes heated water as a composite water product to various flats and apartments mostly occupied by residential tenants.

The occupier receives heated water not energy, which cannot be separated or calculated by legally traceable means. Gas is not withdrawn from the hot water flow meter, which simply measures water volume.

The tenant's individual apartment is not the supply address or supply point, which are very clearly defined in the existing and proposed legislation and are not represented by a hot water flow meter, which is a devise that measures water not gas (or electricity) or heat, though designed to withstand heat.

The distribution system does not include a boiler tank or a hot water flow meter. These items are part of common property infrastructure in the same way as public lighting in blocks of flats and apartments are.

No energy supplier attempts to divide the total amount of energy used to light stairwells and public areas in such multi-tenanted dwellings.

A bulk gas meter or simply a gas meter measures gas volume not energy (heat). Bills are expressed in energy.

A hot water meter does not form part of that distribution system or represent an energization point that can be described as a connection point for an individual end-consumer of energy as a private renting tenant. Such a meter measures water volume only not gas or heat, and is not associated with the supply of gas part of the distribution system or part of the energization point.

Therefore since a hot water flow meter is not such an energization point energy cannot be shown to be taken by individual end-uses of bulk energy supplied to a communal water tank on the basis of its mere existence.

2. Adoption of practices that could be interpreted as **substantively or procedurally unconscionable** in threatening disconnection of an essential services where the service alleged to be provided does not reach the premises of the recipient deemed to be receiving it

3. Adoption of practices that appear to be **legally and technically unsound and unsustainable**;

These services are hot water services, with threatened or actual disconnection often undertaken in circumstances that are guaranteed to cause significant material detriment to those who are inarticulate, vulnerable and/or disadvantaged in some way; and others without such disadvantages but who have a right nevertheless to rely on enshrined rights under multiple conflicting provisions.

Ownership of the hot water flow meters does not allow the supplier to disconnect hot water supplies. Disconnection in the Victorian Energy Retail Code (VERC) refers to disconnection of gas as follows:

> *(b) for gas*
>
> *the separation of a **natural gas installation** from a distribution system to prevent the flow of gas.*

It would seem that ownership of hot water flow meters by energy retailers is seen as a lever through which disconnection of hot water services can be threatened by way of coercing an explicit contractual arrangement with an end-user, normally a residential tenant, who pays for heated water within the terms of a rental lease unless the heated component can be separately measured with an instrument designed for the purpose.

The framework for Disconnection needs to be more clearly spelled out in the law with specific regard to current practices to rely on water meters to calculate deemed energy consumption and threaten or effect disconnection of water products supplied to those who receive no energy at all, but a composite heated water commodity reticulated in water pipes. The Landlord receives the energy as a single energization point for the heating of water tanks communally heated.

For community confidence to exist, jurisdictions need to be trusted to ensure best practice trade measure, commitment to avoid regulatory overlap or adoption of economic models for calculation and pricing that are consistent with community expectations, given the current BHW arrangements, to be consolidated by the VESC within the *Energy Retail Code* under the current Regulatory Review.

Common practice is not a good enough reason for nationwide adoption. These practices are unsound and unsustainable. A prompt action should be taken to ensure that the Law and future Rules are amended to properly clarify the contractual position and apportion contractual status to the correct parties – in this case Landlords/Owners or Owners' Corporation.

4. Adopt practices that appear to **contain unfair substantive and procedural terms as covered under Unfair Contract provisions within the Fair Trading and Trade Practices provisions**

   The Victorian *Energy Retail Code* is peppered with references to the Fair Trading provisions, and possibly other such Codes in other State jurisdictions.

   The Victorian Energy Retail Code is peppered with references to the Fair Trading provisions, and possibly other such Codes in other State jurisdictions. These are to be removed. Skepticism about the efficacy or access through generic provisions has been the subject of many community concerns.

   In any case it is well documented that there is a history of weak compliance enforcement if at all of breaches of ERC provisions Marketing Code of Conduct.

   As mentioned elsewhere, EWOV had suggested a model regarding the role of the Marketing Conduct Advisory Committee in assisting the VESC with governance of future Market Codes.

   Merely transferring the existing Rules for BHW arrangements from retailer licencing requirements to Codes, such as the Victorian *Energy Retail Code* of anywhere else by Regulators, Policy-Makers and Ministers through whatever means will not in law have the effect of removing enshrined consumer rights or overlap with other regulatory schemes as is specifically disallowed under the terms of the *Essential Services Commission Act 2001* and there terms of the Memorandum of Understanding between Consumer Affairs Victoria and the Essential Services Commission, which perhaps now belongs also the DPI with current policy control over BHW matters.

   Some considerations regarding the perceived unfair practices endorsed under the BHW statutory provisions contained in codes, guidelines and deliberative documents endorsed at jurisdictional level in three States include:

   (a) Dependence on a single supplier supplying bulk energy to a single energization point on the common property infrastructure of Landlords and/or Owners' Corporations.

   (b) The requirement of enter into transactions not completely understood, if at all, despite the publication online more recently of the BHW policy provisions, representing to the vas majority of the population unintelligible algorithm conversion factor formulae deeming hot water flow meters to be suitable substitute ancillary energization points for the purposes of calculating individual consumption of gas used to centrally heat water supplying multiple residential tenants.

(c) The requirement to enter a deemed contract on a *"take-it-or-leave-it"* basis, excessively one-sided and carrying with any refusal the real risk of disconnection of essential services, in this case a composite product from which the energy component cannot be separated. These provisions are unilaterally imposed even where no energization point exists through which individual consumption of gas can be measured, and where the proper contractual party is the Landlord or OC.

(d) Demands for *"acceptable identification"* and contact details are being imposed on the wrong parties. Most apartment blocks and flats clearly identify the managing agent's contact details. Therefore communications for Landlords or Owners Corporations should be directed to the agent or Owners' Corporation.

(e) The implied unfair term that disconnection provisions can be extended to disconnection of composite products from which the energy component cannot be separated; that disconnection or restriction of such a product is a natural and regulator or policy-maker-endorsed consequence of refusal to accept deemed status.

(f) The implied unfair term that debt and debt collection practices, and even legal recourses are implementable and even reasonable, upon refusal to accept deemed contractual status by an end-user of energy supplied to multiple residential tenants through a single energization point on common property infrastructure belonging to the Landlord or Owners' Corporation.

(g) The potential for unconscionable conduct through unjust coercive threat of disconnection of hot water services against inarticulate, vulnerable and disadvantaged end-consumers with, for example psychiatric or intellectual disability; cognitive; low threshold for tolerating external stresses; poor understanding or capacity to acquire understanding of provisions imposed; in circumstances where the Landlord or OC are the rightful contractual parties; where the supply of heated water is an integral part of mandated standard leases under residential tenancy provisions; and where the victims of coercive threat of disconnection have no energization point through which they are *"deemed"* to have received unauthorized supplies of energy. In the absence of such an energization point no such consumption can be deemed to have been taken by individual end-users of bulk energy supplied to multiple tenants in apartment blocks and blocks of flats.

(h) Not only does threat of disconnection of essential services under these circumstances represent unconscionable conduct causing in certain cases indisputable material detriment to end-users of bulk energy; but associated debt collection practices and possibly unfair imposition of *"bad debtor"* status in these circumstances may also be construed as unconscionable.

(i) The unfair expectation that end-users of bulk energy provide safe unhindered and convenient access to meters (whether on not those meters represent energization connection points or simply hot water flow meters capable only of measuring water volume, not gas volume or heat (energy).

5. **Implement practices that appear to defy the fundamental and broader precepts of contractual law,** including under energy and other provisions in the written and unwritten law.

   These considerations go far beyond contract agreements or their absence and include unacceptable, unfair and inappropriate trade measurement practices that are contrary to the spirit and intent of national trade measurement provisions.

   Specifically the retailers are encouraged to creatively interpret the deemed provisions within the existing legislation to imply a right to impose a deemed contractual status on end-users of energy[316] in circumstances where no individual energization[317] point exists for end-users of composite water products from which the heating component cannot be separated or measured by legally traceable means; notwithstanding the various discrepant interpretations of the existing deemed provisions under s46 of the *Gas Industry Act 2001* and proposed provisions for the NECF that fail to clarify matters in relation to absence of energization points.

   Consequently the provisions have the effect of endeavouring to re-write contractual law and strip end users of heated water of their enshrined rights under multiple provisions, exploiting the most vulnerable within the community housed as renting tenants, often on low incomes in older multi-tenanted dwellings still equipped with communal boiler tanks and a single energization point for gas to heat water provided to multiple tenants.

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316 Notwithstanding that all interpretations within energy provisions qualify that the use of the singular may be taken as plural; that the use of terms importing natural person may be taken also to imply entities such as corporations, including OCs or other bodies

317 *"the establishment of a physical connection of the premises to the distribution network to allow the flow of energy between the network and the premises"* – the wording used in the MCE SCO Table of Recommendations

The provisions have the effect of unjustly unilaterally imposing contractual status on the wrong parties and imply "unauthorized consumption" and "taking supply" of gas where those receiving heated water are receiving a composite product which retailers are not authorized under their licences or the legislation to sell, restrict or disconnect., and from which the heating component cannot be measured in a legally traceable way with an instrument through which gas passes.

There is no question of unauthorized consumption of gas by residential tenants receiving heated water as an integral part of their lease arrangement; the cost of which is included within mandated rental leases in the absence of individual energization points. Creative and misleading use of the terms such as meter or hot water meter or *"individually monitored hot water consumption"*

Within the proposed NECF Policy Paper and parameters customer connection is described as

> *"the establishment of a physical connection of the premises to the distribution network to allow the flow of energy between the network and the premises"*

This suggests the physical existence of a connection point through which energy passes[318] situated in the customer's premises, meaning in the case of residential end-consumers either on the promises or connected to those premises through the flow of energy between network and premises. Such a flow of energy from energy connection point to boiler tank centrally heating water for multiple tenants in a multi-tenanted dwelling does not fit such a description.

Deemed customer distribution contract within the proposed Law and Rules refers to the contract between a distributor and a customer that arises by operation of law when the customer takes supply of energy at a connection point that is connected to that distributor's distribution system. The distribution system does not include a boiler tank or a hot water flow meter.

These items are part of common property infrastructure in the same way as public lighting in blocks of flats and apartments are. No energy supplier attempts to divide the total amount of energy used to light stairwells and public areas in such multi-tenanted dwellings

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318 Gas meters measure gas volume not heat. These meters should be routinely referred to as "bulk gas meters" rather than *"bulk hot water meters."* The water meters should be referred to as hot water flow meters. The latter measure water volume only not gas or heat
The current practices for BHW allow for each type of meter to be separately read approximately 2-3 months apart with water volume calculations serving to calculate a guestimate as to how much gas was used by individual tenants allocated a hot water flow meter. Residential tenancy laws do not allow charges to be applied other than actual consumption charges where water meters do exist. The algorithm formulae currently in use to calculate guestimated consumption of gas

An end-user of bulk energy used to heat a communal boiler tank serving multiple tenants takes supply of a composite product supplied by the Landlord under the terms of such a lease. It is not the prerogative of energy policy-makers and regulators to strip away existing and enshrined rights of individuals under other schemes, re-defining and effectively re-writing their private and legitimate contracts with Landlords.

Once a Landlord or Owners' Corporation authorizes the supply of bulk energy to a property owned or controlled by those parties, and once the metering installation and infrastructure is in place; supply has commenced and a supply charge applies long before tenants take up residence or turn on any water tap. The supply charges and consumption charges belong to the Landlord who in turns incorporates into the rent the cost of providing rented premises to individual tenants.

The composite product, heated water, is an integral part of a lease and already paid for under those terms unless each utility can be separately metered with an instrument designed for the purpose (other than for bottled gas).

Finally, though also repeated elsewhere, since this section is about accountability issues, I raise concerns here about inaccurate provision of information to individuals about their legal obligations and entitlements by energy and non-energy entities, complaints schemes, policy-makers and regulators alike.

The obligation under the *Essential Services Commission Act 2001* s15 to avoid regulatory overlap and conflict with other schemes was reinforced by way of a revised memorandum of Understanding between CAV and VESC on 18 October 2007, triggered by concerned raised about the position of end-users of heated water. Those obligations are not upheld in current policies, which since then have been transferred to the DPI, though the VESC continues as regulator and continues to make decisions via EWOV about disconnection issues and threats thereof.

Though the contractual model for BHW pricing and charging is outlined in deliberative documents that remained under dust sheets and not transparently published on line till their had been in operation for well over a year, and then only because of pressure for disclosure following a protracted complaint and enquiry about BHW public policies; and though Clause 3.3 of the *Energy Retail Code* does require retailers to abide by the BHW provisions as contained in Guideline 20(1), the fact is that the existence of all of these provisions do not have the legal effect of removing the enshrined rights of individuals under other schemes.

In terms of inaccurate information provided to the public about their rights and obligations, for example EWOV's website contains reference to the perceived obligation of residential tenants using communally heated water (BHW) in apartments and flats to be contractually obligated to a gas retailer for the provision of the heating component of that water, whilst finally conceding that no separate metering exists for gas in these circumstances.

Similar information is provided by the regulator and policy maker and others.

Those unaware of their tenancy rights for whatever reason, receiving such advice from a body called "ombudsman" would normally not think of pursuing the matter.

They are likely to implicitly believe that somehow they tenancy rights have been removed and they must accept alleged measurement of water volume using meters that are unlikely to have been approved for use by the water authority to calculate their alleged gas consumption for the communal heating of water.

Though EWOV must abide by the policies adopted by jurisdictional energy authorities, and appear to be substantially under the control of the policy maker and regulators despite their protests about independence, providing this type of inaccurate advice about the legal liabilities of residential tenants on a website or in other dialogue with consumers contributes towards undermining the enshrined rights of individuals.

It also makes it less likely that those accessing the information online will lodge complaints, thus keeping awareness down; complaints figures distorted; and the rights of individuals distorted and made further inaccessible.

Provision of such advice by complaints schemes, policy-makers and regulators disregards the enshrined rights of tenants; decisions by VCAT, the provisions and definitions of the *Gas Industry Act 2001* and the *Gas Code*, wherein a meter is an instrument through which gas flows and supply and sale of gas means facilitation of flow of gas to the premises supplied.

In my direct dealings with EWOV, policy-makers and regulators I was informed that these practices were commonplace and it was implied at one stage that they represented "best practice."

Information and advice of this nature needs to be re-examined in terms of its appropriateness. Whilst the provisions remain in place, consumer detriments will continue not only in terms of unwarranted imposition of contractual status on end-users of heated water without separate gas or electricity metering, but also in terms of undermining of rights and consumer confidence in the consumer protection framework.

The very least that the public can expect is accurate information about their rights, more so when they approach a complaints body with a public role known as "ombudsman."

Residential tenants receiving communally heated water have no legal responsibility towards suppliers of energy used for this purpose. Tenancy and Owners Corporation laws are clear about this and VCAT has repeatedly upheld claims from tenants seeking to restore their tenancy rights and hold the Landlord responsible for all utilities that are not separately metered. Refer again to the Tenant's Union's (TUV) submission to the VESC's 2006 Small Scale Licencing

Issues Paper citing several examples of the situations and decisions made in this regard.

Without a gas meter to measure consumption, no contractual relationship exists or ought to exist between the supplier of energy and the end user of heated water. As observed by TUV in discussing p34 of the VESC SSL Issues Paper 2006

The point of raising this here is to again illustrate flaws in accountability and policy-making, including misleading and inaccurate information to the public about their entitlements and obligations.

When a complaints body styled as an "ombudsman" and an energy policy-maker and/or regulator refers to such matters, the public normally accept the information as accurate and not challengeable.

This may account for the relatively low rate of complaints made about BHW arrangements. Nonetheless it does seem surprising that there is a zero rate of reported complaints to EWOV on the issue of BHW arrangements.

The case study cited was open before EWOV for 18 months and closed at that time entirely unresolved. The existing policies were upheld. The case was not reported at all in EWOV's Annual Report or its context highlighted as a consumer issue. EWOV manages to conceal lengths of time taken to resolve issues beyond the three month mark by merely referring to matters that took "longer than 3 months" to resolve. There should be a requirement to mention these in numbers of days, as is undertaken by some other industry-specific complaints handling schemes.

That the matters were systemic in that case both with regard to policy and supplier conduct was unquestionable but both EWOV and VESC chose not to report or recognize the issues as systemic. The conduct has resumed, and the contractual issues, that were separate to those, but not recognized as such, remain in dispute with resumed risk of unwarranted disconnection of essential services.

It is not EWOV's policy to transparently declare how long complaints remain unresolved. Their reporting habits include merely starting whether a matter took longer than three months, thus concealing those delays that stretch well into a second year. This gives a false impression of turnover, efficacy and workload parameters. Other schemes mention numbers of cases group by numbers of days taken to resolve in each time frame.

14. Facilitate inaccurate provision of information to consumers:

Includes adoption online publication by regulators and complaints schemes, and oral and written information provided to the public that may be construed as inaccurate as to the rights of individuals, especially in relation to residential tenancy rights. Providing inaccurate information to the public in this way may represent legal compliance breach

As mentioned previously, the laws governing legal compliance[319]. have implications for the use of the internet for commercial or government purposes, including the validity of electronic transactions and information.

Amongst the provisions of such laws are those that regulate the claims made by or about web-based content and services. This includes laws that prohibit misleading or deceptive conduct in trade which establish liability for the provision of negligent advice or information.

Various laws can impose liability on the operators of a web site, including laws relating to negligent statements and laws that prohibit misleading and deceptive conduct.

There is the question of provision of inaccurate and misleading information to the public by statutory authorities, regulators and complaints schemes where regulatory overlap considerations arise.

The enshrined rights of tenants under tenancy laws for instances do not become legally diluted by attempts by policy-makers and regulators under other schemes to re-write those laws by making provisions in codes, guidelines, licence provisions, orders in Council (OICs) or even conflicting legislation.

It could be considered misleading and inaccurate to inform consumers that they are obliged to accept contractual obligation to energy providers if that energy is not delivered to their premises in energy apparatus, meaning a gas service or transmission pipe or electrical line, regardless of network ownership.

Failure to distinguish between water provision reticulated in water pipes and energy provision facilitating the flow of energy to a specified premises means missing the finer points of formulating small scale licencing and other energy policies that impact on end-consumers.

The Tenants Union Victoria has attempted to highlight some of these concerns, but my reading of some of the various submissions made generally indicate that the fine points of technical detail and contractual law issues appear to be inadequately raised or considered

It is postulated in this component submission that provision of information to the public on the websites of complaints schemes, regulators, government bodies and commercial operators could be construed as inaccurate and/or misleading if it is alleged that residential tenants must relinquish their enshrined rights under tenancy laws or other provisions regarding liability for utility costs, including consumption, supply, commodity and/or other non-energy costs, bundled or others.

This concern is discussed further elsewhere.

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319 Legal compliance found at *http://www.egov.vic.gov.au/index.php?env=-innews/detail:m1421-1-1-8-0-0:n-385-1-0--*

For example EWOV, using the title of *"Ombudsman"*[320] advises the general public on its *"Frequently Asked Questions"* (FAQ) web screen that although no separate gas meters exist for *"bulk hot water"* (meaning provision of gas for communally heated water in blocks of apartments and flats), residential tenants must expect to pay gas retailers for (alleged) gas consumption by individual tenants, and may therefore receive two lots of gas bills.

Similar information is or was published by VESC, and is implied in the existence of the Bulk Hot Water provisions, currently contained in the VESC Guideline 20(1) Bulk Hot Water Charging. Policy provision for this has been under DPI control since 1 January 2008.

Those unaware of their tenancy rights for whatever reason, receiving such advice from a body called "ombudsman" would normally not think of pursuing the matter.

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320 A term that may mislead the public into believing that such a body has statutory special body status with direct accountability to Parliament, as in the case of State and Commonwealth Ombudsman; and levels of independence beyond mere legal structure that these bodies do not enjoy. They are co-regulated industry-based complaints handlers with no mediation functions powers or skills; exceptionally limited binding powers rarely used, unilaterally binding on scheme members in a limited range of case types; and normally only possible with the consent of the scheme member. Only 36 binding decisions have been made in total, and none at all in the past six years. Refer to the disturbing report by Energy Action Group (ERAG) (2004) Essential Services Commission Energy and Water Ombudsman Retailer Non-Compliance Report cited in full in Appendix with this submission. See also figures shown on EWOV's website.
EAG report found at
http://www.chronicillness.org.au/utilitease/downloads/Enery%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc
See also Appendix 1 to EAG Submission to MCE 2006 Legislative Package.
http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf
EWOV is an industry-based scheme, run funded and managed by industry but substantially accountable to the economic regulator, Essential Services Commission under the terms of its Charter, Constitution and Memorandum of Understanding dated 21 April 2007 with the Essential services Commission
The terms of the Memorandum of Understanding between Essential Services Commission and Energy and Water Ombudsman (Victoria) Ltd [320] Updated by Memorandum of Understanding dated 21 April 2007 between Essential Services Commission and Energy and Water Ombudsman (Victoria) Pty Ltd, the latter being a company limited by guarantee without share portfolio with a public role representing the interests of consumers and users, and thus for the purposes of s16 of the *Essential Services Act 2001*, a prescribed body holding MOUs also with CAV the DPI and more recently the ACCC, and AER.
The terms of the MOU between VESC and EWOV specifically states that though that "*…. memorandum does not deal with constitutional, governance or scheme operational issues, for the Commission has regulatory responsibility under EWOV's Constitute or Charter.*[320]
Despite this EWOV, VESC and the DPI persist in claiming that EWOV is independent and has no external accountabilities, nominating its Internal Merits Scheme as the only appropriate appeal mechanism against decisions in relation to energy suppliers; with other matters relating to performance governance and accountability being the sole province of the Scheme Ombudsman; of in relation to broader aspects of the operation of the scheme, the EWOV Board.

They are likely to implicitly believe that somehow they tenancy rights have been removed and they must accept alleged measurement of water volume using meters that are unlikely to have been approved for use by the water authority to calculate their alleged gas consumption for the communal heating of water.

Though EWOV must abide by the policies adopted by jurisdictional energy authorities, and appear to be substantially under the control of the policy maker and regulators despite their protests about independence, providing this type of inaccurate advice about the legal liabilities of residential tenants on a website or in other dialogue with consumers contributes towards undermining the enshrined rights of individuals.

It also makes it less likely that those accessing the information online will lodge complaints, thus keeping awareness down; complaints figures distorted; and the rights of individuals distorted and made further inaccessible.

In any case, as Eyler said in 1979, *what good are figures if they do no good to men's souls and bodies?*

Provision of such advice by complaints schemes, policy-makers and regulators disregards the enshrined rights of tenants; decisions by VCAT, the provisions and definitions of the *Gas Industry Act 2001* and the *Gas Code*, wherein a meter is an instrument through which gas flows and supply and sale of gas means facilitation of flow of gas to the premises supplied.

15. **Targetting**: The arrangements does not target the right group in terms of contractual liability, holding responsible contractually responsible to energy retailers residential end-users of heated water who receive no energy at all to their premises, but rather a composite water product which the suppliers are not licenced to sell or permitted to disconnect

16. **Timeliness** The arrangements were adopted retrospectively when there was long-standing evidence of market failure and appear to have had the perverse effect of enhancing rather than correct the failures

17. **Consistency**: Introduces inconsistencies and adverse interactions with other regulations and policies.

18. **Accountability**: Are unclear and conflict with definitions and provisions within and outside the energy arena, unfair and the processes for its application are not transparent or readily contestable outside of legal recourses. The provisions represent regulatory conflict with residential tenancies, owners' cooperation; spirit and intent of trade measure practice; contain substantive unfair terms; and because of regulatory overlap with other schemes contravene the express provisions of s15 of the *Essential Services Act 2001*

19. **Risk Management:** Because of unfairness, risk of conflict, expensive complaints handling, tribunal or legal appeal; leave providers following regulatory instruction at risk of breaching consumer rights; fair trading practices and the intent and spirit of national measurement laws; the provisions will in any case become formally illegal when remaining utility exemptions are lifted; the practices are also seen to have driven unacceptable conduct that appears to be tacitly overlooked

20. **Consultation:** Consultation processes from the outset were not transparent

21. **Enforcement: Non-existent in terms of consumer protection against unfair contractual terms and unacceptable market conduct**

22. **Flexibility:** Increasingly ineffective as consumers become more aware of their rights; oppose the regulation; seek other forms of redress; will breach national trade measurement laws;

Since the adoption of this Guideline 1 March 2006, after various deliberative processes during 2004 and 2005, it has been possible with regulatory sanction for energy retailers to undertake the following:

- Creatively interpret the provisions of the *Gas Industry Act 2001* and the *Electricity Industry Act 2000* by imposing on the wrong parties contractual status, where the proper contractual responsibility for any consumption and supply charges or any other associated charges lie with the Landlord/Owner or representative.
- Use water meters to effectively pose as gas meters using practices that could be construed as misleading, and has economic and trade measurement implications because of the methods employed to derive costs, using water volume calculations if calculated at all, to guestimate gas or electricity usage by rule of thumb methods specifically discounted by other schemes as valid calculation of energy consumption, and soon to become formally invalid and illegal under national trade measurement laws (Part V 18R *National Measurement Act 1960*).
- Use trade measurement practices that defy best practice as well as the spirit and intent of existing trade measurement laws and regulations, and which will become formally invalid and illegal as soon as remaining utility exemptions are lifted from national trade measurement provisions
- Effectively make inaccessible the enshrined contractual rights under conflicting schemes and other provisions in the written and unwritten laws end-users of heated water that is centrally heated and supplied to Landlords or their representatives, including tenancy provisions and common law rights under contractual law; as well as the specific provisions of unfair contract provisions and the provisions of other generic laws.

These practices in turn have enormous implications for the following:

- Assessment of who the contractual party should be and how customer or relevant customer is properly interpreted under deemed or other provisions.
- How soon consumer protections can be restored such that they can once again readily access their fundamental contractual, tenancy and other rights without threat by energy retailers and/or distributors of disconnection of heated water services reticulated in water pipes to individual flats and apartments without any physical energy connection, gas transmission pipe or electrical line.
- When consumers can expect the issue of Landlord/Owner obligation to be factored into contractual governance models and energy provisions generally.
- When the issue of avoidance of overlap and conflict with other schemes can be formalized as a regulatory requirement in the interests of best practice. Under the *Essential Services Commission Act 2001*, it is specifically required that there should be no overlap or conflict with other schemes. The BWH provisions directly contravene that legislated requirement.
- Whether the entire energy regulation framework and trade measurement framework can be seen to be compatible with the bulk hot water pricing charging and trade measurement provisions (economic stream – NPWG).
- The legislative and other regulatory arrangements, including regulatory overlap with other schemes; and conflict within existing energy provisions with regard to the bulk hot water arrangements in general for residential tenants with consumer detriments illustrated by case study example.
- The deemed contractual arrangements that are currently unjustly applied to multi-dwelling apartments and bulk hot water supply; and the parties that may be subject to these arrangements where they are residential tenants in commercially rented multi-tenanted dwellings with a single energization (connection) supply point.
- The existing rights of end-consumers of energy and water in terms of regulatory overlap with other regulatory schemes with conflicting provisions as to the responsible parties in BHW arrangements impacting on residential tenants and the specified rights and obligations of Landlords and/or Owners' Corporation under certain enactments; as well as the implications of adoption of trade measurement practices that violate the spirit and intent of existing national laws which will formally render those practices invalid and illegal with high penalties when remaining utility exemptions are achieved.
- Whether the current regulatory framework in relation to BHW service provision can be separately treated to other metered gas supplies; and especially given the definitions within all other existing energy provisions; the regulatory overlap with other schemes and with the provisions of unwritten laws; the implications under the Criminal Code

- The dilemma faced by retailers in terms of the ongoing provision of energy services and BHW supply on the one hand being expected to uphold the terms of their licences by adopting the provisions of all codes and guidelines which include the BWH arrangements; and on the other observing their obligation under licence to sell disconnect or restrict gas and electricity not hot water products, composite water products or other such products.
- The absence of any control under the existing regulatory framework by the current regulator(s) which:

> *"proscribes what information must be provided to be occupier but does not prescribe the language and format for such correspondence."*

Such gaps are at risk of being carried into the new national energy template law.

Terminology in current use dignified as *"vacant consumption letters"* often received many months after a tenant moves into a block of flats or apartments is being routinely sent as a first contact strategy including threat of disconnection of hot water services within 7-10 days (rather than the gas or electricity for which

Dispute resolution – small scale licencing

I note with concern that data that should be publicly available to inform public policy is not always published.

I cite a particular example of the feasibility study undertaken by EWOV when the Essential Services Commission suggested that EWOV assume responsibility for complaints handling in relation to small scale licencing and providers of embedded network services.

EWOV legitimately raised a number of concerns in response to this proposal, discussed as part of the consultative exercise for Small Scale Licencing conducted by the ESC, with a final decision being provided in march 2007.

The VESC claimed that in the absence of available data about the small scale licencing market (notwithstanding that EWOV had undertaken a feasibility study) their decision to nominate EWOV would stand.

EWOV's reluctance to accept responsibility should have been enough of a caution, combined, as it appeared to be with concerns about conflicts of interests though not phrased in those precise terms. EWOV believed that assumption of responsibility for this complex area that overlapped with other regulatory schemes, including residential tenancy and owners' corporation provisions may not be in the interests of their current scheme participants; the small scale providers or the public.

In order to illustrate my points I quote directly, though the matter is dealt with in further detail elsewhere, and notably in Part 2A under a detailed look at small scale licencing provisions and stakeholder inputs.

I support the view that all users of energy, embedded or otherwise should have appropriate access to dispute resolution. I am concerned that the public has access to resolution processes and other forms of redress through the efforts of staff adequately trained and experienced in the matters involved.

Though EWOV with its limited jurisdictional powers dopes deal with a range of issues that are predominantly associated with billing, connection, reconnection and marketing conduct matters, their experience knowledge and training of matters under other schemes, including residential tenancy and contractual matters is not only limited but in my view inadequate to deal with the complexities of small scale provider disputes.

I do not share CALV's views that EWOV is at all times the most appropriate body under its current structure, funding parameters and regulator control.

I am concerned about the interpretative distortions that have apparently been made in applying the deemed provisions under s46 of the *Gas Industry Act* 2001 (GIA) and *s39 Electricity Industry Act (EIA)* that have already resulted from guidance provided to EWOV in relation to BHW provisions. These recipients of water products have been incorrectly lumped together with small scale licencing operations with tacit inclusion in philosophies that appear to regard them under the same category.

Confusion about what is or is not *"separately metered"* has characterized debate. The *GIA* and the tenancy provisions do not regard as separately metered energy that is not delivered through the facilitation of flow of energy. That does not occur with BHW arrangements deeming water meters to be suitable instruments through which gas is measured.

My direct experience has not substantiated faith in the protection system in these areas.

I strongly believe that dispute resolution should be provided by a body not funded by industry and not under the control of energy policy-makers and regulators.

I agree with CALV's concerns and views expressed below about Pricing and Competition for Small Scale Licencing. I do not believe that competitive pricing in this area is indicated at all.

I particularly believe that it is a backward step to remove the obligation to inform all customers of their right to go to VCAT only after the complaints scheme has formally agreed to take the embedded network operator onto its scheme. This is making inappropriate decisions for consumers about their redress options.

It is extremely disappointing that the VESC decided to remove the obligation to confirm consumers of their right to go to VCAT. Consumers should be aware of all of their options at the outset and not be forced into conciliation, especially if they believe their chances of resolution are slim and they may well have an 18-month wait before a matter is closed – without resolution!

It happens to be an infringement of human rights to mandate for conciliation. EWOV's powers are exceptionally limited when it comes to policy matters.

Elsewhere I have discussed possible conflicts of interest; the reluctance EWEOV showed to assume responsible for these network providers; the flagging of their pre-empted right to make decisions on a case-by-case as to which cases would be referred elsewhere., given especially the extensive overlap with other schemes, including those administered by Consumer Affairs Victoria.

It is my view that CAV should be more proactively involved in directly investigating matters that are clearly issues for the Fair Trading, Unfair Contracts, Residential tenancies and Owners' Corporation provisions.

However, if the conduct of any supplier or Responsible Entity is related to fair trading or trade practices matters these are really issues for CAV under their jurisdictions.

EWOV is a co-regulatory body dedicated to energy and water matters but also has limited jurisdiction and no training at all to deal with complex tenancy issues or policy issues.

The biases of the VESC and DPI are already plain in the issue of BHW provisions and how existing provisions may be apparently distorted to suit popular user-pay philosophies regardless of whether goods or services are supplied to the individual made contractually responsible.

As a consumer and given my direct experiences that makes me far less confident in the existing complaints scheme, policy and regulatory decisions and the extent of protection or compliance enforcement available. Again my direct experience has been extraordinary reluctance on the part of both EWOV and the VESC to appropriately directly refer matters to other arenas where the jurisdictions may more properly lie.

I begin by providing VESC's Final Recommendation of March 2007 regarding customer dispute resolution mechanisms for small scale (exempt) licencing, followed by the discussion within the Final Report on p 39-41. I do not believe that the requirement to inform customers of their right to have matters heard by VCAT should be removed. The public should be aware of all their rights and options at the outset.

> ***3.2.4 Customer dispute resolution mechanism***
>
> ***ESC 2007 Small Scale Licensing Framework: Final Recommendations, Melbourne.***
>
> ***Recommendation***
>
> *That EWOV establish a new 'fee-for-service' membership category for small scale operators. That the requirement to inform customers of their right to have matters heard by the Victorian Civil and Administrative Tribunal be removed.*

Currently, the OIC requires that in the event of a dispute, an exempt person must make reasonable endeavours to resolve the dispute, advise the customer of his or her right to apply to have the matter heard by VCAT and continue to distribute or supply electricity to the customer

Stakeholders were of the view that EWOV's dispute resolution mechanisms should be made available to customers within embedded networks. In their submission to the Issues Paper, AGL Sales noted that:

… a dispute resolution mechanism [should] be provided through the Industry Ombudsman on a fee for service basis.[321]/[61]

The Consumer Law Centre Victoria commented that:

Most glaring disadvantage is that customers do not have access to EWOV's dispute resolution mechanism.[322]/[62]

In its Draft Recommendations, the Commission expressed the view that small scale operators should be obliged to join the EWOV scheme and inform customers of their right to access the services of EWOV's dispute resolution mechanisms.

The obligation to inform should occur at the time customers enter into an embedded network arrangement and at the time that there is any dispute between the operator and a customer.

The Commission also recommended that EWOV create a new membership category for small scale operators. The cost of membership should be a fee-for-service arrangement with no annual membership fee. Such an approach would minimise the cost impact to operators of becoming members of the scheme but would also recover the incremental costs of addressing issues arising from the new membership category.

A fee-for-service would also provide an incentive for operators to minimise their disputes with customers in order to minimise the cost of the fee. Potentially, this incentive effect would have the added benefit of minimising the impact on EWOV

321 [61]AGL Sales 2006 Small Scale Licensing Framework — Issues Paper, p.1. c/f VESC Final Recommendations March 2007

322 [62]Consumer Law Centre Victoria 2006, Submission to the Essential Services Commission on the Small Scale Licensing Framework Issues Paper, p. 2.

Several stakeholders commented on the Draft Recommendations. Origin Energy stated that:

… by adhering to the Energy Retail Code, an exempted small scale on-seller would be required to comply with clause 28.2(b), which clearly states a customer has a right to refer a complaint to EWOV and must be informed in writing by their supplier.[323] /[63]

The Commission considers that by making a recommendation on a dispute resolution scheme it is clarifying the rights and obligations under the existing OIC, including the right to make a complaint to EWOV. As noted in section 3.1, it is unclear in the current OIC whether embedded network customers can make a complaint to EWOV or what, if any, role EWOV has in resolving such complaints.

This, however, can be made explicit under a registration system for small scale operators. The Trans Tasman Energy Group agreed with a fee-for-service arrangement stating in its submission that

… [e]xempt retailers have only a relatively minor number of customers when compared to licensed retailers. We propose there should therefore be no annual fee and only a fee applied when the service is used by the Exempt retailer.[324] /[64]

In contrast, existing members of the EWOV scheme were concerned to ensure that they did not end up cross-subsidising small scale operators for the costs of EWOV's services. For example, while AGL Sales supported the recommendation that small scale operators become members of EWOV and be charged on a fee for service basis, it was also concerned to ensure that:

> *… existing members of EWOV should in no way subsidise the activities resulting from the creation of the new membership category or resolution of complaints raised by customers of small scale operators. To this end AGL considers that EWOV should be free to decide what is the best way for it to recover any costs that it incurs in providing its services to small scale operators.*[325] /[65]

323 [63]Origin Energy 2007, Small Scale Licensing Framework – Draft Recommendations, 9 February 2007, p. 6.

324 [64]Trans Tasman Energy Group 2007, Op. cit., p. 1.

325 [65]AGL Sales 2007, Small Scale Licensing Framework – Draft Recommendations, 7 February 2007, p.1.

The EWOV indicated that, in its view, charging on a fee-for-service basis:

…would mean that EWOV's current members are subsidising the new members. If the fee-for-service level only meets the incremental costs, these members are making no contribution to EWOV's fixed costs. This is an unacceptable arrangement, and it is difficult to see how it could be equitable for EWOV's existing members. … The ESC's recommendation would involve setting up a parallel billing system that involved monthly billing in arrears and would almost certainly involve EWOV in issues of debt collection and bad debts. Annual membership fees give EWOV financial security for its fixed costs. [326][66]

The EWOV considered that the Draft Recommendation on a fee-for-service membership category for small scale operators was premature at this stage as a full study will be needed to assess the most sensible basis for charging, if membership of EWOV is found to be a viable option.[327][67]

In its submission, EWOV noted that a feasibility study is required in order to make soundly-based decisions on the matter. EWOV noted that its Board would proceed with such a study as a matter of haste and that the study would aim to establish:

- *the full number and nature of entities expected to become members of EWOV*
- *a suitable charging basis for their entry into EWOV*
- *a suitable membership category basis for such entry*
- *estimated complaint and enquiry numbers*
- *potential impact on the financial and operational stability of EWOV*
- *policies, processes and systems needed for complaint handling*
- *human and other resource impacts on EWOV*
- *the possible range of services to be offered to the entities and their cost • voting rights and company representation • Charter and Constitution changes.* [328][68]

326 [66]Energy and Water Ombudsman (Victoria) 2007, Op. cit., pp. 2-3.

327 [68]Ibid., p. 2.

328 [68]Ibid., p. 2.

The Commission will work with EWOV on establishing a dispute resolution scheme for customers of small scale operators. The results of EWOV's study may also provide useful inputs into the Commission's own implementation process.

In the absence of the results of this feasibility study, the Commission has maintained its recommendations that small scale operators become members of the EWOV scheme. The Commission remains of the view that small scale operators should be obliged to join the EWOV scheme, inform customers of their right to access the services of EWOV's dispute resolution mechanisms and that the cost of membership should be a fee-for-service arrangement.

With access to EWOV's dispute resolution mechanisms there is little benefit in continuing to require small scale operators to inform their customers of their right to access VCAT's processes. That said, customers would still have access to VCAT through the Residential Tenancies Act and Fair Trading Act.

I note the views of EWOV cited above and their serious reservations about fee-for-service fees because of the administrative costs involved. EWOV' had never felt quite comfortable about the proposal to extend their services to cover small scale licence or exempt embedded networks.

As to stripping consumers of their rights to be aware from the outset of all of their complaints options, including VCAT, this is an unacceptable erosion of consumer rights. As mentioned previously it is an infringement of human rights to force conciliation or to withhold redress options from consumers.

Returning to EWOV's 2006 response to the SSL Issues Paper the following views were expressed by EWOV in its submission to the VESC Small Scale Licencing Issues Paper:

Extract from EWOV's 2006 Submission to Small Scale Licencing Framework Issues Paper

As the Issues Paper notes (on page 27), the Schedule to the Order in Council provides that, in the event of a dispute, small scale distributors and/or on-sellers are required to advise the customer of their right to have the matter heard by the Victorian Civil and Administrative Tribunal (VCAT).

For consumers, there are two shortcomings with this provision:

1. Not all customers would regard VCAT as an accessible and practical option. There is normally a fee for taking a dispute to VCAT1 and, as the Issues Paper notes, it can be a lengthy process [2]. A tribunal forum can also be intimidating for some customers.[329]

2. As the Issues Paper notes (at page 34), there has been no regulatory oversight of whether this provision (or the other conditions in the Order in Council) are being complied with.

EWOV has been contacted by some customers regarding energy and water issues relating to small scale distributors and/or on-sellers. Attachment A to this submission provides a sample of the matters that have been raised.

Where the complaint has related to a small scale distributor and/or on-seller, EWOV has not had jurisdiction to investigate the matter. EWOV has instead provided these customers with information – for example, about the ESC's guidelines on electricity prices in caravan parks. As EWOV's role and experience of these complaints has been limited, we are not in a position to comment comprehensively on whether small scale distributors and/or on-sellers are advising customers of their right to have their dispute heard by VCAT.

Whilst a few of the customers who have contacted EWOV had taken their issue to VCAT, EWOV does not know how these customers became aware of this option.

EWOV was in favour of *"contracting participants"* by arrangement. I quote directly

The Issues Paper states (at page 27) there is an initial $5, 000 fee to join the EWOV scheme. This information is out-of-date and incorrect.

Annual Levy, EWOV's Constitution now provides (at clauses 9.2(c) and 9.2(d)) that, in summary, each Contracting Participant will contribute an amount that EWOV considers equitable based on the Contracting Participant's customer numbers and share of total cases.[330] */*[3]

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329 Despite pointing out these very issues to EWOV and the VESC in the case study cited, the s55 *RTA* VCAT option was cited as a perfectly good way to make amends. In that case, it was the energy supplier who was imposing contractual status, with energy policy-maker and regulatory sanction. It was the energy supplier who was threatening disconnection. Though issues were similar, this was not an issue of an embedded network where energy was being supplied – it was the old story of water meters posing as gas meters; no delivery through flow of energy to the premises deemed to be receiving the energy; possible rewards for Landlord and Supplier – but none for end user of utilities.

330 [3]EWOV's Constitution and Charter can be viewed at.

This means there is now scope for a small scale distributor and/or on-seller to join the EWOV scheme as a Contracting Participant, with the Annual Levy as agreed by them and EWOV.

In May 2006 EWOV's Constitution and Charter were amended to include an ad hoc jurisdiction – so as to allow other participants in the electricity gas and water industries to join the scheme by agreement as 'Contracting Participants'. In relation to EWOV's

I move on to make provide further comments by EWOV to the Small Scale Licencing Issues Paper in 2004

However, EWOV is mindful that the number of small scale distributors and/or on-sellers is potentially very large – although the exact number is not known. The entities involved are diverse and some are complex (for example, an apartment block with managing agents and multiple bodies corporate). EWOV's initial inclination is that it may be preferable to create a new membership category for small scale distributors and/or onsellers, rather than entering into a vast range of separate 'Contracting Participant' agreements. The creation of such a new membership category would require amendments to EWOV's Constitution and Charter[331]*/*[4]

In summary, EWOV wishes to make the following points regarding the practicalities of customers in small scale arrangements having access to the EWOV scheme:

It would be consistent with EWOV being a 'one stop shop' for Victorian consumers with energy and water complaints.

It would benefit customers of small scale distributors and/or on-sellers, as EWOV's services are free to customers and readily accessible (95% of cases are received by phone).

EWOV does not consider that it would be appropriate for the government to unilaterally mandate participation in the EWOV scheme for the following two reasons:

(1) Any expansion of the EWOV scheme to cover complaints relating to small scale distributors and/or on-sellers would require extensive prior consultation with and approval of the EWOV Board.

331 [4]Clause 2.1 of EWOV's Constitution currently defines 'Electricity Members', 'Gas Members' and 'Water Members'.

(2) If it is proposed that the EWOV scheme should cover a significant number of small scale distributors and/or on-sellers, then an independent feasibility study would first be required to consider the nature of the 'new industry', case estimates, cost allocation methodology, resourcing, staff training, budgeting and funding implications and amendments to EWOV's Constitution and Charter.

Such independent feasibility studies have been undertaken previously – when the scheme expanded to include the natural gas, water and liquefied petroleum gas (LPG) industries

If, following consultation with EWOV and, if necessary, an independent feasibility study, the decision is made that small scale arrangements should participate in the EWOV scheme, then this decision should be backed up by a clear regulatory requirement.

EWOV is mindful that some of the energy and water issues involving small scale distributors and/or on-sellers do merge with broader tenancy disputes and complex tenancy law. EWOV would need to approach such matters on a case-by-case basis.

The EWOV Charter provides me with discretion to decline to investigate a complaint if, in my opinion, it is more appropriately or effectively dealt with by any other body.[332] [5]

Dispute resolution

The AER considers that the relationship between ombudsmen/small customer dispute resolution schemes and the regulator is an important one and it could benefit from recognition in the Law or Rules of the role that ombudsmen play in being a key point of contact for consumers with disputes with participants. Taking account of the role of small customer dispute resolution schemes in the national framework would be consistent with cl. 14.6(a) of the Australian Energy Market Agreement.

332 [5]Clause 6.3(d) of the EWOV Charter

Furthermore the AER and ombudsmen will likely need to be able to share information to carry out their respective roles effectively. Some of this information may be confidential. Whilst jurisdictional regulators and ombudsmen frequently address protocols for information sharing through memoranda of understanding (MOUs) these are informal documents and the basis for information sharing between jurisdictional ombudsmen and the cross-jurisdictional AER is less clear.

The Trade Practices Act provisions restricting the AER from sharing confidential information allow certain bodies to be prescribed by regulation to be authorised recipients of such information. Ombudsmen could be so prescribed where information (such as referral of complaints received by the AER) needs to be shared with them. Conversely ombudsmen will likely need to be able to share information (such as compliance reports, and information on systemic issues) with the AER. The Law or Rules could provide for this.

MK Comment

EWOV provided case studies citing one in particular where an embedded network was created and there were detriments to the customer who wished to remain with her preferred retailer rather than opt for the restrictions of slab usage imposed by the embedded electricity network.

I support EWOV's view that pre-existing customers in such situations should be provided with the right to bypass incorporation into the embedded network without penalty or costs for meter charging and the like.

With a view to preventing these complaints, EWOV suggests that, where an embedded network is created, the regulatory framework should state that pre-existing customers have a right to remain with their preferred retailer, without incurring meter change costs.

EWOV has provided some succinct case studies in their response to the Issues Paper highlighting a variety of examples of detriment. These are useful to know about. They all relate to electricity supply in embedded networks, studying housing, rooming houses, caravan parks and shopping complexes where exploitation has occurred.

This is a grey area. Where residential tenancy laws enters the picture and there is blatant exploitation, coupled, in the case of BHW arrangements explicit policy-maker and regulator instruction for retailers to behave in a certain way, the question of consumer protection becomes blurred.

I am concerned about comments regarding the complexities of broader tenancy disputes and complex tenancy law. I note EWOV's comment that matters will be decided on a *"case-by-case"* basis, with right reserved to refer the matter to other bodies if deemed appropriate. This means EWOV's Charter will allow decision-making on matters under other regulatory schemes for which EWOV staff have no training.

My direct experience has been that EWOV (p7 Response to VESC SSL Issues Paper) does not always make robust identification of systemic issues or refer them. The disturbing EAG (2004)[333] cited elsewhere and reproduced within this Component submission testifies to paucity in systemic identification referral and transparency.

These are not matters for which EWOV has any training or expertise. It has not been my direct experience that these complexities were understood or correctly interpreted by either EWOV or VESC, or indeed the DPI. The matter, which was about bulk hot water arrangements squeezed into energy laws and equally force-fitted philosophically into the *"embedded network"* parallels, in the absence altogether of a shred of evidence that anything at all was being delivered.

I now turn to the more worrying but honest submission made by EWOV by way of further comment to the VESC Small Scale Licencing Framework in February 2007.

EWOV had proffered a large list of reservations that appeared to be justified as shown in the reproduced submission below.

So strongly did EWOV feel about the considering the prospect of extending its services to small scale licencing Relevant Entities, that it took on an urgent feasibility study the results of which do not appear to be readily accessible.

One of the reservations alluded to conflict of interest perceptions by mentioning the need in some haste to seek a Board Meeting to discuss whether taking on this new class of scheme member will be in the best interests of EWOV, the entities and their customers.

There are legitimate concerns about staffing impacts and demands on resources; on financial stability of EWOV, voting rights, change of Constitution and Charter and other reservations. There are reservations expressed about billing practices to secure fees from small scale licensees

These are credible and real concerns.

EWOV's own reluctance should be considered when deciding the most suitable body to field complaints against small scale licencees. Is this not a matter of direct infringement with the provisions of tenancy and owners' corporation laws.

Is it feasible that consumer protections at all levels, and despite the existence of generic laws may be becoming more diluted?

I provide the entire letter written by the Scheme Ombudsman, and add my own concerns about whether EWOV is indeed the best dispute service for the purposes described.

EWOV's workload is currently excessive not its capacity to cope without ongoing *"interim arrangements"* to re-refer back to the provider those complainants who are already eligible to have a matter investigated by them.

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[333] Energy Action Group (2004) Essential Services Commission Energy and Water Ombudsman Retailer Non-Compliance Report. Prepared by EAG after FOI access to records

They have experienced staff turnover, retraining, demands on their services beyond their control and by the sounds of it are already overloaded.

EWOV's skills and training are not focused on complex matters that impinge on interpretation of residential tenancy, fair trading, owners' corporation and trade measurement laws. There are conflicts of interest immediately apparent in the philosophies of the Victorian policy-maker and regulator in terms of how they seem to view appropriate policy regardless of their obligation to avoid regulatory conflict and overlap with other schemes.

The matters are more appropriately dealt with by the CAV or some other approved dispute resolution body.

Submission from EWOV 16 February 2007[334]

Re: Small Scale Licensing Framework – Draft Recommendations

Thank you for the opportunity to comment further on the Essential Services Commission's (ESC's) *Small Scale Licensing Framework – Draft Recommendations (December 2006)*. This submission will concentrate on the recommendations of most immediate relevance to the Energy and Water Ombudsman (Victoria) (EWOV), namely those about small scale operators being required to become members of EWOV and EWOV establishing a new class of membership for them, on a fee-for-service basis. An attachment comments on the other recommendations.

Draft recommendations relating to membership of EWOV

EWOV is, as it has previously said, open to the idea of customers of small-scale operators having access to its dispute resolution services. Aspects of the recommendation, however, need further investigation, before EWOV is in a position to be satisfied that entry of the previously exempted small scale entities is in the best interests of EWOV, the entities and their customers.

[334] *H:\ESC\Consultation Papers & Responses\2006-7 ESC Small Scale Licensing Framework Review\070216-L-EWOV comments re Small Scale Licensing Framework Draft Recommendations.doc 2H:\ESC\Consultation Papers & Responses\2006-7 ESC Small Scale Licensing Framework Review\070216-L-EWOV comments re Small Scale Licensing Framework Draft Recommendations.doc 3*

Feasibility Study

In every previous instance where it has been suggested that EWOV's jurisdiction be expanded to accept a new class of members, a feasibility study has been undertaken to fully explore the pros and cons of such a change. Such a feasibility study is particularly important in this case because the number and nature of the potential members are not known. It is therefore hard to estimate the possible number of cases and the impact on workload. If, as has been suggested as a possibility, thousands of new entrants may eventuate, this would constitute the largest and most fundamental change to the scheme's operations since its inception in 1995.

EWOV strongly believes that a feasibility study is required in order to make soundly-based decisions about this matter. Accordingly the EWOV Board will proceed as a matter of haste to undertake the study, to enable the directors of the Corporations Law company Energy and Water Ombudsman (Victoria) Limited to make a sound decision for the company.

If the feasibility study outcome is that fee-for-service is realistic, then that option can be pursued. The recommendation appears to have been made on the basis that EWOV may constitute a cost barrier for this group of potential members. As its current arrangements about Contracting Participants make clear, there is provision for annual membership fees to be set on an equitable basis. The current minimum annual membership fee is $2,000 and the Contracting Participant provisions contemplate fees that are even lower than this. If small scale operators are financially viable, EWOV's initial view, subject to a feasibility study, is that fees of this level should not be a barrier.

Billing of EWOV members

EWOV's current billing arrangements involve six-monthly billing in advance with a reconciliation taking place in the following six months. This has worked well and EWOV has never had to worry about bad debts. The ESC's recommendation would involve setting up a parallel billing system that involved monthly billing in arrears and would almost certainly involve EWOV in issues of debt collection and bad debts. Annual membership fees give EWOV financial security for its fixed costs.

Administration

The invoicing and bill payment for a large number of small entities would potentially be a major addition to the administrative arrangements for EWOV.

Case Management System

The enhancements required for the registration of a large number of new small entities would also pose a major challenge.

It has been helpful to hold discussions with the ESC prior to this final submission being forwarded. Our submission of 25 August 2006 set out our view about the need for a feasibility study, and we continue to hold this view. EWOV appreciates that the ESC is to make its recommendations to government by March 2007. In order not to impede this deadline, we ask that any recommendations which go forward talk about participation in 'an approved dispute resolution scheme' such as the wording in the licences. This will give EWOV time to establish whether it is in fact the best option for dispute resolution in this sector.

Further comments

Attachment 1 sets out EWOV's comments on all of the Draft Recommendations (as listed at pages xiii – xvi of the ESC's paper).

All sorts of strategies, including the attractive *"look through tax entity"* incentives may well have been at play. The VESC and DPI may have favourable inclinations towards the rosy concepts they present. Are these schemes compatible with best practice avoidance of in regulatory overlap? Is their perpetuation robbing end-consumers of their enshrined rights.

From a public perspective it is of concern that the energy policy-maker and regulator in Victoria have not been able to distinguish the rights and entitlements of renting tenants from those of the retailers enjoying rewarding collusive arrangements with Owners' Corporations or Landlords.

The fact of the matter is that many of these issues overlap and conflict between schemes, protracted football games of accountability are played between agencies, and renting tenants caught in the cross-fire between jurisdictions generally turn out to be the casualties, whilst the rest of the world holds the belief that the consumer protection framework is generally working quite well.

Whilst it is well and good to have a co-regulatory scheme that is self-funded, there are many concerns about governance and conflicts of interest that are not normally raised in forms seeking feedback on a limited range of issues the is raised on public consultative forums.

I entirely agree that consumer protections should be extended to all recipients of energy – which includes those in embedded situations.

My concern is the degree of control that the VESC has over EWOV, and what may be seen as "conflicts of intensity if EWOV's income and very existence depends on its scheme members Stakeholders in other arenas have commented that many outcomes in self-regulated and co-regulated schemes frequently resulted in decisions favourable to scheme participants.

My own experience with advocating for 18+ on behalf of a particularly inarticulate, vulnerable and disadvantaged end-consumer of heated water services in a residential apartment unjustly imposed with contractual status was extremely negative – see case studies in appendices.

My view was that EWOV took on matters of policy out of jurisdiction, was dependent on the policy-maker and regulator to provide interpretative and philosophical guidance, and the outcomes were less than satisfactory.

The Merits Review process is cumbersome and only available at the discretion of the decision-maker, who made it a point of conveying her right to refuse Merits Review before it was contemplated.

The matter ran on for over 18 months. The VESC made the final decision about contractual matters which remains in dispute.

In its submission to the VESC Small Scale Licencing Review, EWOV felt it should, relying on its Charter reserve the right to evaluate each matter on its merits and refer to other entities matters of complexity, including the complexities of residential tenancy laws for which EWOV staff are provided with no training or regulatory backing. It was my direct experience in advocating for a particular matter on behalf of a tenant, that neither EWOV nor VESC were prepared to be influenced by direct advice from the peak Victorian body that the party held contractually responsible for energy costs for "bulk hot water" provision was not the relevant customer. The Relevant Entity (RE) was the Landlord/Owner.

Having now read in more detail of VESC's philosophical views in the matter of *"user-pay"* for energy, regardless of whether energy is actually delivered to the pre4mises of an end-user of utilities; and regardless of how that deemed energy usage, sale or supply is apportioned or calculated, or whether an appropriate measuring instrument is used through which energy passes at all, I am concerned about equitable outcomes.

The DPI's and VESC's philosophical beliefs are openly available with regard to BHW arrangements. The obligation to uphold s15 of the *Essential Services Act 2001.*

All I can do is to repeat my view that until or unless industry-specific complaints schemes are governed differently away from direct regulator control and funding and more distanced from dependence of scheme participant membership, at the very least public perceptions of conflict of interest will be difficult to allay.

Having said that I am aware that many special interest groups focused on hardship have found EWOV's input helpful to their clients. When the power imbalances are weighted and when money is owed negotiation takes a different form. Even so, Andrea Sharam had found in her report Power Market and Exclusions that the outcomes through negotiation were not always favorable since those with hardship often ended up on a repayment plan that was unaffordable and plummeted into further financial debt.

When it comes to more complex matters, and more especially where there is conflict and overlap things may be different.

I quote directly from the Further Comments from Tenants Union Victoria to the VESC Issues Paper.

> ***5. Dispute resolution***
>
> *We agree that capacity to access an independent dispute resolution process is essential, but contend that there are a number of shortcomings with the Victorian Civil and Administrative Tribunal (VCAT) process. Fees apply (though these can be waived if the applicant demonstrates financial hardship) and the process is not especially expeditious. Furthermore, in the absence of enabling legislation, we are concerned that VCAT may not have effective jurisdiction to hear and determine these matters.*
>
> *The Issues Paper accepts that VCAT is empowered to adjudicate dispute between consumers and small-scale operators and/or onsellers. Disputes in which the TUV has represented applicants were heard in VCAT's Residential Tenancies List or Civil Claims List, as the Tribunal has express jurisdiction over matters pertaining to the Residential Tenancies Act 1997 or the Fair Trading Act 1999. However, VCAT's jurisdiction to adjudicate disputes between small-scale operators and/or on-sellers and consumers in embedded networks has not been made explicit in legislation or the OIC, and we contend that express provision should be made empowering VCAT to hear these matters to effect an accessible and straightforward dispute resolution.*
>
> *It is also important to note the reticence of low-income households in marginal tenures (such as caravan and residential parks) to access dispute resolution procedures, because they perceive that making complaints will result in their eviction. Customers whose housing choices are constrained by poverty are much more likely to be living in substandard conditions, and their fear of potential homelessness makes them more likely to tolerate exploitative conduct on the part of service providers. Consequently, they are less likely to be aware of and to exercise their legal rights. The availability of the VCAT process alone in these circumstances does little to protect vulnerable households from unfair and exploitative conduct on the part of small-scale distributors and/or on-sellers.*

All consumers should enjoy the same level of government and legal protection, regardless of whether they reside in an embedded network. The Electricity and Water Ombudsman's (EWOV) dispute resolution processes have the advantages of being free and non-adversarial.

We believe all consumers should have access to EWOV, to ensure customer parity and fairness.

We note permitting customers in small-scale arrangements access to EVOW would likely involve amending EWOV's Constitution and Charter to include a specific membership category for small-scale distributors and on-sellers. We would also wish to ensure that the addition of embedded networks does not threaten the viability of EWOV's existing scheme, which offers real protection for Victorian consumers.

We recommend that further work be undertaken to determine the optimal means of effecting access to EWOV for customers in small-scale arrangements.

ESC Notification Review of the Exemption Framework for Small Scale Activities[335]

The Commission is conducting a review of the exemption framework for the distribution and retailing of energy on a small scale. This concerns the supply and sale of energy to consumers who share a defined geographic boundary such as residential apartments, shopping centres, retirement villages and caravan parks.

Under the Electricity Industry Act 2000 and the Gas Industry Act 2001, distributors and retailers of electricity or gas must hold a licence unless they are exempt from this requirement.

For electricity distribution and retailing, general exemptions are specified in an Order-in-Council which came into effect on 1 May 2002. An entity may also obtain a specific exemption from the Governor-in-Council.

There is no general Order-in-Council applying to the distribution and retailing of gas in an embedded network; consequently, an operator of an embedded network requires a licence to distribute or retail gas unless a specific exemption has been granted by the Governor-in-Council.

335 ESC online notification of Review of the Exemption Framework for Small Scale Activities *http://www.esc.vic.gov.au/public/Energy/Consultations/Review+of+Exemption+Framework+for+Small+Scale+Activities/Review+of+the+Exemption+Framework+for+Small+Scale+Activities.htm*

In March 2006 the Commission received a letter from the Minister for Industries and Resources requesting that the Commission undertake a review of the small scale exemptions framework. The Minister has asked for advice on the energy licensing and exemptions framework; specifically, how it could accommodate small scale energy distribution and selling activities. The review will also consider what should be the appropriate form of regulation for small scale energy distribution and selling activities.

The Commission has released an Open Letter to announce the commencement of the review. The Commission has released an Issues Paper that seeks comment from stakeholders on the current licensing exemptions framework and what regulatory framework should apply to small scale energy distribution and retailing.

This review has assessed the adequacy of the current regulatory arrangements applying to the small scale distribution and/or resale of energy to customers within embedded networks. It has provided an opportunity for stakeholders to assess whether these arrangements are sufficient for regulating the activities of small scale operators and reflect upon the appropriateness of the obligations that they must comply with.

In deciding upon its recommendations, the Commission has given consideration to views as set out in his letter to the Commission and the current national arrangements as administered by the Australian Energy Regulator.

Another important consideration has been the benefits that small scale distribution and/or reselling activities can provide to their customers and to customers in the cost impact on small scale operators themselves so that they can continue to offer these benefits to their customers.[336]

The Commission has concluded that the current regulatory framework applying to small scale distributors and/or resellers needs improvement. However, it believes that these improvements can be achieved through only minimal changes to the existing framework, minimising the impact on small scale operators while also improving the customer protection framework.

Once the Commission's role in administering the revised arrangements is clarified, the Commission will undertake a comprehensive consultation process consistent with its Charter of Consultation and Regulatory Practice.

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336 It is hardly a benefit for consumers to be improperly and unjustly imposed with contractual status when the proper contractual party is the owners Corporation (Body Corporate) as more fully discussed in Part5

At this stage, the Commission does not have any specific timelines for implementation as these will depend upon the Minister's deliberations on the recommendations and how soon the revisions to the legislation occur. However, the Commission will be aiming to begin implementation as soon as practicable after a response is received.

Overview Final Report ESC Small Scale Licencing Framework

The small scale distribution and/or resale of electricity are currently regulated under the provisions of a general Order-in-Council (OIC) which exempts certain persons from obtaining a licence under the Electricity Industry Act 2000 (EIA 2000). Small scale operators may also obtain a specific exemption from the Governor-in-Council.

In contrast, there is no general OIC applying to the small scale distribution and/or reselling of gas. As such, entities wishing to undertake the distribution and/or resale of gas at any scale must first either obtain a licence under the Gas Industry Act 2001 (GIA 2001), or obtain a specific exemption from the Governor-in-Council.

While exempt from the obligations pertaining to a licence, the general OIC sets out certain terms, conditions and limitations that those exempted by the OIC must comply with to retain their exemption.

Currently, there is no agency responsible for over-sighting whether small scale distributors and resellers of electricity are compliant with the requirements of the OIC. In effect, those undertaking the intermediary distribution, supply and/or resale of electricity self-assess themselves against the requirements of the OIC.

While the Essential Services Commission (the Commission) has a role under the OIC, this is limited to issuing a certificate that states that a particular activity does or does not comply with the definitions contained within clause 5 of the OIC. It is also important to note that this role is only activated when the Commission is requested to undertake such a review. There is no obligation upon an entity to seek a certificate from the Commission.

This review has provided an opportunity for stakeholders to assess whether these arrangements are sufficient for regulating the activities of small scale distributors and/or resellers of electricity within an embedded network. It has also provided an opportunity for stakeholders to reflect upon the terms, conditions and limitations applying to exempted small scale distributors and resellers, as well as whether general exemptions should be extended to the small scale distribution and/or reselling of gas.

Reasons for undertaking the review

This review has been undertaken in response to a letter the Commission received from the Minister for Energy Industries in March 2006. In that letter, the Minister noted that the use of exemptions to facilitate small scale distribution and selling activities within embedded networks was not consistent with the intent of the OIC.

…licence exemption Orders (which are made on Ministerial recommendation) are primarily designed to address incidental, unintended or technical breaches of the standard licensing provisions.[337] /[1]

The Minister also indicated that the Government would prefer not to rely on the OIC as the primary regulatory instrument for embedded customer situations.

As a result, the Minister requested the Commission to provide advice on the energy licensing and exemptions framework and how it could better accommodate small scale energy distribution and selling activities.

3 OBLIGATIONS IMPOSED (VERSC Small Scale Licencing Issues Paper 2006)

In this chapter, the Commission sets out its final recommendations on the obligations that should apply to those small scale operators registered under the Commission's proposed registration system (see chapter 2). The approach to enforcing these obligations is set out in chapter 4.

3.1 Assessing the current obligations

The Commission's approach to determining what obligations should apply to registered small scale operators has been to use the existing obligations under the Order-in-Council (OIC) and assess whether there should be any changes or additions to these obligations. This approach aims to ensure that any proposed changes are only incremental and thus minimizes the cost of transitioning to the revised regulatory arrangements.

However, the Commission has also aimed to ensure that the obligations imposed are sufficient to ensure that customers within embedded network arrangements receive adequate protection.

337 [1]Letter from the Minister for Energy Industries to the Chairperson of the Essential Services Commission of Victoria, 21 March 2006.

The OIC sets out certain terms, conditions and limitations that exempt persons must comply with to remain exempted by the OIC. The obligations applying to all exempt persons include:

- *that the exempt person provide the Minister or the Commission with any information requested for the reasonable administration of the OIC (clause 6)*
- *that electricity be distributed and sold at no more than the tariff that would have applied had the customer purchased electricity and related services directly from a licensed distributor or retailer (clause 7)*
- *the payment of Special Power Payments to customers who would be otherwise entitled to receive such payments (clause 7)*
- *compliance with any provisions of the Electricity Safety Act 1998 or the Regulations or any other instruments made under the Electricity Safety Act 1998 (clause 8).*

The OIC also sets out conditions and limitations specific to the intermediary distribution and supply of electricity in embedded networks and the sale of metered electricity in an embedded network. Where a person is undertaking the intermediary distribution of electricity, the person must:

- *observe all applicable provisions of the Distribution Code as if that person were a licensed distributor*
- *in the event of a dispute, make reasonable endeavours to resolve the dispute, advise the customer of his or her right to apply to have the matter heard by the Victorian Civil and Administrative Tribunal (VCAT) and continue to distribute or supply electricity to the customer.*

Under the OIC, where a person is undertaking the sale of metered electricity in an embedded network, the person must:

- *observe all relevant provisions of the Retail Code as if that person were a licensed retailer*
- *observe all applicable provisions of any Pricing Rule • when commencing the sale of electricity to a small or large business customer, inform the customer in writing that they have the right to purchase electricity from a retailer of their choice*

- *not, by reason only that the exempt person has changed its licensed retailer, cease to sell electricity to a customer unless that customer has elected to purchase electricity from a licensed retailer*

- *in the event of a dispute, make reasonable endeavours to resolve the dispute and advise the customer of his or her right to apply to have the matter heard by VCAT.*

The Commission's view is that these obligations remain relevant to small scale distribution and/or retail, and thus these obligations should continue to apply going forward.

However, some improvement could be made upon these obligations. For example, small scale operators are required to inform business customers of their right to retail choice but not residential customers. Customers may take disputes to VCAT, but it is not clear whether they can access the customer dispute resolution processes provided by the Electricity and Water Ombudsman (Victoria) (EWOV).

The Commission recommends that the following changes are made to the obligations that currently apply:

- *Extend the requirement to inform business customers of their right to retail choice to residential customers.*

- *In the event that section 35 of the Electricity Industry Act 2000 (EIA 2000) ceases to have effect, provide the Commission (or responsible agency) with the power to reference or establish an alternative reference tariff to which the Pricing Rule will apply.*

- *Include a requirement to be members of the Electricity and Water Ombudsman (EWOV) Scheme and inform customers of their right to access the services of EWOV's dispute resolution mechanism.*

- *Remove the requirement to advise the customer of his or her right to apply to have the matter heard by VCAT.*

- *Include a requirement to provide customers with information on concession entitlement rebates as provided by the relevant authority.*

- *Include a requirement to observe all applicable provisions of the Electricity Customer Metering Code.*

- *Include a requirement to observe the Commission's Wrongful Disconnection Procedure.*

- *• Include a requirement that late payment fees must not be imposed on customers consuming less than 20 MWh per year.*

- *Include a requirement for the operator to provide each of its customers with current details on who to contact if the customer has any questions or concerns in relation to their network*

The Commission is also proposing that a Code or Guideline for embedded networks be developed. This Code or Guideline will, among other things, specify which clauses of the Electricity Distribution Code, Energy Retail Code, Metrology Procedure and Electricity Customer Metering Code registered small scale operators must comply with.

To this end, the Commission also recommends that the following obligation apply:

- *Observe any Code or Guideline that the Essential Services Commission may issue in relation to embedded networks.*

- *Further discussion on the reasons for the Commission's recommendations is set out in the following sections*

The Department of Primary Industries is proposing to roll out advanced interval meters. In this event, the Commission does not believe that it will significantly alter the recommendations it has made on the obligations that small scale operators should comply with. However, as customers within embedded networks will have access to the competitive retail market access or reference to a Pricing Rule would need to be consistent with that for all electricity retail customers.

On the issue of implementation, the Final Decision of March 2007 advised that

> ***Extract VESC Final Decision, p64 Final Recommendations***
>
> ***Implementation – Small Scale Licencing***
>
> *In its Draft Recommendations, the Commission did not discuss the implementation of the framework in any great length. At that time, it suggested that the framework could be implemented through amending the Order-in-Council (OIC) rather than alter governing legislation.*
>
> *A few stakeholders commented that further discussion of implementation would be beneficial. For example, SP AusNet suggested that:*
>
> *The Recommendations include a number of Commission actions to establish proper governance of embedded network development, and activities by industry presumably, under Commission facilitation. These include changes to the EIA, creation of a Register, establishing EWOV process details, writing the Embedded Network Code including developing the connection and operational rules as outlined below in section 5, and developing and documenting an audit and enforcement regime. SP AusNet would like to see in the Final Recommendations some consideration of an implementation process and timing of these actions so that there is minimum delay in following through into meaningful actions to create the new Embedded Network regime.* [338] [109]
>
> *Since the Draft Recommendations, the Commission has discussed implementation with the Department of Primary Industries (DPI) should the Minister accept the Commission's recommendations. The DPI has indicated its preference to implement the framework through amendments to the Electricity Industry Act 2000 (EIA 2000) rather than through the OIC.*
>
> *The Commission notes that further consideration will need to be given to determine the most appropriate legislative and regulatory approach for implementing the recommended framework and what form the process of implementation might take.*

338 [109] SP AusNet 2007, Op. cit., p. 2.

However, the framework should address the following key points • those undertaking the intermediary distribution and supply of electricity and the intermediary selling of electricity should be exempt from holding a licence under section 16 of the Electricity Industry Act 2000 but should be required to register their activities with the Essential Services Commission of Victoria (recommendation 1) • the framework should set out the requirements for obtaining and retaining registration (recommendation 2)

Since the Draft Recommendations, the Commission has discussed implementation with the Department of Primary Industries (DPI) should the Minister accept the Commission's recommendations. The DPI has indicated its preference to implement the framework through amendments to the Electricity Industry Act 2000 (EIA 2000) rather than through the OIC.

Clearly the arrangements relate to electricity embedded networks where electricity is being supplied through an intermediary with ownership of control of the network.

It does not apply to gas arrangements, and the question of arrangements for energy supplied to a single energization point for supply of gas to storage water tanks reticulating the water to individual flats and apartments has mistakenly been included in discussion of embedded networks and small scale licencing.

There are many implications for these arrangements beyond the contractual ones since trade measurement laws appear not to have been considered at all or the question of regulatory overlap with other schemes, which is specifically disallowed under the *Esssential Services Commission Act 2001*.

I refer to and support the views of Peter Mari in his submission to the Productivity Commission's Consumer Policy review (20078) sub112) and of Professor Luke Nottage (sub114) which are discussed in more detail in subdrpart3_rb, and were aired in previous submissions from me to the PC's Consumer Policy review, notable subdrpart4 and subdrpart5.

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 again refer to Professor Luke Nottage's[339] concerns in original May submission to the Productivity Commission's Issues Paper and attached also to his submission to the PC Draft Report[340]

> *"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.*
>
> *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."*

339 Associate Professor University of Sydney Co-Director Australian Network for Japanese Law

340 Nottage, Luke (2007) and (2008), Submissions to Productivity Commission's Issues Paper and Draft Reports respectively Australia's Consumer Policy Framework. SUB114

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:[341]

> *"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."*
>
> *The wrongful disconnection payment has been very successful in Victoria by encouraging retailers to take extra care to follow the correct procedure before disconnection.*[342] *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.

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341 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

342 The grey area is with the bulk hot water provisions evidently inappropriately sanctioned by the Victorian (and other Sates) 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 consumer5 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.

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 identified[343] the witty and amusing insights on the role of statutory Ombudsman[344] expressed by Dr. Peter Shergold, the latter until recently Secretary, Department of the Prime Minister and Cabinet on the occasion of the 30th Anniversary o the Commonwealth Ombudsman[345] Dr Shergold's views on the role and nature of the statutory Ombudsman is shown earlier in this document.

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 ender 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.

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343 Field, Chris (2007) *"Early perspectives from Chris Field in his role as Western Australian Ombudsman"* Speech to Western Australian Chapter of Administrative Law September

344 As opposed to those bodies misleading using the term. In the context of industry-specific complaints schemes run-funded and managed by industry participants

345 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.
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.

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 policy [346] views on vested interests

So again, from Graeme Samuel[347] 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 interested 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 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.

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346 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*

347 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

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

In 1997, the Federal Government issued a set of six benchmarks for industry-based dispute resolution schemes.[348] This phrase suggests complaints handling but not alternative dispute resolution, which mean something different, are conduct5ed 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 2001,* the six benchmarks are specified as mandatory.

There is also provision under the same clause of public perception of bias.

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

SECTION 12

OVERARCHING OBJECTIVES IN RELATION TO OF CORPORATE SOCIAL RESPONSIBILITY AND THE PUBLIC INTEREST TEST

Comment:

There appear to have been a number of gaps in PC's Consumer Policy Framework recommendations for to meeting the needs, not merely of the poor and marginalized, but also of many middle-Australians, who, in the words of Wayne Swann, Treasurer, in his book *"Postcode: the splintering of a nation."*

> *"…. Are beginning to wonder when they will see some of the benefits of economic growth"* [349]

Such gaps appear to be include the upholding the National Consumer Policy (NCP) in relation to those less fortunate requiring social welfare service provision or living in regional areas, and secondly the broader principles of good health and community provision *(refer to SCC Findings 2000).*

> *"The Senate Select Committee found that social services were not shown to improve during NCP.*[350] *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.*

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349 Swann, Wayne Cited from article in The Age *"Postcode"* Reviewer Farah Farouque 30 July 2005 found at *http://www.theage.com.au/news/reviews/postcode/2005/07/29/1122144004071.html*

350 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*

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."

In its submission to the Senate Select Committee, PILCH made the following statements in its Executive Summary Overview outlining the rationale for enhanced corporate social responsibility[351]. These considerations need to be taken into account when considering the parameters of a consumer policy framework for Australia.

Executive Summary

1.1 ***Overview*** *This Paper examines the nature, extent, scope and incidence of corporate social responsibility in Australia. It also considers the legislative and policy frameworks that variously encourage or discourage corporations with respect to conducting their business and affairs in a socially and environmentally responsible and sustainable way.*

1.2 *The Paper concludes that current frameworks do not promote, and in some instances, constitute obstacles to, corporate social responsibility. Given the capacity of corporations and corporate conduct to either promote or derogate human rights and social, environmental and community interests, the Paper proposes a range of legislative and policy initiatives – including in relation to directors' duties, reporting and disclosure requirements, and government procurement – to ensure that corporations consider the interests, values and rights of stakeholders and the broader community.*

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[351] PILCH (2005) Submission to the Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility (July)
Found at
http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/submissions/sub04.pdf

Findings

In this Paper, the term 'corporate social responsibility' is used to refer to corporate decision-making, management, practice, performance and reporting which is:

- *Ethical*
- *Sustainable and*
- *Has regard to local, social, community and environmental interests as well as financial considerations*

The impact and influence of corporate activity is significant, widespread and increasing. Corporations have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to impact harmfully on the human rights and lives of individuals and communities.

Recognising these impacts and spheres of activity and influence, particularly as they pertain to the realisation of fundamental human rights, there is a strong public interest in the conduct of business and corporate affairs to impact positively not only on relevant financial interests, but also on relevant social and environmental interests.

While the extent of corporate social responsibility in Australia has increased significantly over the last decade, it still remains low. Less than 10 per cent of corporations demonstrate a developed understanding of the relationship between corporate social responsibility and business.

There is a manifest need for policy and incentives to promote corporate social responsibility and encourage companies to contribute to the realisation of human rights within their spheres of activity and influence.

Section 181 of the Corporations Act, which requires directors to act in good faith in the best interests of the company and for a proper purpose, only permits corporations to have regard to, and act in the interests of, social, environmental and broader community interests in so far as those interests are related to, or likely to bear on, the financial interests of shareholders.

As previously mentioned, one of the submissions to the PC's current Review of Australia's Consumer Policy Framework was from Vijaya Nagarajan.[352] In her submission Ms. Nagarajan explores the concept of a:

> *"A consumer fully armed with relevant information, who is articulate and rational (as) a necessary assumption of the neo-classical model and its importance. (This) has been long acknowledged."*

Is acknowledgement alone that consumer empowerment is crucial enough to make a difference or is consumer empowerment no more than a concept in competition policy?

Is the assumption that competition will be beneficial to the consumer making competition law more palatable globally as Ms Nagarajan suggests, or is that assumption merely artifactual and more about theoretical neoclassical economics?

As proposed by Ms Nagarajan, hand in hand with privitisation of previously public monopolies, comes a:

> *Competition law and policy is now accepted as an essential tenet of a market oriented economy with many developing and transitional countries specifically adopting competition laws that mirror those in developed countries. The assumption that competition will be beneficial to the consumer makes competition law all the more palatable globally across all sectors of production. Privatisation of public monopolies such as telecommunications electricity water and other essential services is being actively pursued across the world aimed at increasing competition in all sectors.*
>
> *However, hand in hand with these changes has been a clear acknowledgement that market failure is common and competition does not guarantee that consumer's interests are met thereby requiring rigorous and often specifically targeted consumer protection laws*

[352] Vijaya Nagarajan BEc LLB (Macq), LLM (Monash) is a Senior Lecturer at Macquarie University. She teachers Trade Practices Law and Business Organizations. Her research interest include Regulation; Competition Law, Commercial law and legal education Her submission to the Productivity Commission's Issues Paper explores some important social, consumer protection and regulatory principles and asks some challenging questions about perceived consumer sovereignty, competition policy and neo-classical economic theory.

Unless consumer protection provisions are robust – which they are not considered to be despite the plethora of regulations (see for example energy industry), and unless compliance enforcement is guaranteed of such rules as are in place, proper protections will not be obtainable.

VLAS argues for a strong effective suite of regulatory measures as being necessary in relation to consumer policy[353]

> *"…precisely because the relative power of consumers compared to industry is so asymmetric and competition policy is handicapped in acknowledging this reality."*

I reproduce the astute observations made by VLAS in their submission to the PC Issues Paper to reinforce the view that competition policy has never adequately protected marginalized and vulnerable groups.[354]

> *"Competition policy is premised on the primacy of competition and market forces to produce efficiency and quality outcomes. The extent of the economic benefit of these policies to the economy are contested with economists such as John Quiggins arguing the benefit is only 0.2 % of GNP. Competition policy has never adequately included protection for vulnerable groups, such as socially, economically and culturally marginalised groups.*
>
> *Even proponents of competition policy have acknowledged that the supposed aggregate benefits may not be enjoyed equally. Within this policy frame any form of Government regulation may be construed as a cost to business."*

In principle, the Victorian Department of Justice[355] recognizes the need to ensure that civil procedures better support the focus of modernizing justice, protecting rights and addressing disadvantage. In addition, effective processes need to be available to support prompt and fair resolution of commercial dispute.

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353 VLAS (2007) Response to PC's Issues Paper (May);

354 Ibid VLAS (2007) p1

355 Department of Justice, (DOJ) (2004)Victoria *New Directions for the Victorian Justice System 2004-2014:* Attorney-General's Justice Statement (2004) 9

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."*

> *"Market forces are global but the social fallout that policy makers have to manage are local"*[356]

That was the opening line of Chapter 5 of the SSC Report on the Socio-Economic Consequences of Competition Policy.[357]

At 9.30 AM on 1 November 1999 a group of most distinguished participants met to discuss a range of issues associated with competition impacts on the community at large, and on social and welfare parameters in particular applying the public interest test. That committee was the SSC on the Socio-Economic Consequences of the NCP.

Though the issues concerning the ADR regulatory proposals under consideration by the VPLR Committee are not concerned with competition policy, some of the conclusions drawn by that SSC apply to all areas where public policy and regulatory reform are under contemplation. The issues raised should certainly be of interest to the PC. As this submission is targeted at both Inquiries, I hope inclusion of material outside the direct parameters of each will be accepted in the spirit intended – to inform and highlight further debate about the specific tools that will be required to improve the consumer protection framework, and to reinforce what has already been said so eloquently by others.

The Chairman opened the proceedings with an outline of the enormous number of issues that needed to be discussed in examining the operation and administration of the NCP on the community and environment and to receive feedback on the issues raised in the committees interim report and in the reports from other inquires, and to look for possible solutions.

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356 Western Australian Parliamentary Standing Committee on Uniform Legislation and Intergovernmental Agreements, (1999) "*Competition Policy and Reforms in the Public Utility Sector"*, Twenty-Fourth Report, Legislative Assembly, Perth, , p xvii

357 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*

The Committee was given the impossible task of not only discussing the issues on the table, but also of presenting its report within the last sitting day in December 1999, which at a guess would have been within a five week period. That was eight years ago almost to the day. The witnesses were asked to give evidence and were offered indemnity under parliamentary privilege to encourage frank discussion.

It is now 2008. Twenty-first century community expectations are not what they were a decade or two ago. This is a consumer-driven society. Government policy at all levels needs to recognize that.

"Competition goals" and fiscal economic ideologies will not in themselves serve to appease community anxieties. What is more, measures to meet fiscal goals and economic reforms based on reducing regulatory burdens at all costs will quite simply not serve to engage community support for policies that may be transparently ignoring community need, expectation and proper access to justice.

In discussing cost implications of effective consumer protection reform, VLAS[358] has effectively argued that:

> ***Extract from VLAS Response to Productivity Commission's Consumer Policy Framework Issues Paper 2007***
>
> *The 'playing field' is far from level hence strong effective consumer policy is a necessity. Consequently, it is with some concern that we note that the Issues Paper appears to start from the premise that regulation may be too expensive.*
>
> *The framing of this inquiry suggests that regulation is unaffordable and ineffective compared to empowerment. More generally the terms of reference imply scepticism 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.*
>
> *The key rationales for Government intervention to empower and protect consumers are social justice and protection of disadvantaged members of the community.*

358 VLAS (2007) Response to Productivity Commissions Review of Consumer Policy Framework Issues Paper, May

VALS adds that Government intervention to empower and protect consumers is necessary. VALS supports formal regulation of the market through legislation etc as opposed to market self regulation.

This is because the theory of market self-regulation is flawed in practice when it comes to minorities, such as Indigenous Australians, and poor people. In reality, Indigenous Australians do not have enough leverage to effect market self-regulation because they are a minority, which undermines any notion that they have choice or have influence to effect changes that protect their rights.

It is important that formal regulation occurs so that standards are established and redress is available before it is too late.

VALS[359] seeks to answer questions about what the balance should be to ensure that consumer's decisions properly reflect their preferences (empowerment) and procribing particular outcomes (protection) as follows:

Rationales for Government Intervention

The key rationales for Government intervention to empower and protect consumers are social justice and protection of disadvantaged members of the community. It is VALS' experience that the needs of remote Indigenous Australians are often emphasised or, prioritised in terms of funding, at the expense of the needs of urban/regional Indigenous Australians. Government intervention should acknowledge that both remote and urban/regional Indigenous Australians have needs that should be met.

VALS adds that Government intervention to empower and protect consumers is necessary. VALS supports formal regulation of the market through legislation etc as opposed to market self regulation. This is because the theory of market self-regulation is flawed in practice when it comes to minorities, such as Indigenous Australians, and poor people. In reality, Indigenous Australians do not have enough leverage to effect market self-regulation because they are a minority, which undermines any notion that they have choice or have influence to effect changes that protect their rights. It is important that formal regulation occurs so that standards are established and redress is available before it is too late.

[359] Ibid VALS (2008) Response to PS's' Issues Paper, p1

Regulation can lead to complexity and VALS argues that regulation that is not complex but simplified will benefit both consumers and those in the consumer industry. Please see further discussion of the issue of simplification of the system below.

Discussion about a consumer policy framework occurs within a Government policy frame which includes National Competition policy. Such policies are demonstrably unfair to disadvantaged people as they presume the presence of a level playing field.

The 'playing field' is far from level hence strong effective consumer policy is a necessity. Consequently, it is with some concern that we note that the Issues Paper appears to start from the premise that regulation may be too expensive.

The framing of this inquiry suggests that regulation is unaffordable and ineffective compared to empowerment. More generally the terms of reference imply scepticism 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.

The dichotomy between empowerment and protection posed by the Issues Paper is a limiting one. Both effective empowerment and regulation are essential if consumers in aggregate and disadvantaged consumers in particular are to be better protected and better prepared.

Consumers who are culturally and/or economically disadvantaged already face a range of disincentives from accessing empowerment or regulatory regimes.

However, the complexity of products, services and standards make it a challenge for most consumers not simply disadvantaged ones.

Even if it can be proven that there is no cost benefit to the Government, or to business, of having regulation which protects consumers there would still be a justice benefit. Where that justice benefit was shared at least proportionally by vulnerable groups it could be described as a fairer system.

VALS argues that if the empowerment and regulation strategies simply try to incrementally tinker with the existing system then regulation will become more expensive and empowerment will become more difficult and also more expensive.

If regulation and empowerment are to be effective at creating a fairer system there needs to be a commitment to reducing the complexity of regulation as well as improving consumer's access to regulatory enforcement processes. Reduced complexity makes it easier for business and the community to know what is expected. The idea of simplifying regulation is a win-win strategy as it makes it clearer for all parties what standards apply.

There is a risk that simplified regulation would increase the scope for unscrupulous businesses to utilise loopholes to get around simpler legislation.

"This means review of how the system works and the opportunity for disadvantaged consumers to seek remedies at Courts and Tribunals would have to be re-established through a civil legal aid system. Without effective access to regulatory enforcement most disadvantaged consumers will be continue to miss out on assistance. Even in cases where the monetary value of the matter is relatively small the relative significance to a person of low income may be great and systems need to reflect these issues.

VALS' submission advocates that consumer policies should be framed around achieving a fairer system where aggregate improvements as well as specific improvements to disadvantaged groups of consumers are prioritised.

VALS supports formal regulation of the market through legislation etc as opposed to market self regulation. This is because the theory of market self-regulation is flawed in practice when it comes to minorities, such as Indigenous Australians and poor people in general. In reality, Indigenous Australians do not have enough leverage to effect market self-regulation because they are a minority, which undermines any notion that they have choice or have influence to effect changes that protect their rights. It is important that formal regulation occurs so that standards are established and redress is available before it is too late. Regulation can lead to complexity and VALS argues that regulation that is not complex but simplified will benefit both consumers and those in the consumer industry. Please see further discussion of the issue of simplification of the system below.

The pace at which regulatory reform is taking place is dizzying. It is not that reform should not have been considered carefully with proper evaluative processes in place earlier, but rather how quickly decisions are now being made, especially for example with energy reform, with steadfast refusal to note the impediments to deeming competition in both gas and electricity markets successful.

This rhetoric and background may well be annoying to those who just want to know what the ADR landscape looks like and possibly whether the State Government can race through the Victorian parliamentary processes those recommendations for civil justice reforms that may need more careful consideration.

Alternatively, inquiries such as those of the Productivity Commission's current Review of Australia's Consumer Policy Framework[360] (or for that matter any other initiative to reduce regulatory burden at all possible costs) may not see any sense in these global arguments aimed at promoting consumer interests, and proper access to justice.

As Dr Chris Field has noted:

> *"…competition is never an end in itself; it is simply a means to an end, that end being to achieve an efficient allocation of resources and the maximization of the long term interests of consumers.*[361]*"*

So here we have it competition is apparently about *"efficient allocation of resources"*[362] rather than:

> *"…broad principles of the public interest and take account of the difficult to measure social factors rather than relying on narrow more easily measurable economic factors."*[363]

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360 Field, Chris Discussion Paper, *"Consumer Advocacy in Victoria",* launched at the National Consumer Congress, also on 16 March 2006.Pages 21 and 22 of the draft Discussion Paper c/f David Tennant's rebuttal at the same conference *"The dangers of taking the consumer out of consumer advocacy."*

361 Tennant, David (2006) *"The dangers of taking the consumer out of consumer advocacy*" A speech delivered by David Tennant Director, Care Inc Financial Counselling Service At the 3rd National Consumer Congress, hosted by Consumer Affairs Victoria Melbourne 16 March 2006. Rebuttal of Dr. Chris Field's Paper *"Consumer Advocacy in Victoria"* March 2006 as above

362 As espoused by Dr. Chris Field

363 A Report of the Senate Select Committee on the Socio-economic consequences of national competition policy, Ch 5 found at http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc Recommendations Found at *http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc/Recommendations.*

Which of these views does the Victorian Parliamentary Law Reform Committee and/or the Victorian Parliamentary Law Reform Commission embrace? Or the Productivity Commission? We already know what the Australian Energy Market Commission and the Victorian ESC believes. Does the Victorian Department of Communities (VDC) have a view on this contentious issue?

What can either the State or the Federal Government do to appease community organizations and concerned private citizens that all is well; that consumer protections are of paramount concern; and that regardless what is done to address *"competition goals?"*

The concern is how the PC intends to meet the gap when the Commonwealth is required to meet the needs of the low fixed-income vulnerable and disadvantaged groups (not simply on financial hardship grounds), when energy price deregulation becomes a reality as is predicted?

At present, within the energy industry benchmarks of best practice consumer-focused service deliveries and protections may have become a blurred and inaccessible partly because of under-funding and resourcing, but also perhaps because of policies that are weighted from the outset in favour of industry./[364]

There is also the question of procedural inertia. Without a dedicated research and policy body such as has been suggested by CHOICE (ACA) and other community organizations these gaps will continue to compromise proper protection.

In 2000 the SSC in 2000[365] received many submissions and other evidence on these issues in particular, the inadequacy of the NCP legislation and agreements:

- *The inadequacy of State legislative review processes;*
- *Pricing subsidy or regulatory distortions having adverse environmental impacts*
- *Fundamental issues of private versus public ownership of natural resources*
- *Adverse social impacts of water pricing reforms; and*
- *The inadequacy of the application of the public interest test*

[364] See also Tamblyn HJ (2004) Tamblyn J (2004) *"The Right to Service in an Evolving Utility Market National Consumer Congress"* 15-16 March 2004 Park Hyatt, Melbourne
Expresses similar philosophies to that expressed the previous year in Rome as above. Refer to analysis by Gavin Dufty, (2004) ibid

[365] SCC (2000) *"Riding the Wave of Change,"* A Report of the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy Committee 2000, Ch 5

In Chapter 4[366] of its 2000 SSC Report reference was made to a recurring theme identified in the interim report. These related to difficulties in the way in which National Competition Policy had been implemented.

Prominent amongst those difficulties were problems with interpreting and understanding the Public Interest/Public Benefit Test, including these factors:

Extract Senate Select Committee Report 2000 NCP Policy

- *a lack of understanding of national consumer 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*

The Committee's reservations were confirmed by the responses received to the Interim Report. The SSC formed the view that failure to properly explain the NCP had contributed to these serious problems. Policy and rule-makers need to make sure that the policies proposed are not only well understood by stakeholders but by themselves, with a thorough understanding guaranteed for those directly affected, or the broader public.

This cannot be achieved without effective communication, timely provision of all protocols and documentation relied upon, and meaningful and timely stakeholder dialogue. That dialogue should be ongoing, and open. It should not be restricted to chance availability to respond to numerous consultation initiatives with overlapping deadlines.

The mechanism should exist for informal dialogue and proactively sought inputs from all stakeholders. This should apply to every avenue of public policy with the principles of transparency and accountability being paramount.

The first observation made by the SSC in this chapter was the impact of specific infrastructure investment (e. g. the Snowy Mountains Scheme) on urban concentration and the impacts on rural and regional Australia in response to wider economic and social currents.

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366 Ibid SCC (2000) Ch 4, *The Public Interest Test and its Role in the Competition Process*

Whilst the SSC 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.

The PC's findings had produced estimates that were subject to variation. What the Committee had been concerned to ensure, was that the impacts of the policy are monitored in a rigorous fashion and the results of such monitoring are reported to policy-making authorities.

Social commentators had found that:

> *"Structural change (had) also left a growing group of so called 'battlers' in comparatively low paid jobs, poorly organized and reliant on a relatively stagnant minimum award wage structure. As these people slip behind the rest of the population (including fellow workers able to benefit from enterprise bargaining), they feel insecure and as bitter and resentful of people on welfare as they are of the 'tall poppies'"*

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.

> *"The Senate Select Committee had found that social services were not shown to improve during NCP.*[367] *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.*

[367] 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

> *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."*

Whilst no negative changes were found to be

> *"…..as a result of NCP or indeed micro- economic reform generally," the Committee found that there was "potential there for the NCP to worsen the impact of rural downturn, industrial changes, globalization etc…"*

The Committee acknowledged the right of the Australian community to:

> *"be informed of the costs of the policy particularly through clear identification of social change hardship and environmental costs."*

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 alternatively, 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."*

The PC had

> *"…..identified job losses by infrastructure providers in its latest report and justified these losses in terms of improvements in efficiency. The adverse impacts of these employment losses can be compared to the impacts of the early tariff reductions on the manufacturing industries."*

A significant finding of the SCC Report was that:

> *"To improve efficiency State governments have sought to address overstaffing in their electricity utilities. This saw total employment in the electricity supply industry decline from slightly more than 80000 in 1985 to around 37000 in 1997….much of this decline occurred prior to implementation of the NCP in 1995. However reductions in employment have continued since then…"*[368]

> *"The Committee doubt(ed) that the benefits of NCP will ever be able to be satisfactorily measured. The Commission's attempts are praiseworthy but they are estimates subject to variation. What the Committee is concerned to ensure, is that the impacts of the policy are monitored in a rigorous fashion and the results of such monitoring are reported to policy making authorities."*

The impact of NCP on social welfare was discussed extensively in the Senate Committee's Report. In particular the Committee examined:

> ***1.*** *Whether or not the supply provision of social welfare services health and related services had been adversely affected by the introduction of NCP; and*
>
> ***2.*** *Secondly whether there was a need for structural adjustment assistance or transitional assistance for those adversely affected by NCP*

The Committee noted how many social, welfare and medication organizations had supported the view 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"*

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368 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Inquiry Report, No 8, September 1999, p 108.

It has been suggested 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. In commenting on the impact of the provision of social welfare services, health and related services the Report continued:

> *"……the local area seems to be where the problems surface first and in the old structure we were able to try and jump on that very quickly.*
>
> *"I am not saying that is the answer to everything-there are a lot of bloody awful services out there that should have been defunded-but I do feel that the move to competition as the answer to that is actually causing much more fragmentation. Also from the ground it is the most incredible waste of money I have ever seen in my life."*
>
> *"Many people feel that this marketplace stuff has got out of hand. To some extent in my mind national competition policy is seen as this marketplace ideology writ large. We want to see a benefit that has more social value for people in their lives."*

Will the compensatory services following price deregulation and removal of the safety net be contracted services of a similar standard to what has been bluntly deemed by the SSC as "bloody awful services that should have been defunded….."?

The SSC predicted:

> *"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."*

There were problems recognized with project commencement requirements; funding issues; systems parameters; best practice recruitment parameters; continuity of funding.

There were recommendations that data collection should be qualitative and not merely quantitative.

The SSC recognized the need for robust assessment of impacts of various policies adopted.

It is not enough to rush enthusiastically into reform of the magnitude envisaged and imminent for energy infrastructure regulatory and economic change. I now refer to the Discussion Paper on Corporate Social Responsibility (CSO) the Public Interest Law Clearing House (PILCH)[369]

Levels of CSR

The term 'corporate social responsibility' is used broadly to describe a view of corporate governance which advocates the pursuit by companies of a broader range of objectives than simple profit-making. However, it is helpful to distinguish levels of corporate conduct that may be consistent with CSR.[370]

Compliance

Companies, like individuals, are subject to a wide range of legal obligations and regulation, some of them specific to business and industry sectors (for example, accounting regulations or product labeling requirements) and some of general application (for example, a duty to avoid injury to members of the public).

On a conventional economic view, legal compliance might be seen as one of a number of costs to a business.

On this view, it is in a company's best interests to adopt a narrow, minimalist view of its legal obligations, so as to limit costs whilst continuing to operate lawfully.

Although compliance with all applicable legal and regulatory obligations is fundamental to the practice of CSR, CSR goes beyond compliance in that it involves companies engaging in conduct not required by law which serves broader interests than the pursuit of immediate profit for shareholders.

369 PILCH (2005) Discussion Paper Corporate Social Responsibility and the Corporations Act 2005 Found at *http://www.pilch.org.au/files/Y885BU8MKC/PILCH%20CSR%20Discussion%20Paper.doc*

370 Wilson Therese, (2005) *"The 'best interests of the company' and corporate social responsibility"*, paper presented at the Corporate Law Teachers Association conference, 7 February 2005, 4. c/f Ibid PILCH (2005) Discussion Paper Corporate Social Responsibility

Sustainability

Companies are increasingly recognizing that their long-term profitability depends upon their business operations being sustainable. By most definitions, 'sustainability' means that a company must not only take care of operating factors that contribute to its short-term profitability, but do so in a way that preserves its ability to meet future needs, by taking into account social and environmental factors.[371]

In order to sustain its operations over the long term a company is not only required to manage risk and consider its direct operational needs in the future, but also to consider the well-being of the society and environment in which it operates.

By taking account of its impact upon and relationship with society and the environment, a company can help preserve and enhance the 'external' conditions that are fundamental to its profitability, such as the natural resources, infrastructure, rule of law and intellectual capital from which it benefits.

Responsibility to stakeholders

The pursuit of sustainability will require a company to consider a variety of interests, including the interests of 'stakeholders' that are important to its long-term profitability. However, CSR might be said to go further than sustainability in that, by its terms, it suggests a company has a 'responsibility' to take into account the interests of stakeholders, as well as its shareholders.

In this vein, Don Argus, Chairman of BHP Billiton Limited, has stated that a company's 'licence to operate' is conferred upon it by the communities in which it operates.[372]

Who are the stakeholders to whom a company owes responsibilities? Stakeholders might be limited to groups connected to the company by conventional legal relationships such as employees, suppliers, clients, and consumers or persons to whom a company owes a duty of care.

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371 Sustainable Measures, *Definitions of Sustainability and Sustainable Development* found at *<www.sustainablemeasures.com/Sustainability/DefinitionsDevelopment.html>*.

372 Don Argus, address to Edmund Rice Business Ethics Initiative, 19 May 2002, Found at *<www.erc.org.au/busethics/articles/1036114283.shtml>*.

Alternatively a company might view itself as having responsibilities to a broader group, whose interests are somehow affected by the company's operations, for example as a result of their involvement in secondary or service industries, as a result of effects on a shared environment or as beneficiaries of a social service provided by a private sector operator.

Social activism

At its highest level, CSR might include the pursuit, by a company, of objects beneficial to society that are altogether unconnected to its commercial operations. Examples might include acts such as the making of donations to charitable organizations, allocation of staff or other resources to not-for-profit projects or companies taking a stance on a human rights issues.[373]

Frequently, advocates of CSR refer to the 'business case' for companies engaging in social activism. Nevertheless, there is no reason why CSR theory should not accommodate the possibility of acts of corporate philanthropy or idealism with purely altruistic motives."

In that joint submission to the ERIG Discussion Paper 2006 a number of consumer advocacy organizations[374]

An efficiency and public interest focus

ERIG states that it's Discussion Papers "concentrate on economic efficiency"[375] *Moreover, quoting the Hilmer Report,*[376] *ERIG posits that competition is the fundamental driver to achieve economic efficiency.*

While we agree that efficiency and competition are important principles informing future energy market reform options, we are of the view that the public interest must underscore the implementation of these principles.

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373 An example (albeit short-lived) was Microsoft Corporation's support for a bill banning discrimination against same-sex attracted people (see David A Vise, *'Microsoft Draws Fire for Shift on Gay Rights Bill'* The Washington Post, 26 April 2005,
Found at
<www.washingtonpost.com/wp-dyn/content/article/2005/04/25/AR2005042501266.html>

374 Joint Submission (2006) from Various Community Advocates to Energy Reform Implementation Group Discussion Papers Nov 2006
found at
http://www.erig.gov.au/assets/documents/erig/Consumer%20groups%20ERIG%20joint%20submission20061216114324%2Edoc

375 ERIG, (2006) Discussion papers, Nov 2006, p 24.

376 Hilmer Committee, *Independent Committee of Inquiry into National Competition Policy*, August 1993

The energy market objective is to maximise efficiency in the long term interests of consumers. In our view, the long term interests of consumers are advanced by ensuring continuous access to the affordable, reliable and safe supply of energy, in recognition that energy is an essential service to the community. We are concerned that ERIG has ignored the public interest in favour of a narrowly defined notion of efficiency and that while pure economic efficiency may contribute to the long term interests of consumers, it does not always do so. For this reason we continue to hold the view that competition and efficiency goals need to be balanced by other social policy goals.

In its review of National Competition Policy, the Productivity Commission outlined a number of key benefits of Australia's micro-economic reform program for consumers.

These include improved productivity, sustained economic growth and increased consumer choice. The Commission noted, however, that "experience with NCP reinforces the importance of ensuring that the potential adjustment and distributional implications are considered at the outset".[377] *The review noted the "mixed impacts" of reforms on regional communities and adverse impacts on the environment (such as increased greenhouse gas emission from the reform-related stimulus to demand for electricity). In our view, economic growth exists to serve not just the majority of Australians, but all of them. Public policy programs must not place such an emphasis on wealth creation that we pay insufficient attention to how we distribute wealth.*

Further economic reforms must sit alongside of social justice policies that ensure a fair, decent and inclusive Australia. In its final report, ERIG must more clearly address distributional and environmental implications of its recommendations and proposals for reform. The pursuit of economic efficiency, by governments, is pointless unless it contributes to social ends.

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[377] Productivity Commission, (2005) *Review of National Competition Policy Reforms (Report No 33)*, Apr 2005, p 150.

In February 2006, Consumer Law Centre Victoria and Monash University's Centre for the Study of Privatisation and Accountability released a comprehensive report analysing the impact of electricity reform in Victoria. The report, Electricity Reform in Victoria: Outcomes for Consumers, found that while electricity reforms have produced some significant benefits, these benefits have not accrued equally among consumers.[378] *Benefits have accrued to industry, commercial users and metropolitan consumers while low-income and disadvantaged consumers (including rural and regional consumers) have seen mixed impacts from reforms. ERIG has failed to consider the ways in which unequal distribution of benefits from reform may seriously impinge upon overall consumer benefit. We are concerned that ERIG's proposals, including those related to retail price regulation (see further below), will have significant negative impacts on the most vulnerable sections of the community.*

*ERIG proposes that the best way to deliver assistance to members of the community disadvantaged by reform is through Community Service Obligations (**CSOs**). As stated by PIAC in its supplementary submission to the ERIG Issues Paper, we agree that CSOs can have an important and effective role in mitigating negative social outcomes from competition reform.*

However, we do not see participation in CSO programs as the limit upon service providers' community responsibility. ERIG does not acknowledge or attempt to deal with the complexity involved in targeting and implementing CSOs to ensure they are effective. A number of reports previously provided to ERIG demonstrate the difficulty in this task.[379][380]

Difficulties include targeting customer groups who do not generally benefit from CSOs, including the "working poor" who, despite being on limited incomes, may not hold concession entitlements. Hiving off social responsibilities to the vague notion of CSOs is an inadequate response to addressing the disadvantage faced by some vulnerable consumers. ERIG's final recommendations must ensure that service providers responsibilities to disadvantaged and vulnerable consumers are explicit and clear. Victorian reforms relating to hardship and wrongful disconnections are examples of ways in which these responsibilities should be reflected."

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378 CALV and the Centre for the Study of Privatisation and Accountability (2006), *Electricity Reform in Victoria: Outcomes for Consumer*, Feb 2006.

379 Uris Keys Young, (2005) (PIAC NSW) *"Cut off: the impact of utility disconnections"*, a research project of the Utility Consumers' Advocacy Program, (February 2005) Public Interest Advocacy Centre, Sydney

380 Rich N. Mauseth M, (2004) (CLCV & CUAC) *"Access to Energy and Water in Victoria"* A Research Report CLCV and CUAC. Nov

In its submission to the Energy Hardship Enquiry in 2005, the KCFS[381] raised a number of pertinent issues regarding access to financial hardship relief for those struggling to meet bills. Amongst the salient points of disadvantage was that relief through the Utility Relief Grants Scheme (URGS) is only a temporary and does not give recipients a debt-free start. Those who are on Centrelink payments but earning low enough income to be of equivalent income are normally excluded. The paper refers to *Rich and Maseuth (2004)* paper.

Utility Relief Grants Scheme (URGS) – mains and non mains

URGS commenced out of the HEAS program by a social work student placement in 1983-84 as a pilot program. The original concept was to provide low income and disadvantaged consumers a fresh start and worked in conjunction with HEAS who provided energy efficiency information and assistance to replace energy inefficient appliances. This has now changed to less substantial financial assistance without the support of energy efficient information. URGS considered low income consumers not necessarily only those with a health care card.

Eligibility criteria

- *Health card holder (there is some flexibility with this but still very restrictive)*
- *Your energy or water use has increased substantially, resulting in high energy or water bills;*
- *You have had high unexpected expenses on essential items, for example, funeral expenses;*
- *Your household income has decreased substantially, for example, due to unemployment.*

Advantages

- *Provides usually once off limited financial assistance to highly targeted consumers experiencing temporary hardship.*
- *Suspension of the utility account and no disconnection until URGS is processed is an enormous advantage to consumers experiencing hardship.*
- *This program is vital for low income consumers experiencing temporary hardship to prevent disconnection.*
- *Improvements with the form are currently underway.*

381 Kildonian Child and Family Services (2005) Submission to The Energy Hardship Inquiry Energy and Security Division, Issues Paper

Disdvantages

Only a temporary measure for people experiencing hardship. Limited amount of grant money often does not give consumers a debt free new start. Access to Energy and Water in Victoria summarises this problem," if a grant is meant to relieve a household's temporary financial crisis, the grant's usefulness will be undermined if, after the application of the grant, the household is still left in financial crisis." (Rich& Mauseth, 2004 p71)'

Limited criteria means people experiencing genuine hardship may not qualify. For example, people without health care cards but on a low income that is not low enough to be Centrelink equivalent.

People experiencing genuine chronic poverty or fuel poverty, without change in circumstances may not meet even one of the three criteria. This program is aimed at people facing temporary hardship only.

The current application form is hard to access by Culturally and Linguistically Diverse (CALD) people, people with mental heath issues as well as people with poor literacy levels because of the amount of information requested by the form. The greatest demand to access a financial counselor by consumers is to receive assistance in filling in the URGS form. This assistance could be very time intensive. Business receive a payment from DHS to process the form but financial counsellors do not.

Recommendation

That the URGS is maintained and strengthened by dropping the health care card criteria for people on low incomes (working poor) and increase the amount of money granted to consumers to give them a debt free start.

That the URGS form be revised after the consultation process earlier this year to make it more accessible.

Who will pay for community service obligations

This is a good time to ask the question who will pay for the community service obligations. The electricity market is becoming national and the other utilities will one day follow. The Victorian government needs to work hard on the ministerial council for energy to maintain the hard earned gains for consumers in Victoria for electricity once electricity is Federal. Part of the battle is to secure funds. Since utilities are essential services in order to ensure access and eradicate fuel poverty and establish federal energy programs for disadvantaged consumers while maintaining state programs for gas and water the government needs to advocate for community service obligations to be paid from utility GST revenue. The GST revenue is the only fair way to ensure access for low income consumers to essential services, and ensure they benefit from Victoria's abundant brown coal reserves. With GST revenue we could pay for leading world class consumer protection programs across Australia."

In 1999 during the dialogue about the socio-economic impacts of competition policy Graeme Samuels 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 who:

"having a vested interest to claim the retention of their vested interest."

Samuels 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.

He then went on to discuss the level of guidance should be provided to agencies involved and various tiers of government at national state and local level, so that they could gain a

> *"better understanding of the way that the public interest issue should be considered."*

Mr. Samuels was not satisfied that this had been achieved with the best success levels.

The first measure is then is for governments to determine guidelines as to the application of the public interest test to offer the best level of assistance to those that are applying the test in its application.

He identified three areas of public interest that needed as a first-line to be taken into account – that any reviews of legislation is undertaken independently, rigorously and transparently, in order to ensure that enough material was received from stakeholders

> *"that presents the genuine public interest as distinct from material being received from vested interests that are purporting to represent the public interest."*

His recommendations went beyond recognition of public interest parameters, the rigorous application of the public interest test and the principles of transparency and accountability. He felt that:

> *"the public interest should have been applied right throughout the process of competition policy."*

Mr. Samuels saw a place for re-examining why and whether state legislation and regulation should have been exempted from s51 of the *Trade Practices Act*. This had been achieved by lobbying governments, not by being subjected to rigorous public interest test.

The cynics have suggested that the reason they secured exemption by transparent public interest assessment.

Following Alan Fells' explanation of the examples in the wine growers and medical fields, Senator Murray sought some clarification as to how switching gas water electricity and so on to more competitive practices were differentiated in the public interest analysis and the perceived consequences, baring in mind the social issues and the essential nature of these services.

He referred to the Industrial Relations Commission philosophies regarding safety net considerations, and compared this philosophical approach to that of the ACCC and ASIC.

> *"The process of those reviews is, as we have said on many occasions, to be conducted independently, transparently, objectively and rigorously. Those reviews have the capacity to examine all the options and to examine all the issues of public benefit that have been established in case law, in practice and in commission decisions through authorization processes over the past 25 years.*
>
> *You have got all the capacity to do that and you should, in fact, do it. They involve considerations, not only of economic issues, but also of social issues.*
>
> *Indeed, the Competition Principles Agreement in clause 1(3) lists only one economic issue, that of economic efficiency, amongst the seven, eight or nine—I forget the exact number—issues that need to be considered where relevant and where appropriate in the area of public benefit assessment."*
>
> *The others, as you will know, relate to employment issues, ecological issues, environmental sustainability, occupational health and safety, social welfare, equity considerations, regional employment and regional development. There are a whole lot of issues there that are listed and they are not exclusive.*
>
> *They are inclusive. Social issues and social relevance is very much a part of competition policy and ought to be applied with all the wealth of experience that has been developed over the past 25 years in the administration of the authorization of public benefit and public interest tests."*

The Committee's reservations were confirmed by the responses received to the Interim Report. The SSC formed the view that failure to properly explain the NCP had contributed to these serious problems. Policy and rule-makers need to make sure that the policies proposed are not only well understood by stakeholders but by themselves, with a thorough understanding guaranteed for those directly affected, or the broader public.

I refer to the recommendations of the (SSC) in 2000[382] when discussing NCP intentions and goals, which includes effective and timely stakeholder consultation and parameters that extent beyond commercial gain.

With those reservations in mind it is important to re-emphasize that sufficient lead time is allowed to plan for the price and social impacts that will leave possibly half the

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[382] Ibid SSC (2000) *"Riding the Wave of Change",* A Report of the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy Committee 2000 Ch 5

population at risk of shell-shock and disadvantage when price deregulation becomes a reality. That may be a growing proportion as the population ages.

SCC Recommendations 2000

1. *That all reviews of legislation and changes to competitive arrangements in the social welfare sector adhere to the broad principles of the public interest and take account of the difficult to measure social factors rather than relying on narrow, more easily measurable, economic factors.*

2. *That all contracting out arrangements and competitive tendering processes and documentation in the social welfare sector be public and transparent. There should be a presumption that all documents will be public and any claims of commercial confidentiality should be kept to a minimum and where essential.*

3. *That, where appropriate, the Commonwealth Departments of Health and Aged Care and Community Services, examine competitive tendering programs and determine which services are properly and efficiently competitively tendered and which may be contracted out on a benchmark of service basis. Particular attention should be paid to rural and remote communities where locally provided co-operative services may be integral to the success of service delivery."*

4. *That Governments critically examine competitive tendering processes for social welfare services with a view to ensuring that a sophisticated and flexible approach is taken to the provision of service. The process should consider as part of the public interest test: quality, consistency and continuity of service; the value of local co-operative arrangements and the personal nature of such service.*

Another important recommendation of the SSC was in relation to impacts on urban, rural and regional communities expressed as follows:

> *"For rural development policies to be successful there needs to be a greater focus on people. Perhaps the best way to achieve this is by emphasizing the value of social obligations rather than the 'rights' of self-interested individualism. Conventional wisdom stresses the importance of competition rather than community. While the current approach to rural development, at the very least, recognizes the importance of rural Australia, successful achievement of its objectives requires a more critical consideration of the dominant neo-liberal approach to policy-making."*
>
> *However, only under very special circumstances will the process of adjustment generated by unfettered market forces be socially optimal. Processes of economic contraction are likely to proceed excessively rapidly as the loss of one area of economic activity imposes external costs on others.*

Finally, I quote from the same chapter of the SSC Report on the impacts of micro reform:

> *"… (the) "impact of micro reform is becoming more and more severe in terms of its effects. And it is becoming harder for fiscal and other reasons to smooth the social effects."*

It was recognized that:

> *"In the small rural centres of Australia the circumstances benefitting perfect competition are most unlikely*

Deregulation of professions and centralization of policies of government departments were considered amongst other factors to have a detrimental social impact on rural populations.

As far back as 1999 in discussions about NCP generally it was recognized that anger in the many rural populations had metamorphosed into fatalism and the feeling that the government had left the negotiating table.

It can only be hoped that the energy reforms will not lead to outcomes like that for the vulnerable groups and populations, and that the remainder of the Australian population does not become even more disillusioned than they are about the general and specifics impacts of the proposals envisaged in terms of the social and welfare prices that will undoubtedly be paid.

Besides that there is the question of the smaller energy companies, the second-tier energy retailers simply trying to retain liquidity and a small share of the market.

They too must be given every support since in some ways they will potentially share the same position of facing power imbalance detriments, fear of uncertainty and worse than that fear of being swallowed up by the giants. Powerdirect has already seen that happen as the inaugural second-tier retailer.

Dr. Steven Dovers of the ANU[383] is quoted by the SSC as saying:

> *Anyone who has played junior football can impart the invaluable lesson that a level playing field, set rules and fixed goal posts the stuff of healthy competition matter little when someone twice your size charges at you. Just as big firms can (and do) run over and flatten small firms in a "fair and competitive" market, so it is that weakly institutionalised policy considerations can be easily outweighed by strongly institutionalised ones. Thus it is for ESD, and the lack of institutionalisation is evidenced in comparison to other public policy fields.*

[383] Professor Steven R Dovers. BSc (Canberra) BLett. PhD (ANU) has degrees ecology and geography and a PD in environmental policy. His research centres on approaches to sustainability policy and environmental management that integrate the nature of substantive problems and natural systems, with a public policy and institutional perspectives including policy and institutional analysis; decision-making in the face of uncertainty; emergencies, climate change impacts; science; policy interactions; adaptive policy and management; natural resource management; interdisciplinary research theory and practice and environmental history.
Professor Dovers, of ANU, focuses on interactions between human and natural systems and related policy and management questions, rather than on single disciplines or sectors – complex problems in environment and sustainability require an interdisciplinary and cross-sectoral approach. His research combines rigorous scholarship and development of practical policy capacities.
Professor Dovers has cop-authored, edited and co-edited over two hundred articles, books, chapters, conference papers and reports, including over eighty refereed works and significant conference papers and highly regarded books. He has been chief investigator or co-investigator in externally-funded research projects work A1.6 million and is regularly invited to speak at policy-oriented conferences. Post-graduate research training is at the core of his research program, and he teaches the course Policy and Institutional Analysis (SRES 3028-6018).
Professor Dover's profile cited above can be found at
http://fennerschool.anu.edu.au/people/academics/dovers.php

Even official sustainability policy states that environmental, social and economic policy should be balanced and integrated, and this means that there should be some degree of parity in policy processes. Yet the underpinnings of much social and especially economic policy are vastly more substantial than environmental concerns. Where are the ecological equivalents of the Australian Bureau of Statistics, National Accounts, Census, input out put tables, monthly population surveys, or Productivity Commission< Where is the implementation that would make ESD a weak statement of ecological rationality comparable to its counterpart from economic rationality, the pervasive National Competition Policy (NCP)? NCP makes for an interesting comparison.

Chapter 6 of the SSC Report of 2000 referred to the essence of the Interim Report in which the Committee had canvassed the difference between the public interest test of the NCP and the public benefit test of the ACCC as follows:

"The need for public debate and understanding has not diminished.

Public benefit has been and is given wide ambit by the Tribunal as, in the language of QCMA (at 17,242), 'anything of value to the community generally, any contribution to the aims of society including as one, of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress'. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources.

We bear in mind that (in the language of economics today) efficiency is a concept that is taken to encompass 'progress' and that commonly efficiency is said to encompass allocate efficiency, production efficiency and dynamic efficiency."[384]

Clause 1(3) of the Competition Principles Agreement provides that Governments are able to assess the net benefits of different ways of achieving particular social objectives.

Quoting directly again from Ch 6 of the SSC Report of 2000.

[384] Victorian Newsagency Decision, ATPR 41-357 at 42,677.

Without limiting the matters that may be taken into account, where this Agreement calls:

> *a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or*
>
> *b) for the merits or appropriateness of a particular policy or course of action to be determined; or*
>
> *c) for an assessment of the most effective means of achieving a policy objective;*
>
> *the following matters shall, where relevant, be taken into account:*
>
> *d) government legislation and policies relating to ecologically sustainable development;*
>
> *e) social welfare and equity considerations, including community service obligations;*
>
> *f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
>
> *g) economic and regional development, including employment and investment growth;*
>
> *h) the interests of consumers generally or of a class of consumers;*
>
> *i) the competitiveness of Australian businesses; and*
>
> *j) the efficient allocation of resources.*

The Committee continues to be concerned about the application of *'public interest'* given the confusion that exists over what the term means or allows under NCP. The confusion, when:

> *"....combined with the administrative ease of simply seeking to measure outcomes in terms of price changes, encourages the application of a narrow, restrictive, definition. The Committee considers that it is important to devise a method of assessment of the policy which attributes a numerical weighting to environmental and social factors to avoid the over-emphasis on dollars merely because they are easy to measure. Mr. Waller advised the Committee that:*
>
> *"In summary, it is a difficult area. There are problems of methodology, there are problems about the practical application of the policy. Underlying all this, I would say that I think that, in net benefit terms, the national competition policy arrangements are of major value to Australia in meeting the problems it faces globally."*[385]

> *"The Committee recognizes the argument that the NCP has contributed to Australia's success in meeting the problems it faces globally, particularly, the economic shocks that came out of the "Asian melt down". However, even if it is accepted that that is the case, the country's overall ability to cope internationally is not always fully appreciated in the face of lost jobs, reduced pay and conditions, failing or lost social infrastructure, or the other adverse consequences of structural change that are perceived to be attributed to NCP."*
>
> *One of the most significant statements made in this chapter is of direct relevance to the proposed infrastructure reforms.*

I quote directly from the statements made by Mr. Ritchie National Farmers Federation in his dialogue with Senator McGauran:

> *"Mr RITCHIE—My assumption is that obviously we support some of the initial gains that have been made under national competition policy, but in areas such as infrastructure, NFF is starting to have some real, serious concerns. The picture that Rod Nettle painted about what is going to happen to rural and regional Australia is not a difficult picture for us to extrapolate to, either."*

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385 Mr M Waller, Committee Hansard, 1 November 1999, p 841

> *"If you apply a strict principle of user pays to the provision of infrastructure, then you are not going to have a rural and regional Australia to worry about in 25 to 50 years because nobody out there can afford to pay.*
>
> *This is the whole principle of externalities under which economic theory had been working for 100 years until we decided to throw it out in 1994. Let us go back and see if that was a sensible decision to throw out the principle of externalities and external benefits."*

Looking as if he were *"champing at the bit,* Graeme Samuel, President National Competition Council, was invited to make opening comments. He chose to focus on the definition of the term public interest – which he said defies all attempts at further definition, because

> *"the public interest is as broad as it is long but it endeavours to encompass what the two words suggest—that is the public and the interests of the public."*

The best I can manage is to direct readers to the reservations that have been expressed by multiple community organizations and consumer policy advocates many times over, and especially in the lead-up to full retail competition in 2003.

Graeme Samuels. Chair ACCC, 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 interested 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."*

He then went on to discuss the level of guidance should be provided to agencies involved and various tiers of government at national state and local level, so that they could gain a:

> *"…better understanding of the way that the public interest issue should be considered. "He was not satisfied that this had been achieved with the best success levels."*

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He identified three areas of public interest that needed as a first-line to be taken into account – that any reviews of legislation is undertaken independently, rigorously and transparently, in order to ensure that enough material was received from stakeholders:

> *"that presents the genuine public interest as distinct from material being received from vested interests that are purporting to represent the public interest."*

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The cynics have suggested that the reason they secured exemption by transparent public interest assessment. Following Alan Fells' explanation of the examples in the wine growers and medical fields.

Senator Murray sought some clarification as to how switching gas water electricity and so on to more competitive practices were differentiated in the public interest analysis and the perceived consequences, baring in mind the social issues and the essential nature of these services.

He referred to the industrial relations Commission philosophies regarding safety net considerations, and compared this philosophical approach to that of the ACCC and ASIC.

"The process of those reviews is, as we have said on many occasions, to be conducted independently, transparently, objectively and rigorously. Those reviews have the capacity to examine all the options and to examine all the issues of public benefit that have been established in case law, in practice and in commission decisions through authorization processes over the past 25 years.

You have got all the capacity to do that and you should, in fact, do it. They involve considerations, not only of economic issues, but also of social issues. Indeed, the Competition Principles Agreement in clause 1(3) lists only one economic issue, that of economic efficiency, amongst the seven, eight or nine— I forget the exact number — issues that need to be considered where relevant and where appropriate in the area of public benefit assessment."

The others, as you will know, relate to employment issues, ecological issues, environmental sustainability, occupational health and safety, social welfare, equity considerations, regional employment and regional development.

There are a whole lot of issues there that are listed and they are not exclusive. They are inclusive. Social issues and social relevance is very much a part of competition policy and ought to be applied with all the wealth of experience that has been developed over the past 25 years in the administration of the authorization of public benefit and public interest tests."

The public has never felt less confidence that their rights will be upheld or that justice will be readily accessible. Theory and practice gaps have become more noticeable despite myriads of guidelines in place. Enhanced education of key energy regulatory staff and complaints scheme staff may not go astray.

Current strategies in heralding reform measures are thought by many to be lacking in the department of meaningful dialogue. Not that the dialogue is not occurring, but there are queries about how meaningful that dialogue is; how well the consumer voice and other voices are being heard; the extent to which airing and meaningful reciprocal dialogue is occurring with stakeholders in time to make a difference before new regulations are put in place.

In a climate of rushed policy change such as is envisaged, and in the light of the tensions and apprehensions apparent on both sides of the fence, all stakeholders are begging for more certainty and stability that they perceive to be offered, improved meaningful dialogue and longer timelines to give effect to the theory of stakeholder consultation.

The public at large is also looking for improved transparency, such as publishing of all external reports relied upon (one example may be the AEMC contracted survey to Wallis Consulting – perhaps the public can have full access to the entire report with conclusions rather than a raw data summary as presented at two recent Victorian public forums during September.

The community continues to express concerns over the speed at which the whole regulatory process in the energy industry is being revamped.

Turning now to a more detailed examination of infrastructure policy reform with energy at the top of the list, this limited submission refers to recent findings in the literature that may be worth considering.

The community at large has expressed ongoing concerns about the speed with which proposed change is occurring.

A study published in the CUAC quarterly July 2007 examined models of consumer consultation. Through a public grant the paper Consumer Consultation: International Best Practice Models was produced by the Monish Centre for regulatory studies and funded through a CUAC public grant.

CUAC the study identified that effective consumer consultation needed to draw from different models. Key concepts identified were:

1. *A clear, genuine commitment to consult, beyond either manipulation or tokenism*
2. *Use of a wide range of consultation mechanisms rather than a single method*
3. *Commitment of appropriate resources*
4. *A mix of formal and less formal arrangements; and*
5. *Public accountability and transparency.*

These principles are upheld in numerous quarters.

With regard to energy regulatory reform, a literature review[386] recently undertaken by *Jamison, Holt and Berg (2005)* of the Public Utility Research Centre, University of Florida discussed.

[386] Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.* The Electricity Journal Vol 18(6) July 2005 pp 36-35

> *"Well-conceived regulatory frameworks, including independent regulators, sound price-setting regimes and transparent regulatory processes that invite stakeholder participation, can improve the investment climate by increasing predictability and reducing political risk"*

These authors have taken the care to identify gaps in the literature on risk mitigation in infrastructure. Notable gaps are:

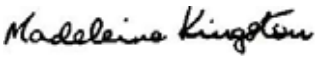
> *"…an understanding tradeoffs between instruments that have conflicting effects the dynamic process of policy development sustainability of infrastructure policies leadership and the effects of multilateral institutions. We also find a lack of synergy in some areas of research and recommend approaches for increasing awareness and collaboration."*

Whilst this chapter is not about regulatory reform, the topic of a separate chapter in this series I include with concern a snippet from the Victorian Government's Philosophies as contained in the Victorian Premier's booklet *"Reducing Regulatory Burden"*[387] referring to *"National leadership in implementing the National Competition Policy reform initiatives"*

> *(27) In addition to targeting reductions in the administrative burden of regulation, the Government will reduce the compliance burden imposed by State regulation.*
>
> *(28) Compliance burden is the additional cost incurred by organisations in order to adhere to legal requirements. For example this could include the purchase of additional equipment to comply with food safety regulation or to meet environmental standards for the disposal of industrial waste.*
>
> *(29) The Government believes there is scope to simplify and streamline regulation while at the same time ensuring that its policy objectives continue to be achieved.*
>
> *p8 Reducing the regulatory Burden" The Victorian Government's Plan to Reduce Red Tape"*

[387] Brumby, John (2006) *"Reducing the Regulatory Burden"* The Victorian Government's Plan to Reduce Red Tape"

Whilst efforts are made by community organizations to support the socioeconomic rationale for customer protections in energy markets[388], and whilst there are widespread concerns about the tokenism of community consultation in the major regulatory and consumer policy changes that are being envisaged, the public appear to be at ongoing of detriment on account of alleged exploitation of policy provisions in place that either inadvertently or deliberately facilitate questionable conduct that leave the public at risk.



Madeleine Kingston

[388] Refer to funded project CUAC Partnership Grant produced by PeopleFirst

SECTION 14

REGULATORY DESIGN IN RELATION TO CONSUMER POLICY SOME BRIEF REFLECTIONS

> ***Chapter 3 Objectives for consumer policy: Some general concepts in more detail***
>
> ***PC Draft Recommendation 3.1***
>
> *Australian Governments should adopt a common overarching objective for consumer policy: "to promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith"*

PC Draft Recommendation 3.1 proposes to support the proposed overarching objective for consumer

> *"to promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith"*

In support of these recommendations, the PC has made six specific recommendations with the aim of providing:

> *"….more specific guidance to those developing and implementing consumer policy."*
>
> *"The consumer policy framework should efficiently and effectively aim to:*
>
> - *Ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition;*
> - *Ensure that goods and services are safe and fit the purposes for which they were sold*
> - *Prevent practices that are unfair or contrary to good faith*[389]

[389] On the issue of good faith, please see further comments about discrepant interpretations of such phrase by the Courts and others, and refer also to the views of stakeholders on the use of this phrase. Perhaps, consistent with the recommendations of the Victorian Bar to the Victorian

- *Meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage;*[390]
- *Provide accessible and timely redress where consumer detriment has occurred and*

Promote proportionate risk-based enforcement[391]

MK Comment

As mentioned in the Part 3, the Productivity Commission's Draft Report contained many strengths as did its Final Report of April 2008, which was modified to some extent because of the fiscal and constitutional considerations and took into account some of the input from numerous stakeholders. I acknowledge these. I particularly commend the PC for the care taken to explain its rationale. Countless hours and revisions have gone into preparation of the twin reports, Volumes 1 and 2.

The devil is in the detail and there are a number of perceived flaws discussed shortly. I join others who have cautiously supported the overarching objectives, which I would like to see expanded and further clarified.[392]

At this stage, without the detail it is quite difficult to know what will actually eventuate, especially if procedural barriers such as infrastructure and constitutional considerations may result in dilution of original intents.

My personal view is that the concepts of consistency, reduction of regulatory burden; where appropriate, or the need for more proactive Commonwealth Government control is at issue and it is justifiable to have these issues addressed at national level.

Leaving aside for the moment the

"concept of confident and informed participation of consumers…"

Parliamentary Law Reform Commission's ADR Discussion Paper, a definition of *"a duty to act honestly"* (e.g. to minimise cost and delay)
Secondly "*a duty to assist the Court in achieving the overriding purpose" (e.g. "to conduct litigation in an appropriate manner"* may be a more appropriate way of phrasing the overall guideline of preventing practices that are "unfair of contrary to good faith"

390 I would like to see this phrase expanded to include at least the terms *"inarticulate, and culturally or linguistically diverse"* with further clarification of those with mental illness, intellectual incapacity or cognitive problems. There is insufficient clarification of vulnerable and disadvantaged which appears to be interpreted differently by different people at different times

391 The implications of the clause *Promote proportionate risk-based enforcement* seem to be unclear

392 ACCC (2008) Response to PC's Draft Report; February 2007

I would prefer to see the term *"good faith"* phrased differently as recommended by the VB on the basis that this terms *means different things to different people* and can give rise to discrepant interpretations, as could the terms *"misleading and deceptive."*[393] This is discussed further shortly. See also other comments in that section concerning standards of conduct.

I feel that the over-arching objective usefully be extended to acknowledge core values such as contained in the Justice Statement[394] Such justice principles are clarified as follows[395]:

> ***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."*

The objective could perhaps have read:

> - *to ensure that consumers are sufficiently well-informed and sufficiently confident to benefit from and stimulate effective competition*[396]*; and to ensure that both suppliers and consumers exercise a duty to act honestly.*
> - *To incorporate the justice principles of equality accessibility and effectiveness*

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393 Victorian Bar (2006) Response to Victorian Parliamentary Law Reform Issues Paper. See reflection of Professor Michael Bridge's definition cited in this submission by the Victorian Bar

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

395 Consistent with the Victorian Attorney-General's Statement of Justice 2004

396 As suggested by CHOICE in their response to the PC's Draft Report

> *In court proceedings, parties should have and obligation*
>
> *(a) to assist the Court in achieving the overriding purpose –*[397]
>
> *that is:*
>
> *(i) to minimise cost and delay;*
>
> *(ii) to conduct litigation in a proportionate manner.*

I deal first with the Overarching objective suggested by the PC has on page 11 of the Report refers to its primary benchmark

The role of behavioural economics beyond recognition of its existence and academic examination of its application is a crucial part of developing an overall consumer policy framework, designing overarching objectives and determining what is really meant by

> *"the well being of the community as a whole"*

There I highlight or draw direct attention to some of the submissions that the Productivity Commission has no doubt considered already, including that of Kildonian UnitingCare; the Queensland Government; the views of Peter Kell; the views of Deborah Cope of PIRAC Economic Consulting to name a few.

Kildonian Uniting Care has quite outspoken about apparently dismissal of evidence by behavioural economics as inconclusive or of little practical value. I cite below shortly from their submission to the PC's Draft Report (206DR). The submission counteracts criticisms made of behavioural economics and suggests that more traditional theories offer no more complete or cogent explanations for consumer behaviour.

In suggesting proper application of behavioural economics, Kildonian UnitingCare has made the following specific recommendations which I would like to endorse as inclusions into the operational objective

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

[398] ***Recommendations***

Kildonan would like to see an additional operational objective:

- *Provide consumers access to goods and services especially essential goods and services.*
- *Research and consultation into market imbalances especially in the area of financial products and services.*
- *Research and consultation in the area of behavioural economics and how this area of study can inform and strengthen consumer protections beyond mere information disclosure.*

These recommendations follow on from detailed discussion in the submission from Kildonian Uniting Care. Kildonian UnitingCare has commented on their disappointment that behavioural economics appears to have been dismissed as follows:

"…..very discouraging to see the evidence by behavioural economists mainly dismissed by the Productivity Commission as inconclusive or of little practical value.

If this information is not relevant, why are aspects of behavioural economics (for example prospect theory) standard text book requirements in assessing and understanding consumer risk behaviour in marketing? By understanding a consumers' internal risk analysis, marketing can proactively focus on turning the risks into benefits in the message, and thus overcoming significant perceived consumer resistance. Kildonan strongly suggests that findings from behavioural economics are reconsidered and incorporated into the consumer protection framework in order to address the large imbalance between individual consumers and suppliers.

Kildonian UnitingCare has gone on to discuss in detail to discuss the implications of failing to appropriately consider the role of behavioural economics in influencing consumer protection policy.

The submission further suggests that

[398] Kildonian Uniting Care (2008) Submission to PC Draft Report SUBDR206 Feb, p4

If consumer choice does not result in consumer benefit it may not be that the consumer is unsophisticated but that a stronger safety net is required to balance market failures. A failure to acknowledge that at times consumers may not act in a completely rational manner and protect their self interests may overlook vital consumer protections.

One could argue that the sub-prime market failure is almost a text book case of behavioural economics in action. People discount the future are influenced by framing and do not always act in their best interests. Low cost loans were offered by suppliers and accepted by consumers with little consideration of ability to repay once the interest rate reflected the market rate after a set future time. The requirements to sell and meet targets, based on the attraction of commissions by suppliers and the dream of buying their own home by the consumer framed this transaction outside the pending future reality. The sub-prime market failure has shown that both consumers and suppliers may not act in their own best interests.

Consumers are locked into loans they can barely afford often living a hand to mouth existence. In America, once the property is sold in a market that has plummeted consumers risk losing their only asset at a discount price as well as being left with the balance of the debt the house sale could not clear. Similarly, some large financial institutions have experienced significant losses while most financial institutions have experienced a world-wide credit crunch that has escalated the price and limited the availability of credit across the industry. It may appear that some significant suppliers did not exhibit the sophistication necessary to protect their own self interest. Every major area of study has its critics, this should not deter from the overall merit of the behavioural economists findings.

The Productivity Commission needs to consider and investigate behavioural economics in an unbiased manner as there may be applications for consumer protections that are currently not considered. Current markets depend on consumer choice as an expression of acting in consumers' best interests.

If consumer choice does not result in consumer benefit it may not be that the consumer is unsophisticated but that a stronger safety net is required to balance market failures. A failure to acknowledge that at times consumers may not act in a completely rational manner and protect their self interests may overlook vital consumer protections.

Next I highlight components of the observations made by the Queensland Government. In citing the findings of the Australian Treasury,[399] in relation to important determinants of wellbeing and how consumer behavioural economics (CBA) can be used constructively in formulating a robust consumer policy framework.

> *"CBA can be difficult to apply to some benefits of proposed action such as assessing the monetary value of life health and well-being. These harder to quantify benefits are important to balancing the cost benefit equation but can be neglected in the national CBA process.*
>
> *In examining the assessment of costs and benefits in policy the Commonwealth Treasury's wellbeing framework recognizes that analyses of economic development which only take in income and which neglect other important determinants of wellbeing.*
>
> *The behavioural economics approach treats key aspects of consumer decision making as endogenous originating from within the individual. While the classical economics approach treats key aspects of consumer behaviour as exogenous that is influenced by their external environment.*
>
> *This means the behavioural approach can offer more insights into consumer decision making where neo-classical economics alone is unable to explain critical issues for consumer protection.*[400{39}]

In suggesting proper application of behavioural economics, Kildonian UnitingCare has made the following specific recommendations which I would like to endorse as inclusions into the operational objective

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399 Australian Treasury (2004), Policy Advice and Treasury's Wellbeing Framework, *Economic Roundup*, Winter.

400 Smith, R and King, S (2006) *"Insights into Consumer Risk: Building Blocks for Consumer Protection Policy"* Roundtable on Demand-Side Economics for Consumer Policy: Summary Report, OECD, Paris c/f Submission to Inquiry into Australia's Consumer Policy Framework by Queensland Government

On the issue of behavioural economics Peter Kell argues that[401]

> *"….one of the key sources of the current frustrations about consumer protection policy is that much of it in this country is still based on a very limited and increasingly old fashioned view of consumers derived from a narrow economic model. We are still approaching consumer and competition policy based on a model, in fact, that I would argue at time is actively misleading about how consumers make decisions and how we consume. This has to change. This is our challenge, and our policies and messages for consumers will be better if this happens.*
>
> *Behavioural economics, I do not think, has all the answers. But it is a very good place to start and it is about time that Australia caught up with the 10 or 20 years of thinking that has been going on in relation to this issue in other countries, notably the US.*
>
> *There is an old joke about economists. An economist is someone who looks at something in practice and wonders whether it would work in theory. The traditional approach does not require empirical investigation and unfortunately that is how much of our approach to consumer behaviour in competition and consumer protection regulation has worked in Australia.*

Though I am pleased to see that consideration has been given by the PC to behavioural economic theories, at least in principle, there appears to be so much focus on process that it is hard to see how these theories are likely to be incorporated into the practical application of the proposed policy framework. Others have commented on the process concerns perhaps at the sacrifice of outcomes.

The heurtisics of decision-making; discrepancies in the interpretation of consumer conduct, notably switching conduct; and the significant segment of the community who are unable to make decisions in their best interests, despite provision of I formation and regardless of quality, makes this field a challenge when determining whether the effectiveness of competition is real or imagined, since all components of the market need to be working well for this to be the case.

I refer the PC to the submission by PIRAC Economic Consulting (Sub106); and to the submissions and work of others. Peter Kell CEO of ACA has also written and spoken in various arenas about the issue of behavioural economics, including at National Consumer Congress forums.

I refer to published frank views such as those of Peter Kell as CEO of Australian Consumer Association (ACA, the publisher of CHOICE) in two recent National

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401 Kell, Peter (2005) *"Keeping the Bastards Honest – Forty Years On….."* Speech delivered at the 2005 National Consumer Congress Melbourne March, p6

Consumer Congresses regarding regulatory philosophy and echo Edmund Chattoe's[402]/[403] challenging question as to whether economists and sociologists can indeed have meaningful dialogue.

I also refer to the work of Edmond Chattoe from the Department of Sociology University of Surrey, Guildford, UK, who has questioned whether sociologists and economists can communicate. I provide below an abstract and the introduction to from his 1995 paper and some pertinent arguments from the body of the paper.

> *"This paper addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained. The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations. This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development. "*

[402] Edmond Chattoe, Sociologist, University of Guildford, UK,

[403] Chattoe, Edmond, (1995) *"Can Sociologists and Economists Communicate? The Problem of Grounding and the Theory of Consumer Theory"* This research is part of Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Found at http://www.kent.ac.uk/esrc/chatecsoc.html
Refer also to Tennant David *"Taking the consumer out of consumer advocacy."* Published speech delivered at the 3rd National Consumer Congress (2006). Theories of consumer grounding in advocacy. Mr. Tennant, Director Care Financial inc. believes that consumer advocacy policy that is not grounded with consumers is potentially dangers and likely to be ineffective.

*"**Introduction***

This paper arose as a result of a literature survey on the economic and sociological theories of consumer decision-making, in the early stages of a project to construct a computer simulation of the budgetary decision process. The original plan was to choose a suitable theory, implement it as a computer simulation model and use interviews and diary research to provide a rich source of data and suggestions for theory development. In fact, both the prevailing economic theory, and a large amount of sociological material proved unsuitable for this purpose. The process of understanding why much of this theory was unsuitable suggested an important role for computational simulation and cast some interesting highlights on the methodological differences between economics and sociology. As an economist recently arrived in a sociology department, I realised that my attempts to explain myself and understand others were themselves a suitable object of social research. This paper is both a result of that process and a contribution to it.

The paper is divided into three parts. In the first, the economic possibilities for consumer theory are considered, and the deep difficulties of operationalisation and grounding are addressed. In the second part, the contributions of sociology are considered. It is argued that these are currently non-theoretical, at least by economic criteria, but nonetheless extremely important. (Economics has under-stressed their importance because they cannot readily be fitted into its theoretical framework, but this reflects neither their true importance, nor an accurate assessment of the defensibility of the resulting economic theory.) Finally, the possibility for a reconciliation of both views is suggested within the (non partisan) computational framework.

Methodological prescriptions are often unsatisfactory because they simply descend into rhetoric. It is almost impossible to decide on the correct way to do science that has yet to be done. Instead, I shall consider science that has already been done using the traditional methodology and explain how it has led to the paradoxes that now exist. In suggesting an alternative and illustrating the way in which it avoids these paradoxes, I shall argue that it is therefore a better way to proceed."

Chattoe explains that the economic theory of consumer choice

> *Posits a preference ordering over a specified set of goods a set of 'axioms of rationality' and a budget constraint*

He refers to textbook arguments that are used to suggest the choice of axioms based on 'common sense" or plausibility rather than the demands of theory

In discussing the economic view Chattoe speaks of levels of risk in applying popularly held economic consumer theory. Limitations are least damaging; removal of limitations involves straightforward generalization of the theory and constitutes a large part of the normal science practiced by consumer theorists

However, by contrast, Chattoe refers to genuine concerns about the risks of relying on obscurities and paradoxes, referring to not simply the state of development of the theory, but its suitability as a description of real phenomena.

Says Chattoe:

> *Paradoxes are the most damaging type of difficulty since they suggest that the theory may actually be incoherent rather than simply incomplete or unclear.*

These grounding theories can be extrapolated to discussion of such issues as advocacy that is not grounded in consumers. David Tennant believes that such models of advocacy can be ineffective as well as potentially dangerous.[404]

These further extracts from Chattoe's paper may be pertinent to the current and similar enquiries:

> *In fact some models, though not typically in consumer theory, permit agents to estimate the coefficients in a common and correct model of the world, but this is an extremely restricted sense of learning, which is at least as much the process of establishing a model by which the world is to be understood.*

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[404] Tennant, David (2006) *"Taking the consumer out of consumer advocacy"* Published speech delivered at 3rd National Consumer Congress Melbourne March. Rebuttal of Dr. Chris Field's paper *"Consumer Advocacy in Victoria*" delivered at the same congress.

Economists often answer questions that bear a striking resemblance to those we might really want answered.

It seems unlikely that sociologists will be particularly keen to fit their theorising to the structure of a model which was unable to tackle the problem it obliges them to solve.

In fact, there is ample evidence that it will not, at least at the level of psychology (ref 14).

Historically, sociologists have never paid a great deal of attention to consumption. ... When attention was devoted to actual consumption behavior, it was most often a branch of social pathology, concerned with social problems of insufficient nutritious food, excess alcohol, inadequate health care, too many cigarettes. Only rarely did the sociological classics examine consumption for its own sake." (ref 21, page 1).

Furthermore, it is notorious that interview data is considered, without adequate argument, to be inferior to that obtained from other sources. Hall and Hitch (ref 10) found that "cost-plus" pricing was extremely widespread among firms, yet marginal pricing is still almost universal in theory building.

Simulation is often criticised for producing models that are "too complex" or that are able to "show anything"'. This is not a valid criticism of simulation, rather of the fact that simulation has an embarrassing habit of revealing questions we can't answer. Mathematical models don't solve this problem, they simply allow us to ignore it."

As suggested by David Adam in his award-winning essay cited above

"has poverty disappeared from the agendas of ministerial councils?"

Adams believes that federalism is a barrier to *"joined-up"* ways of working and that Painter's collaborative federalism (1999) is still a way off.

Each recommendation for the proposed framework is discussed below:

"ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition"

This is an important goal and one that has received much attention in dialogue between stakeholders and various public inquiry initiatives, including the PC the AEMC and certain state enquiries such as the VPLR Committee's ADR Discussion Paper and then VPLR Commission's Civil Justice Review.

In discussing neo-classical economics Vijaya Nagarajan[405] acknowledges that:

> *"market failures can result where the consumer is not equipped with sufficient information to participate effectively in the market or where the consumer may be mislead or deceived. Accordingly consumer laws have been focused on disclosure or on consumer protection."*

Yet the Chairperson of the AEMC commented at both the Melbourne and the Bendigo public meeting forums on 4 and 5 September 2007 respectively, that that effective competition could mean that:

> *"competition is sufficient to keep the marketplace in balance, even if every customer is not necessarily well informed."*[406]

One of the submissions to the PC's current Review was from Vijaya Nagarajan.[407] In her submission Ms Nagarajan explores the concept of a:

> *"A consumer fully armed with relevant information, who is articulate and rational (as) a necessary assumption of the neo- classical model and its importance. (This) has been long acknowledged."*

Perhaps simple acknowledgement insufficient to make a difference or is consumer empowerment no more than a concept in competition policy?

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405 Nagarajan, Vijaya (2007) Response to PC's Issues Paper

406 CUAC September Quarterly "AEMC Review of Effectiveness of FRC

407 Vijaya Nagarajan, BEc LLB (Macq), LLM (Monash) is a Senior Lecturer at Macquarie University. She teaches Trade Practices Law and Business Organizations. Her research interest include Regulation; Competition Law, Commercial Law and Legal Education Her submission to the PC's Issues Paper explores some important social, consumer protection and regulatory principles and asks some challenging questions about perceived consumer sovereignty, competition policy and neo-classical economic theory.

Could it be the assumption that competition will be beneficial to the consumer making competition law more palatable globally as Ms Nagarajan suggests, or is that assumption merely artifactual and more about theoretical neoclassical economics?

As proposed by Ms Nagarajan, hand in hand with privitisation of previously public monopolies, comes a:

> *Competition law and policy is now accepted as an essential tenet of a market oriented economy with many developing and transitional countries specifically adopting competition laws that mirror those in developed countries. The assumption that competition will be beneficial to the consumer makes competition law all the more palatable globally across all sectors of production.*
>
> *Privatisation of public monopolies such as telecommunications electricity water and other essential services is being actively pursued across the world aimed at increasing competition in all sectors. However hand in hand with these changes has been a clear acknowledgement that market failure is common and competition does not guarantee that the consumer's interests are met thereby requiring rigorous and often specifically targeted consumer protection laws."*

To what extent is the consumer actually an active participant using the price mechanism effectively to obtain goods or services?

Ms Nagarajan refers to:

> *"The regulatory space is now occupied by a myriad of parties including public and private bodies using a variety of strategies such including the traditional litigation route as well as resorting to individual blogs all of which have the power of regulating the conduct of business"*

It is valid to question how real that theoretical consumer power may be within the regulatory space. Do consumers really have any say at all apart from cursory involvement in consumer consultative processes? Is the voice of the people being heard, and if so is responsiveness up to community expectations?

Please see my discussion under PC Draft Recommendation 11.1 *"Empowering Consumers"* and reference to the compelling arguments presented by VLAS for formal regulation in a timely way as argued by VLAS in their original submission to the PC Issues Paper (sub79) and to other arenas, including the VPLR Committee's ADR Discussion Paper.

Ms Nagarajan discuses manufactured confusion in speaking of bundled offers and other confusions that develop despite the provision of information.[408] This is further discussed elsewhere.

Meaningful consumer engagement

Consistent with the theory models of best practice leadership embraced by *Jamison (2005)*[409] will the politicians and bureaucrats of Australia recognize that the foremost leadership skill recommended is the ability to:

> *"get on the balcony and see what is really going with operations politicians consumers and others a meaningful engagement with all stakeholders."*

Current strategies in heralding reform measures are thought by many to be lacking in the department of meaningful dialogue. Not that the dialogue is not occurring, but there are queries about how meaningful that dialogue is; how well the consumer voice and other voices are being heard; the extent to which airing and meaningful reciprocal dialogue is occurring with stakeholders in time to make a difference before new regulations are put in place.

One way to encourage proper community consultation and input is to make informal "stitch-in-time" submissions more welcome within and outside consultative forums so that early signs of market failure can be detected and addressed before a public enquiry becomes mandatory.

Many consumers and other stakeholders wish to be more involved in policy inputs. The pace at which inter-related initiatives expect input within unreasonable competing deadlines means that neither consumers nor community organizations, nor other stakeholders have a reasonable opportunity to participate.

There is insufficient online access to public policy documents and difficulty in seeking clarification from prescribed agencies about jurisdictional boundaries and accountabilities. This should be addressed to promote a more open and transparent government.

In a climate of rushed policy change in many arena, such as is envisaged within the energy industry with price deregulation around the corner, despite overall market readiness in both gas and electricity markets, and in the light of the tensions and apprehensions apparent on both sides of the fence, all stakeholders are begging for more certainty and stability; improved meaningful dialogue and longer timelines to give effect to the theory of stakeholder consultation.

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408 Nagarajan, Vijaya, (2007) Response to PC's Issues Paper

409 Jamison, MA, Holt, L, Ber, SV, (2005) *"Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank."* The Electricity Journal Vol 18(6) July; pp 36-45

The current energy market in Victoria at least, and now to some extent also in South Australia, it does not seem so. Wholesale prices are excessive. Market structure and market rules are rendering it impossible for smaller retailers to either obtain suitable contracts or to physically obtain gas, for example. The impacts of generator-retailer vertical and horizontal integration are under-recognized and causing havoc in the competitive market.

Bureaucrats appear to be supporting the notion of competitive (energy) markets based on flawed conceptual thinking. The public are not fooled – and the entire nation stands to pay an unacceptably high, irreversible price down the track.

Is there a case for enhancement of evaluative skills governance and accountability amongst those who make far-reaching decisions such as energy price deregulation in a volatile and unstable market fraught with market power dominance; restrictive rules and other factors impending proper competition in both gas and electricity markets, given the impact of being able to offer duel fuel products.[410]

ERIG has already recognized gaps in AEMC governance and staffing issues. Will eroded faith in the AEMC's ability to make considered and well-informed decisions ultimately contribute to collapse of community confidence such that there are no veins left to revive? Clearly the decisions are made, but the community is not ready to accept the validity of the assumptions made, the conclusions drawn and have rejected the paucity of the data relied upon, save for market participants who stand to enhance market dominance.

What can the community at large expect of future accountabilities from top down and bottom up? When will the gaps be addressed with accountability and how? These are pertinent questions from the community that require investigation and answers – in the public interest.

The risk is being passed on to consumers along with the price. How long can this go on without a recession developing?[411]

Though the PC has now made some recommendations for improved access to information, this alone will not solve the issue of inability to effectively participate in the market for those, for example with literacy issues, cognitive impairment; intellectual or psychiatric disability, isolation from information sources; or other barriers.

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410 See for instance the submissions by Victoria Electricity to AEMCs First and Second Draft Reports raising these issues – which were not so much as acknowledged by cursory response; and the submission by the ACCC to the AEMC's Second Draft Report cautioning against making assumptions about the reasons for barriers to competitive growth

411 See Kilian, Lutz (2007) *"The Economic Effects of Energy Price Shocks"* abstract found at http://www-personal.umich.edu/~lkilian/jel052407.pdf (with acknowledgements to Paul Edelstein and others) Poses such questions as *Why do energy price increases seem to cause recessions, but energy price decreases do not?*

> *Ensure that goods and services are safe and fit for the purposes for which they were sold*[412]

This is a very worthy goal. It is really very difficult to know how to comment till the policy tools are identified.

> *Prevent practices that are unfair or contrary to good faith*[413]

Standards of conduct

The term good faith is a pleasing concept, though not without its inherent issues, notably interpretative discrepancies. The same applies to interpretation of the phrase misleading and deceptive conduct as currently contained in generic provisions.

I reflect the Bar's concerns, reflect Professor Michael Bridge's definition[414] 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."*

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412 I note gaps in specific recommendations to ensure that services, especially fungible services such as energy, are delivering as expected (for example heated water, which in any case energy providers are not licenced to sell, but rather simply the energy that heats, chargeable to Owners Corporation if the individual consumption of such energy cannot be measured with an instrument (meter) designed for the purpose,. Note water meters are not suitable instruments through which energy can be measured. Such practices will become explicitly illegal and invalid when existing utility exemptions are lifted. This matter is discussed under Ch 8

413 On the issue of good faith, please see further comments about discrepant interpretations of such phrase by the Courts and others, and refer also to the views of stakeholders on the use of this phrase. Perhaps, consistent with the recommendations of the Victorian Bar to the VPLRC's ADR Discussion Paper, a definition of "a duty to act honestly" (e.g. to minimise cost and delay) and secondly "*a duty to assist the Court in achieving the overriding purpose" (e.g. "to conduct litigation in an appropriate manner"* may be a more appropriate way of phrasing the overall guideline of preventing practices that are *"unfair of contrary to good faith"*

414 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].

I had suggested to the Productivity Commission; the Victorian Parliamentary Law reform Commission that the Victorian Bar's recommendations should be adopted regarding the overriding obligation for consumer policy, if imposed on all participants, and not just the parties and their lawyers, the *"over-riding obligation"* should be:

> - *A duty to act honestly and*
> - *A duty to assist the Court in achieving the overriding purpose –*
>
> *that is*
>
> - *to minimize cost and delay*
> - *and to conduct litigation in a proportionate manner*

The VB 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 may 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*

MK Comment

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."*[415]

In addition, the VB has suggested that 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. I support that view.

Further, the VB 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 VB[416] has suggested a simpler requirement to act honestly and reasonably. Factors such as cost, delay, complexity and formality are some of the impediments to accessing justice that the Victorian Parliamentary Law Reform Committee Discussion Paper has already identified.

Chapter 3 of the VPLRC 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.*

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415 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

416 Victorian Bar. (2007) Response to Victorian Parliamentary Law Reform Committee's ADR Discussion Paper. Seer also Victorian Bar submissions to Victorian Parliamentary Law Reform Commission's Civil Justice Review.

As mentioned previously, I would prefer to see the term *"good faith"* phrased differently as recommended by the VB and discuss this shortly.

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

> *Meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage*[417]

I would like to see included the phrase

> *"inarticulate vulnerable disadvantaged and culturally or linguistically diverse."*

Both vulnerability and disadvantage tend to mostly conjure up financial hardship and when arguments are raised to implement policies such as deregulation, this appears to be the focus of attention, diverting attention away from other forms of disadvantage and vulnerability. Whilst community protection through financial hardship policies and enhanced community service obligations should be robust this is not the only area of need.

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.

In any case the terms vulnerable and disadvantaged though discussed as concepts in the PC's Draft Report are not incorporated into the objectives or sufficiently defined to leave no room for discrepant interpretations.

At a recent 2008 Public Hearing of the VPLR Committee's Inquiry into ADR, several community groups[418][419] 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).

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417 Victorian Parliamentary Law Reform Committee Discussion Paper 2007

418 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

419 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

The groups attracting particular focus at that hearing, and in written submissions to the VLRC's ADR Inquiry as well as the PC's Consumer Policy Review 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.*

VLAS[420] has pointed out their experience that:

> *The needs of remote Indigenous Australians are often emphasised or prioritised in terms of funding at the expense of the needs of urban/regional Indigenous Australians.*
>
> *Government intervention should acknowledge that both remote and urban/regional Indigenous Australians have needs that should be met.*

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.

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[420] VALS (2007) Submission to VPLR Committee's ADR Discussion Paper

At the VPLRC's ADR Inquiry the problems faced by victims of crime as a single marginalized group was discussed. The problems faced by such groups, especially victims of serious crime in achieving best outcomes, if any, were of concern. [421]

Another specialist group accessing ADR processes was youth groups requiring youth services or youth justice facilities.[422]

Marginalized 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.[423]

The VALS submission eloquently discusses merits of formal equality as superior to substantive equality. Equality and fairness principles and 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.[424]/[425],

Systemic racism is also discussed in the context of over-representation of Aboriginal people in the criminal justice system.

VLAS recommends that systemic discrimination has to be strategically addressed and makes specific recommendations in terms of Koorie ideas and values which should be considered as a policy or program is developed.

A crucial component of the various VLAS submissions made is recognition that:

> *"some western assumptions about communication and culture may handicap an understanding of the importance of other cultural approaches."*

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421 Crime Victims Support Association (2008) Presentation by Mr. Noel McNaramara, CEO, in support of written submission to VPLRC's Inquiry into Alternative Dispute Resolution

422 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

423 Paraphrased from Victorian Aboriginal Legal Service (VALS) written submission to VPLR Committee's ADR Enquiry, p4

424 Ibid VALS submission, p4

425 Ibid VALS submission p4

The same arguments may be applicable to other marginalized groups, such as those suffering from psychiatric disorders, with or without substance dependence; intellectual disability; cognitive impairment for a variety of reasons, including psychiatric or intellectual disability. Though 60-80% of those with psychiatric disability[426] (also have a dual diagnosis label (viz. substance dependence).[427]

A further marginalized group that deserve specialist attention are international students whether fee-paying, or Commonwealth of Australia stipends,[428] other student stipends awarded to those from developing countries. See further discussion under access to justice, legal aid and legal advice.

I support and directly cite from CUAC's July 2007 submission to the AEMC Issues Paper[429]

> ***4.6 Impact of competition on vulnerable customers***
>
> *Which customers are likely to be considered vulnerable customers? What factors contribute to customer vulnerability?*
>
> *There has been significant work done in recent years to identify vulnerable consumers. A good working definition has been formulated by Consumer Affairs Victoria and is 'a person who is capable of readily or quickly suffering detriment in the process of consumption.*[430]

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426 Whether or not formally diagnosed, bearing in mind for example that it can take over a decade to diagnose bipolar disorder an incurable serious mental illness).

427 Substance dependence (addiction), abuse and use are not synonymous terms. In 1991 T. D. Boscarelli identified a gene for addiction. Addiction is a serious mental illness also in its own right and frequently seen in combination with other psychiatric disorders. This condition, whether or not comorbid with other psychiatric illness can lead to criminal activity and the need for targeted specialist and sensitive inputs, including proper access to non-court interventions

428 Such as AusAID (Australian Agency for International Development) also called development assistance, international aid, overseas aid or foreign aid, refers to the efforts of developed countries to reduce poverty in developing countries - those countries with low average incomes compared to the world average. The term 'development aid' often refers specifically to Official Development Assistance (ODA), which is aid given by governments through their individual countries' international aid agencies, like AusAID. also called development assistance, international aid, overseas aid or foreign aid, refers to the efforts of developed countries to reduce poverty in developing countries - those countries with low average incomes compared to the world average. The term 'development aid' often refers specifically to Official Development Assistance (ODA), which is aid given by governments through their individual countries' international aid agencies, like AusAID.

429 CUAC Response to AEMC Issues Paper.

430 Consumer Affairs Victoria (CAV) (2004) Discussion Paper *What do we mean by 'vulnerable' and disadvantaged' consumers?*, *http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/vulnerabledisadvantaged.pdf c/f CUAC's Response to Issues Paper citation 9, page 11*

It is important to remember however that vulnerability is not just about the consumer, but also about the market's perception of the consumer:

The 'market dimension' of consumption incorporates the motivations of buyers and sellers, consumers' information requirements for successful purchases and the capacity of markets to 'fail' in ways that are detrimental to consumers.

The 'personal dimension' of consumption incorporates those attributes and circumstances of individuals that affect how purchase decisions are made (particularly access to and use of information) and how a consumer is positioned in transactions relative to sellers.

Variables in each of the market and personal dimensions affect consumer vulnerability, but it is not necessary for there to be problems in both dimensions for concerns about vulnerability to arise. Consumers with normal capacities and in 'ordinary' personal circumstances may still be susceptible to detriment, due to the characteristics of a particular market, product or transaction.[431]

A key group of vulnerable consumers is those who are prone to financial hardship. The Commission should also be aware of the demographics in Victoria that indicate a very high proportion of the population is on a fixed or low income:

UNSW Centre for Social Policy Research, under the auspices of the Committee for Melbourne Utility Debt Spiral Project, found a strong correlation between serious financial deprivation and utility stress.

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[431] CUAC (2007) Response to Issues Paper citing CAV Discussion Paper *What do we mean by 'vulnerable' and disadvantaged' consumers?*, 2004, p1 ibid CUAC, in Response to AEMC Issues Paper, AEMC; *June; cit 10, p1 found at* *http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/vulnerabledisadvantaged.pdf*

Households experiencing utility stress accounts for

- *31 per cent of Victorians aged 15 or over hold a concession card;*
- *By household, approximately 37 per cent of Victorian households have at least one person in the household who is a concession cardholder;*
- *43 per cent of concession cardholders are aged 65 and over; and*
- *In some areas of the state, notably East Gippsland and parts of Central Victoria, the number of concession card holders can be over 40 per cent of the local population.*[432]

In some areas of the state, notably East Gippsland and parts of Central Victoria, the number of concession card holders can be over 40 per cent of the local population.[433]*70 per cent of all households suffering financial hardship;*

- *25 per cent of all households in income poverty; and*
- *83 per cent of all households suffering both financial hardship and income*[434]

Temporary Hardship

I reiterate the issues raised by CUAC concerning temporary financial hardship issues in their original response to the AEMC Issues Paper

In relation to temporary financial hardship CUAC has stated that it is not possible to develop a complete check-list of reasons for why consumers fall into temporary financial hardship. CUAC cites research that:

"Certain characteristics have a more pronounced correlation to utility stress than others."[435]

However in relation to temporary financial hardship, CUAC has pointed to research showing that:

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432 Ibid CUAC Response to AEMC Issues Paper

433 Ibid CUAC Response to AEMC Issues Paper

434 Dept of Human Services (2007), *State concessions and hardship program 2005-06*, March, p8 ibid c/f CUAC Response to AEMC Issues Paper p11, cit 11

435 Ibid CUAC (2007) Response to Issues Paper, p12

> *"Consumers can experience hardship for various but equally critical reasons (interest rate rises that lead to higher mortgage repayments loss of a job family break up or a sudden unexpected bill for car repairs to name but a few possible scenarios)."*[436]
>
> *First timers can be "inexperienced in dealing with customer assistance schemes. These customers are very dependent upon the response they receive from energy retailers as their situation often means that they are not linked to the state concession system Centrelink or other welfare/customer assistance schemes.*[437] [14]

Research has demonstrated that retailers' inflexibility when negotiating payment plans can be a cause of severe utility stress and imminent disconnection. For customers with temporary payment problems an affordable plan can be all that is needed to solve the problem.[438]

Chronic Hardship

In their response to the Issues Paper CUAC had identified the customer group that included customers with low income levels experiencing a long-term struggle to meet basic household expenses (housing, food, transport and utilities).

CUAC pointed out that this group may not always find it impossible to pay their energy bills:

> *"…but they may often forego other essentials goods or services to pay for energy, as well as under- consuming as a way of making the service more affordable.*
>
> *A key issue for this customer group is that only measures that address the affordability of energy are going to alleviate the problem. There are, however, many ways of addressing affordability, including reducing the cost of energy for this customer group, reducing consumption levels through improved energy efficiency and improving direct financial assistance or income levels.*[439]

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436 Ibid CUAC Response to Issues Paper, p12 AEMC Retail Competition Review p 12

437 Rich, N and M Mauseth, M, *Access to Energy and Water in Victoria – A research report,* CALV p64-65 citation 4, AEMC Issues Paper Review of Effectiveness of Retail Competition in the Gas and Electricity Markets c/f CUAC Response to Issues Paper, p12 AEMC Retail Competition Review

438 N Rich and M Mauseth, (2004) *Access to Energy and Water in Victoria – A research report,* CALV and CUAC 2004, p 64-65.

439 Ibid CUAC (2007) Response to AEMC Issues Paper, p12 p 12

St Vincent de Paul Society Victoria told the Victorian Committee of Inquiry into energy hardship that between 2001-02 and 2003-04 there was a 230% increase in utility assistance provided to consumers15. The Commission should take care that any changes to the safety net arrangements do not simply shift responsibility from the retailer to the community sector.[440]

The primary - and a very valuable - benefit to consumers is the protection the standing offer provides consumers against price volatility. That has not been a major concern in the past, given the stability of wholesale market prices, but it is certainly an issue for the future.

Exposing residential consumers, who are least well prepared to manage that risk, would certainly imperil access to affordable energy.

Another important and often overlooked has been the facilitating role the standing offer provides to set the ROLR price. Industry has complained about the costs incurred in determining the price of a standing offer, but neglects to mention that having a ROLR safety net requires a similar process regardless.

The ESC's decision in identifying the standing offer terms and conditions points out both its value in protecting vulnerable consumers, as well as endorsing the rigour with which it has been set. The ESC's reasoning is worth citing in full:

"… but they may often forego other essentials goods or services to pay for energy as well as under-consuming as a way of making the service more affordable.

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[440] StVdePSoc (2005) Submission to Committee of Inquiry into Financial Hardship of Energy Consumers June; p15, available at *http://www.doi.vic.gov.au/doi/doielect.nsf/2a6bd98dee287482ca256915001cff0c/3bf666a8e99340ecca257030001632f7/$FILE/St%20Vincent%20De%20Paul%20Society.pdf c/f CUAC Response to* Issues Paper July 2007 AEMC Retail Competition Review

SECTION 14

SOME FURTHER REFLECTIONS ON THE ROLE AND PROPER UNDERSTANDING OF BEHAVIOURAL ECONOMICS

Louise Sylvan as Deputy Chair of the Australian Competition and Consumer Commission (ACCC) as well as Chair of the OECD Economics for Consumer Policy Working Group[441] has emphasized the role of behavioural economics in consumer policy. Ms Sylvan points out on page 2 of her recent submission to the Productivity Commission,[442] that the OECD Working Group chaired by her see behavioural economics as complementary to conventional and information economics.

Ms Sylvan goes on to say that a thorough understanding of how consumers will behave is essential for reaching policy decisions that will work effectively in many markets.

In referring to the OECD Toolkit attached to her submission, Ms Sylvan has pointed out the following:

> *"…Both the detriments and the decision-making segments of the Toolkit, however, pre-suppose that research is occurring and that some agency or agencies have responsibility for 'watching' the demand side, and carrying out pro-active investigative and rigorous analysis of consumer outcomes.*

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441 Louise Sylvan was appointed Deputy Chair in November 2003. She was formerly the Chief Executive of the Australian Consumers' Association (ACA) and President of Consumers International. An active member and worker in consumer protection, nationally and internationally, for over 15 years, Ms Sylvan is well known for her work in enhancing consumer rights in a range of areas such as health, food safety issues, financial services, as well as in competition and consumer policy. Currently, Ms Sylvan serves internationally on the OECD Consumer Policy Committee and nationally on the federal government's Expert Group in Electronic Commerce and the Australian Statistics Advisory Council to the ABS. Prior memberships included six years on the Australian Prime Minister's Economic Planning Advisory Council and the Self-Regulation Task Force in 1999–2000. Ms Sylvan has a BA and MPA from universities in her original homeland of Canada and immigrated to Australia in 1983.
Source: ACCC website: *http://www.accc.gov.au/content/index.phtml/itemId/812026*

442 Sylvan, Louise (2008) Submission to Productivity Commission's Draft Report, p1, subdr252
Found at *http://www.pc.gov.au/__data/assets/pdf_file/0008/78686/subdr253.pdf*
Louise Sylvan is Deputy Chair at the Australian Competition and Consumer Commission and Chair of the Economics for Consumer Policy Working Group at the OECD

Ms Sylvan has expressed concern about

> *".....quite appropriate hesitancy about intervening in markets – because of regulatory risk and uncertainty – has become translated into a lack of activity in rigorously examining consumer problems in markets …. (a) confusion between the task of final evaluation and decision- making and the process of investigation and analysis."*[443]

On page 4 of her submission SUBDR253 made these concluding comments:

> ***"Conclusion***
>
> *To conclude, an evidence-based approach to consumer policy, which takes as its focus an analysis of consumer outcomes, and which bases any intervention o real consumer behaviours, can help ensure that ineffective interventions are not pursued or are remedied, and that sound alternatives are considered within a sophisticated cost-benefit analysis, including whether a market will respond successfully to consumer problems by itself within a reasonable time.*
>
> *Equally important, examining whether markets are working from the consumer perspective complements the type of market analysis which is undertaken on the competition (or supply side) and in some jurisdictions is an integrated task.*[444] *The current draft decision tree in the OECD Toolkit for Consumer Protection and Empowerment recognizes this integration and is attached for your information.*[445]

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443 Global Competition Forum found at *http://www.oecd.org/document/25/0,3342,es_2649_37463_39410210_1_1_1_37463,00.html* c/f ibid Sylvan, Louise (2008) subdr253, p3-4

444 See for example, *http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/* c/f Sylvan, Louise (2008) Submission subdr253 to Productivity Commission's Draft Report, p4, cit.7

445 See attachment to Louise Sylvan's Submission to the PC's Draft report, p5 *"Draft decision Tree – from Chapter 5, Customer protection and Empowerment.: Building a Toolkit for Policy Makers"*, adapted from Australian Productivity Commission

In her submission to the PC sub106 Deborah Cope of PIRAC Economic Consulting[446] had referred to the findings of the OECD Roundtable on Demand-side Economics for Consumer Behaviour (2006) provided an extensive list of examples of behavioural biases.

In itself, this diversity in behaviour creates a challenge for applying behavioural theory to public policy questions. It makes it difficult to analyze and provide guidance on how to identify the economic and social concerns that can arise from various types of behaviours, and the government policies and interventions that would be most effective in dealing with those categories of behaviours.

Amongst other submissions addressing the role of behavioural economics and a through understanding of current and predicted consumer behaviour I highlight the submissions from PIRAC Economic Consulting Sub106;[447] Joint Consumer Submission subdr228;[448] St Vincent de Paul Society's submission to the AEMC's Draft Report, CHOICE's submission sub108, and the submission by Kildonian Uniting Care (2008) Submission to PC Draft Report subdr206 Feb, p4.[449]

As discussed in more detail in subdr242part2, paged 13-16, Edmond Chattoe from the Department of Sociology University of Surrey, Guildford, UK, has questioned whether sociologists and economists can communicate. I provide below an abstract and the introduction to from his 1995 paper and some pertinent arguments from the body of the paper.[450]

Chattoe sociologist explains that the economic theory of consumer choice

> *Posits a preference ordering over a specified set of goods a set of 'axioms of rationality' and a budget constraint*

He refers to textbook arguments that are used to suggest the choice of axioms based on *"common sense"* or plausibility rather than the demands of theory.

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446 PIRAC Economic Consulting sub108 to Productivity Commission's Issues Paper, p5 consumer behaviour Found at *http://www.pc.gov.au/__data/assets/pdf_file/0007/67255/sub106.pdf*

447 PIRAC Economic Consulting (2007) *"Bridging the Gap Between Government Theory and Policy."* Sub 106 to Productivity Commission's Issues Paper (August) Found at *http://www.pc.gov.au/__data/assets/pdf_file/0007/67255/sub106.pdf*

448 Joint Consumer Submission (2008) subdr228 to Productivity Commission's Draft Report (March) Found at *http://www.pc.gov.au/__data/assets/pdf_file/0005/77846/subdr228.pdf*

449 Kildonian Uniting Care (2008) Submission to PC Draft Report subdr206 Feb, p4 Found at *http://www.pc.gov.au/__data/assets/pdf_file/0011/76898/subdr206.pdf*

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

In discussing the economic view, Chattoe speaks of levels of risk in applying popularly held economic consumer theory. Limitations are least damaging; removal of limitations involves straightforward generalization of the theory and constitutes a large part of the normal science practiced by consumer theorists

However, by contrast, Chattoe refers to genuine concerns about the risks of relying on obscurities and paradoxes, referring to not simply the state of development of the theory, but its suitability as a description of real phenomena.

Finally Chattoe sums up as follows:

> *"This paper addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained. The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations. This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development."*

The AER publication State of the Energy Market 2007[451] cautions the manner in which switching or churn rates should be put when assessing customer participation.

> *"While switching (or churn) rates can also indicate competitive activity they should be interpreted with care. Switching rates are sometimes high at a relatively early state of market development when customers are first able to exercise choice and can stabilize even as a market acquires more depth. Similarly it is possible to have low switching rates in a very competitive market if retailers are delivering good quality services that gives customers no reason to switch."*

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[451] Australian Energy Regulator (2007) State of the Energy Market, 2007 AER 6.2.2, p 183
Note the AER recognizes that this publication is out of date. It does not take into account the events of the winter of 2007, and the reservations expressed by Victoria Electricity (the child company of Infratil Ltd) a Tier 2 Energy Retailer in its submission to the AEMC Second Draft Report (2008), or its previous submission to the Issues Paper (2007).
Nor does it take into account the multiple internal market considerations that appear to have been either altogether neglected or incompletely assessed by the AEMC in their assessment of competitiveness in the gas and retail markets in Victoria. These issues are summarised briefly with citations in the Executive Summary, repeated with sub5 as an Appendix (Summary), and discussed in much greater detail in subdr242part6 as a component of this submission to the Productivity Commission

NEMMCO published churn data measuring the number of customer switches from one retailer to another, and such data has been published for NSW and Victoria since FRC was introduced in 2002 and for South Australia since 1 October 2006. The data covers gross and net switching

Gross switching: *Measures the total number of customer switches in a period, including switches from a host retailer to a new entrant, switches from new entrants back to a host retailer, plus switches from one new entrant to another. If a customer switches to a number of retailers in succession, each mover counts as a separate switch. Over time, cumulative switching rates may therefore exceed 100 per cent.*

Net switching: *Measures the total number of customers at a specified time who are no longer with the host retailer and have switched to a new entrant. This indicator counts each customer once only.*

Both indictors exclude customers who have switched from a default arrangement to a market contract with their existing retailer.

A churn rate measures switches as a percentage of the underlying customer base. The local energy regulator in each state publishes retail customer numbers on an irregular basis.

The AER publication summarizes churn rates since the introduction of full retail contestability as follows

Customer switching behaviour

Conclusions: [452]

"The establishment of the national electricity market was an ambitious vision in the early 1990s. On balance, the benefits forecast have been delivered, but not without much perseverance and hard work.

[452] State of the Energy Market 2007. Australian Energy Regulator. Exec Summary Conclusions, p35 AER 2007. Found at *http://www.aer.gov.au/content/index.phtml/itemId/713232/fromItemId/656023*

The market still faces challenges. Timely investment in new generation will be needed. The interaction between government-owned and private businesses is a continuing source of tension. The appropriate framework for ensuring optimal national transmission investment, when planning is conducted primarily at state level, has continue to receive review and attention. The new regulatory regime will require bedding down – and no doubt many other issues will arise."

"However, it is less than 10 years since the first trial of an interstate market and eight years since the start of the NEM. A lot has been achieved, but there is still much to do."

Engagement between retailers and customers

The twin Wallis Survey Consumer and Retailer Surveys Commissioned by the AEMC's Retail Competition Review[453] found that:

"Consumers of all types were approached by retailers, those most likely to be approached owned their own homes or businesses and had electricity and gas connected.

Domestic customers in regional areas and in older age groups were more likely than others to be approached as were businesses employing up to 4 people – especially for electricity."

Retailers did not differentiate between customers of different types in their marketing efforts. The costs to acquire and retain customers are similar for first and second tier retailers and are significantly higher for business customers.

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[453] Wallis Consulting Group (2007) Retailer Research Report for AEMC Review of Competition in the Gas and Electricity Retail Markets. October 2007 Found at *http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/consultants/001Retailer%20Study%20Research%20Report%20-%20prepared%20for%20the%20AEMC%20by%20Wallis%20Consulting%20Group.pdf*
See also Wallis Consulting Group (2007) Consumer Research Report for AEMC Review of Competition in the Gas and Electricity Retail Markets (August Ref WG3325 Found at *http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/consultants/000Consumer%20Study%20Research%20Report%20-%20prepared%20for%20the%20AEMC%20by%20Wallis%20Consult%20Group%20(NB:%20for%20correct%20formatting,%20print%20double%20sided).pdf*

Not surprisingly, in-depth interviews suggested that most retailers are focussing on the domestic segment of the market. The profile of the ideal customer within this segment is:

- *A household that consumes a lot of energy; and*
- *Has the capacity to pay bills.*

This has led them to target suburbs where larger houses with high consuming appliances are likely to be found. This is especially the case for second tier retailers who are building their customer bases.

The heavy reliance on door-knocking to generate sales introduces an additional bias away from types of housing where access is difficult, for example townhouses, flats, apartments and units with centralised security. These types of housing are not being discriminated against, per se.

Door knocking and telesales are the main sales channels used by all retailers to contact customers. Above the line advertising methods are rated as the least efficient in terms of their effectiveness per dollar spent in this market. Retailers use a range of sales channels to inform customers of their terms and conditions, tariffs and any non-price based incentives and offers.

The internet is the most widely used information dissemination tool."

The characteristics of businesses are slightly easier to determine and retailers are aware that some types of industry use more energy than others. Several retailers specialize in selling to the business market and they use similar principles to the domestic market (e. g anticipated consumption and location) to target their sales efforts.

Customer choice and behaviour:

In discussing consistent themes in both the retailer and consumer surveys commissioned in 2007 by the AENMC, Wallis consulting group report as follows in the Executive Summary viii:

Take up of contracts: Survey Findings:[454]

Retailers agree that many customers do not know the terms and conditions of their contracts in detail or even the name of their supplier, owing to lack of interest, not lack of information.

Customers on standing offers remain with their known retailer because of the relationship and service they have received.

Customers do not refer to many information sources when deciding which company to buy energy from with most taking information given by retailers at face value.

Retailers are of a view that energy is a low involvement product and consumers are not interested in seeking market offers for electricity and gas. Therefore to keep the market active retailers adopt strategies by proactively approaching customers."

"Door knocking and telesales are the main sales channels used by all retailers to contact customers. Above the line advertising methods are rated as the least efficient in terms of their effectiveness per dollar spent in this market. Retailers use a range of sales channels to inform customers of their terms and conditions, tariffs and any non-price based incentives and offers. The internet is the most widely used information dissemination tool."

"Retailers believe that customers will switch if they are offered immediate price benefits, green energy, flexible payment options and, more particularly amongst the business segment, guaranteed prices for a set period. Customers will remain with retailers for demonstrated customer service."

Extract from Wallis Consulting Group Consumer Research Report (2007) for AEMC (August) *p62*[455]

The market has moved in the last three years, however it is motivated by actions taken by retailers rather than customers. For their part, the proportion of customers who are actively engaging in the market place, shopping around and seeking out offers is low. Even the majority of customers who have switched their retailer and have changed their arrangements thus entering a market contract are not keen to switch again.

454 Ibid Wallis Consulting Group Retailer Research Report (2007) for AEMC (October) as above

455 Ibid Wallis Consulting Group (2007) Consumer Research (Aug)for AEMC p62 and 63

While retailer activity has increased this has focussed on door-knocking and telesales activity. The growing number of Australian households that have placed themselves on the Australian Communications and Media Authority's Do Not Call register is also testament to a growing number of Australians who do not want to receive telemarketing/telesales calls meaning that it will become increasingly difficult for retailers to use this channel in future. (p139 Wallis Consumer Survey August 2007 for AEMC p139 3.7)

Customers themselves are no more motivated now than three years ago to take action of their own accord. Thus churn in the market would seem to relate to the efforts of retailers rather than the interest of customers themselves. (p141 Wallis Consumer Survey August 2007 for AEMC) (p63

Wallis had reported that respondents were asked their support for full retail competition by asking them whether, taking everything into account, they believed being able to choose their retailer and enter into an agreement to buy energy was good or bad.

Wallis Consulting Group Consumer Survey reported that in response:

Extract from Wallis Consulting group Consumer Research Report (200&0, p61)

The main concerns expressed were:

- *A belief that the market should not be privatised;*
- *There is too much choice in general;*
- *It is confusing;*
- *There are too many retailers hassling for change;*
- *Deregulation forces prices up; and*
- *It is too much of a hassle to change.*

The Wallis Consumer Survey also reported on page 135 of their August 2007 Report that:

> *Across both market segments 80% of those people who said choice was good said they were unlikely to switch retailers in the coming year. These quotes from in-depth interviews with businesses sum up their point of view:*
>
> *"In general, I'm not against change – but not for change's sake. I like competition. I hate monopolies. That's why I left Telstra" – business customer switched once three years ago and does not intend to switch again.*
>
> *"Energy deregulation has had no particular benefit for my business, but I believe it is beneficial to the broader community" – business customer on standing offer."*
>
> *"I believe that deregulation has been harmful and has only created wealth for companies. Service standards have dropped and bills have risen" – Domestic customer on standing offer."*

The Wallis consumer survey confirmed the following:

> *"The majority of customers do not plan to switch retailer in the next year because they have a contract, like their current retailer or do not perceive it to be worth the effort.*
>
> *The majority also supports the ability to choose their energy retailer.*

The existence of choice does not by any means guarantee change. Retailers know that they have to woo customers to achieve the switches, and also have certain sub-sets in mind to target.

Thus perceptions of awareness of choice and apparently *"strong support for ability to choose a retailer"* appears not to have translated into active pursuit of those choices, and as indicated on many who have switched would not do so again, according to the Wallis Survey (p141).

Engagement between retailers and customers

The twin Wallis Survey Reports commissioned by the AEMC's Retail Competition Review found that:[456]

> *"Consumers of all types were approached by retailers, those most likely to be approached owned their own homes or businesses and had electricity and gas connected.*
>
> *Domestic customers in regional areas and in older age groups were more likely than others to be approached as were businesses employing up to 4 people – especially for electricity."*
>
> *Retailers did not differentiate between customers of different types in their marketing efforts. The costs to acquire and retain customers are similar for first and second tier retailers and are significantly higher for business customers.*
>
> *Not surprisingly, in-depth interviews suggested that most retailers are focusing on the domestic segment of the market. The profile of the ideal customer within this segment is:*
>
> - *A household that consumes a lot of energy; and*
> - *Has the capacity to pay bills.*
>
> *This has led them to target suburbs where larger houses with high consuming appliances are likely to be found. This is especially the case for second tier retailers who are building their customer bases.*
>
> *The heavy reliance on door-knocking to generate sales introduces an additional bias away from types of housing where access is difficult, for example townhouses, flats, apartments and units with centralized security. These types of housing are not being discriminated against, per se.*
>
> *Door knocking and telesales are the main sales channels used by all retailers to contact customers. Above the line advertising methods are rated as the least efficient in terms of their effectiveness per dollar spent in this market. Retailers use a range of sales channels to inform customers of their terms and conditions, tariffs and any non-price based incentives and offers. The internet is the most widely used information dissemination tool."*
>
> *The characteristics of businesses are slightly easier to determine and retailers are aware that some types of industry use more energy than others. Several retailers specialize in selling to the business market and they use similar principles to the domestic market (e. g anticipated consumption and location) to target their sales efforts.*

[456] Ibid Wallis Consulting Group (2008) Consumer Research Report for AEMC Review of Competition in the Gas and Electricity Retail Markets (August Ref WG3325)

MK Comment

It is of concern that retailers have become discerning about which customers they will target. The risk of those on low fixed incomes being neglected and compromised in the impending free-for-all climate are high. The consumer protection framework needs to be solid, affordable and accessible however that is structured under a national framework. None of this is in place yet and the draft report not ready for some time.

In PIAC's Submission (p3) to AEMC's First Draft Report this body has referred to the narrow terms of references adopted by the AEMC, and therefore the heavily weighted emphasis on economic rather than social and environmental criteria for assessing the effectiveness of competition in the Victorian energy market.

PIAC has suggested that the following factors should be considered in evaluating competition effectiveness.

> ***Extract from PIAC Submission to AEMC First Draft Report p3Effectiveness of Competition in the Gas and Electricity retail Markets in Victoria***
>
> 1. *Social and environmental criteria for assessing the effectiveness of competition*
> 2. *The economic costs and benefits for competition for consumers*
> 3. *Assessment of the actual impacts of competition on consumers' bills*
> 4. *Examination of the potential impacts on consumers of further price deregulation*

As to considering at this stage removing the standing offer pricing arrangements, despite any plan for a transition process, with the consumer protection framework still on the drafting board; regulatory measures not yet determined; and so much else happening, it would seem that this is not only a premature step but would place a substantial proportion of consumers at high risk.

See for example UnitingCare Wesley's analysis of consumer impacts in South Australia within a couple of years of the introduction of Full Retail Contestability,

The combined submission to AEMC's Review from Footscray Community Legal Centre and Financial Counselling Services Inc. and Essendon Community Legal Centre Inc[457] had in the previous 12 months collated:

> *"Casework studies by both centres indicated "a lack of consumer awareness about the status of 'deemed" "standing offer" 'default' or "market contracts."*

These organizations also noted that

> *"consumers appear to lack awareness of their legal contractual obligations when 'switching' retailers'.*

That survey data, obtained on 21 June 2007, by the two Community Legal Centres named, in association with the CUAC and Tenants Union of Victoria was based on tenants of local housing estates, and therefore would not have included those imposed with alleged "deemed contract" status that related to bulk energy provision, since two separate arrangements exist for residential tenants receiving bulk energy supplies not individually meters with either gas or electricity meters, but who are all the same charged for energy on the basis of imprecise algorithm calculations.

In the case of housing estate residents, the Department of Human Services or delegate willingly accepts body corporate status and combined bills for housing estates tenants. These bodies are the only ones permitted to make direct arrangements based on a flat rate chargeable without the benefit of meter reading, which cost is passed on as a service charge to such tenants.

MK Comment

It is of concern that retailers have become discerning about which customers they will target. The risk of those on low fixed incomes being neglected and compromised in the impending free-for-all climate is high. The consumer protection framework needs to be solid, affordable and accessible however that is structured under a national framework. None of this is in place yet and the draft report not ready for some time.

Having said that, the rights of the entire community are also issues of public interest. It cannot possibly be acceptable to strip these rights away by incorporating into energy-specific provisions anything that will have the effect of making less accessible or altogether unreachable the entitlements that are in place within other protections under Acts of Parliament or other provisions.

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[457] AEMC Review of Retail Competition Response to Issues Paper, Footscray Legal Centre and Essendon Community Legal Centre 28 June 2007

Please refer to the Wesley Voice publication Spring Quarterly 2004[458] published with the view of examining what had happened since the application of competition policy

Though relating to competition issues dating back to earlier FRC days, the issues raised and the hard data published serve as eye openers into issues relating to consumer protection and the absence of evidence that large sub-sets of energy end-consumers have benefited from FRC.

That important article was published to examine the impact of competition policy introduced in the 1990s to open up the Australian energy market to competitive forces, in the expectation that competition would achieve cheaper prices for consumers and reduce risks to Government.

Wesley Voice made the following recommendations which are as valid today. The South Australian market operates differently and special needs require to be considered.

> ***Extract from Wesley Voice September 2045 Spring Quarterly***
>
> ***"Summary***
>
> *The application of competition policy to energy markets in South Australia has led to significant increases in electricity prices for residential consumers with particular hardship being caused for low income and vulnerable households.*
>
> *There is a need for concerted action at all levels of the South Australian community including:*
>
> *It is appropriate that the broader community take active steps to reduce their demand for electricity.*
>
> *State Government needs to ensure that fuel driven poverty is understood before making further changes to the States energy market.*
>
> *State Government also needs to review concession policies in the light of growing in energy related hardship.*
>
> *ESCoSA, the Regulator has a role in requiring transparency of the market through readily available data.*

[458] Wesley Voice Spring Quarterly 2004 pgs 1-8 *Low income people and energy choices – background to SA Energy Market; and Characteristics of Economic Goods/Services and 'Essential Services'* p 9. found at *http://www.unitingcarewesley-sa.org.au/Portals/0/WesleyVoice%20Issue%201%20--%20Spring%202004.pdf*

ESCoSA must ensure that hardship provisions are established and applied, recognizing that electricity is an essential service and so is different from other standard market goods.

ESCoSA needs to require effective hardship policies from retailers and explore socially responsible tariffs.

GST should be removed from residential electricity bills.

State Government should return to the market as a generator, using renewable energy technologies.

An industry levy is needed to assist with funding financial counselling, in the first instance and other vulnerable household assistance.

The whole community is urged to embrace "Solar Adelaide", increasing our use of solar energy and reducing the need for new infrastructure.

I again draw attention to David Tennant's [459] views. He believes that there is room for a Commission for Effective Markets. He describes effective as safe, effective 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.

I again urge the AEMC and Productivity Commission to examine the critical input by Gavin Dufty, Social Scientist, St Vincent de Paul in his 2004 VCOSS Paper examining government policy and attitude in relation to Universal Service Obligations.[460]

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[459] Tennant, David (then) 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 found 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

[460] Refer for example to G Dufty *"Who Makes Social Policy?– The rising influence of economic regulators and the decline of elected Governments.* VCOSS Congress Paper 2004
See also and Tamblyn, J. PowerPoint presentation at World Forum on Energy Regulation, Rome September 2003 *"Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition?"* John Tamblyn was the Chairperson Essential Services Commission Victoria. He is now Chairperson of the AEMC.

The ultimate goal should be to create consumer protections for the wider Victorian community, but particular for those who are vulnerable or disadvantaged for a variety of reasons not limited to financial disadvantage.

The aim would be to ensure that consumers and other stakeholders are not placed in untenable positions of second-guessing their entitlements and to have to individually fight for them through complaints and litigious processes because of conflicting policies and legislative provisions adopted by various statutory bodies, some clearly in consumer detriment; or because access to justice is compromised for procedural or economic reasons.

Chris Field has wisely suggested that a first principles framework approach to policy design is warranted. It is difficult to know how long it will realistically take to develop such a framework and implement it. At this stage the time-line to implement regulation reform looks to be some 15 months for the first target state, Victoria**.**

It would seem that the Wallis surveys did not seek information from those who have no choices at all – such as embedded network end-consumers or those in a similar position (even if the term embedded network is not strictly applicable) living in multi-tenanted private rental accommodation, where the body corporate did the choosing, and the end-user is dumped with an inappropriate contractual status in situations where no separate gas or electricity meters.

Though perhaps this discussion may more conveniently be included with the section on consumer detriment it is mentioned here because it is pertinent to consumer awareness of the packages being offered, how deemed contracts **a**re interpreted and how their decisions should be governed if they make switching decisions to accept contacts with providers prepared to creatively interpret their unilaterally perceived contractual status.

These customers will not benefit at all from further moves to deregulate the market and if they continue to be inappropriately labeled as contractually obligated instead of the Owners_Corporation for bulk energy supplies used to heat centrally heated boiler tanks with calculations made not be site specific visits for meter reading (despite application of supply charges) but by alleged reading of water meters posing as gas or electricity meters, with water volume being measured to calculate average gas or electricity consumption by several individual tenants in multi-tenanted dwellings.

I am very concerned about the implications of some of these *'innovative demand side initiatives,'* and in particular the issue of embedded networks, the new NEM Metrology Procedures[461] and the decision of government to exempt certain suppliers from holding distribution licences or a retail supply licence. GRIDX's application was recently approved by the AER, apparently *"in the public interest."*[462]

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[461] See National Electricity Metrology Procedure NRMMCO V 1.20 Doc No MT_OP1985v001 found at *http://www.nemmco.com.au/meteringandretail/640-0139.pdf*

[462] See Embedded Networks and Retail Competition Consultation Final Determination 22 August 2007 and NEM Metrology Procedures found at *http://www.nemmco.com.au/meteringandretail/618-0012.htm*

See for example: *Embedded Networks and Retail Competition Final Determination Prepared by Strategy and Development for NEM v No 1.0 Issue date 22 August 2007* and the formalized NEM Metrology Procedures that followed referring to child and parent embedded networks without regard to the contractual issues that I have repeatedly raised impacting on end-consumers.

As discussed elsewhere on 24 July 2007 Australian Power and Gas had purchased from Momentum Energy their 15,000 unhedged residential customers, 11,000 of which were Victorian – a market that Momentum could no longer afford because of wholesale prices.

Since its market failure on 22 July 2007 and withdrawal from the retail electricity market as a second-tier retailer because wholesale prices became impossible to sustain viability, Momentum Energy has decided to focus on billing operations and the embedded network market.

There are past cautionary tales of those using loopholes embedded network arrangements, as discussed below.[463]

In the case of those receiving bulk energy for hot water supplies without separate meters the contract lies with the owner's corporation entity (body corporate). Deemed contract provisions in existing provisions were never intended to apply to end users who were receiving energy supplies that could not be measured at all.

They referred either to those entitled to standing offers at the time of the introduction of full retail competition, or else to those who accepted supply and then refused to honour a contract undertaken or illegally used supplies.

In the case of those whose bulk energy cannot be measured precisely and using proper trade measurement practices, these provisions seem to have been conveniently and inappropriately applied where the proper contract lies with the owners' corporation.

The body corporate invites the energy supplier onto the premises to fit the metering installation and commences to take supply from the moment the infrastructure is in place.

A supply charge is effective at that point in time, following an implicit contractual arrangement between body corporate entity and bulk energy supplier. The distribution supply point is the point of the double custody changeover point from wholesaler to retailer (or other middleman), and thence to the point where the gas or electricity leaves the distribution system and enters the outlet of the meter on common property infrastructure.

There is one supply point for energy (though it is more than possible that hidden supply charges to include the inappropriate reading of water meters to determine energy usage may be applied). The supply point at the outlet of the meter is on the body corporate common property and therefore there should be only one supply charge – for the reading of the gas meter.

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[463] See for example *"Embedded Networks – Disconnecting Consumers"* CUAC Spring Quarterly 2005 Article by Tim Brook, pp 11-12

Landlord's or their representatives cannot charge for any utility not individually metered and his arrangement with the bulk supplier is undertaken in that knowledge and implies acceptance of his legal responsibilities under the *Residential Tenancies Act 1997*. Water that has not water efficient devices fitted cannot be charged for.

In any case energy retailers are licenced to sell gas or electricity and not water products, value-added products or any other products. If energy cannot be appropriately measured with instruments designed for the purpose it is impossible to see how they can be charged for or any contract deemed to exist.

Creative and apparently bizarre practices are in place to allow for magical algorithm conversion factor formulae to be used to assess energy usage, apparently without the benefit of site reading, though much is made of access to meters that are not even designed for the purpose.

In Victoria there practices are apparently endorsed by regulators who explain their adoption by reference to aims to minimize price shocks for low-income individuals. What is misses is that the contract does not belong to the end user at all in these circumstances. Attempts to implement regulations that have the effect of stripping end-users of their common law contractual rights need to be reconsidered in the public interest, in deference to existing legislative and common law provisions; in the interests of adopting best trade measurement practice and in the simple interests of justice and fairness. If these matters are not properly addressed in the design parameters in the design framework, further consumer detriment will result.

Many current and proposed arranged appear to have had the effect of seeming to ignore the fundamental common law contractual rights of individuals, or protections under other legislations; or indeed even within energy regulations.

As to appropriate trade measurement practice and implementation of best practice, or at least adoption of procedures that represent the intent and spirit of the law, there is much room for improvement here in the public interest. See for example Part V 18R National *Trade Measurement Act 1960* Part V 18R regarding the appropriate use of trade measurement instruments for the purpose designed.

Water meters are not suitable instruments for measurement of gas or electricity and when utility exemptions are lifted as is the intent this practice will become invalid and illegal. Refer to Victorian bulk hot water pricing and charging provisions and in other states.

Check these provisions against CUAC's September 2005 Quarterly article authored by Tim Book *"Embedded Networks – Disconnecting Consumers."* [464]

[464] CUAC Spring Quarterly September 2005 *Embedded Networks Disconnecting Consumers* p 11 and 12 Article by Tim Brook. Discusses practices of unlicenced energy distributors apparently exempted under State provisions from compliance with regulations and charging up to ten times the going rate for regulation prices of electricity and gas.

There are numbers of issues that I would like to raise with policy advocacy agencies including CUAC, EAR. The plight of embedded consumers generally and end-consumers of energy used to heat bulk hot water is quite different to those cited in Tim Brook's article in CUAC's Spring 2004 edition in which the VTAC case *(Winter v Buttigieg)* case was briefly discussed.

In the case of the matters brought before VCAT by the Tenants Union Victoria, the end-embedded end-consumers were receiving domestic supplies in embedded networks where the middleman network distribution provider had been excepted from holding a licence.

The contractual issues that I have repeatedly raised appear not to have been understood or addressed at all by anyone yet. I will write to you further on these. Meanwhile, of great concern are the revised NEM Metrology Procedures.

I read the Final Determination[465] and feedback from Industry and EAG and was concerned to find that despite much opposition new terminology such as parent and child networks have been introduced and rules changed. These have serious detrimental implication for consumers especially those on low incomes or otherwise disadvantaged.

As an end-user with direct contact with those of particular disadvantage, including a close family member, who has been allegedly unconscionably threatened with disconnection to his hot water services even though his energy supplies for bulk hot water services that are communally heated cannot be measured except by guestimate through conversion factors; and that he is not and should never be considered contractually obligated to any party, energy supplier or embedded network distributor.

Yet the new NEM Metrology Procedures and its associated deliberative documents[466] seem to allow this. These issues have been the subject of more protracted discussed in previous submissions to the Productivity Commission, to AEMC's Retail Policy Review and other correspondence to AEMC; to the AER, MCE Market Reform team and numerous state and federal bodes.

Under trade measurement provisions albeit that there are some remaining utility exemptions to be lifted, current practices are deemed to be invalid and illegal, so it is just a matter of time before more appropriate arrangements will need to be put in place to measure up, better clarification of contractual obligation, and enhanced consumer protections.

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465 NEM Embedded Networks and Retail Competition – Final Determination V1.0 22 August 2007 Prepared for NEM by Strategy Development – adopted in the face of opposition by industry and other participants

465 National Electricity Market Metrology Procedure PV 1.20 Prepared by NEMMCO- MT OP1985-001 found at *http://www.nemmco.com.au/meteringandretail/640-0139.pdf*

466 National Electricity Market Metrology Procedure PV 1.20 Prepared by NEMMCO- MT OP1985-001 found at *http://www.nemmco.com.au/meteringandretail/640-0139.pdf*

This sort of strategy apparently endorsed by policy will be not give the market much confidence or faith in the system, will create bad blood and angst between consumers and suppliers, and between consumers and regulators or policy-makers; destroy potentially strong and lasting relationships with the consuming public; and have the effect of stripping end users of their enshrined rights, since they normally take on residential tenancy leases not expecting to pay for bulk energy, or other utilities that cannot be individually measured scientifically using appropriate instruments, under protections already afforded to them. More than that they expect their common law rights and rights under the rules of natural and social justice to be upheld also.

Whilst the justification put forward for adoption of bizarre conversion factor algorithm calculations allowing measurement of water volume and charging by cents per litre when calculating gas or electricity usage by individuals using bulk hot water, is that this was undertaken to buffer against price shock to low-income end-users, contractually the contract lies with the body corporate once invited onto the premises to fit the metering installation, as it is the body corporate who is the *"relevant customer"* and *"commences to take supply"* at the point at which the gas or electricity leaves the distribution point and enters the outlet of the meter on common property infrastructure.

The apparently bizarre algorithm conversion factor calculations are apparently condoned by the Victorian energy regulator Essential Services Commission without it seems an understanding of some of the fundamentals of contractual law.

It could be argued successfully that when a body corporate invites a bulk energy supplier onto a property to fit a bulk gas meter; the metering installation is completed; and water meters installed to calculate individual gas or electricity consumption; such an arrangement between supplier and body corporate constitutes a contract between them to supply energy for heating water tanks communally used by renting tenants in flats and apartment blocks without free-standing property or separate energy meters.

Retailers are licenced to sell gas or electricity but are now appear to be selling water products or heated water, though they do not own the water, and through energy does not pass through the meters theoretically used to measure individual consumption by tenants.

In fact site-specific reading was rejected as an option to inconvenient and expensive to adopt.

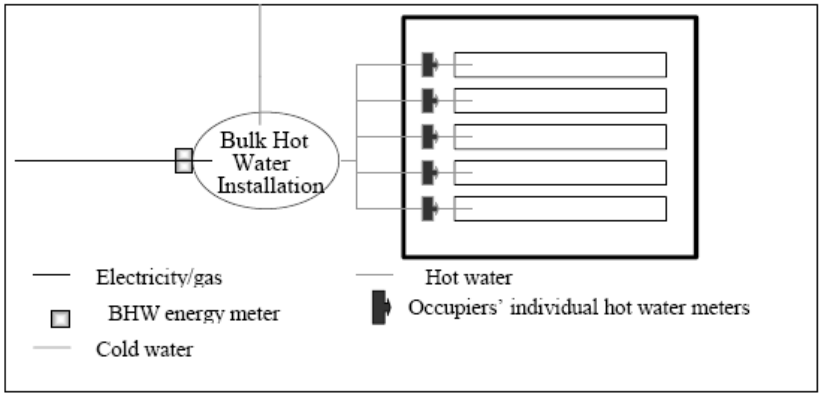
Nevertheless, private residential tenants are bearing the brunt of averaged guestimated calculations of deemed energy consumed that cannot be measured precisely in a scientific way; are deemed to be contractually obligated where the proper contract lies with the body corporate entity (owners corporation), and on the basis that a contract is formed between landlord and supplier at the moment gas is received at the double-custody changeover point at the point at which, in the case of gas, the gas leaves the upstream distribution point and enters the outlet of the meter. A supply charge applies from the moment the infrastructure is in place, so the body corporate *"commences to take supply"* just as soon as the metering installation is complete after agreement is reached for supply with the supplier.

Public protections in this regard are non existent; this issue has been a thorn in the wide for years and remains unaddressed. All surveys and discussion of competition have conveniently refused to acknowledge the existence of apparently bizarre arrangements that detract not simply from social obligation but from acceptable practices.

Unless energy efficiency devices are fitted, and subsidies provided for older poorly maintained properties to be retro-fitted energy will continue to be wasted, consumer satisfaction levels will remain low and proper obligations and liabilities will remain unaddressed.

To a large extent the existing bulk hot water pricing arrangements based on conversion factors alone that take a doctorate in alternative mathematics to figure out. The current measurement practices are in contravention of the spirit of existing trade measurement and utility provisions. These issues are discussed in more detail in subdr242parts4-5.[467]

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only to illustrate apparent statutory endorsement of bulk hot water service provision and alleged liabilities.[468]

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467 Publication of Part 5 submitted to the PC in April 2008 is yet to be published online. It contains considerable technical and legal detail of existing harmful regulations, and in particular those relating to bulk hot water provisions in three states – Victoria, South Australia and Queensland, where water meters are posing as gas meters; policy-makers, regulators, energy providers, owners Corporations and complaints schemes are collusively hampering access to proper justice and enshrined consumer rights and protections and the intent and spirit of trade measurement practices. Stakeholders are invited to seek further information directly from the author of this multi-part submission – see cover sheets for contact details.

468 Taken from: Final Report Review of Bulk Hot Water Billing Arrangements September 2004, Essential Services Commission (ESCV). Refer also to subsequent Final Decision – Final Decision: Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (Final Decision)" December 2005

As noted above in the quote from the PIAC submission to the MCE Retail Policy Working Group:[469]

> *"there is no regulation of the quality of supply that can be made available to the customers of these networks in NSW. The monopoly supply situation of these end users and the fact that most could be classified as 'vulnerable' makes inset networks an important consumer protection issue."*

I cite directly below from the research paper by *Langmore and Dufty (2004)* in relation to household responsiveness to electricity price in retail markets. The issues are as current, the gaps in proper assessment of the market as a whole including consumer behaviour and impacts of deregulation remain unchanged.

The paper discusses society equity expectations with emphasis on the right for all to access affordable electricity, irrespective of income or location and upholds the need for a regulated universal safety net to all domestic households via standing offers, including specific price caps with minimum headroom and regulated minimum service terms and conditions associated with those safety net prices.

I endorse those views, shared by many others. The decision to remove all regulatory control over prices, including the last remaining price cap control, the default safety net for energy is likely to have far-reaching and socially inequitable outcomes, besides other considerations in terms of choice and market balance.

In cases where monopoly conditions apply, such as the provision of bulk hot water, and leaving aside for a moment the unresolved contractual debate as to proper contractual part (Owners Corporation) the choice of supplier is altogether removed, being one made by the Owners Corporation through a direct contractual arrangement with a supplier, but nevertheless through collusive arrangements with sanction from policy makers and regulators unjustly imposing contractual obligation on end-consumers where their energy component used in heating water cannot be accurately and justly measured using an instrument designed for the purpose and in accordance with best practice and the intent and spirit of trade measurement provisions.

There is insufficient available data upon which to base predictions of consumer behaviour on various innovative demand control strategies would work. These are discussed in some detail below

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469 *http://www.esc.vic.gov.au/NR/rdonlyres/4554EA66-6F9E-49C8-934E-1E8232D989AC/0/FDP_EnergyRetailCodeAmendmentsFinalDec05.pdf*
PIAC (2007) Submission to Retail Policy Working Group (RPWG) Working Paper 2 (February), p3

The *Langmore and Dufty 2004* study indicated their findings from the literature that

> *"…households' demand responsiveness to prices changes are inelastic in the short and long run. That is demand responses are less than proportional to the change in price."*

The factors in the internal energy market have changed and these have apparently been incompletely assessed as being effectively competitive in both the gas and electricity markets, based on data perceived to be paltry and incomplete; and evaluation that remains the subject of sustained criticism.

The study discussed confirmed limited price responsiveness with respect to both marginal demand changes and contracting decisions, which is why the authors recommended a regulated universal safety need offered to all domestic households via standing offers, specifying price caps with minimum headroom, as well as regulated minimum service terms and conditions associated with those safety net prices.

The likelihood of these recommendations being met and community concerns addressed in terms of anxieties about rising prices and proposals for a number of energy reforms, including total price deregulation by removal of the last remaining safety net; lighter regulatory control, less accessible and affordable complaints and arbitration redress, and the roll out of smart meters before the technological, legal and regulatory constraints have been carefully considered or adequate behavioural data is available.

Time-frame constraints prohibited the collection of meaningful data that may have better assisted the NERA Consulting Team with their consumer impact assessments.

As to how the smart meter roll out and time or use (TOU) principles will impact if at all on changed behaviour or demand elasticities these are discussed in greater detail elsewhere within this component.

Extract from Langmore and Dufty's 2004 Research Paper[470]

Part II. Household responsiveness to price: market participation

11. Introduction

The responsiveness of households to price must be considered in context of their participation within the retail market for electricity. This is because in spite of low price elasticity of demand for electricity, responses to price signals may nonetheless be reflected by households contracting decisions with retailers. Rather than changing their marginal consumption in response to prices, households may seek out the best possible price terms to reflect their existing level or pattern of usage.

By exercising choice, households in turn can bring about more competitive pricing. Improved market discipline results because consumer 'search' efforts or, at least, household's willingness to submit to favourable market offers heightens the incentives for retailers to keep prices at competitive levels. Thus the conduct of market players as evidenced by the interplay between consumer choice and retailer pricing is integral for effective competition to prevail.

According to the ESC, exercising choice in a way which is consistent with effective competition requires consumers to: be aware they have a choice of retailers, be well informed of the available offers and, importantly, act to switch retailers offering terms and conditions which best meet their requirements and preferences.[471]/[127]

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470 Langmore, M and Dufty G (2004) *Domestic electricity demand elasticities, issues for the Victorian Energy Market*. Research Paper. Exec Summary. 74 citations Found at *http://www.esc.vic.gov.au/NR/rdonlyres/3FE4B6D8-7023-4D2D-80C1-B15017D09B7B/0/Sub23_StVincentDePaulSociety.pdf*
See also Sharatt, D. & Brigham, B.H., (2002) *The Utility of Social Obligations in the UK energy industry*, Centre for Management Under Regulation, University of Warwick, c/f *Langmore and Dufty (2004)* above

471 [127]ESC, (2004) Review of Effectiveness in Gas and Electricity, Draft Report p. 55

In any case, searching and switching would logically only be undertaken by consumers when the expected benefits (price or otherwise) from a new offer exceeded the real and perceived costs of making the decision.[472]*/[128] When the opposite case occurs and the costs supercede benefits, consumer inertia can result. Resistance to 'switching' advantages the incumbent retailer since its demand is made more inelastic.*[473]*/[129]*

This can culminate in market power, since without the fear that their customer base will be eroded the incentives to offer competitive prices are undermined.

This section will first consider the issue of consumer inertia and what impediments are posed to consumer's price responsiveness before the extent and representation of household participation in the market are considered. Where participation decisions impact differently upon households, the differences will be identified. Finally, options to improving price responsiveness are discussed with regard to their implications upon the safety net and equity more generally.

472 [128]Reid, H. (2000) *"Standard Offer by Utilities: Making Competition Work for All,* Public Interest Advisory Centre, p8, c/f *Langmore and Dufty (2004),* p41

473 [129] Giulietti, M., Waddams Price, C, Waterson, M., (2000) "*Redundant Regulation? Competition and Consumer Choice in the Residential Energy Markets*," Research Paper Series, Centre for Management under Regulation, Warwick University, November, p9 c/f ibid *Langmore and Dufty (2004),* p41

12. Impediments to household's responsiveness to price in retail markets

Switching retailers may indicate that people are acting in response to perceived improvements in price and service combinations offered in the market. Yet for a large portion of the market the best price possible for their level and pattern of consumption is currently provided by the deemed and standing tariffs. While the lack of more attractive market offers in itself represents a failure lack of consumer 'switching' amongst this group is not negative since moving from existing tariffs onto a market contract would be antithetical to their interests. For others though lack of responsiveness in the market is indicative of consumer inertia to the extent that the real or perceived costs of considering or implementing other options are substantial enough that they outweigh the benefits even if these include significant price savings.

The risk of consumer inertia among Australian households was identified by SRC International which advised the NSW Independent Pricing and Regulatory Tribunal that "domestic customers were unlikely to be motivated to switch for amounts that would sustain the profits of retailers."[474] */*[130]

In the UK, there is evidence that pervasive consumer inertia has provided advantages to incumbents that have facilitated extensive monopoly pricing. Brigham and Waters on, for example, found that no retailer had lost more than 50% of its original customer base despite a consumer of average consumption level paying over 9% more than if they switched to the median alternative supplier.[475] */*[131] *Also, a study conducted by MORI for the UK National Audit Office and Ofgas found that one in five non-switching consumers would require a price reduction of greater than 25% to switch, while one in twenty would only switch if bills were halved.*[476] */*[132] *Interview evidence from one retailer confirmed pervasive consumer inertia, admitting that "34% of our customer base would never move whatever we did."*[477] */*[133]

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474 [130]Sharam, A (2004). *"Survey submission to ESC effectiveness review", (*27 January) p. 14 c/f ibid *Langmore and Dufty (2004),* p42

475 131 Brigham, B. and Waterson, M., (2003) *Strategic Change in the Market for Domestic Electricity in the UK,* Research Paper Series, Centre for Management under Regulation, Warwick University, Feb, p. 5 c/f ibid *Langmore and Dufty (2004),* p42

476 [132] MORI, *Gas Competition Review: August 1998*, London: National Audit Office, (Nov), p15 cited in Reid, H. *Standard Offer By Utilities, Making Competition Work for All,* Public Interest Advisory Centre, 2000, p.5 c/f ibid *Langmore and Dufty (2004),* p42

477 [133] Brigham, B. and Waterson, M., (2003) *op. cit.*, p5 c/f ibid *Langmore and Dufty (2004),* p42

12.1 Access to electricity is taken for granted

Electricity is an essential service for which universal access is guaranteed as part of government regulation. Purchasing electricity therefore is not so much a 'decision to buy' as it is in the case for many goods, but rather, is more akin to a 'decision to use'. Since access is largely taken for granted, this may provide incumbent advantages since marginal usage is not such a conscious decision owing to the relative homogeneity of the product and continuity in usage. For consumers who proactively seek alternatives, the expected benefits must exceed the real and perceived costs of changing.

Alternatively they would need to be 'pulled' from their existing supply arrangements with the promise of incentives from retailers that would outweigh transfer costs. Since consumers place a large premium upon access to supply, if transferring is in any way perceived to place at risk that access then this would mitigate against changing.

12.2 Informational problems

Exercising retail choice in the electricity market requires first and foremost that consumers are aware they have a choice of retailer. According to the ESC, residential consumers are now almost universally aware of retailer choice.[478] */*[134] *Yet consumers also require specialized knowledge of other suppliers and available market offers. Awareness in these name an alternative retailer to their own, let alone alternative offers.*[479] */*[135]

Also, while for many goods responding to price is a matter of checking and comparing price tags, in electricity markets obtaining and evaluating offers requires time and effort. These search costs are likely to be considerable with consumers here and overseas citing insufficient information and difficulty comparing offers as primary impediments to transferring retailers.

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478 [134]ESC, (2003) Review of Effectiveness in Gas and Electricity, Draft Report p.55 c/f ibid *Langmore and Dufty (2004),* p43

479 [135]Ibid ESC, (2003) Review p.56 c/f ibid *Langmore and Dufty (2004),* p43

The difficulty of making price comparisons is a function of several factors. The first factor is that price information is not widely publicized. Three in six retailers specify rates only subject to provision of personal information and another two report its availability only on request. [480] [136] Secondly, tariff structures are relatively complex and often include both fixed and consumption dependent rates.

Difficulties distinguishing underlying price signals are also compounded by tariffs being offered in combination with loyalty programs or discounts. Further, since price information is provided by suppliers directly this is likely to provide conflicting messages to consumers and messages that are difficult to interpret given the incentive or perception for each supply to provide biased advice.[481] [137]

AGL downplayed the burden to consumers posed by these informational issues by noting that consumers made choices in industries such as the market for health insurance, that were similarly beset with complexity.[482] [138] Yet, arguably this market has analogously invited government intervention in many countries, if not by compulsory insurance at least through government subsidised comparator services.

While informational barriers exist across all consumer groups, the barriers may be larger for some than others. Specifically, certain groups due to their personal/household circumstances may find information harder to access or evaluate. These factors, identified by the ESC, included mental or physical disability, limited English proficiency or illiteracy, limited capacity or inclination for critical assessment or comprehension of market offers, limited access to information due to geographic remoteness and time deprivation.[483] [139] While the effects of these factors upon participation in the electricity market have not been quantified in many cases, those identified by the ESC to be most at risk of lacking confidence accessing and evaluating information included small residential consumers outside Melbourne with low household incomes, in blue collar occupations and nearing retirement age.[484] [140]

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480 [136]Ibid ESC, (2003) Review of Effectiveness in Gas and Electricity, Draft Report, p. 57 c/f ibid *Langmore and Dufty (2004),* p43

481 [137]Giulietti, M, Waddams Price, C, Waterson, M., (200) *op. cit*., p8 c/f ibid *Langmore and Dufty (2004),* p44

482 [138]Ibid ESC, (2003) Review of Effectiveness in Gas and Electricity, Draft Report, p57 c/f ibid *Langmore and Dufty (2004),* p44

483 139Ibdi ESC, Review of Effectiveness in Gas and Electricity, Draft Report, p105 c/f ibid *Langmore and Dufty (2004),* p44

484 [140] Ibid ESC, Review of Effectiveness in Gas and Electricity, Draft Report, p56 c/f ibid *Langmore and Dufty (2004)*, p44

12.3 Lack of Experience in the market

Lack of market experience creates an informational problem to the extent that it can contribute to the disjuncture between real and perceived switching costs. For example, unlike the purchase of most consumer goods, many households have a history of purchasing electricity from only one supplier. The lack of familiarity with the process of initiating a switch means that some consumers may overestimate the 'hassle' of switching. Predicted hassle was the number one deterrent to switching. [485]*/*[141] *Also mis-judgment of switching costs were confirmed in a study conducted in the UK where many respondents believed that the process of changing supplier would take a day or more while in many cases practice proved it in fact took far less.*[486]*/*[142] *These perceived costs mean that consumer's view switching as a significant decision, an investment even, not to be taken lightly.*

In addition, limited experience with switching may mitigate experimenting with different suppliers if consumers perceive costs in making a 'mistake'. The costs of mi-judgement are raised if retailers impose minimum supply periods since consumers may perceive complications associated with terminating contracts or having to switch suppliers again. [487]*/*[143]

Also, since Sharam found that households have limited understanding of their rights with respect to returning to deemed and standing offers, this again heightens the perceived risk of switching.[488]*/*[144]

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485 141 Ibid ESC, Review of Effectiveness of Gas and Electricity, Draft Report, p59 c/f ibid *Langmore and Dufty (2004),* p44

486 142 Giulietti, M, Waddams Price, C, Waterson, M., (2000) *op. cit*, p16 c/f ibid *Langmore and Dufty (2004),* p45

487 143 Giulietti, M, Waddams Price, C, Waterson, M., *op. cit*, Giulietti, M., Waddams Price, C, Waterson, M., *Redundant Regulation? Competition and Consumer Choice in the Residential Energy Markets,* Research Paper Series, Centre for Management under Regulation, Warwick University, November 2000, p7 *c/f ibid Langmore and Dufty (2004),* p45

488 144 Sharam, A (2004 *op. cit*., Sharam, A. *Survey submission to ESC effectiveness review,* p.20 *Langmore and Dufty (2004),* p45

Lack of market experience may occur across consumer groups. The perceived 'hassle' of switching may impinge more, however, on those for whom information processing represents a larger cost, such as time constrained individuals (but would equally apply to those with literacy issues, non-English speaking backgrounds etc. whose transaction costs incurred would be higher than for 'average' consumers without those attributes).[489] */*[145]

The perceived costs of experimentation may also be higher for those with a long purchasing history under state ownership or older Australians more generally.

13. Household participation in the market

Due to the importance of consumer 'switching' activity in creating incentives upon retailers to offer competitive prices it is considered by the ESC to be "the most important indicator of the effectiveness of competition"[490] */*[146] *Yet while switching rates gauge the level of market activity and thus provide a necessary check on consumer inertia it is an imperfect indicator of households' responsiveness to price. This is because choosing an electricity retailer involves consumers weighing up price as well as many other variables including service convenience offered by combined bills or the advantages offered by associated loyalty programs. In addition misleading or exploitative market offers may arise which lead consumers to take up contracts they perceive to be beneficial in price terms (for example due to a 'cashback' bonus on sign up or free electricity for fixed periods) without regard to how the underlying tariff structure will impact upon bill sizes.*

Nonetheless since households nominate price as the most important factor motivating their decisions to enter market contracts[491] */*[147] *it can be considered one (albeit inoptimal) means of ascertaining households' responsiveness.*

Two statistics are used to quantify switching: gross measures record the total number of customer transfers while net measures capture the erosion of market share by the local retailer while controlling for multiple transfers undertaken by one customer. Both measures of switching understate total market participation by not including those who have moved off deemed and standing tariffs by signing up with their local retailer. [492] */*[148]

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489 145 ESC, *Review of Effectiveness in Gas and Electricity,* Draft Report, p105 *Langmore and Dufty (2004),* p45

490 146 ESC, (2003) *Review of the effectiveness of retail competition and the consumer safety net for electricity and gas*, Issues Paper, (December), p6 c/f *Langmore and Dufty (2004),* p46

491 147 Ibid ESC (2003), (December) p72

492 148 Ibid ESC (2003) p71

Two statistics are used to quantify switching: gross measures record the total number of customer transfers while net measures capture the erosion of market share by the local retailer while controlling for multiple transfers undertaken by one customer. Both measures of switching understate total market participation by not including those who have moved off deemed and standing tariffs by signing up with their local retailer. [493]/[148]

Since full retail contestability has been introduced the ESC report that market participation has grown. Gross switching has risen from 4% in December 2002, to over 10% at the end of 2003.[494][149] *Net switching has similarly risen to 12% at the end of 2003.* [495]/[150] *Once those who have moved from deemed and standing tariffs to sign with local retailers have been included, the proportion of households on market contracts increases to 17 per cent.*[496]/[151]

To evaluate these levels the ESC used other liberalized electricity markets such as the UK and New Zealand as a yardstick, comparing the extent of switching evidenced here with those observed at a similar stage of market development in these other countries.

This comparison led them to conclude that Victoria's switching rates are slightly less than those observed in other jurisdictions but are nonetheless still consistent with 'effective competition'.[497]/[152]

Yet even taking the most favourable estimate of switching, with less than 20% of residential households on market contracts, this lies well short of the majority participation the ESC had hoped to attain. While further growth is projected with participation rates thought to lie anywhere between forty and eighty percent by 2005,[498]/[153] *it must still be noted that the literature shows considerable differences with respect to the levels of participation necessary for a market to be deemed competitive. Even at levels of switching which nearly double the existing rates in Victoria, commentators in Britain still disputed whether effective competition would prevail, since 70% of the market had still resisted switching from the incumbent.* [499]/[154]

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493 148 Ibid ESC (2003) p71

494 [149] Ibid ESC (2003) p69

495 [150]ibid ESC (2003) p59 c/f ibid *Langmore and Dufty (2004),* p46

496 [151] Ibid (2003) ESC, p.71 c/f ibid *Langmore and Dufty (2004),* p47

497 [152] Ibid ESC, (2003) p70 c/f ibid *Langmore and Dufty (2004),* p47

498 [153] Ibid ESC (2003) p71 c/f ibid *Langmore and Dufty (2004),* p47

499 [154] Brigham, B. and Waterson, M., (2003) *Strategic Change in the Market for Domestic Electricity in the UK,* Centre for Management Under Regulation, University of Warwick, p12 c/f ibid *Langmore and Dufty (2004),* p47

Ultimately evaluations of the market would therefore seem to be largely contingent on the belief as to whether minority participation will in fact impose sufficient discipline upon the market in order for it to be deemed competitive.[500]/[155] *In considering this question, most commentators seem to be most concerned with whether or not the gains from competition are being extended to all as opposed to being confined to certain market subgroups. Since the profile of the participating group rather than merely the percentage level of market offers is important, the next section will consider this question.*

14. Household representation in the market

Market offers are available to all customers.[501] *Yet since less than one in ten consumers initiated contact with a retailer in order to purchase supply, market participation is largely contingent on being made an offer by retailers.* [502]/[156] *In turn, the marketing priorities of retailers have been driven by household profitability.*[503]/[157] *This has led to market segmentation as retailers compete vigorously to 'cherry pick' those consumers where high profit margins are available.*

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500 [155] Giulietti, M., Waddams Price, C, Waterson, M., (2000) *"Redundant Regulation? Competition and Consumer Choice in the Residential Energy Markets,* Research Paper Series, Centre for Management under Regulation, Warwick University, (November), p.6 /f ibid *Langmore and Dufty (2004),* p47

501 Note those receiving bulk energy supplies, though unilaterally imposed with customer status with contractual obligation, such an obligation does not and should not exist except directly between energy suppliers and Owners Corporation. Refer to the owners Corporation legislation; contract law; the spirit and intent of trade measurement provisions. Currently Owners Corporations and energy suppliers, with the apparent sanction of policy-makers and energy regulators endeavour by sleight of hand conversion factor algorithms, and the use of water meters posing as gas meters, try to re-write contract law, impose deemed status on end consumers of bulk energy used to heat centrally heated water supplying such water to residential tenants in multi-tenanted dwellings
Despite the existence of a revised Memorandum of Understanding between Consumer Affairs Victoria and the Essential Services Commission Victoria, disallowed overlap between regulatory schemes and requiring the adoption of best practices, these unjust practices continue to rob end-consumers of their enshrined rights under multiple provisions. These issues are extensively discussed in subdr242Part 4 already online and Part 5 submitted to the Productivity Commission in final form during April and awaiting online publication

502 [156]ESC, p68 c/f ibid *Langmore and Dufty (2004),* p48

503 [157] ESC, (2004) p63 c/f ibid *Langmore and Dufty (2004),* p48

Market segmentation has been justified by retailers on the basis that customer acquisition represents an investment. Attracting customers involves the use of marketing channels, the most successful of which include expensive door-to-door and telemarketing strategies.[504]*/[158] To recover the costs of acquisition, customers are targeted primarily according to their profitability.*

Where profits are insufficient, retailers seek to "amortise" costs by having a payback period where customers are locked in to a fixed term contract.[505]*/[159]*

The upshot of market segmentation on whichever foundation it is based is that certain groups are likely to benefit from the keen interest retailers show in acquiring their custom whilst other groups are likely to be largely ignored by all retailers.

Customer attractiveness in electricity markets has typically been defined on the basis of consumption levels. High profit customers have typically encompassed those with high consumption (with the exception of off peak users). This segment, incorporating 40% of the electricity market have been the target of intensive retailer rivalry.[506]*/[160]. By contrast, the ESC suggested that among other classes of customers competition is less developed such as for those in outer regional Victoria, those with low consumption volumes (below 6MWh) or those on off peak dominant tariffs.*[507]*/[161] Retailers have sought to avoid making offers to poor credit risks, households with consumption below a particular threshold or high off peak users.*[508]*/[162]*

The problem with market segmentation is that the single largest group 'shopping' for utility providers are price responsive, low income consumers.[509]*/[163] Yet since these consumers are more likely to be low volume and hence low margin, they are also more likely to be targeted for exclusion, potentially limiting the extent of market participation. Fixed term contracts may also deter participation by low income earners, who are more likely to reside in rental accommodation and change homes more frequently.* [510]*/[164]*

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504 [158] Ibid ESC, (2004) p63 c/f ibid *Langmore and Dufty (2004),* p48

505 [159] Ibid ESC, (2004) p63 c/f ibid *Langmore and Dufty (2004),* p48

506 [161]Ibid ESC, Review of Effectiveness in Gas and Electricity, Draft Report, p86 c/f ibid *Langmore and Dufty (2004),* p48

507 [162] Ibid ESC, p104 c/f ibid *Langmore and Dufty (2004),* p48

508 Ibid ESC, p104 c/f ibid *Langmore and Dufty (2004),* p49

509 [163] Sharam, A., (2004) Survey Submission to the ESC Effectiveness Review, 27th January 2004, p49 p.14 c/f ibid *Langmore and Dufty (2004),* p49

510 [164]Ibid ESC, p63, c/f ibid *Langmore and Dufty (2004),* p49

Retailer selectivity against low income groups is not always overt discrimination. As stated already, retailers are concerned not so much by income levels as by those factors impinging upon profit margins such as credit risks or low consumption. Informational asymmetries mean that even exclusion of these groups requires approximations, with the costs of segmentation quickly exceeding the potential gains.[511]*/*[165] *Yet, targeted exclusion of low margin groups using income proxies, such as concession cardholding status is inefficient.*

Not only does it capture a larger group than is otherwise problematic (since some are high volume users and many may be good payers) but it also comes at the expense of market share due to the high proportion of cardholders (40%) and thus is potentially detrimental to profitability.[512]*/*[166] *Weeding out unprofitable low income consumers is therefore more efficiently achieved using specific criterion. While this indirectly targets certain low income earners for exclusion, others may still be considered by retailers.*

Market segmentation is important to the extent that market offers are not equally accessible to all groups and therefore, for certain groups, the advantages potentially gleaned from participation are missed due to the extra costs associated with seeking out contracts. With respect to low income earners, though, it is worth remembering that even if market offers were equally accessible to them, it is questionable whether, in the majority of cases, sizeable price gains exist to take advantage of. Since many low income earners represent low profitability to retailers due to low consumption, unless improvements upon offer prices can be made, non-participation in the market among this group could be sustained.

511 [165] Brigham, B. and Waterson, M. (2003) *op. cit.*, p.11 c/f ibid *Langmore and Dufty (2004),* p49

512 [166] Ibid ESC, p.64 c/f ibid *Langmore and Dufty (2004),* p49

The following is an extract from p30 of the Wallis Consulting Retailer Survey reported in October 2007 as a commissioned Consultant's Report for the AEMC's Retail Competition Review[513]

> *This shows that retailers generally believe energy consumption is the most important factor followed by their location. Face to face interviews revealed that there are differing views as to whether it is more expensive to supply customers in some geographic locations than others:*
>
> *"In the gas market there's still some areas where it's very difficult to get hold of supply, so the Wimmera region for gas, it's contracted up by certain parties so it becomes important to understand where it's at.*
>
> *The way the market's broken up in Victoria, with the overlay in distribution, retail, electricity, distribution and retail gas, makes it enormously complex to actually set a pricing structure in place. It's the patch network as we call it, and there's upwards of 40 different patch combinations across the market in Victoria once you're on a single field with your customers so that all draws down to you can easily fall into an area where you're totally unprofitable to a geographic location." – first tier retailer*
>
> *"We haven't particularly targeted one distribution area we are kind of all over the place and when I say all over the place, we are only a few percent of the market but we are kind of scattered across distribution areas. There are some areas that you might not want to go to because of very large line losses in some of the very extreme rural areas, say Mildura for instance. Basically means that your cost is a lot higher so they are far less attractive so there are obvious areas that you don't want to go. But we go all over Victoria and across, almost fairly evenly across the distribution businesses." – second tier retailer.*

Much emphasis has been placed on time of use principles. The direct quotes below from the commission consultant's report prepared by Wallis Consulting Group in October 2007 for the AEMC's Retail Competition Review expresses the misgivings of some retailers about the likelihood of customer engagement as a result of Time of Use Metering.

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513 Wallis Consulting Group (2007) Retailer Research Report for AEMC Review of Competition in the Gas and Electricity Retail Markets. October 2007, p30 Found at *http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/consultants/001Retailer%20Study%20Research%20Report%20-%20prepared%20for%20the%20AEMC%20by%20Wallis%20Consulting%20Group.pdf*
See also companion WCG (2007) Consumer Survey (August)

The rationale behind the introduction of smart metering and HAN options depends on behavioural change principles that may be misplaced. Refer to *Langmore and Dufty's 2004* Research Paper examining inelasticity of demand for electricity usage cited above.

Comment by Wallis Consulting Group in Retailer Survey Research Report for AEMC (2007) p26

Time of use metering will be introduced into Victoria and retailers have misgivings about whether customers will engage more with energy products as a result. There is a general belief that most people will not change their behaviour following the introduction of these meters, unless there are appliances or mechanisms to alert consumers of the actual ongoing electricity costs as they being incurred. However, even with these meters, there are some concerns that most consumers will either ignore the signals or may not be in a position to do anything about them (e. g. appliances are not capable of being set to run off-peak):[514]

Extract from Wallis Retailer Survey providing the views of a first tier retailer and of a second tier retailer in their own words (p26)

"Time of use meters is an interesting one because from my perspective it's sort of a bit of a blunt instrument to try and deal with demand management. What I mean by that is if you go and whack a time and use meter on a house that measures consumption every minute, every 30 seconds, whatever, if you still have a retailer that's issuing an aggregated bill at the end of the 90 days then what use is it? None whatsoever. If the customer doesn't get the pricing signals at the time that they need to adjust their behaviour then it's not going to have the impact. Even if a customer was to get the bill and it has all this slice of data on it and it says "Gee Thursday at four o'clock I had my dryer going and the price was up at a peak price, oh gee that cost me a whole lot of money", it's too late for them to change anything and around that particular behaviour and one would argue are they going to have significant impact to remember that for next time when they're not getting the pricing signal anyway." – second tier retailer

"Someone spent a lot of money building a big house and they've spent, you know, up to $10 - $12,000 putting in an air conditioning system in their house so that they can be nice and cool when it's hot.

514 Consultant comment in their Wallis Consulting Group (2007) Retailer Research Report for AEMC Review of Competition in the Gas and Electricity Retail Markets. October 2007, p36 Found at *http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/consultants/001Retailer%20Study%20Research%20Report%20-%20prepared%20for%20the%20AEMC%20by%20Wallis%20Consulting%20Group.pdf*

They get home and it's 48 degrees and they're looking at the thing (meter) going "Oh, you know, you shouldn't be using your air-conditioner", yeah well…, I've just spent all this money on the thing I'm going to turn it on!" – second tier retailer

However, there is some evidence that these meters may reduce consumption and some retailers are undecided about their merits. The key to reduced consumption seems to be the need for direct signals to the customer.

"I think the time of use meters that are just plugged into the meter box and don't do anything for the consumer, won't do anything for the consumer. But those that are equipped with devices that sort of flash……"

SECTION 15

SOME STAKEHOLDER CONSULTATION ISSUES

Finally, I resurrect some concerns that have been expressed general about consumer protection, advocacy redress and single market objects

I cite below from a 2005 letter from EAG[515] to the MCE Market Reform Team regarding NEM Rules and National Electricity Law.[516] Failure to consult with stakeholders in an appropriate way has resulted in an expression of outrage. Other stakeholders have been more polite, but continue to express disappointment at the poor levels of meaningful consultation in all energy arenas where changes and reforms are being considered.

> ***Excerpt from EAG letter to MCE Market Reform Team November 2005***[517]
>
> ***Lack of meaningful consultation***
>
> *The EAG would like to express outrage about the timeframes for, and timing of, public/stakeholder consultation. EAG believe there are major issues of substance and not just process that need to be addressed in the new NEL/NERs. We strongly recommend that more work and public discussion needs to occur before they are finalised and enacted. The holiday months of December and January (for most of government and industry) are not the time to be 'tackling' these crucial reforms.*
>
> *EAG is distressed to see that the current draft NEL/NER legislation fails to address several significant issues like Merits Review in the package. The SCO has failed to show why we only have the current incomplete package when with some more time (at least 6 months) we could have a complete reform package. At this stage there is an implicit "Trust Us Approach" EAG doesn't!*

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515 Energy Action Group is a 30-year of non-profit organization focussed in the main on energy issues relating to small consumers (less than 160 KWh/a and less than 10TJ/a (major users). Members determine EAG policies and directions. EAG activities cover both national and sub-national issues for the social action component of our work see http://www.vicnet.net.au/~eag1/. EAG has a policy of trying to work collaboratively with market participants and other consumer groups (like EUAA) on issues of common interest

516 EAG (2005) Submission to Ministerial Council on Energy Market Reform Team re EAG Initial Submission on National Electricity Law & National Electricity Rules Found at *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroupNELsubmission20050105111827.pdf*

517 Energy Action Group is a 30-year of non-profit organization focussed in the main on energy issues relating to small consumers (less than 160 KWh/a and less than 10TJ/a (major users). Members determine EAG policies and directions. EAG activities cover both national and sub-national issues for the social action component of our work see http://www.vicnet.net.au/~eag1/. EAG has a policy of trying to work collaboratively with market participants and other consumer groups (like EUAA) on issues of common interest

*As governments appreciate, electricity markets and associated infrastructure provide essential services to the community. EAG believes that Ministers are rather sensitive to energy price increases and major outages. These essential services have to date been provided by the National Electricity Market (**NEM**) which was developed over 3 years from 1995 to 1998 with the benefit of considerable consultation with industry. It is alarming that governments now seek to change the institutional and governance arrangements of the NEM without the benefit of the considered views of industry, major users and consumers.*

The SCO has provided no justification for the haste of this consultation process. It therefore appears the SCO is unaccountable to the MCE and, indirectly, to the industry, major users and consumers.

The use of Judicial Review as the only legal basis outlined in Section 7 and Section 68 strongly disadvantages consumers in trying to address poor regulatory decisions and unacceptable behaviour by market participants and the AER, AEMC and ACCC

Standing of End Users

*The EAG supports the broadening of groups that can propose Rule changes with the introduction of the "other interested parties" inclusion. Nonetheless, the EAG considers there should be an **express** right of standing for appropriate industry associations/groups representing electricity end users to ensure that there is no prospect that standing of such associations and groups may be open to question. This express right of standing needs to be applied broadly throughout the NEL and the NERs, and not merely restricted to matters concerning Rule changes. Further to the standing issue is the need to provides adequate resources for a consumer group to mount a case to ensure that a rule change or an appeal that has merit (and is not frivolous or vexatious) can be sustained to it is finalised.*

Checks and Balances of the AEMC, AER, NEMMCo and ACCC

The EAG is unconvinced that there are appropriate checks and balances in respect of AEMC's, AER's, NEMMCo and ACCC's performance of their respective functions (as outlined in the NEL and NERs). Such checks and balances are essential to ensure that these bodies fulfill the single market objective and that there are effective representation, review and appeal mechanisms to allow end users fair and equitable participation.

Merits review can form a significant part of such checks, balances and the reversibility of poor decision making which is particularly important in an industry with significant natural monopolies and hence the need for economic regulation. A merits review process acts as an important discipline for regulators in ensuring they undertake an objective, robust and transparent evaluation. However, it is also important to develop a 'sound' and 'fair access' merits review process (see, for example, issues of standing and funding as discussed in this submission).

The EAG is of the opinion that a merits review process given appropriate resourcing being made available to consumers, coupled rules about vexatious and frivolous appeals will lead to better decision making by the market operator and the various regulatory bodies (AEMC, AER, NEMMCo and ACCC) involved in the NEM..

The provision of Judicial Review in the NEL/NER provides for a expensive and hopeless outcome where at best "a decision is set aside" and is then sent back to the body that made the poor determination/decision in the first place. It is clear that an independent merits review should give a better outcome and provide scrutiny on poor regulatory decisions. The issue then becomes how to resource consumers in a merits review process so they can effectively participate.

The current arrangements in the Gas Code reward market participants for appealing a determination (With the one exception of the Western Australian Epic pipeline case, where Epic paid too much for the assets in the first place).

Enforcement Procedures

The EUAA believes that the strength of the Rules and penalties entrusted to the AER under the Rules will be critical to the issue of whether the Rules provide acceptable outcomes for end users. Again, the EUAA considers that the NEL must expressly provide for end users to request that the AER investigate breaches of the Code. In addition, the NEL should expressly permit end users to seek damages for breaches.

Funding of End Users to Effectively Participate

There is no reference in the NEL or the NERs on how end users and their representatives should be resourced to participate in the new institutional arrangements. The EAG will be examining this matter further.

It is clear that the NEM Advocacy Panel doesn't understand the specific funding requirements for less than 160 MWh consumers in this market. Their recent 20th of December decision to part fund a SACoSS project and to put a condition that they find 40% of the project funding from other sources shows a total failure to understand that small consumer groups don't have access to financial resources.

The Advocacy Panel decision making process have also acted as a deterrent to consortia funding were groups can run a common project, minimising wasteful project duplication

Reliability Panel

The EAGA will continue to examine the function of the Reliability Panel to ensure that its functions are consistent with the single market objective, that is, whether the Panel is required to consider the end user consequences of their decisions.

But in the interim EAG recommends that the Reliability Panel be more self sufficient that the current arrangements, where NECA or the AEMC provides the secretariat functions, call tenders and employs the consultants to work on the Panels various Legal and Rule obligations. The Panel needs to have access to robust and independent advice from NEMMCo, AEMC and AER.

Adequate support for the market objective

As noted earlier, the issues identified the above commentary effectively reflect aspects of the NEL framework which must be designed to support the single market objective. All aspects of this package must be appropriately implemented. In the absence of adequate support for the market objective, it will be necessary to ensure that consumers' interests are protected by way of significant amendment to the market objective. In addition, further safeguards to protect the interests of the consumers will be required, such as the requirement of "consumer impact statements" for decisions or actions under or in respect of the NEL or the NERs.

Managing market power

It is also important to ensure that appropriate measures are in place for the mitigation of the potential exercise of market power by generators. The EAG seeks confirmation from the MCE that section 46 of the Trade Practices Act will continue to apply to market participants in respect of their conduct in the NEM, notwithstanding the NERs status as a statutory instrument.

Further, the EAG believes that there is prima facie evidence that the current behaviour under the NEC and the proposed sections in the NEL and NER governing market power abuse are too weak to have any real impact and, combined with less than desirable competition in the generator sector, have lead to higher than necessary volatility on the NEM pool and higher risk premiums, the costs of which are ultimately borne by end users. The EAG hopes to address this matter in more detail in 2005.

Signed John Dick President, EAG

EAG is particularly disappointed with the MCE process to date as there has been little effective analysis of the strengths and weaknesses of the current NEM arrangements.

The following brief comments illustrate this point.

Currently some $17B worth of network capital investment has either been approved or is in the process of being approved by the ACCC and the jurisdictional regulators to replace aging assets, to provide new investment for increased per capita consumption and new connections to the year 2009. At least $6 to 7 B of the $17B will be spent to meet summer peak load growth and continue the process of lowering the asset utilisation curve!

Gavin Dufty's submission on behalf of St Vincent de Paul Society to the AEMC First Draft Report has expressed his concerns about the process of release of the draft report in a timely way at the time that the media were provided with a copy. To allow for proper consultation all stakeholders who have lodged an interest or who have been part of the consultative dialogue should be provided with a timely personalised electronic copy of public release protocols, as has been suggested by Mr. Dufty. He had gone as far as to suggest that:

> *"failure to follow such a process only serves to undermine the independence of the AEMC and could be interpreted as a strategy to exclude or limit debate on these important matters."*

As far back as 2005, in their submission to the National Energy Market Branch of the Department of Industry, Tourism and Resources, the Energy Action Group (EAG)[518] had observed that

> *"Prudent regulatory and parliamentary practice requires either adequate time for affected parties to fully assess and consider proposed regulatory amendments."*

Alternatively EAG suggested that *"regulatory impact statements"* (RIS) be made available to assist affected parties quickly to understand the affects of the proposed changes."

[518] Submission to Department of Industry Tourism and Resources *"EAG Initial Submission on National Electricity Law and National Electricity Rules"* 5 January 2005

This is from Robin Eckermann Principal, Eckermann & Associates, Adjunct Professor (Network/Communication Technologies), University of Canberra[519] regarding the smart meter rollout:

> *I appreciate the pressure to meet tight deadlines – and recognise the possibility that this submission will be set aside because it does not conform to the relatively specific guidelines within which feedback has been invited. However, in the words of Lord Chesterfield "Whoever is in a hurry shows that the thing he is about is too big for him." There is no better time than right now to pause and check that nationally we are setting our sights on the right goals.*
>
> *The health of the planet that we will leave to our children and to our grandchildren depends on seizing every opportunity – especially the big ones such as are on offer through the overhaul of ageing electricity supply networks.*

> ***CALC Submission to CBA Smart Meter Roll Out Phase One National Minimum Functionality regulatory Impact Statement 1 November 2007***
>
> ***Extract re consultation processes and burdens***
>
> *1 November 2007*
>
> *The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Ministerial Council of Energy's (**MCE**) Phase One – National Minimum Functionality Regulatory Impact Statement (**Phase One**), which was released for consultation on 4 October 2007. **Consultation Process** Consumer Action is aware of the MCE's constrained timetable to undertake the cost-benefit analysis of a national smart meter rollout, and appreciates the opportunity to participate in the consultation process, including attending workshops and providing a written submission on behalf of consumer interests. We are concerned, however, at the level of documentation that has been presented to consumer groups for review (approximately 1200 pages over six documents) and the time frame allowed to provide constructive feedback which would enable consumers to have confidence in the process.*

[519] Eckermann, Robin (2007) Principal, Eckermann & Associates, and Adjunct Professor (Network/Communication Technologies), University of Canberra
Found at
http://www.mce.gov.au/assets/documents/mceinternet/Eckermann%5Fand%5FAssociates20071119104053%2Epdf

> *We have been contacted by some consumer representatives, including a consumer representative on the Australian Standards committee developing a standard for direct load control systems, who would like to participate but feels they are unable due to the limited time for consultation. We are concerned that failure to consider consumer expertise may compromise the process with the result that a robust cost-benefit analysis will not be achievable.*
>
> *As a result of the limited timeframe to respond, combined with the level of energy market reform activity requiring consumer participation, we are constrained by resources and time, and have therefore provided a submission addressing only those key areas we have reviewed and believe currently need to be addressed.*

If the desire to achieve robust stakeholder input, especially that from community individual and organizational stakeholders is genuine, consultative dialogue needs to be seen to be proactively cooperative, timely and transparent.

I quote again directly from the Rudd Governments pledges as contained in the publication *"First Hundred Days (2008)"*[520], in which the agenda for beyond those 100 days is also flagged by a set of general objectives which include:

> *"harness(ing) the best ideas from people in business, in community organizations, in research institutions and elsewhere across the country;*
>
> *"pulling together the best resources and the best ideas from everywhere in the nation."*

520 Australian Government (2008) First Hundred Days February 2008. (The Rudd Government's Commitment)
http://www.pm.gov.au/docs/first_100_days.doc#_Toc191998567

Finally I refer to the Rudd Government's pledges as contained in the publication "First Hundred Days" (2008) [521]

> *Extract Rudd Government's pledges as contained in the publication "First Hundred Days (2008)" – Speech by Kevin Rudd*
>
> *Globalisation, new technologies, demographic change, climate change and changes in the global power balance mean that what has made Australia successful in the past cannot be relied upon to deliver success in the future.*
>
> *If we don't prepare for Australia's long term challenges in an orderly and strategic way, we risk missing out on our best opportunities, and being unprepared for future challenges.*
>
> *Governments have access to excellent advice and information from government departments and key public institutions.*
>
> *But to achieve our potential, we need to pull together the best resources and the best ideas from everywhere in the nation.*
>
> *That is why the Government has called the Australia 2020 Summit, to be held in Parliament House on the weekend of April 19-20.*
>
> *This is an important initiative to harness the best ideas from people in business, in community organisations, in research institutions and elsewhere across the country.*
>
> *The Summit will provide ideas and options for the nation's future – topics including the future economy, the nation's infrastructure, our environment, our farmers, health care, indigenous Australians, the arts, national security, how we improve our system of government, and how we strengthen our communities and ensure nobody is left out of Australia's future.*
>
> *The Summit (was) co-chaired by the Prime Minister and Professor Glyn Davis, AO, the Vice Chancellor of Melbourne University, who will be supported by a steering panel of ten eminent Australians. Summit sessions will be co-chaired by the Steering Committee members and Ministers.*
>
> *Premiers and all Opposition Leaders from around the nation (were) invited.*

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521 Australian Government (2008) First Hundred Days February 2008. (The Rudd Government's Commitment)
http://www.pm.gov.au/docs/first_100_days.doc#_Toc191998567

SECTION 16

SOME ADVOCACY AND FUNDING CONCERNS

I had intended to make a separate submission about advocacy and funding and may still do this reproducing what is already shown below, in case the focus becomes lost in the other matters contained here.

However, in view of the specific issues raised in this narrowly focused submission, perhaps there is some room to re-emphasize concerns.

I strongly support recommendations made by David Tennant[522] 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.

David Tennant's views on advocacy inspiration to me, and I have previously cited them, notably in my as discussed in my submission to the Productivity Commission subdr242 regarding advocacy and the desirability of applying a grounding theory to advocacy provision with real-life client and member bases from which to draw examples and consumer concerns.

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.

I also refer to the views of Edmund Chattoe in his challenge to whether it is possible for economists and sociologists to have effective dialogue.

The aim should be to ensure that consumers and other stakeholders are not placed in untenable positions of second-guessing their entitlements and to have to individually fight for them through complaints and litigious processes because of conflicting policies and legislative provisions adopted by various statutory bodies, some clearly in consumer detriment; or because access to justice is compromised for procedural or economic reasons.

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522 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

Chris Field has wisely suggested that a first principles framework approach to policy design is warranted. It is difficult to know how long it will realistically take to develop such a framework and implement it. At this stage the time-line to implement regulation reform looks to be some 15 months for the first target state, Victoria**.**

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 early this year had 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.

The following is taken directly from David Tennant's Paper given at the 3rd National Consumer Congress 2006.[523]

I acknowledge Mr. Tenant's willingness to be quoted so liberally from that paper, which is in the public domain and considered to be an important contribution towards providing some balance in defining consumer advocacy and presenting an alternative view that helps determine how advocacy models impact on the subjects of that input – the variety of consumer stakeholder groups and individuals that make up the advocacy landscape. These are not restricted to those facing hardship.

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[523] David Tenant (2006) *Taking the consumer out of consumer advocacy*. A speech delivered by David Tennant, Director Care Financial Counselling Service at the 3rd National Consumer Congress hosted by Consumer Affairs Victoria Melbourne 16 March 2006. Rebuttal of the speech of Chris Field.
[1]This speech responds to a Discussion Paper, *Consumer Advocacy in Victoria,* by Chris Field that is being launched at the National Consumer Congress, also on 16 March 2006. In the preparation of this speech, I have relied on a confidential draft provided by Consumer Affairs Victoria and, in light of the possibility that the final version of the paper to be released might vary from the draft provided I have attempted to keep direct quotations from the Discussion Paper to a minimum
Found at
http://www.afccra.org/documents/Thedangersoftakingtheconsumeroutofconsumeradvocacy.doc

That speech focuses on two central themes which David Tenant has chosen on the basis of his personal understanding and experience which *"lead to different conclusions than those Chris has reached."*

These were:

> 1. *What it means to be a consumer advocate and*
>
> 2. *The dangers associated with policy dogma*

David Tenant begins by dissecting Chris Field's view as quoted below from his Discussion Paper

> ***What it means to be a consumer advocate:***
>
> *"Consumer advocacy should be a voice for the maximization of the long-term interests of all consumers, distributed in a way that accords with our agreed notions of justice".*[524][2]

> *The Discussion Paper presents the above proposition as more than just a working definition of consumer advocacy. It is given almost the significance of a mission statement being referred to on several occasions presumably to emphasise what consumer advocacy should be all about. (p2)*
>
> *As a general statement of intended outcomes the quote above appears entirely reasonable. Trying to achieve the best results for as many people as possible in ways that meet a general societal expectation of what is fair and just is a worthy goal. But does it fulfill the responsibility that follows being asked to speak for another? If the other is a person or people of average means with average capacities and expectations perhaps it does. In my view however consumer advocacy requires a working definition sufficient to meet the needs of those who are not average pressing for responses that are not simply reflections of current societal norms. Indeed it is often the case for the vulnerable or disadvantaged that normal societal activity has caused or contributed to the harm they need to have addressed.*

524 [2]Examples include a slightly varied version of the statement which appears in the Executive Summary at page 9 of the draft Discussion Paper, the above quote is used as a paragraph heading on page 18, and a varied version appears in the summary of section 1 of the Discussion Paper on page 31

In explaining the work of Care Financial Inc and its constituents, David Tennant goes on as follows:

> *The client group Care works with are amongst the most vulnerable in our community. They also tend to be the least commercially attractive. If and when product and service providers compete for these clients' business far too often that competition is about exploiting their vulnerability and disadvantage even further. Respect and dignity are not concepts that Care's clients would consistently associate with their market interactions. (p2)*
>
> *But respect, dignity and responsiveness to needs are precisely what Care aims to provide. The standard may not be met all of the time, but the aim is a reliable commitment. (p2)*
>
> *Staff at Care have a pretty straightforward view of consumer advocacy. It means acting in the interests of our consumer constituency. From individual assistance and representation through to activities that seek to address collective concerns the needs of our clients are paramount. That is not to say Care does not have other duties or stakeholders with which it is required to interact. For example there are reporting obligations under funding contracts legal requirements as part of being an incorporated body and so on. But the central duty to the clients is unassailable. It is in short the reason for the agency's existence. This central tenet of prioritising the needs of a consumer constituency is a feature common to other agencies with which Care interacts and that we would identify as consumer advocates. (p2)*

> *Why make an issue of this? There is an increasing tendency to want to broaden the description of consumer advocacy in a way that I personally find meaningless. At the extreme end of the spectrum it is sometimes suggested that as everyone is a consumer – we are all potential consumer advocates. The Discussion Paper recognises that any consumer with a view about consuming is not necessarily consumer advocacy. It does however seek to stretch the concept across activities that are not in my view consumer advocacy and to stakeholders that are not consumer advocates.*

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 bodies[525][4]. *Individually and collectively industry government and regulatory bodies play crucial roles in delivering good consumer outcomes. They are not however consumer advocates. (p2)*

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. (p2)

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. (p2-3)

Similarly it has been suggested that industry groups can advocate for consumers. There is evidence of a growing culture in the world of commerce that recognises social responsibilities. Industries are being challenged to better serve the communities in which they operate in ways that benefit more than just the bottom line for shareholders. Some of the initiatives created and pursued by individual companies even on occasions by industry groups have been fabulous and have produced genuine community benefits. But in recognising those benefits and acknowledging even applauding some of the advances it is a much bigger leap to include industry as a category for consumer advocacy. (p3)

525 [4]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.

Turn it around the other way for a moment. Using the same broad logic applied in the Discussion Paper, consumer advocates would equally be a category in the mapping of government. Or they might appear in the corporate structural diagram presented in Annual Reports to Shareholders. Stakeholders yes. Important ones – I hope so. But undertaking the same roles with the same sets of responsibilities – I don't think so. (p3)

Perhaps a better test of what constitutes consumer advocacy is that of primary obligation. If the central and over-riding obligation is not to consumers, then those undertaking the activities are not consumer advocates. Whether that test holds true in all circumstances is something that could undoubtedly benefit from further analysis and discussion. (p3)

The dangers of policy dogma

At the heart of Chris's proposals is a belief in the current dominant force in market economics: (p3)

Consumer advocates should, as a first principle, be a voice for competition.[526] *[5]*

The statement is developed and qualified by other observations about balancing the unintended consequences of market failure and of addressing the needs of the vulnerable and disadvantaged. Competition remains however a key focus of the entire work; a recurring theme in how consumer advocates should undertake their activities. Chris prioritises the commitment to competition in listing the four matters that in his view consumer advocacy groups must address and promote:

- *consumer advocacy should provide a voice for competitive markets,*
- *consumer advocacy should provide a voice for consumer protection regulation,*
- *consumer advocacy should provide a voice for consumer redress and*
- *consumer advocacy should provide a voice for distributive justice.*[527] *[6]*

526 [5]This is another of the statements that receives more than one reference in the Discussion Paper, appearing initially in the Executive Summary (page 9 of the draft).

527 [6]The four headings are utilised throughout section 1 of the Discussion Paper, to introduce and then summarise the author's identified priorities.

When one tackles the sacred subject of competition policy in Australia, you can actually feel the shift that occurs. As the topic is being raised today, I have no doubt that a proportion of people in the room will experience their pulses starting to race and be fighting an urge to curl their top lips in a collective sneer – as another luddite, flat earth, pinko-lefty consoomer whinger wants us to hold back the wheels of commerce. Equally others might be getting a sense that they can start to stomp and cheer, or link arms for a stirring rendition of 'Give peace a chance'. If that describes a feeling that is building for you, take a deep breath – nothing so dramatic is going to take place. (p4)

Competition has delivered some extraordinarily positive outcomes. As a nation we are more prosperous and have more choices available to us as a result of embracing and promoting competitive markets. (p4)

Competition is however a tool. As Chris importantly notes:

> *"competition is never an end in itself, it is simply a means to an end, that end being to achieve an efficient allocation of resources and the maximization of the long term interests of consumers.".*[528][7]

The Discussion Paper warns consumer advocates to avoid being seen as unthinking protectionists. I agree but do not accept that the way to achieve that end is to become primarily an advocate for the current dominant economic paradigm. In fact the weakest part of the entire paper for me is how consumer advocates, particularly those acting for low income consumers are actually supposed to tackle instances of market failure. There are plenty of references to distributive justice and to sharing the wealth created by competition, but almost nothing about articulating the failures of competition to deliver acceptably equitable outcomes and, more specifically, what to do when the nature of the competitive activity itself actually causes the consumer harm. (p5)

If we return to the concerns expressed in the preceding section about what is consumer advocacy and who does it, the great danger in taking the Discussion Paper too literally is that one actually sees no role for consumer advocates at all. I agree absolutely with observations about the need for more and better policy voices in the consumer landscape. Not at the expense of coalface service delivery however, especially for low income and disadvantaged consumers. Even in rather better designed and resourced landscapes such as exist in the United Kingdom, those front line activities must play a central role in consumer policy development ground up, rather than top down..

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528 [7]Pages 21 and 22 of the draft Discussion Paper.

Similarly, prioritising the needs of the vulnerable is a good use of resources, rather than a drain. If we are serious about empowerment, focussing on the excluded and working with those people to move them to a position of inclusion must be the priority

Another way to understand the dilemma is to consider it through the framework of how government and regulatory agencies might seek to engage with communities more broadly. I will try to explain that briefly.

If consumer advocates are considered as those owing their primary and over-riding duty to consumers, they are both custodians and communicators of community views. The refreshing new approach to community engagement being championed by government trailblazers like the Victorian Department of Communities, does not seek to require of the community the discipline (or limitation depending on one's perspective) of government service. Instead there is an apparently genuine recognition of the need to hear from communities, through the voices of communities, in ways that are simple and accessible and then to look for outcomes through partnership or through building local capacity.[529][8] *(p5)*

The Discussion Paper, even though written by a respected former consumer movement colleague, promotes a potentially less effective approach to communication.

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. (p5)

529 [8]These are broadly goals encompassed in the design principals adopted by the Department of Communities. For a discussion of these principles see Yehudi Blacher, *Changing the Way Government Works,* Public Administration Today, October – December 2005, pp 38-42

Mr. Tennant end is brief but powerful speech on a note of characteristic frankness:

> ***Summary: (p5)***
>
> *Let me end as I began. The Discussion Paper presents a model for the design and delivery of Consumer Advocacy in Victoria. It will therefore be important for consumer advocates in Victoria to digest and respond to the work and I hope they take that opportunity.*
>
> *In relation to the broader issues raised in the Discussion Paper my comments have been direct and largely critical. I do however acknowledge the significant work the paper represents on Chris's part and the importance of ventilating those issues. Consumer advocates should never, in my view, feel embarrassed or apologetic for speaking plainly on the part of the consumers they represent. It is ultimately part of discharging the duty that speaking on behalf of another represents.*

Finally on the issue of advocacy, I quote from the website of St Vincent De Paul Society as follows.[530] It is quote that David Adams would wholeheartedly endorse, because of his understanding of poverty and its drivers ad the extent to which it is the responsibility of the community as a whole to develop a sustainable social policy addresses at least a fraction of consumer need and expectation.

> ***Advocacy***
>
> *Advocacy on the behalf of the poor and disadvantaged is a key function of the Society. The founder [of St Vincent de Paul Society] Frederic Ozanam once said:*
>
> > *"You must not be content with tiding the poor over the poverty crisis: you must study their condition and the injustices which brought about such poverty, with the aim of a long term improvement."*

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530 St Vincent de Paul Society website Found at *http://www.vinnies.org.au/UserFiles/File/VIC/Publications/Research/2005%20General%20Brochure.pdf*
The Society is democratic, with major office bearers being elected to their positions for a limited term and, like any democratic institution, its members come from a broad spectrum of economic, political, philosophical and social backgrounds.

I am indebted to Adam Suleiman[531] of the American Evaluation Association Discussion List for directing interested parties to the Grassroots Action learning links concerning impact assessment and participation. This development worker from Nigeria and evaluator provided the information in response to an online enquiry from a fellow evaluator on the AEA Discussion List seeking information more broadly on advocacy but containing an evaluation component, and

> **GrassrootsActionLearning Page 3 02/09/2003 Secton1: Why What and Key Challenges**
>
> **1.1 Why grassroots action learning? Impact assessment and participation**[532]
>
> *Since the late 1990s, donors, NGOs and researchers have become increasingly interested in participatory impact assessment and participatory monitoring and evaluation*[533]*/*[2] *. The World Bank's Participatory Poverty Assessments in 60 countries, constituted a methodological innovation in bringing together subjective experiences from 60 countries into an overall analysis of poverty*[534]*/*[3]
>
> *Multilateral and bilateral donors have produced Manuals on tools and methods for participatory research and impact assessment*[535]*/*[4]*Northern and Southern NGOs have been developing ongoing systems for participatory monitoring and evaluation*[536]*/*[5]

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531 Adam Suleiman of Nigeria is a development worker with local community grassroots groups, NGOs, CBOs, and FBOs in Nigeria involvement in sustainable development ventures tor educe poverty through micro credit and small enterprise development, vocational skills development and placements, advocacy, information technology and health through innovative participatory development methodologies. He is a member of the Global Development Network, the African Evaluation Association, the Nigerian Institute of management, the American Evaluation Association Discussion Group EVALUTALK. He is particularly interested in inner motivation to bring change in the lives of the poor, disadvantaged and vulnerable people.

532 Linda Mayoux (2003) *Grassroots Action Learning* Section 1: grassroots action learning: why, what and key challenges Linda Mayoux is Consultant for Wise Development found at *http://www.enterprise-impac...s/toolbox/grassrootsactionlearning.shtml*

533 Links to overview papers and resources can be found on the following websites: for participatory evaluation: *http://www.people.cornell.edu/pages/alr26/parEval.html;* for Participatory Action Research: *http://www.goshen.edu/soan/soan96p.htm;* for community-based research: *http://www.loka.org/crn/*

534 3 Narayan, D., R. Chambers, et al. (2000); Narayan, D. and P. Petesch (2002) *c/f ibid Mayoux L (2003)*

535 4 For example FAO's Participatory Monitoring, Assessment and Evaluation (PAME) of the early 1990s (Case 1990) and GTZ's Participatory Impact Monitoring (PIM) *www.GTZ.org. c/f ibid Mayoux L (2003)*

536 5 For example Action Aid's ALPS system, see *www.actionaid.org.*

Methods have varied from informal focus groups to participatory diagram tools (PLA). These latter have seen rapid innovation in ways of using diagrams to collect quantitative as well as qualitative information[537] */*[6]

This interest in participatory methods for impact assessment has been part of a wider change in perspectives on development. Since the early 1990s participatory approaches have been a required component for funding in development programmes. By the end of the 1990s the interest in project-level participation had widened to a concern with civil society development and good governance. Partly inspired by the findings of the Participatory Poverty Assessments, voicelessness and powerlessness are now explicitly recognized as integral parts of a multi-dimensional definition of poverty. Empowerment, civil society development and building social and government institutions responsive to needs of the poor were explicit themes in World Bank World Development Report 2000/1. This emphasis is echoed in DAC Guidelines on Poverty Reduction and in policies of bilateral aid agencies.

There is now increasing interest in developing ongoing structures and systems for dialogue between very poor people, NGOs, governments and international aid agencies as an integral part of civil society development and good governance. For example a DFID review of the Participatory Poverty Assessments concluded that:

Advocacy

Advocacy on the behalf of the poor and disadvantaged is a key function of the Society. The founder [of St Vincent de Paul Society] Frederic Ozanam once said:

> *"You must not be content with tiding the poor over the poverty crisis: you must study their condition and the injustices which brought about such poverty, with the aim of a long term improvement."*

537 [6]See Burns 2002; Barahona and Levy 2002 and for specific tools, see the paper 'Using Diagrams' by the author on this website (!!Insert link). *c/f ibid Mayoux L (2003)*

As far back as November 2001, fort-nine people engaged in advocacy and citizen participation efforts in several countries came together for a meeting on *Making Change Happen: Advocacy and Citizen Participation,*[538] co-sponsored by Action-Aid-USA, the Asia Foundation, the Participation Group and the institute of Development Studies, and Just Associates.[539]

As principal author of the published paper resulting from this conference, Cindy Clark[540] raises some important social and political questions about the role and nature of advocacy, inclusive participation by stakeholders at all levels and the underlying reasons for creating space for such participation

The conference *Making Change Happen* held in 2001 discussed over four days explored ways in which to take an expanded view of advocacy and citizen participation, activities that are often viewed as technical projects devoid of power and politics.

Organizisers and participants expressed the view that

> *In reality advocacy and civic participation involve a complex interaction of power and resistance as those working for change in different contexts face different levels of openness and pluralism risk and corruption.*

A challenging view posed in the published paper from this conference was:

> *"The challenge of the new politics for our century is how to build strong states which are also strongly held accountable by citizens."*

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538 *"Making Change Happen"* 2001 conference, details found at *http://portals.wi.wur.nl/files/docs/ppme/MakingChangeReport.pdf*

539 Just Associate (JASS) (JASS) is a strategic support and learning network committed to strengthening the vision, strategies, leadership, and impact of organizations that promote human rights and economic justice. Through training, technical advice, action research and other kinds of support, we facilitate linkages and learning between people and organizations from the South and North working at different levels of public engagement on critical social and economic issues. Our capacity-building efforts are informed by a rights-based approach to organizing, development and citizen action and our work is grounded in a holistic analysis of power and change. As a bridge between groups, we promote reflection, new knowledge, strong organization, and better practice at community, national and global levels.

540 Cindy Clark (2001) *"Making Change Happen."* Conference Paper. Cindy Clark, Program Coordinator for Just Associates, Washington DC and rapporteur of Making Change Happen, is the principal author of this paper.

In discussing the nature of participation in such a setting, the paper expresses these pertinent views:

> *One important consideration is the nature of participation involved. Is the space only for consultation without a clear idea of what will be done with the opinions and information that are gathered?*
>
> *Are there opportunities to influence decisions regarding the agenda timing and participating groups or have such decisions already been made behind closed doors? In some cases there may be advantages to participating in an established agenda in the hopes of incorporating different interests. At other times, energy may be better spent focusing on the development of an entirely different and independent agenda. Thus tension exists between what can be termed "invited" and "created" spaces. Effective participation in pre-determined, invited. spaces will require not only clear demands for change, but demonstrating considerable clout as well. Simply participating to take advantage of an opportunity to engage with powerful institutions is insufficient without aiming to ultimately transform existing power relations. .Created. spaces that are opened by advocates themselves may require more resources to develop, but are likely to offer stronger negotiating positions for advocacy.*

These insights are provided here from published sources to encourage consideration by interested stakeholders of various advocacy models

The following anecdote from the report cited above illustrates the frustrations that participants may feel when they participate in "created spaces" where the motions of inclusive community participation may be followed, but inputs (from community participants) and outcomes (decisions) are mismatched

> *"…when you are marginalized and you don't participate and you have no openings; when somebody comes to you and tells you 'okay, you have the right to participate' … it is like a fish, it throws a hook to you and catches you up."*
>
> *Daoud Tari Abkula (Pastrolist, Communication Initiative, Kenya) presented the experiences of Pastoralists in their engagement with the process leading up to the Kenyan national Poverty Reduction Strategy Paper (PRSP) for the World Bank.*

> *He described how many Pastoralists felt that not participating in the PRSP process would only further marginalize them, so a tremendous effort was mobilized to conduct a large consultative process to facilitate pastoral input to the document.*
>
> *Pastoralists felt they were successful in including a substantial share of their demands in the final PRSP. However, when the World Bank decided not to r highly frustrated and disillusioned with the process.*
>
> *This experience highlighted the importance for advocates to carefully weigh potential advantages and drawbacks to opportunities for engagement.*

Principal Author Cindy Clarke refers to the presentation of Meenu Vadera of ActionAid Uganda a follows:

> *As many organizations move from a service delivery to a rights based approach to development, the discourse of power becomes even stronger within organizations, in some cases propelling them to recognize that they cannot use the "same old paradigm" in their work but must demonstrate different ways of relating, understanding, and educating. Yet, in the need to gain power, to win quick victories, organizations are tempted to adopt the old paradigms they are trying to change. Processes of organizational change and learning require change in systems and policies as well as spaces for dialogue around these issues and tensions.*

The paper later sums up the role of the various actors in advocacy as follows, bringing the debate about grounding theories[541]

> *In summing up the discussion around the various actors in advocacy, many of the participants agreed that multiple representations of multiple voices in advocacy are both possible and desirable. There is no single voice, be it from an institution, social movement, or individual that can appropriately represent by itself the interests of a particular population. In this sense, there are many different ways that institutions and individuals can facilitate dialogue and contact without having to be interlocutors or speaking on behalf of other people.*

[541] See for example Edmund Chattoe (UK) (1995) *"Can Sociologists and Economists Communicate?"*, both discussed at some length in parts 1 and 2 (Submission 242 to the Productivity Commission's Consumer Policy Review

If and when an advocate represents the interests of marginalized groups with decision- makers, it was emphasized that this must always be tied to feedback mechanisms so that the mandate for representation is both clear and consistently refreshed.

Many advocates emphasize a focus on supporting marginalized people in acquiring the tools needed to speak for themselves Tools such as knowledge, awareness, consciousness, security, and resources. The role of NGOs or other organizations in providing this support may be understood as facilitation of necessary research, capacity-building, and organizational development. At the same time, it is important for advocates to recognize the responsibility involved in these processes. Critical consciousness involves risks, for example in contexts where there is limited or no security to exercise rights. Likewise, empowerment itself can be a very painful and difficult process. For this reason advocacy must involve a process to surface risks, both personal and public, to analyze alternatives, and from that information to make choices.

As repeated in the Conclusion and Recommendation section, in general my views are that there should no exclusionary practices of philosophical beliefs should hamper equitable distribution of advocacy funds and inputs.

As observed by EAG, there are currently no provisions for gas users, which produce equity issues and this gap results in disadvantage those seeking advocacy input, including vulnerable, disadvantaged and inarticulate consumers of utilities. Those unjust imposed with contractual status on the basis of water volume consumption but charged for "delivery of gas bulk hot water" should be entitled to advocacy through gas advocacy funds if available, since the dispute is with gas retailers and other energy providers claiming a contractual relationship for gas. This anomaly in previsions appear not to be addressed anywhere at all in the advocacy models proposed or already adopted and a blind eye generally seems to have been turned to the implications of BWH provisions, frequently mistaken as *"embedded network"* customers.

The term embedded is exclusive to electricity, and in any case is not applicable to end users of composite water products reticulated in water pipes. Therefore deferred decisions pending Network Policy Working Group deliberations may not throw sufficient light on these issues unless the matter is urgently placed on the agenda as a separate issue to embedded network economic and non-economic policy planning present and future.

A robust understanding of the legalities and technicalities involved is essential to informing better policies including advocacy models and how this group of utility users can best be assisted to regain their enshrined rights and have proper access to advocacy through available funds.

Having read considerable material and in the light of my own experiences endeavouring to secure advocacy support for selected issues, I cannot help reflecting the concerns of others about balancing of priorities.

I agree with others that the needs of different interest groups do need to be balanced. Therefore I am concerned to hear that there are some interest groups who are not receiving the support or funding that they should.

Frequently some of the collective efforts of larger consumer stakeholders still meeting the classification of small consumers requirements make a contribution that have impacts for all small consumers. There is a need for equity and balance, and apparently that is not always achieved.

The public is entitled to know not only how funds are being spent but how decisions are being made to prioritize issues of consumer concern in the advocacy arena; whether there is a waiting list for certain items to ever reach the agenda and how the interest needs of individuals or groups can obtain equitable input from those slicing up the funding cake and the advocacy policy priorities for attention.

I do not wish to give the impression that hardship issues and the needs of the vulnerable and disadvantaged are not a major priority in terms of my personal allegiance and social values. Indeed I have frequently given of my time and efforts to support the needs of those in this category and have face-to-face experience of supporting such groups at a grass-roots level.

This whole component submission is predominantly focused on a class of utility en-users who for the most part live in sub-standard accommodation, including transitory accommodation or facilities.

Many of these live in poorly maintained privately rental apartment blocks and flats; others in caravan parks and rooming houses; some in other facilities where they face market exploitation not only at the hands of utility providers and exempted network operators, but also on the basis of statutory and regulatory policies that place then in vulnerable positions. My personal commitment to supporting the limited range of goals that I can afford the time to pursue in this regard is evidenced by the effort I have invested to date in consultative and other initiatives.

For the past twelve months I have devoted considerable time targeting various advocacy policy groups and individuals, statutory authorities, regulators, state and federal, complaints schemes and consumer bodies and their funded projects with the view of raising awareness and input on selected issues.

I acknowledged that my efforts have indeed been largely focused on interest groups facing disadvantage in one way or another. In addition I have tried to focus on selected needs of the wider community when it comes to the expectation that their enshrined rights will be upheld whether or not they are the subjects of disadvantage or any description, which is a term all too often narrowly taken to mean financial hardship. Most of the provisions are also focused on this, so that if issues arise outside of that there are no foreword-looking contingency plans to deal with this. The Wrongful Disconnection

Procedures perhaps illustrate this. Those receiving communally heated water and those in embedded network situations are just as entitled to be considered under wrongful disconnection procedures, but this is not even covered or report.

Having openly stated my position, my personal values also include upholding equity issues generally. I am therefore disappointed to hear that there is not always an equitable allocation of resources, and also that there is apparently a lack of cohesive effort amongst different consumer groups such that common projects can be shared between divergent interest groups striving for improved consumer protection.

I have drawn my own conclusions about exclusionary practices and have highlighted some of these elsewhere, including concerns about what processes may be in place for those groups without client bases to establish the needs and views of their constituents when participating in Consumer Consultative Committees such as the one administered by the Essential Services Commission Victoria.

Elsewhere I have expressed concerns that Working Papers and issues papers in the current Regulatory Review have not been published at all to inform the wider community and to give them appropriate and timely opportunities to participate.

Those who are regularly in touch with planners policy-makers and regulators and become aware of the plethora of consultative processes rarely have the time and opportunity to proactively participate

Despite my many efforts to call attention to the range of issues of concern to me and to request that these be formally placed on the table for discussion in such exclusive forums, I am yet to see evidence that this has occurred or a single reference in any published Working Paper or Issues Paper that acknowledges these efforts even in terms of simply seeing the issues on the agenda..

Therefore I feel that I can empathize with those individuals or consumer groups who may feel unheard in the consumer advocacy arena at least when aiming to represent those categorized as small customers, whether residential or business.

I can only refer again to David Tennant's views about consumer advocacy that is not grounded with consumers may not only be ineffective but also possibly dangerous.[542]

Having said that, I recognize the importance of consumer interest groups with a policy advocacy brief. CUAC has no brief whatsoever to take up individual matters. They believe this is EWOV's role, whose jurisdiction is limited and cannot in any case become involved in policy matters, legislative interpretation, tariffs and the like, under the terms of their Charter and Constitution.

CUAC states on his website home page that has no mandate to deal with individual consumer issues. Direction is given to the Energy and Water Ombudsman instead, whose limited jurisdiction and parameters restrict the range of issues that can be addressed.

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[542] David Tennant (2006) *Taking the consumer out of consumer advocacy*. Speech at 2006 National Consumer Congress. Rebuttal of Chris Field's speech

VESC also believes it is not geared to deal with individual complaints, make the same re-direction.

The same applies to the CAV, though they still have enforcement responsibilities for energy suppliers alleged to breach the FTA. Having said that it is VESC view that CAV must assess *FTA* breaches not EWOV of VESC.

That brings the whole matter round in a circle in the accountability shuffle since none of the bodies involved is prepared to take direct responsible for follow-through with robust investigation of breaches, particularly generic breaches. This makes for extremely compromised consumer protection. I am mindful of the views expressed by the Property Council in 2000 suggesting the need to define which body is the single or final point of reference in decision making for essential services, and concerns about the number of parties involved that could dilute the effectiveness of the decision-making processes.

CUAC describes its functions as follows:

CUAC

- provides a voice for, and strengthens the input of, Victorian utility consumers - particularly low income, disadvantaged, and rural and regional consumers - in the policy and regulatory debate
- initiates and supports research into issues of concern to Victorian utility consumers, through in-house research and building the capacity of consumers through its Grants Program
- investigates and responds to systemic issues affecting Victorian consumers in the competitive electricity and gas markets and with regard to water.

CUAC, as a wholly owned Government program under the auspices of CAV with a corporate identity, has been active in the policy debate and undertakes research and submission-based advocacy to effect changes. Their contribution is acknowledged and appreciated.

However, CUAC has no member base of client group. There appear to be no mechanisms by which policy issues can be brought forward for supplication to policy-makers and regulators. It is unclear how matters can be placed on the agenda for consideration by groups of individuals.

It is unclear how systemic issues identified by individuals or groups considered to be systemic can be placed on the agenda for input.

The BHW matters received CUAC attention in 2004 but there has been little input on this issue since save for the inputs by the Tenants Union Victoria, who have raised the issue repeatedly in recent and current debates on consumer protection for tenants in particular.

VESC believe that they have no role to play in individual complaints, even when the matters are clearly outside of EWOV's jurisdiction.

Whilst CAV used to handle complaints directly about energy suppliers, they no longer do so. Instead they believe this is EWOV's role, despite all jurisdictional limitations. However, the CAV is still responsible for compliance enforcement, presumably relying on an industry-funded complaints scheme to have the expertise and willingness to appropriately refer all matters; to make complete assessments of such matters, and obtain the cooperation of the VESC with identification of issues, including systemic issues, refer these and take a visible compliance enforcement approach. All of these issues have been the subject of dissatisfaction, and especially the issue of identifying, highlighting and reporting systemic issues.

This leaves a huge burden of responsibility on EWOV whose resources during the last two years or so have been particularly strained; who has faced staffing shortages, and has found the increased complaints load since mid-2007 a huge strain. Refer to Resolution 26 Report referred to elsewhere.

As a consequence EWOV has adopted a policy of re-referring complainants with their consent to the supplier even after two attempts to role the issues in that way. This has the effect of reducing complaints figures for those complaints that would normally have been handled by EWOV.

As to the market conduct issues identified, often VESC refuse to address or comment on these, believe this to be CAV's role. CAV believe it is EWOV's role, as does the DPI. So matters frequently go round in circles.

Where statutory policy is seen to have driven market conduct issues, besides the need for input on those matters that fall into the too hard basket, addressing the source problem of the flawed policies poses significant challenges.

It is these sorts of issues for which advocacy is needed and rarely obtainable. Therefore a balance needs to be struck between research priorities and those which need direct advocacy input. Also, if advocacy funds are not accessible for appeals this limits the extent to which proper and fair access to justice may be obtainable.

In that light I quote below an extract from a letter from EAG to the MCE Market Reform Team as far back as November 2005. Since then EAG has written on a number of occasions, I have liberally quoted from various submissions, including in its entirety the one to the MCE Legislative 2006 Legislative Package as an Appendix since it covers a range of issues that are not always raised by the consumer groups focused on hardship issues.

Others, such as Energy Action Group for example, in the submission to the MCE SCO 2006 Legislative Package have expressed some serious concerns, for example about advocacy models, staffing, parameters; funding and research. Refer for example to their submission to the MCE SCO 2006 Legislative Package.[543]

> *EAG believes that it is also worth mentioning at the outset is that there is a tendency in the advocacy reforms being advanced by the MCE to seeing a need for the Panel to be accountable to the MCE via the AEMC. EAG has a serious concern that the MCE has ignored the need for the Panel to be accountable to end users. The major objective of the Advocacy Panel is to ensure that end users are intended to be the beneficiaries of the advocacy that the Panel funds and end users are providing the funds that the Panel disperses. The MCE has not provided for accountability back to end users. (p5)*

> *Our reading of them is that COAG and the MCE intend that ALL consumers be treated equally and in an unbiased manner. EAG has the belief that all consumers in the end should benefit from reform and have the ability to provide input into deliberations about the market and the directions that the market takes. The provisions of the advocacy arrangements that the MCE proposes clearly contradict this proposition.*
>
> *It also ignores the fact that all end users contribute to the advocacy fund through their NEM fees (a component of their electricity bills along with their gas bills in the future) and should have a right to expect access to the funds and to be treated equally in doing so, not in the biased manner being proposed by the MCE:*
>
> *The MCE may not be aware that larger users provide at least 70 percent of the funds made available for end user advocacy and should be entitled to benefit from the advocacy that is funded by the Panel. EAG strong believes that large users have a right to feel they are being poorly treated by the MCE's proposal which almost completely fails to comprehend the real purpose of advocacy and how it can be made to work most effectively for most end users. The role of the National Consumer Round Table appears to have exacerbated this problem;*
>
> *If the MCE wishes to favour a particular group in allocating advocacy funding, it should either provide advocacy money through the public purse or else only levy the group of consumers who are benefiting. This proposition clearly applies to the funding of low income and environment groups in a number of jurisdictions outlined above.*

[543] EAG (2006) Submission to MCE 2006 Legislative Package found at *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf*

EAG notes that the wording describing this provision in the draft Bill is quite different to that used in the MCE Communiqué outlining their original decision on advocacy reform and in the material released by the MCE explaining the proposed new advocacy arrangements:

"In undertaking its functions, the Panel will have regard for all energy users with a focus on "small to medium consumers."

The wording in the Bill does not give effect to the MCE's decision and there is confusion as to what the MCE real intention is. This mixed message needs to be clarified. p8)

I support the views of EAG on p13 that advocacy funds should be available for appeals-based advocacy. I also believe that non-member based advocacy should have the right to bring appeals, as suggested by CUAC in their submission to the MCE 2006 Legislative Package.

It is therefore of major concern to EAG that the advocacy reforms proposed by the MCE do not specifically allow for advocacy funds to be distributed for appeals-based advocacy. Being able to access advocacy funds for such purposes would be consistent with the objectives in the NEL/NGL, would support the objectives of energy reform (ie that all users should benefit from the reform process), and would support the objectives for advocacy (ie that it "should benefit consumers of gas and electricity (or both)"). EAG would also draw to the attention of the MCE that the inclusion of the limited merits review mechanism is likely to increase the incidence and importance of appeals as part of the regulatory processes in both electricity and gas. (p13)

In effect, end user advocacy around the appeals process will become integral to effective regulatory outcomes in terms of the electricity and gas market objectives, a point recognized by the MCE in terms of the access it has provided to end users in relation to appeals. If end users are unable to take part in the appeals process due to an inability to access advocacy funds for this purpose, then the benefits of earlier advocacy on an issue (and the use of advocacy funds) will be jeopardized.

EAG had suggested that certain features of the previous Advocacy Panel need to be retained, using these words on p4 of the submission:

> *"The most important benefits of the previous Advocacy Panel arrangements that must be retained are*
>
> - *The Panel did not discriminate in terms of favouring particular types of end users.*
> - *The allocation of funds recognized that funding for end user advocacy came from actual users via NEM fees, so that **ALL** end users contributed and should have a right to benefit from the allocation of advocacy funds."*

In relation to the South Australian Bill, EAG had made the following recommendations in its submission to the MCE SCO 2006 Legislative Package

> *"Given the above EAG urges that the Bill introduced into the SA Parliament should:*
>
> *1. Provide for an Advocacy Scheme that treats all end users equally and allocates funds on a competitive basis.*
>
> *2. Ensures that organizations making applications for funds are required to demonstrate their legitimate claims to be representing end users of energy.*
>
> *3 The draft Bill also provides that funds allocated to advocacy on behalf of both electricity and gas users and for Panel administration will be drawn from both sources.*
>
> *3. Alternatively, provide for a mechanism whereby users can elect to direct their share of funding to the Advocacy Panel or to a nominated organization. This could be done annually via their bills (with a form and an explanatory note included briefly setting out the options available and their claims for funds)."*

I reflect EAG's concerns about Advocacy Panel operations and the claim that it is not subject to direction by the AEMC or MCE in its performance of functions, which may be belied by the fact that the Panel is in fact directed in respect of how it is to perform its functions in allocating funds to small consumers.

It is extremely unclear what happens with gas advocacy, available funds or processes. Perhaps the MCE could clarify this publicly.

Excerpt from EAG's submission to the MCE 2006 Legislative Package and the Consumer Advocacy Arrangements[544]

EAG has a long history of being actively involved in a number of jurisdictional licensing rule and code changing consultations. The major point of difference between EAG and the Round Table participants is that our views have been formulated from experience and case work.

EAG is aware that in several jurisdictions market participant retailers and distribution companies are having difficulties in billing customers have customers on the wrong "use of system" charges or fail to comply with the relevant codes relating to estimated billing procedures

It is EAG's basic contention that un-enforced licences rules and codes are worthless to consumers and that an emphasis on the minor tweaking of the Rules and Codes without enforcement doesn't particularly help consumers deal with utilities. Attachment 1 a 2004 EAG investigation into the relationship between the Victorian Ombudsman scheme and the Essential Services Commission of Victoria demonstrates that many systemic problems do not get addressed by the statutorily responsible organization. Unfortunately for Victorian consumers this position has not changed since Attachment 1 was written.[545]

EAG therefore recommend that the draft Bill on Advocacy Reform include specific allowance for funding of appeals-based advocacy. EAG further recommend that applications for such advocacy be supported by information showing that the appeal is soundly based and that eligibility be limited to end users or to bodies that are representative of them and will have standing.

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544 Ibid Energy Action Group (2007) Submission to MCE 2006 Legislative Package and Advocacy Arrangements found at (January) *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf*

545 Elsewhere under discussion of accountability I have raised real and ongoing concerns about the extraordinary perception held by the Victorian energy entities, including the VERC, DPI and EWOV about their own accountabilities. In particular I repeat concerns from my direct experience and from what I have read that systemic issues are not robustly identified, reported or referred. In general I support the view that tweaking of rules and codes without adequate enforcement commitment is pointless. Likewise, shifting provisions from one set of documents to another does not constitute reduction in regulatory burden or improved consumer protection. I am concerned, for example, of the motives behind making a cosmetic repeal of the BWH provisions whilst retaining most of their application and transferring to the Energy Retail many provisions with re-defined explicit or implicit definitions that are inconsistent with current energy legislation and with the Case Code (meter; supply address; disconnection (of water supplies)

EAG believes that a number of Australian regulators bias their determinations in favour of the regulated entity to minimize the risk of appeals. To reiterate: if Section 291 (1) remains in the draft legislation no consumer who assesses the risk involved in this section will wish to appeal a determination. So the current legal appeals paradigm where the industry applicant v's the regulator appeals process will continue, this process provides a tilted playing field towards the applicant providing substantial rewards to ensure that asymmetric appeals against the regulator will continue into the future. Unfortunately this process has already set a number of precedents that will need to be overturned in the future by another legislative package. (p13 EAG 2006 submission to MCE SCO)

Excerpt from EAG letter to MCE Market Reform Team November 2005[546]

Funding of End Users to Effectively Participate

There is no reference in the NEL or the NERs on how end users and their representatives should be resourced to participate in the new institutional arrangements. The EAG will be examining this matter further.

It is clear that the NEM Advocacy Panel doesn't understand the specific funding requirements for less than 160 MWh consumers in this market. Their recent 20th of December decision to part fund a SACoSS project and to put a condition that they find 40% of the project funding from other sources shows a total failure to understand that small consumer groups don't have access to financial resources.

The Advocacy Panel decision making process have also acted as a deterrent to consortia funding were groups can run a common project, minimising wasteful project duplication

A 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.

[546] Energy Action Group is a 30-year of non-profit organization focussed in the main on energy issues relating to small consumers (less than 160 KWh/a and less than 10TJ/a (major users). Members determine EAG policies and directions. EAG activities cover both national and sub-national issues for the social action component of our work see http://www.vicnet.net.au/~eag1/. EAG has a policy of trying to work collaboratively with market participants and other consumer groups (like EUAA) on issues of common interest

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 responsible 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 instruments[547]; and has also examined the updated Memorandum of Understanding between Essential Services Commission Victoria (ESC) and Consumer Affairs Victoria (CAV).[548]

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.

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[547] See for example updated MOU between ESC and EWOV dated 21 April 2007

[548] 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.

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 Report[549]

> *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.*
>
> *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*

[549] 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*
Chapter Seven, Statutory Authorities

Consumer Utilities Advocacy Centre Ltd (CUAC) *(ACN 100 188 752*

CUAC is a public company, limited by guarantee, established under the Corporations Act. The Member of CUAC is the incumbent Minister for Consumer Affairs, who appoints a Board. This Board operates as an independent advocacy organisation. CUAC is wholly funded by the Victorian State Government.

CUAC was founded to ensure the interests of Victorian consumers are effectively represented in the policy and regulatory debate on electricity, gas and water, and has a constitutional mandate to focus on the interests of low income, disadvantaged and rural consumers.

Finally I am concerned to read in the submission by CUAC to the MCE 2006 Legislative package that regardless of efforts, even when advocacy is valid, well-considered and approached, such input is often discounted after considering the arguments put forward. This has a dampening effect on incentives to participate in the policy debate.

It is not a privilege to those groups include consumer interest groups and consumer and user groups. In fact is a highly demanding process in terms of the time and stress involved in preparing material for consultative forums often with competing deadlines providing minimal time for proper consideration of all matters.

However, there are clear advantages for the arenas running consultative processes, since much research and argument is prepared by others by the "sweat of their brows," so to speak that may assist with decision-making for those with an open enough mind, not merely rubber-stamping pre-determined decisions.

This has often appeared to be the case.

> ***Extract from CUAC Submission to the Ministerial Council on Energy 2006 Legislative Package: Gas and Consumer Advocacy***[550]
>
> *It is our experience that decision makers, including Government and regulators, rarely indicate that a submission or piece of research has altered or affected their decision. When stakeholders views are recorded, often one will be cited to represent a range of views. And, as the SCO is aware, even when advocacy is valid, well- considered and appropriate, the decision- maker can still elect to take an opposite position, having weighed input from a range of stakeholders*

In terms of redress options generally, in September 2007, David had reported in The Age[551] concerns about conflicts of interest. The report, based on the Ombudsman's Annual Report showed that

> *Senior Victorian Government bureaucrats (had) covered up ignored or condoned serious conflicts of interest*

> *The annual report also showed that Ombudsman George Brouwer's office had received more than 3628 complaints a 15 per cent increase on last year. Local government accounted for almost one in four complaints.*

As reported by The Age, delays and misleading details in dealing with freedom of information applications to government agencies.

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550 CUAC (2006) Submission to MCE 2006 Legislative Package Gas and Advocacy. Found at *http://www.consumeraction.org.au/downloads/CALC-CUACsubmissionto2006legislativepackage19Dec06.pdf*

551 The Age. (2007*) Complaints to watchdog jump* 21 September. David Rood Reporter

The Ombudsman's report notes that conflicts of interest have increased over the past year with public sector managers choosing to ignore clear conflicts and acting with their own interest in mind.

"On several occasions when senior officers learned of a serious conflict of interest, they condoned the improper behaviour, ignored it or attempted to justify it," the report said.

In relation to Freedom of Information applications, the Age referred to the Ombudsman Report of continued complaints about FOI.

“with several cases where the reason given for claiming exemptions under the law was "clearly misleading".

"Some agencies took advantage of every available exemption to provide as little material as possible," it noted.

SECTION 17
CONCLUSIONS AND RECOMMENDATIONS

Conclusions – for attention Productivity Commission and others:

As mentioned in the Executive Summary, it is my frank contention within this and other component submissions current past and intended to multiple arenas, that such goals are rendered well nigh impossible to attain because of the following:

Policies and regulations that may fail to meet obligations that are inherent in the enactments under which they are created, normally as separate corporate legal structure as a philosophical approach to re-badging of regulators and complaints scheme; accountability;

Policies and regulations that may overlook some of the fundamental principles of accountability, including the requirement to be bound by Crown and avoid regulatory overlap with other regulatory schemes and provisions in the unwritten laws, including the rules of natural and social justice;

Policies and regulations that may fail to rely on evidence-based evaluative principles; poor evaluative design; and dare I say, governance and leadership gaps;

Policies and regulations that are often poorly designed, with little knowledge or acceptance of other regulatory schemes;

Policies and regulations designed that may demonstrate almost no understanding of the provisions of the Criminal Code;

Policies and regulations appear to be designed with almost no understanding or acceptance of provisions within the unwritten laws;

Policies regulations designed that may fail to meet minimal standards of general regulatory consistency within and outside the energy provisions;

Policies and regulations that lack overall governance and a single ADDD

Policies and regulations that may pay no more than lip-service allegiance to best practice benchmarking principles

Policies and regulations that may fail to allow sufficient lead-time and adequate quality opportunities for wide stakeholder input, which includes a willingness to publish and make readily accessible all deliberative and consultative documentation and to notify stakeholders in a timely manner of all new material that relates to decision-making and

consultative processes
Policies and practices that may fail to adopt effective Memoranda of Understanding that lead to more formalized legally-binding contractual agreements between relevant entities, including prescribed authorities; prescribed bodies and entities; public entities and the like, regardless of corporate legal structure or statutory identity Policies and practices that may fail to allow enough flexibility to keep up with market changes and community expectations; but enough certainty within the Law to avoid uncontrolled hurtling into regulatory change based on an ad hoc approach Policies and regulations that may demonstrate inadequate technical knowledge of a specialist field Policies and practices that are adopted on an ad hoc basis without sufficient far strategic planning Policies and regulations conceptualized and adopted without sufficient technical knowledge of a specialist field and are undertaken on an ad hoc basis with minimal far-reaching strategic planning. Policies and practices that represent regulatory overlap; inequities and often market failure are discussed elsewhere. Suffice it to say here that overlap and conflict with other schemes is specifically disallowed under the express terms of s15 of the *Essential Services Commission Act 2001*. Such policies and regulations inevitably lead to market failure; confusion for both consumers and market participants, expensive complaints handling and sometimes litigation, private or regulator led under generic laws. The Productivity Commission is well aware of this, hence the current Regulatory Benchmarking Review, with tight deadlines for response to their Draft Report. I am yet to read it and endeavour to respond.

The case study and discussions in this rather narrowly focused and detailed component submission intended largely for energy and trade measurement arenas may serve to highlight some important issues of consumer detriment, the perceived flaws in reasoning is seen to be confusion as to which categories of utility consumers are *"embedded"* because of use of an embedded network through which energy is supplied; and by contrast those who are receiving heated water supplies and legally without any obligation to pay for heated water unless the heating component can be measured in a legally traceable way through the direct flow of energy to the premises of the recipient deemed to be contractually obligated.

Despite extensive supplication and lobbying by community organizations of the Victorian Government and economic regulator to resolve inequities, this submission aims to show that consumer detriments remain unaddressed and existing policies for BHW contractual and economic costing has heightened rather than lessened the detriments. The BWH arrangements need urgent re-consideration within both economic and non-economic streams before the conceptual governance model is finalised at national level. Meanwhile the consumer detriments are considerable and unlikely to be appropriately addressed under current policy and regulatory control. The position of energy providers is also highlighted in being required to adopt practices that are legally and technically unsustainable and represent significant overlap and conflict within and outside energy provisions current and proposed.

There are common misconceptions about the term embedded networks. The lexicon is exclusive to electricity. For gas provision providers need to be licenced. Ownership of hot water flow meters, often installed 30-40 years ago, but even if updated may not meet minimal water industry standards or approval. Ownership of these devices that measure water volume not gas or electricity does not create new contractual concepts or permit substitution of energy meters for water meters. The current BHW provisions represent appalling trade measurement practice.

A detailed real-life case study illustrating consumer detriment as a tip of the iceberg example of, energy policies perceived to be flawed and harmful; legally and technically unsustainable; facilitating unacceptable market conduct; and based on contractual and economic costing modelling seen to be placing both consumers and energy suppliers at risk. The complaint lodged with EWOV stayed upon unresolved and unaddressed for 18 months. Regulatory input was entirely unsatisfactory.

A frank discussion of perceived flaws in consumer protection through industry-specific complaints schemes overseen by economic regulators and funded by scheme participants – based on a real-life case study unresolved after 20 months, with file closure 18 months from time of complaints lodgement. Illustrates limited jurisdictional powers; skilling and resourcing issues; over-influence by economic regulatory decision-making. Lessons to be learned maybe.

Regulatory overlap and conflict are specifically forbidden within the *Essential Services Commission Act 2001*. Is there any point in legislative provision that is consistently ignored? What are the community impacts and how does this impact on market stability and community confidence. Why have regulators whether or not of corporately structure? How can the community be confident in a climate where regulators do not uphold their own enactments? How will this impact on competition and the economy.

Some provocative non-rhetoric questions

Does allocative efficiency have all the answers, or should some of these goals be occasionally sacrificed for a more balanced and confident market?

Regulatory overlap and conflict are specifically forbidden within the *Essential Services Commission Act 2001*. Is there any point in legislative provision that is consistently ignored? What are the community impacts and how does this impact on market stability and community confidence. Why have regulators whether or not of corporately structure? How can the community be confident in a climate where regulators do not uphold their own enactments? How will this impact on competition and the economy.

How will equity needs be met?

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

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

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

The BHW arrangements are an embarrassment to governments. Their perpetuation under the current terms contractual model, pricing and charging and trade measurement methods need careful scrutiny to bring the arrangements in line with community expectation and best practice. What can be done to achieve this and who will do it?

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

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

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

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

Will we need to resurrect the Senate Select Committee of 2000 to examine the issues again as to whether competition policy is being appropriately interpreted, and to re-examine what may be happening to the detriment of the community at large within the energy industry in particular?

I am led to believe that hope is pointless and that all one can expect of proper community consultation and effective regulation is to have travelled the journey without expectation of any outcomes. Are they all wrong?

Recommendations: Productivity Commission

I urge the Productivity Commission to consider these matters in the context of best practice policy and regulatory practice within Government agencies, Independent Regulators and other relevant entities fulfilling a public role.

Regulatory Overlap and Conflict Issues

The input of the Productivity Commission in recommending to all Governments the necessity to consider other regulatory schemes and avoid overlap and conflict with those schemes and with the provisions of the unwritten laws, including the rules of natural and social justice.

Trade measurement practices; derived costs and methods and rational used impacting on contractual governance (BHW)

The broad principles of such matters need to be explicitly covered in all existing and proposed legislation

That there is weak, if any, demonstrable adherence to mandated provisions within enactments binding regulators and other parties, specifically the binding provisions, and the requirement to avoid overlap and conflict with other schemes present and future.

It is implicit also that such conflict must also be avoided with the provisions of the unwritten laws, including the general and specific rights of individuals under common law contractual provisions; the and rules of natural and social justice.

In relation to regulatory overlap within energy provisions, s15 of the *Essential Services Commission Act 2001* specifically disallows overlap with other schemes present and future. This has been disregarded in certain provisions, including the Bulk Hot Water Charging Arrangements, which are also echoed in South Australia and Queensland. This is discussed in great detail in Part 2A, a brief version of which has been published on the ESC website as a component submission to the current VESC Regulatory Review.

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

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

I urge the Productivity Commission to view these matters as examples of flawed regulations that have not taken into account impacts on the community at large in adopting practices that infringe on their enshrine rights under other regulatory schemes and that also adopt practices that do not reflect best practice, particular with regard to trade measurement and calculation methods in deriving costs for energy and applying contractual models that appear to be legally and technically unsound and unsustainable.

In the interests of best practice all new laws and rules, including the proposed national energy provision explicit refer to the obligation of policy markers and regulators to adhere to the requirement to avoid regulatory overlap with other schemes present and future and with the provisions of the written and unwritten laws

Memoranda of Understanding

There are intrinsic structural and legal weaknesses in Memoranda of Understanding between prescribed agencies and other bodies, or those between bodies as between prescribed agencies, such that until or unless such instruments as statements of intent are either structured at the outset as legally binding; or else superseded by more formally binding instruments, their value has to be considered carefully in terms of desirable outcomes.

These instruments stop at commitment between the parties to adopt *"best endeavours"* to resolve matters of dispute between those parties; in the event that those endeavours fail, most such instruments fail to clarify at all what arbitration can be sought in resolution, if any.

That being the case, it is not uncommon for these instruments to be undertaken spuriously or else effectively disregarded as instruments capable to achieving the processes and outcomes for which they were originally designed.

Organizational cultural matters may play a role in determining how seriously these instruments are taken in any case; but looseness in wording and failure to specify hierarchical processes for resolution of differences services to compound these issues so as to render the instruments of minimal value

These instruments are often seen as no more than tools of appeasement and cursory goodwill, but when it comes to the crunch implementation is not always taken seriously – why should they be when it is possible to rip up the statement of intent within 30 days notice; when no more than best efforts are required to repair or bridge discrepant views as to outcomes, and when in any case few are legally binding.

One solution would be to mandate for more formalized agreements to follow up on original good faith statements of intent, bearing in mind that good faith may only have no much mileage. In the absence of corporate culture motivation this commodity may go only a short distance.

It is suggested that flawed Memoranda of Understanding between bodies, including those between prescribed bodies, be strengthened.

Perhaps a short period could be allowed for the terms of agreement to sink in before a more formal and more legally binding instrument replaces the MOU. Goodwill is not always enough. Some regulators because of corporate structure believe that they have no accountability. That needs to change if best practice regulatory benchmarking is envisaged.

General Regulatory Design

As noted in the Statement of Contentions, policy and regulatory design principles often fall short of optimal outcomes because of:

- complacency; deficient technical or legal understanding of the principles underpinning the processes and decisions made
- failure to keep up with community expectations and changing market and consumer needs;
- inadequate accountability parameters in place including accountability to the wider community (the taxpayer), coupled with sub-threshold commitment to embracing accountability principles as part of an organizational cultural attitude
- governance and leadership shortcomings;[552]
- compromised understanding of and adoption of best practice evaluation modeling and practices;[553]
- failure to adequate examine the internal market[554]
- failure to assess sustainability factors
- failure to balance allocative efficiency goals against moral and social values, principles and recognition that it is the responsibility of the community as a whole to address these factors and in particular protect the interests of those who may be inarticulate, and or vulnerable and/or disadvantaged; whilst at the same time recognizing the needs of other classes of consumers and market participants, including small businesses and their representatives.

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552 See best practice leadership principles and attributes

553 See best practice theory models for evaluation, which does not begin with assessment of information gathered, or at the information gathering stage; but rather as a first step strategic planning stage to determine desired outcomes, how these will be achieved at short-medium and long-term intervals; what and how data will be gathered and how longitudinal data gathering may help inform policies

554 See Appendix 10 (pp950-969) discussing some aspects of perceived failure to adequately assess the internal market and the extent to which competition in Victoria's gas and electricity retail markets may have failed the *"effectiveness"* test

- Inadequate risk mitigation strategies, which according to *Jamison et al* applies a set of institutional and financial instruments to make risks and rewards commensurate with each other, in order to enable good performance.[555]
- Failure to adopt sound price setting regimens *(Jamison et al* see ref below)
- Attempts by regulators to operate in vacuum conditions within the regulatory system
- *Jamison et al (2005)* suggest proper governmental checks and balances, including the judicial and legal systems, systems for regulating the financial sector; environmental policies; and the country's conflict resolution mechanisms; political system and relationships with other countries and with multilateral institutions
- Failure to adopt regulatory design within the regulatory system and the regulatory entity in ways that match the country's institutional endowment *(Jamison et al 2005)*
- Compromised belief and acceptance of operators, customers, foreign governments and multilateral organizations (such as The World Bank) that the regulatory agency is legitimate and capable *(Jamison et al 2005).*[556]

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555 Asian Development Bank, Japan Bank for International Cooperation, The World Bank, 2005, "Accountability and Risk Management," In *Connecting East Asia: A New Framework for Infrastructure*. c/f Jamison, M. A. et al (2005) in Mechanisms *to Mitigate Regulatory Risk in Private Infrastructure investment: A Survey of Literature*,. (For World Bank) Public Utility Research Centre, University of Florida
Note Jamison's theories are referred to in Attachment X providing headings only from the literature review cited. Jamison and co-authors believe that a regulator's ability and flexibility to institute policies that increase the predictability of cash flow for investors. Arguably, corruption levels and pro-poor mechanisms are frequently considered features of the regulatory design

556 Mark A. Jamison, 2005, *"Leadership and the Independent Regulator,"* Public Utility Research Center, University of Florida, Gainesville, Florida.
Mark Jamison as Director of the Public Utility Research Centre Florida, USA was one of the speakers at the Ninth ACCC regulatory Conference in Queensland
Dr. Jamison is the former associate director of Business and Economic Studies for the UF Center for International Business Education and Research and has served as special academic advisor to the chair of the Florida Governor's Internet task force and as president of the Transportation and Public Utilities Group
Previously, Dr. Jamison was manager of regulatory policy at Sprint, head of research for the Iowa Utilities Board, and communications economist for the Kansas Corporation Commission. He has served as chairperson of the National Association of Regulatory Utility Commissioners (NARUC) Staff Subcommittee on Communications, chairperson of the State Staff for the Federal/State Joint Conference on Open Network Architecture, and member of the State Staff for the Federal/State Joint Board on Separations. Dr. Jamison was also on the faculty of the NARUC Annual Regulatory Studies Program and other education programs

- For utilities *"unforeseen shock making existing utility policies ineffective counterproductive or even unsustainable" (Jamison et al) 2005).*
- An unsustainable regulatory system *(Jamison et al 2005)*
- Adverse outcomes from trade-offs between instruments that have conflicting effects, the dynamic process of policy development tradeoffs *(Jamison et al 2005)* (for example predictability and flexibility tensions)
- Failure of literary contributions to build on each other because of lack of access or availability (or time) *(Jamison et al 2005)*
- Lack of synergy in research political interference;
- Ineffective company internal controls and systems accompanied by audit panic because of in-house systems that need updating (PriceWaterhouseCooper – the Sarbanes-Oxley blues – see lyrics from song Sarbanes-Oxley blues *"oh for the days when the company director told me what to do")*[557]
- Level playing field issues; impacts of vertical integration and a host of other competition factors
- Unwillingness to challenge conventional ideas about the process of government and public sector management[558]
- Failure to adopt sound price setting regimens *(Jamison et al* see ref below)
- Attempts by regulators to operate in vacuum conditions within the regulatory system
- *Jamison et al (2005)* suggest proper governmental checks and balances, including the judicial and legal systems, systems for regulating the financial sector; environmental policies; and the country's conflict resolution mechanisms; political system and relationships with other countries and with multilateral institutions
- Failure to adopt regulatory design within the regulatory system and the regulatory entity in ways that match the country's institutional endowment *(Jamison et al 2005)*

Dr. Jamison serves on the editorial board of *Utilities Policy*. He is also a referee/reviewer for the *International Journal of Industrial Organization*, *The Information Society*, *Telecommunications Policy*, and *Utilities Policy.*

[557] Section 404 of the Sarbanes-Oxley Act, which requires chief executives and chief financial officers to certify the adequacy of their internal controls. Then outside auditors must attest to that opinion
The idea is to find problems while there is still time to fix them without getting a bad audit report
See also The Pentana Audit Work System (PAWS) risk management software corporate governance

[558] See for example University of Melbourne Public Policy Teaching Program

- Compromised belief and acceptance of operators, customers, foreign governments and multilateral organizations (such as The World Bank) that the regulatory agency is legitimate and capable *(Jamison et al 2005).* [559]
- For utilities *"unforeseen shock making existing utility policies ineffective, counterproductive, or even unsustainable" (Jamison et al), 2005).*
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- political interference;
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See also The Pentana Audit Work System (PAWS) risk management software corporate governance

- Level playing field issues; impacts of vertical integration and a host of other competition factors
- Unwillingness to challenge conventional ideas about the process of government and public sector management[561]

These specific remedies are suggested in addressing some of these shortfalls

In relation to complacency; deficient technical or legal understanding of the principles underpinning the processes and decisions made

- make sure that adequate training, up-skilling and proper support is offered to those responsible for decision-making
- make sure that complacency is addressed in a variety of ways, including pro-active corporate culture re adjustment through training; persuasive techniques; re- recruitment through attritional means; improved recruitment techniques; enhanced leadership techniques

Recommendations:

In relation failure to keep up with community expectations and changing market and consumer needs:

- Enhance public consultative processes
- Follow best practice stakeholder consultative
- Adopt evidence-based practices and avoid decision-making based on generalizations and extrapolations;
- Increase skepticism about rosy-self-perception of performance parameters. It is not always good enough to *"conceal"* gross regulatory inadequacy by "averaging" techniques. Lack of data can also skew results
- Insist on the most stringent parameters of transparency and accountability; review efficacy of parameters adopted every 3-5 years

[561] See for example University of Melbourne Public Policy Teaching Program

- Gain a thorough understanding of evaluative processes in order to structure from scratch theoretical benchmarking criteria, regardless of the absence of data at the outset
- Re-evaluate evaluative processes on a regular basis
- Adopt "listening ear" techniques
- Seek to enhance possibilities for "stitch-in-time" stakeholder input regardless of whether the narrow terms of any particular review or intervention allows for extraneous material
- Pro-actively invite stakeholder input by regular invitation to identify areas of concern regardless of current project parameters
- Adopt strategies that involve all stakeholder inputs that are not restricted to 'expert" viewpoints
- Enhance understanding of the complexities of behavioural economics

In relation to inadequate accountability parameters in place, coupled with sub-threshold commitment to embracing accountability principles as part of an organizational cultural attitude:

- Legislate to ensure that accountability parameters are no longer blurred
- Close legislative loopholes; enhance strength of MOUs; insist on contractual agreements following adoption of MOU's as statements of intent
- Enhance powers of State Ombudsmen

In relation to gaps in governance and leadership shortcomings:[562]

1. Refer to Section X
2. Enhance recruitment strategies
3. Provide opportunities for up-skilling and professional development

[562] See best practice leadership principles and attributes

Recommendation

In relation to compromised understanding of and adoption of best practice evaluation modeling and practices;[563]

Refer to collation of evaluation best practice models

Recommendation

In relation to failure to adequate examine the internal market[564]

Refer to checklist of gaps in internal market assessment (energy) by the AEMC in relation to effectiveness of retail competition in the gas and electricity retail markets in Victoria (similar parameters for South Australia allowing for jurisdictional differences)

Recommendations

Other parameters

In 2004 in a Submission to the Productivity Commission, a joint submission by VCOSS, Brotherhood of St Laurence and the University of Melbourne Centre for Public Policy made a submission to the Review of National Competition Policy arrangements.[565]

I support the recommendations made in that submission included:

Assisting and working with those who experience disadvantage in community based ways

- Developing and piloting innovative programs
- Advocating on behalf of and with those who are vulnerable and / or who experience social, economic and cultural disadvantage without fear of government reprisals.
- Creating deliberative forums

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563 See best practice theory models for evaluation, which does not begin with assessment of information gathered, or at the information gathering stage; but rather as a first step strategic planning stage to determine desired outcomes, how these will be achieved at short-medium and long-term intervals; what and how data will be gathered and how longitudinal data gathering may help inform policies

564 See Appendix 10 (pp950-969) discussing some aspects of perceived failure to adequately assess the internal market and the extent to which competition in Victoria's gas and electricity retail markets may have failed the *"effectiveness"* test

565 Joint Submission, VCOSS, Brotherhood of St Laurnce, Centre for Public Policy, University of Melbourne, to Productivity Commission's Review of national Competition Policy Arrangements

- Representing those who are vulnerable and/or experience disadvantage or marginalization that otherwise have no public voice
- Providing opportunities for those most affected by governmental decisions to be involved in policy formation and evaluation
- Providing an effective channel for consultation and engagement with communities
- Contributing to ensuring governments are accountable to the wider community
- Counterbalancing the influence of corporate organizations over government decision making

Public Interest Test

The Public Interest Test is one of the focal points of the joint submission mentioned above, and speaks of encompassing a broader definition of sustainability – incorporating social, environmental, cultural and economic sustainability, apart from such issues as climate change.

Social cohesion and the contribution of social organizations and their values are discussed by the submission partners.

I referred to these in my submission to the Productivity Commission subdr242part1 and examined in some detail the findings of the Senate Select Committee of 2000 *"Riding the Waves of Change."*

Beyond the extremely valuable contribution made and available to be made to public policy by community organizations, particularly those with a client base, I also support the value of seeking other inputs from a wide range of stakeholders who have direct experience if how public policy affects them and those nearest to them.

CHOICE (ACA) has supported combined administration of competition and consumer policy. The existence of the first Federal Minister for Competition Policy and Consumer Affairs (The Hon Chris Bowen) demonstrates that this philosophy has been upheld.

Porras (2001)[566] in his presentation to the European Commission on behalf of the Directorate General for Energy and transport posed the vexing question is

> *"Should consumer policy be administered separately from competition policy or should institutional arrangements reflect the synergies between the two?"*[567]

Refer to the Directive 96/92/EC of the European Parliament and of the Council of 1996-12-19 concerning common rules for the internal market in electricity, has made significant contributions towards the creation of an internal market for electricity. Experience in implementing this Directive shows the benefits that may result from the internal market in electricity, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness.

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566 At the 2001 European Commission of Energy Regulators Milan Seminar and the presentation by Bonifacio Garcia Porras, Unit Internal Market[566] on behalf of the Directorate General for Energy and Transport.

567 The issue is synergies has been a contentious one, though at present this model has been recommended

Industry-specific Complaints Redress

Structure and administrative law coverage

- That the overall structure of these schemes and their scope, training, skills, jurisdictional limitations and real rather than apparent levels of independent decision-making, have significant implications for regulatory policy making and therefore cannot be taken in isolation from regulatory design.

I quote from Professor Luke Nottage's submission 114 to the Productivity Commission's Review of Australia's Consumer Policy Review

> *"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.*
>
> *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."*

The current structure and accountability parameters of industry-specific complaints schemes generally. in a *"bourgeoning industry"* appears to be such that in addition to more general concerns about the structure of industry-specific complaints schemes; the current legal structure of such schemes gives rise to perceptions of unaccountability. In particular, grey areas of accountability under administrative law necessitate third party accountability through economic regulators (who also believes that is externally unaccountable); or through a statutory authority with overseeing responsibilities only.

An example cited in this submission is Victoria's energy-specific complaints scheme EWOV who is adamant about its independence and alleged unaccountability (because of legal structure and support in this perception from its so-called overseeing entity VESC).

It seems that EWOV has the right to commission feasibility study about expansion of role for example without publishing results that would help inform public policy decisions (see for example small scale licencing and EWOV's response to the VESC SSSL Review discussed elsewhere).

Whose interests were EWOV representing in taking such a stance and how does it balance its perceived conflicts of interest?

- The general community?
- End-users of utilities whether or not actually receiving energy to their respective premises?
- Landlords/Owners' Corporations? Small Scale Licencees?
- The overseeing entity the current energy regulator (state or federal)?
- Their own legal identity and more insular interests in case of litigation because of the scope for them to be sue and be in their own right?
- The politicians of the day?
- How many years will the energy debacle continue without appropriate intervention in terms of complaints redress and energy policy generally?
- What lessons have been learned?

The current structure of industry-specific complaints schemes may often be falling short of community expectation in terms of standards and scope of provision.

The current structure of industry-specific complaints schemes have jurisdictional powers that are exceptionally limited; with policy matters tariffs and a host of issues entirely outside their scope; their binding powers are even more limited, with binding decisions obtainable only with the participant's agreement, which is rarely obtained. There have been a total of 36 decisions in 12 years, and none during the past six years.

There may be 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.

See full discussion elsewhere in Part 1, 2A and 3 (PC)

The issues of independence, structure, governance, funding and desirable separation from industry-specific regulatory control are more political issues that are outside of EWOV's powers to determine. I have discussed some of these issues in considerable detail in previous submissions to the Productivity Commission, with both open and privileged information in support. Please refer to subdr242part4 and subdr242part5 and to all reference to complaints management within this Component submission, tailored for the energy arenas but also of relevance to the PC in the context of the current Regulatory Benchmarking Project

Complaints management needs to be reviewed. The excessively close relationship between complaints handling schemes and regulators, and the funding and management structure of these schemes does not afford sufficient independence of jurisdictional power; decision-making; objectivity in the perception of many. case and those like it.

Please refer to extensive discussion about complaints management detailed in a particular case study of both the substantive issues of complaint which included components within and outside EWOV's jurisdiction; and further detailed discussion of the Federal Benchmarks that are mandated under s36 of the *GIA* and s28 of the *EIA* in terms of co-regulatory industry-specific complaints handling requirements. More timely referral to appropriate bodies for those issues outside jurisdiction or too complex for the skills and knowledge base of EWOV complaints handling staff would have been a more efficient way to handle that

Contrary to popular beliefs, these Federal Benchmarks are not optional or simply desirable, they are mandated. It was not my direct experience that these benchmarks were met in a complaint that was held open for 18 months, barely addressed without any positive end-outcomes from anyone's viewpoint.

Though I concede that there were many external factors, including soaring of complaints figures for a variety of reasons outside of EWOV's control; staff attrition and requirements for re-training were challenges presented to EWOV in complaints management during 2007 and 2008, the fact of the matter is that much room exists for streamlining of process; staff recruitment; skilling. The VESC's assessment of complaints figures in their latest compliance report dated 10 October 2008 appears to minimize the extent of complaints. The figures speak for themselves and are published in EWOV's Resolution 26 Report of September 2008

It is my considered view that whilst it is most important for a jurisdictional or national peak body for consumer protection to be actively involved in ensuring that strategies and approaches used are consistent with adequate levels of consumer protection and that effective reciprocal consultation takes place between such prescribed bodies and any other entity however structured; the potential for problems arise when funding is provided by the prescribed consumer protection body in terms of defensiveness if there are concerns expressed about the efficacy of the operations of the complaints scheme delegated with the responsibility of fielding all complaints.

Please see all other recommendations and supporting material to obtain a clearer picture of how and why regulatory benchmarking may be long overdue not merely in the efforts to achieve best practice national consistency between jurisdictions and regulatory practice, but because a well-functioning market needs to be well-oiled with responsible, strategically planned regulation that has an eye to the future whilst addressing current needs and attempting to respond to community expectation.

Whilst the CAV once directly dealt with energy-specific complaints regarding the conduct of suppliers of energy they no longer field such complaints, claiming, as does the VESC that EWOV is "set-up" to handling such matters. Therefore it is left entirely up to the discretion of a co-regulatory body run, funded and managed by industry participants to decide which issues should be referred.

Frequently systemic issues are not appropriately reported to other bodies where they should be. Frequently the skills or tools may be lacking in identifying such issues; or else there may be political or other motivations to suppress such reporting and action. At any rate the EAG in its disturbing Retailer-Non-Compliance Report of 2004 cited elsewhere found that for both EWOV and the EAG systemic reporting, accountability in record keeping and transparency and compliance enforcement represented significant concerns. It is my firm belief that not much as changed since then

If anything organizational cultural attitudes to proper exposure of market failure, other deficiencies and general compliance may have become slacker, rather than improved

Nothing short of a government-managed body that is independently funded, at least adequately governed, with measurable accountability parameters would meet community expectations. Political and funding issues may serve as impediments in the short medium and even long terms.

However, given the nature of essential services and the history of recurrent problems impacting on the industry, it surely cannot be too soon to revisit the history to see what lessons can be learned from what has not worked to date.

The trends identified by EWOV in increased complaints including billing, marketing conduct and disconnection issues should be taken very seriously especially in a climate where full deregulation is months away and likely to be prematurely declared justifiable.

I remain concerned about the all of the views expressed by the EAG in their submission to the 2006 Legislative Package and repeat these in particular

Naming conventions for industry-specific complaints schemes

The public deserves to know more transparently 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. The presumption of public gullabilit7 is no excuse either.

The public may gain an erroneous impression through repeated use of the term *"independent"* when this merely applies to legal identify structure (corporate re-badging), but to the degree of true independent decision-making without regulatory or policy-maker intervention on most matters

Such schemes are normally under regulator thumb and are set up ender 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.

Recommendation

Revert to calling a rose by its name and be more transparent about the nature and limitations of industry-specific complaints schemes commonly but misleadingly known as *"ombudsmen."*

It is a mistake to give the public such little credit. The persistence with calling these schemes "ombudsmen" will not restore public confidence.

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. They are hardly *"ombudsdmen;"* hardly have their experience, training or status in public perception; and should never be permitted to use a term so misleading in its application.

Recommendation

Consideration should be given to bringing these schemes under the umbrella of administrative law at commonwealth and jurisdictional levels through revised legislation since:

> *"the Courts have not given us a clear ruling on such a hugely busy dispute resolution sector; legislative intervention is necessary here too*[568]

Comment

Standards of service delivery and training – industry-specific complaints schemes

Despite the growing number of consumers ….*likely to turn to the burgeoning industry-association based "ombudsman" dispute resolution scheme, (these schemes) are not designed to efficiently aggregate collective interests*

Industry-specific complaints schemes are not designed to efficiently aggregate collective interests[569]

I refer to and quote again to Professor Luke Nottage's[570] concerns in original May submission to the Productivity Commission's Issues Paper and attached also to his submission to the PC Draft Report[571]

> *"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.*

Industry-specific complaints schemes often appear to be have sub-optimal resources unable to meet demands in timely manner or to evaluate complex complaints that cross several jurisdictions (for example the bulk hot water arrangements and small scale licencing framework issues)

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568 Nottage, Prof Luke, Sydney University Submission 114 to Productivity Commission's Review of Australia's Consumer Policy Framework

569 Ibid Luke Nottage, 114 to PC

570 Associate Professor University of Sydney Co-Director Australian Network for Japanese Law

571 Nottage, Luke (2007) and (2008), Submissions to Productivity Commission's Issues Paper and Draft Reports respectively Australia's Consumer Policy Framework. SUB114

Whilst many complaints handlers have gained experience in hardship matters, even when outcomes are achievable by agreement between the parties through the intervention of such a scheme, in the case of EWOV, it is frequently the case that the terms of such agreements for repayment of debt by installment plan place end-users of utilities in spiraling debt because of unaffordable installment plans. Therefore community obligations in terms of effective hardship programs are not normally met in terms of optimal outcomes. See for example Andrea Sharam's *Power Market and Exclusions* cited elsewhere and Energy Action Group's disturbing 2004 ESC-EWOV Retailer Non-Compliance Report reproduced in its entirety as an appendix and discussed elsewhere.

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Training support, up-skilling and knowledge base can often be deficient in relation to both energy-specific and non-energy-specific provisions that need to be taken into account in decision-making.

The high turnover of staff in such schemes for a variety of reasons limits continuity of case management.

It is not uncommon for complaints to take months to resolve. Delays are conveniently concealed in reporting data (EWOV Resolution Reports) by merely referring to complaints that took longer than 3 months to resolve or close. Reliance may be placed on attrition rates and withdrawals because of delays.

In the case of those with hardship issues, perhaps they move on to professional financial counsellors; perhaps they just fail to thrive because of suspension of essential services.

Inadequate checks and balances make proper assessment of detriments impossible to evaluate.

In the case study cited it was 18 months before the books were closed on a complaint that was not resolved in any way to the satisfaction of any of the parties involved, despite protracted input by the overseeing entity Essential Services Commission. That matter was doubly complicated by policy provisions (bulk hot water arrangements) that made resolution extremely difficult because of the attitude of policy-makers and/or regulators defending policies that appear to be legally and technically unsustainable and in contravention of the explicit requirement to avoid regulatory overlap and conflict with other schemes. This forms a substantial focus in Component submission 2A which in a more abbreviated form is already published on the VESC website as part of his 2008 regulatory review.

The case study is cited and attached to both Part 2A and Part 3, the latter dealing more generally with deficiencies in complaints handling

Regulations that have failed to take into account the requirement to avoid regulatory overlap with other schemes create problems in complaints handling, besides lack of adequate levels of knowledge and understanding of other schemes and the rights of individuals under those schemes. The Bulk hot Water arrangements are a classic example, and the Small Scale Licencing provisions another.

Despite EWOV's extreme reluctance to be allocated dispute resolution responsibility for small scale licencing for reasons that included complexity and overlap with other schemes; staffing levels; and possible conflicts of interests (fairness to existing members; small scale licencees and the public at large), the Victorian regulator has insisted that EWOV assume more responsibility than they appear to be either willing or able to take on.

This is yet another example of deficiencies in decision-making and complaints handling structure.

It also means that accountabilities become blurred and no single body takes overall charge of progressing matters of redress that belong to more than one regulatory arena.

This supports the view that regulatory overlap and conflict with other schemes should be specifically forbidden and that the written laws must also be taken into account

Overall recommendation – industry-specific complaints schemes

There is much to be considered in terms of how industry-specific complaints schemes could be better structured and funded, even if they retain current structures can be better governed collectively and preferably away from regulatory control and industry-funding

These schemes should be named External Industry-Specific Complaints Scheme not Ombudsman

They are not strictly alternative dispute resolution; do not mediate or arbitrate; binding powers are unilateral; only with participant agreement – and extremely rarely obtained in a limited number of case types. To confuse the type of case handling offered by these schemes with those that are professionally managed ADR services is to lump all types of redress together without proper understanding of what is on offer. This was discussed in my submission subdr242part4 and subdr242part5, many components of which will appear in Part 3 to this submission to the PC including case studies to illustrate the points made

Standards of service can be greatly improved with better skilling within the industries covered and beyond since market participants must obey all laws and provisions and regulatory overlap when it does exist creates specialized challenging problems currently not well understood or addressed by either complaints schemes or by their overseeing regulators under the current structures.

Further Complaints Management; advocacy and benchmarking issues

Consumer redress and advocacy issues as contained in body of this submission and elsewhere in the recommendation section

On the topic of regulatory determinations, it is of real concern, as observed by EAG that

> *"….a number of Australian regulators bias their determinations in favour of the regulated entity to minimize the risk of appeals. To reiterate: if Section 291 (1) remains in the draft legislation no consumer who assesses the risk involved in this section will wish to appeal a determination. So the current legal appeals paradigm where the industry applicant vs the regulator appeals process will continue, this process provides a tilted playing field towards the applicant providing substantial rewards to ensure that asymmetric appeals against the regulator will continue into the future. Unfortunately this process has already set a number of precedents that will need to be overturned in the future by another legislative package (p13 EAG submission to MCE 2006 Legislative Package)*

EAG has raised a number of legitimate concerns about how the market is functioning, not only in connection with advocacy, redress, funding, research and access issues, but also to the principle of exclusionary policies that fail to include all agendas and all components of the market requiring protection, "capacity building" effective inter-body communication and an attitude of openness to receiving inputs from sources other than formal community organizations. I cite again the views of David Tennant concerning grounding theories in his speech at the 2006 National Consumer Congress. Advocacy that is not based on membership or that is grounded with consumers and their views can be ineffective and even dangerous. I have discussed some of this in my submission to the Productivity Commission's Review of Australia's Consumer Policy Framework subdr242part4

For all of these reasons and beyond, regulatory changes that will include vastly improved nationalized consumer protection, beyond merely identifying contractual responsibilities as proposed in the NECF Table of Recommendations is highly desirable.

EAG has suggested that "*There is also a strong relationship between information disclosure requirements and the form of regulation. If the information disclosure requirements are weak then informed consumers will have little faith in the regulatory regime.*" Therefore enhanced information disclosure is required.

Enhanced information disclosure seems to be indicated. In relation to the BWH arrangements the proposal to make cosmetic Repeal of the BHW arrangements and transfer of segments to the Energy retail Code may make certain matters less transparent, including the rationale and basis for rule-of-thumb pragmatic derived cost solutions employed and associated trade measurement practices and contractual implications. It has been proposed that the introduction, purpose and authority, as well as the Appendices and explanatory notes associated with the BWH provisions be altogether repealed. Whilst there may be room for better clarity it cannot be in the public interest to remove altogether explanations as to how derived costs are arrived at and what the original rationale was for the adoption of these (other) provisions and the implications of employing existing trade measurement practices. As to the rationale for imposition by energy contractual status on end-users of heated water reticulated in water pipes, this submission focuses on the poor reasoning that has dictated the adoption of these practices that are seen to be legally and technically unsound in every respect, besides the discussed regulatory overlap considerations.

Recommendations by the EAG include that if consumers are to have any faith in the AER/AEMC regulatory arrangements then the AER needs to develop a skill set and a quality control regime to examine a range of NEM and gas market practices and procedures over time.

As a further precaution EAG suggests that the MCE require that the AER provide resources for a non legislated trial period of time (say three years), where any valid comments made by consumers about deficiencies, oversight or poor behaviour by market participants are investigated and publicly reported on a regular basis (say half yearly) by the AER over the funded period.

EAG has expressed *"a number of important reservations around implementation of the regulatory accounting guidelines approach under the Australian light handed incentive regulation. The various jurisdictional regulators, ESC (V), IPART and the ACCC, have had considerable difficulties in developing a common data set to compare information across two regulatory cycles. This problem makes it very difficult to compare regulatory determinations. It is almost impossible to compare the two ACCC Transgrid transmission determinations or the 1999 and 2005 ESC of V Electricity Distribution pricing determinations."*

In this regard has suggested that one of the objectives of the MCE SCO Legislative Package should be the development of data sets that allow the assessment of the effectiveness of the regulatory regime

Regarding more effective consultative processes and record-keeping I have made some simple suggestions on how things can be improved, particularly at jurisdictional level. Most of the practices are already in place at federal level for most agencies running consultative initiatives.

Legislative Package also included in its entirety with Appendix 1[572] as an Appendix to this submission.

Extract from WAG (2004) Submission to MCE SCO 2006 Legislative Package

> *If consumers are to have any faith in the AER/AEMC regulatory arrangements then the AER needs to develop a skill set and a quality control regime to examine a range of NEM and gas market practices and procedures over time.*
>
> *As a further precaution EAG suggests that the MCE require that the AER provide resources for a non legislated trial period of time (say three years), where any valid comments made by consumers about deficiencies, oversight or poor behaviour by market participants are investigated and publicly reported on a regular basis (say half yearly) by the AER over the funded period.*
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>
> *One of the objectives of the legislative package should be the development of data sets that allow the assessment of the effectiveness of the regulatory regime.*

[572] Appendix 1 is the EAG (2004) Essential Services Commission Energy and Water Ombudsman Retailer Non-Compliance Report prepared after FOI access to records. It deals with governance, accountability, transparency and proper identification and reporting of system issues, seen to be a weakness of the current regulatory regime. It is highly pertinent to many of the issues raised in this submission, and should be read in the light of the case studies in the appendices in part 2A

Consultative Processes

The quality of consultative processes is sub-standard in most arenas

Please refer to specific recommendations in dedicated section

A consistent viewpoint expressed by stakeholders generally is the lack of meaningful consultation, including poorly planned timelines, disclosure and a true commitment to considering opinions and input

Another real concern is the manner in which numerous inter-related decisions are made in isolation without satisfactory coordination or strategic planning using the SMART principles or robust evaluative strategies representing best practices. This refers to nearly all arenas.

I cite below from a 2005 letter from EAG to the MCE Market Reform Team regarding NEM Rules and National Electricity Law.[573] Failure to consult with stakeholders in an appropriate way has resulted in an expression of outrage. Other stakeholders have been more polite, but continue to express disappointment at the poor levels of meaningful consultation in all energy arenas where changes and reforms are being considered.

> *The EAG would like to express outrage about the timeframes for, and timing of, public/stakeholder consultation. EAG believe there are major issues of substance and not just process that need to be addressed in the new NEL/NERs. We strongly recommend that more work and public discussion needs to occur before they are finalised and enacted. The holiday months of December and January (for most of government and industry) are not the time to be 'tackling' these crucial reforms.*
>
> *EAG is distressed to see that the current draft NEL/NER legislation fails to address several significant issues like Merits Review in the package. The SCO has failed to show why we only have the current incomplete package when with some more time (at least 6 months) we could have a complete reform package. At this stage there is an implicit "Trust Us Approach" EAG doesn't!*

[573] EAG (2005) Submission to Ministerial Council on Energy Market Reform Team re EAG Initial Submission on National Electricity Law & National Electricity Rules Found at *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroupNELsubmission20050105111827.pdf*

There have been published criticisms about consultation within the NEM and again gaps in decision-making processes for many inter-related decisions. These are not discussed here in detail.

As far back as 2005, in their submission to the National Energy Market Branch of the Department of Industry, Tourism and Resources, the Energy Action Group (EAG)[574] had observed that

> *"Prudent regulatory and parliamentary practice requires either adequate time for affected parties to fully assess and consider proposed regulatory amendments."*

Alternatively EAG suggested that *"regulatory impact statements"* (RIS) be made available to assist affected parties quickly to understand the affects of the proposed changes."

This is from Robin Eckermann Principal, Eckermann & Associates, Adjunct Professor (Network/Communication Technologies), University of Canberra[575] regarding the smart meter rollout:

> *I appreciate the pressure to meet tight deadlines – and recognise the possibility that this submission will be set aside because it does not conform to the relatively specific guidelines within which feedback has been invited. However, in the words of Lord Chesterfield "Whoever is in a hurry shows that the thing he is about is too big for him." There is no better time than right now to pause and check that nationally we are setting our sights on the right goals.*

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574 Submission to Department of Industry Tourism and Resources *"EAG Initial Submission on National Electricity Law and National Electricity Rules"* 5 January 2005

575 Eckermann, Robin (2007) Principal, Eckermann & Associates, and Adjunct Professor (Network/Communication Technologies), University of Canberra Found at *http://www.mce.gov.au/assets/documents/mceinternet/Eckermann%5Fand%5FAssociates20071119104053%2Epdf*

The health of the planet that we will leave to our children and to our grandchildren depends on seizing every opportunity – especially the big ones such as are on offer through the overhaul of ageing electricity supply networks.

Elsewhere I have discussed my dissatisfaction with the consultative processes adopted by the Essential Services Commission and attitude to robust disclosure of certain deliberative and other documentation. I am concerned also about policies that are exclusive to consumer consultative committees where Working Papers and Issues Papers are not published online for all stakeholder input in stages as these are formulated. For example in the current regulators review neither the May Issues Paper nor the Working Papers have appeared at all, yet the Draft Decision has been published with some inputs from stakeholders

SOME GENERAL CONSULTATIVE PRINCIPLES AND RECOMMENDATIONS

To achieve national consistency ensure that all agencies, complaints schemes, regulators, and other entities offer web facilities whereby stakeholder registration for email alerts is possible and that each and every change or update or submission is notified to registered interested parties on an automatic email list (such as that used by ACCC, AER, MCE, Productivity Commission)

Adopt a corporate cultural attitude of transparency and disclosure

Provide timely notice of future consultative processes, proactively seeking the input of all known stakeholders and making sure that consultative processes and public meetings are advertised openly also in a transparent way.

Three weeks to a month is far too short. many deadlines fall concurrently and may be of interest to the small number of stakeholder participants involved

Provide opportunities for stakeholders to make *"stitch in time"* direct submissions outside of consultative processes as issues arise.

This will enable more careful consideration of matters in timescales that are convenient for stakeholders, and can be set aside as matters for future agendas. This can easily be achieved by inviting suggestions or concerns using a generic website address for such matters.

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

Publish Working Paper outcomes for further public input

Publish online all Issues Papers in a timely manner – even four weeks is often insufficient especially where overlapping dates for different arenas occur. Coordination of deadlines between arenas would make a big difference and would require governance in the planning of these.

Publish online all Consultants Reports in a timely manner, at the outset of a consultative period not a few days before responses are due

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

Adhere to the principles of consistency with legislation current and proposed[576]

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

Adhere to principles of avoidance of regulatory overlap with other schemes and the provisions within the unwritten laws, including the rules of natural and social justice[577]

Where possible use a standardized template for tables for recommendation, using similar terminology and layout for both jurisdictional and federal purposes. This may mean that a single form or single set of headings may be used where there is overlap. For example, if the issue is obligation to supply, the matching jurisdictional provisions should use the same terminology. With creative adaption and collaboration, the same Table of Recommendations template form may be useable in both arenas so that burdens on stakeholders are reduced.

Collaborate with federal timetabling for stakeholder responses to consultations to minimize burdens on stakeholders so that clashes in deadline burdens are minimized. It is unreasonable to expect stakeholders to read what may be hundreds of pages and commissioned consultant reports for two arenas with similar deadlines aiming.

Adopt a proactive referral stance in relation to referrals to the Victorian Government (CAV) or ACCC in relation to breaches of the *FTA* and *TPA*.[578] The VESC needs to recognize his information gathering powers, as contained within the *ESC Act* and in retail licences and not simply rely on EWOV as the sole body through which complaints investigation may be handled.[579] Weak compliance enforcement commitment does not provide consumer protection or confidence. Compromised consumer confidence means compromised consumer protection

Madeleine Kingston

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

578 See for example the governance model suggested by EWOV in 2003 regarding the role of the Market Code Advisory Committee cited elsewhere with the flow chart. Submission by EWOV to Review of MCAC November 2003

579 It is in fact a breach of human rights to mandate for conciliation. EWOV is a conciliatory co-regulatory complaints scheme run funded and managed by industry participants, but also significantly accountable to the VESC under the terms of their Charter (Jurisdictions) and Constitution, as published on their website. They were set up under enactments administered by the VESC and DPI, and have mandated requirements to abide by the *Federal Benchmarks for Industry-Specific Complaints Handling*. Such expectations should be incorporated into the new consumer protection laws applicable to whichever body is responsible for complaints handling.

EVALUATION ISSUES

Some best practice evaluation principles are incorporated in the body of this submission and are suggested parameters to consider

These suggestions are not repeated here

LEADERSHIP ISSUES

Some best practice leadership are incorporated in the body of this submission and are suggested parameters to consider

These suggestions are not repeated here

STRATEGIC PLANNING

Some examples of incomplete assessment of markets may have lead to premature or incurrent conclusions because of poor strategic planning, paucity of data and generally poor understanding for the need to examine inter-related decisions in a more coordinated way.

I draw attention particularly to the perceived gaps in the assessment of the internal energy market at the time of reviewing the effectiveness of competition in the gas and electricity markets in Victoria, with similar possible gaps for South Australia. These Reviews were undertaken by the AEMC.

I urge re-consideration of all of these matters.

I refer to the hasty decision made for the Victorian advanced metering roll out. I discuss this issue, pre-payment metering, and small scale licencing issues, as well as the bulk hot water arrangements in considerable detail in Part 2A.

Enhanced skilling in evaluative methodology and data collection appears to be indicated across the board with the aim of improving regulatory decision-making.

Please refer to various discussions in the body of this submission about accountability and transparency principles that are worth adopting.

PUBLIC INTEREST ISSUES

I call attention again to numerous public interest issues highlighted in this submission and in the submissions of many others over time, including during the PC's Review of Australia's Consumer Policy Framework

For reinforcement I highlight a few of these, and refer back to the findings of the Senate Select Committee of 2000 "Riding the Waves of Changes.

Is this Third Wave any different?

Have we progressed far.

We reappear on a regular basis to examine flaws in the operation of the energy market.

There are some legitimate questions to ask as to whether the tail is wagging the dog.

The issues of Federalism and Anti-Federalism discussed briefly elsewhere are pertinent also

Other parameters

In 2004 in a Submission to the Productivity Commission, a joint submission by VCOSS, Brotherhood of St Laurence and the University of Melbourne Centre for Public Policy made a submission to the Review of National Competition Policy arrangements.[580]

I support the recommendations made in that submission included:

Assisting and working with those who experience disadvantage in community based ways

- Developing and piloting innovative programs
- Advocating on behalf of and with those who are vulnerable and / or who experience social, economic and cultural disadvantage without fear of government reprisals.
- Creating deliberative forums
- Representing those who are vulnerable and / or experience disadvantage or marginalization that otherwise have no public voice
- Providing opportunities for those most affected by governmental decisions to be involved in policy formation and evaluation
- Providing an effective channel for consultation and engagement with communities
- Contributing to ensuring governments are accountable to the wider community

[580] Joint Submission, VCOSS, Brotherhood of St Laurnce, Centre for Public Policy, University of Melbourne, to Productivity Commission's Review of national Competition Policy Arrangements

- Counterbalancing the influence of corporate organizations over government decision making

Public Interest Test

The Public Interest Test is one of the focal points of the joint submission mentioned above, and speaks of encompassing a broader definition of sustainability – incorporating social, environmental, cultural and economic sustainability, apart from such issues as climate change.

Social cohesion and the contribution of social organizations and their values are discussed by the submission partners.

I referred to these in my submission to the Productivity Commission subdr242part1 and examined in some detail the findings of the Senate Select Committee of 2000 *"Riding the Waves of Change."*

Beyond the extremely valuable contribution made and available to be made to public policy by community organizations, particularly those with a client base, I also support the value of seeking other inputs from a wide range of stakeholders who have direct experience if how public policy affects them and those nearest to them.

CHOICE (ACA) has supported combined administration of competition and consumer policy. The existence of the first Federal Minister for Competition Policy and Consumer Affairs (The Hon Chris Bowen) demonstrates that this philosophy has been upheld.

Porras (2001) in his presentation to the European Commission on behalf of the Directorate General for Energy and transport posed the vexing question is

"Should consumer policy be administered separately from competition policy or should institutional arrangements reflect the synergies between the two?"[581]

I refer to the Directive 96/92/EC of the European Parliament and of the Council of 1996-12-19 concerning common rules for the internal market in electricity, has made significant contributions towards the creation of an internal market for electricity. Experience in implementing this Directive shows the benefits that may result from the internal market in electricity, in terms of efficiency gains, price reductions, higher standards of service and increased competitiveness.

[581] The issue is synergies has been a contentious one, though at present this model has been recommended

SOME MORE NARROWLY FOCUSSED STATEMENTS OF CONTENTION AND RECOMMENDATIONS – ENERGY RELATED

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

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

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

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

Apart from the deemed provisions, existing and proposed jurisdictional contractual arrangements and trade measurement practices for *"delivery of bulk gas hot water"* or *"delivery of bulk electric hot water"* (BHW) are inconsistent with all other existing energy legislation and other provisions for the supply of energy facilitating flow of energy to premises using a distribution method as contained within the *GIA* and *EIA*.[582]

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

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

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

Use of *gas service pipes* or *transmission pipelines* facilitating the flow of gas in effecting the alleged distribution of gas conveyed in gas service pipes, transmission pipes; or for electricity, as conducted by electrical lines

Use of a *gas fitting* to the premises in question, including a gas meter as defined within the *GIA* as shown below

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

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

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

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

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

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

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

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

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

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

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

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

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

Gas supply through the physical connection of gas from the distribution network to allow *the flow of energy between the network and the premises of end-users as occupants of flats and apartments* [583]

this means supply of gas using a supply point/supply address (synonymous technical terms denoting connection not the living space of an occupier's abode); or alternatively a transmission pipe connecting a network to the said premises (of individual occupants in multi-tenanted dwellings receiving BHW heated in a communal tank delivered in water service pipes).[584]

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

584 A single supply point/supply address is on common property infrastructure

Gas supply as defined under the *GIA* place as defined under the *GIA*[585] applying the definitions of *"customer;" "gas distribution company";*[586] *"distribute" "transmission"; "service pipe"* "*transmission pipeline"; apparatus and works;" "meter" (facilitating flow of gas; capable of measuring gas volume consumption)*[587]

Gas supply through the *"physical connection that is directly activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energization' of the connection)*[588]

Gas supply through facilitation of the *flow of gas (or electricity) between the network and the premises through the connection; and services relating to the delivery of energy to the (alleged) customer's premises, using a gas fitting that "includes meter, pipeline, burner, fitting, appliance and apparatus used in connection with the consumption of gas"*[589]

Connect in the ERC and in the proposed NECF means

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

(b) for gas, the joining of a ***natural gas installation*** *to a distribution system* ***supply point*** *to allow the flow of gas.*[590]

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

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

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585 *Gas Industry Act 2001* Version v36, No. 31 of 2001 with amendments to 25 July 2008 *http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/95c43dd4eac71a68ca256dde00056e7b/B68DAB67BC7D91C2CA257490007EEE15/$FILE/01-31a036.doc*

586 *"gas company"* means a gas distribution company, a gas retailer or a gas transmission company; *"gas distribution company"* means a person who holds a licence to provide services by means of a distribution pipeline; Both definitions are from the *GIA* v36 above

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

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

589 Definitions, *Gas Industry Act 2001*, v36, No 31 of 2001

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

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

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

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

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

Gas supply under the meaning applied in the GIA for supply and sale contract[591] – applicable to gas provision through the gas distribution system or gas transmission system involving a physical connection permitted the flow of gas to the premises deemed to be receiving gas.

That existing and proposed jurisdictional arrangements for *"bulk hot water"* (BHW) contractual model and policy provisions for derived costs (regardless of actual formulae and actual derived rate determined by the DPI from time to time), based on water volume calculations and conversion to gas and electricity rate tariffs are inconsistent with NECF governance contractual model for connection and supply of energy facilitating flow of energy to premises.[592]

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

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

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

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

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

That specifically the authority of Essential Services Commission Victoria (VESC) under existing energy legislation[593] is limited to disconnection of energy and does not extend disconnection of heated water services receiving water reticulated in water pipes in the absence of any energy connection point or transmission pipes facilitating the flow of energy in the premises alleged to be supplied with energy.

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

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

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

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

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

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

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

Some general concluding comments (primarily targeted for VESC, but two other States follow similar processes , South Australia and Queensland)

Part 2 set the scene, covered the BWH matters in a covering letter to the VESC as a submission to their current regulatory review from a registered stakeholder who was apparently not eligible to be part of any of the consultative processes restricted to nominated working party groups. Motivation to be sent o be publicly participating by written submission has driven these lengthy offerings. In the interests of transparency open and prompt publication is sought.

This part has focused primarily on the limited range of issues covered by the VESC's proposal to simplify the Bulk Hot Water Charging Guideline by repeal it and transfer the majority of its provisions and those provisions also thitherto contained within the deliberative documents that led to his ratification in December 2005 and adoption on 1 March 2006.

Part 2B is more extensive in dealing with issues of contract with particular focus on the MCE SCO Table of Recommendations and correlation between existing definitions and provisions, highlighting certain anomalies that need to be corrected.

Meanwhile, certain immediate observations and recommendations are pertinent to conclude this sub-section as Component Part 2A.

Mere transfer from deliberative documents and guidelines of these provisions and revision to Appendices 1 and 2 (the conversion factor calculation formulae) will not help to validate these provisions from a contractual, legal or technical standpoint.

Attempts by policy-makers and regulators to re-write contractual, tenancy, owners' corporation, trade measurement and other consumer protections in the written and unwritten law by adopting codes and guidelines, or alternatively Orders in Council will not serve to make the fundamental reasoning behind these guidelines more valid, legally or technically sound, or the requirement to avoid regulatory overlap with other schemes and other provisions within the written and unwritten laws, including the rules of natural and social justice or in line with community expectation.

As a consequence the provisions will not be seen as meeting best practice regulation that will meet policy or regulatory benchmarking standards in line with community expectation and expediency in meeting the overall objectives of enhancing market operations and consumer protections. In a climate where economic allocative efficiency and pragmatic solutions appear to be eroding the balance that should be obtained in an effective and confident market that addresses the needs and expectations of all stakeholders, this is not only regrettable but stands to compromise standards generally.

Adoption of practices that are of lowest common denominator practice, or because of "usual practice" does not constitute best practice modelling. Beware of adopting practice simply on the basis of majority rules principles. The BHW practices do not represent best practice. The appear to defy the most fundamental principles of acceptable applicable of contractual law principles trade measurement practice; avoidance of regulatory overlap; provisions that represent overlap and conflict within and beyond energy provisions. They need to be scrutinized and revised.

The Law needs to better clarify these matters. It is a common misconception that those receiving bulk hot water are *"embedded consumers of energy."* They are not. They receive heated water supplies in water pipes not through any energy network that may have changes ownership and responsibility between distributor and end-consumer.

Holding end-consumers of heated water products responsible contractually is not an acceptable, fair or just outcome for all of the arguments presented. The existing and proposed provisions do not meet best practice contractually or in terms of trade measurement practice; they represent instead clear regulatory overlap with other schemes; trade measurement practices that do not stand up to scrutiny and that will soon become formally illegal when remaining utility restrictions are lifted.

Because of the policy change-over and more direct control over the BHW provisions by the DPI, perhaps there is a case to make any Memoranda of Understanding within the CAV as a prescribed agency with a regulatory as well as a consumer protection role and those government agencies and regulators involved in policy design and regulatory implementation.

Though it should not be necessary to resurrect issues already aired and taken up with the ESC and EWOV, it would seem that nothing much has changed and that regulatory overlap with other schemes current and proposed remain an issue despite the intervention of the CAV during 2007; the consequent meeting between CAV, EWOV and ESC to discuss these matters; and the prior adoption of a revised Memorandum of Understanding with the ESC, who had handed over policy provision for the BHW provisions to the DPI a matter of months after he Memorandum was formalized; and reminders provided to the ESC about their obligations under their own enactment, the *Essential Services Commission Act 2001*, ss15-16.

The provisions were allegedly undertaken for consumer protection to prevent end-consumers from price shock. That goal was not achieved. Rents continue to go rise and what appear to be collusive arrangements between Landlords and energy suppliers, sanctioned by public policies.

Consumers may perhaps be forgiven for feeling betrayed by perceived erosion of protections and compromised access to already enshrined protections under other schemes and the unwritten laws.

Those who do understand their rights and what they are apparently required to relinquish without explanation or Parliamentary sanction may also feel coerced and intimidated by practices that appear to be both implicitly and explicitly condoned. There are no provisions for disconnection of hot water services by licenced retailers or anyone else in circumstances described (BHW provision). Energy providers are licenced to sell gas or electricity not composite water products. Disconnection means disconnection from energy not composite water products.

It has been my sustained contention that despite efforts to enhance transparency and achieve consistency and harmonization, the proposed provisions contain many drawbacks that deserve further scrutiny, leaving aside the debate about contractual and trade measurement arrangements now under DPI control. Central to the concerns are the inability of the arrangements to show legally traceable measurements that can be used to allocate responsibility to end-users of heated water products.

The BHW provisions were allegedly adopted for consumer protection to prevent end-consumers from price shock. That goal was not achieved. Rents continue to go up. Consumers feel betrayed by eroding protections. They are being coerced and intimidated by practices that appear to be both implicitly and explicitly condoned. There are no provisions for disconnection of hot water services by licenced retailers or anyone else in circumstances described (BHW provision). Energy providers are licenced to sell gas or electricity not composite water products. Disconnection means disconnection from gas or electricity supply.

There is no energy transmission network involved at all. No supply point, energization point, connection point, gas transmission pipeline or electrical line is involved in transporting heated water supplies to end-users in their individual apartments. These end-consumers of composite water products from which the heating component can neither be separated no calculated through legally traceable means are being held contractually liable; threatened with disconnection of water services, and sometimes pursued for perceived overdue of energy bills that should be submitted to Landlords or Owners' Corporation.

A single supply point/supply address energization point exists on common property infrastructure supplying gas or electricity to a single water storage tank owned and operated by a Landlord/Owner supplying heated water to multiple tenants in multi-tenanted dwellings.

The Landlord/Owner takes supply of energy when he authorizes gas or electricity metering installation and that installation is in place. The proper contractual party needs to be clearly identified within the Law. The intent of current and proposed laws is to clarify what constitutes distribution sale and supply of energy using traditional concepts of connection points as a physical connection allowing the flow of energy to the premises deemed to be receiving that energy.

Hot water flow meters do not represent suitable instruments through which that can be achieved. They measures water volume only not gas, electricity or heat. Gas meters measure gas volume expressed in megajoules (MJ), not heat (energy) Bills are expressed in energy. Electricity is measured in KW-h. Water is measured in litres.

There is no correlation between the distribution and transmission systems for energy and water. There are economic and non-economic implications for the current methods used. Regulatory overlap and conflict between regulatory schemes is specifically disallowed under s15 of the Essential Services Commission Act 2001 and the MOU between CAV and VESC. This ahs made no impact on the policies adopted, now under the control of the Department of Primary Industries Victoria (DPI). The two other states are South Australia and Queensland. The original goals of *"preventing price shock to end consumers"* and achieving were not met. Landlords continue to raise rents. They are the correct contractual parties.

The Law needs to clarify this further so that expensive debate, complaints handling and potential litigation or civil penalties are avoided.

Comment and Recommendations Specific issues

Comment Unjustifiable Deemed Status (recipients of BHW; jurisdictional policies three States, Victoria, South Australia, Queensland – usual practice does not make for best practice)

This is a central theme throughout this and related submissions.

The issue is extensively discussed, especially in sub-sections 2A and 2B of a component submission intended for a number of arenas.

The issues raised the facts and philosophies driving them are not new to most of the target arenas.

The are reproduced for further reinforcement and a plea for urgent attention to the anomalies and perceived injustices that appear to have arisen because of the BWH provisions in place deeming end-users of heated water products, reticulated in water service pipes, in the absence of any energization point under whosoever's ownership; embedded or otherwise; there no energization or connection or supply point exists in the individual apartments of residential or other occupies of multi-tenanted dwellings utilizing hot water services communally heated in hot water service tanks.

Most of these facilities are in private rental stock of sub-standard-quality housing for the most part those of fixed low incomes and often other conditions of vulnerability and disadvantage not related to hardship.

This sub-class of consumers have long been targets for inappropriate threat of disconnection of essential services – not normally energy, but heated water supplies, of which the heating component cannot possibly be measured through legally traceable means.

I will refrain from repeating all arguments in support, save to say that these are not individuals who use unauthorized or illegal supplies of energy. They rely implicitly on the enshrined protections under residential tenancy laws to take possession of rented premises, enjoy peaceful tenancy with fear of threat or intimidation involving loss of essential utilities; and specifically relying on their right to be free from any contractual responsibility for heated water supplies that cannot be measured through legally traceable means using an instrument designed for the purpose and capable of measuring gas or electricity consumption.

Hot water flow meters, though designed to withstand heat, cannot measure gas volume, electricity, heat, ambience, heating value or any other energy attribute. For that matter gas meters can only measure gas volume not any of the other attributes.

Site specific reading of any meters was not considered necessary, convenient or cost-effective by industry providers of energy.

In any case their arrangements are with private landlords, and sometimes corporate entities for the provision of gas or electricity through a single energization point on common property infrastructure used to heat static water storage tanks of varying capacity.

The heated water is purchased under contractual obligation to the Water Authority by the Landlord. It is supplied to the mains water outlet, thence carried in water pipes to a water storage tank. The Landlord either implicitly or explicitly also purchases gas or electricity at the outlet of the mains on common property infrastructure. Those commodities are transported in transmission pipes to a communally heated water tank on common property infrastructure belonging to Landlords.

The heated water is thence transported in water pipes, not any part of the energy distribution service or system, and not facilitating either flow of gas or transmission of energy; to individual apartments, normally occupied by low-income renting tenants

Those tenants implicitly rely on enshrined protections under tenancy laws that hold the Landlord responsible contractually for any costs for any utility other than g=bottle gas that cannot be measured through legally traceable means, using an instrument designed for the purpose. Hot water flow meters, though designed to withstand heat, are not such instruments. They measure water volume, not gas, electricity or heat. They also cannot measure ambience, heating value, temperature or affect regulator control any more than can a gas meter which simply measures gas volume.

These recipients of heated water from which the heating component cannot be separated or measured, and who receive the heated water as a composite product reticulated in water pipes are being unfairly held contractually liable for deemed usage of gas or electricity, impliedly either unauthorized or plain illegally, though their individual apartments have no supply points or transmission pipes to show any energy transmission, embedded or otherwise.

Effectively these individuals, mostly private renting tenants, are being considered to be breaching laws by accepting unauthorized supplies of energy that they do not receive; being threatened with disconnection of heated water merely because some energy suppliers own the water meters that calculate water volume usage, if they are read at all; may be facing credit damage because of perceived dues for consumption and supply charges pertaining to alleged energy use, where the proper contractual party is the landlord or delegate under multiple provisions.

This is the theme argument relating to deemed contracts illustrating unjust imposition of deemed contractual status. The arguments are supported throughout the submission with legal, technical, contractual and regulatory overlap and conflict considerations. The explicit provisions of s15 of the *Essential Services Act 2001* prohibits regulatory overlap and conflict with other regulatory schemes, both current and proposed.

This is the repeated and sustained argument present.

Recommendation – deemed contracts

The Law should specifically exempts from deemed status the category of end-consumer of utilities, namely heated water products as a composite product reticulated in water pipes not gas or electricity transmission equipment to individual residential apartments and flats.

Other related arguments regard unjust demands for personal identification and contact details and the unjust requirement to provide safe convenient and unhindered access to water meters behind locked doors in the care custody and control of Landlords or their agents/representatives are presented. The original aim or preventing price shock to end-consumers and greater transparency was not achieved as discussed elsewhere.

This submissions reinforces all other oral and written submissions to a range of arenas, including but not limited to MCE arenas multiple; Essential Services Commission Victoria; Department of Primary Industries Victoria; Consumer Affairs Victoria; Australian Energy Regulator; Australian Consumer and Competition Commission; National Measurement Institute; Productivity Commission; community organizations and representatives; various Ministers, with the aim or raising public awareness and attention to perceived anomalies and injustices.

Where an energy connection is established to the premises (living quarters) of a customer occupying the premises where a current contractual arrangement terminates without a new supply being established, consistent with the recommendations of VCOSS to the RPWG Composite Paper in July 2007, (p6) [594], the Law should clarify that the deemed status should be subject to any provision in the contract itself concerning the terms and conditions to apply on termination to current contractual arrangements

Also consistent with VCOSS' recommendations in the same submission, the termination clause should apply only when contractual arrangements have actually terminated, not when a customer moves into premises that are already connected. The latter scenario could require a consumer to be placed onto a market contract of a previous occupant, without the relevant consent being obtained. VCOSS also expressed concern that contractual expiration may give a retailer the right to terminate a contract or disconnection should the customer be unprofitable or difficult. Therefore VCSOS believes that the deemed supply arrangements should in these circumstances to ensure continuity of supply. I support that recommendation to be included in the Law.

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[594] VCOSS (2007) response to RPWG Composite Paper July 2007 found at *http://www.vcoss.org.au/documents/VCOSS%20docs/Submissions/2007/SUB_070730_RPWG%20Composite%20Paper_VCOSS.pdf*

I support the view of VCOSS that the conditions proposed for notice requirements for deemed supply arrangements should be subsequent not precedent, and that in the case of those receiving heated water from a communal tank in water pipes, with no energy supply direct to their premises through a connection or transmission pipe, no deemed should exist at all

In addition, in the case of those receiving heated water from a communal tank in water pipes, with no energy supply direct to their premises through a connection or transmission pipe, no deemed should exist t all. This should be made explicit within the Law. The concerns particularly apply to the existing bulk hot water arrangements, wherein no energy is supplied to the end-user's premises, but rather water as a composite product reticulated in water pipes. The energy is supplied to the Landlord/Owner by implicit or explicit contract.

Conclusions - Disconnection issues in brief

I repeat that Disconnection in the Energy Retail Code refers to disconnection of gas as follows:

(b) for gas

The separation of a natural gas installation from a distribution system to prevent the flow of gas

Under the approved VENCorp Gas Market Retail Rules (VGMRR) dated the definition of *decommission* in relation to a *distribution supply point*, is to take action to preclude gas being supplied at that *distribution supply point* (e. g. by plugging or removing the *meter* relating to that *distribution supply point*).

All of these terms and the intent of the legislation and entire regulatory framework did not intend hot water flow meters that measure water volume and not gas or electricity to be treated as supply points, or the apartments of innocent end-users without energization points to be regarded as supply addresses.

The Landlord commences to take supply at the outlet of the meter on common property infrastructure from the moment he agrees to accept delivery of gas to the outlet of the gas meter at the overall property address and the infrastructure is in place.

Recommendations - Disconnection

The NECF Law should provide for explicit exclusion of deemed status of consumers of composite heated water products where no energization point exists; where no evidence exists that transmission pipes of any description can be identified in the individual apartments of residential tenants of other occupiers of flats and apartments using bulk hot water systems (storage tanks heated by single energization points).

This is a fundamental matter of contractual governance. It should not rest with jurisdictional control, more so because discrepant interpretations have resulted from the current looseness of wording; perceived misinterpretation of the intent of the deemed provisions; regulatory overlap creep; material consumer detriment; expensive complaints handling, dispute and potential civil litigation; conflict in particular with the intent and spirit of trade measurement laws, and potential to have in place practices that will soon become formally illegal when remaining utility exemptions are lifted.

The existing legislation holds that all supply points in existence as single supply point and billing points prior to 1 July 2007 remain as single billing points. This is upheld in the VENCorp rules in Distributor-Retailer settlements, and it particularly is applied for all supply points providing energy to communal water tanks used to supply heated water to individual apartments and flats.

Therefore the new energy Law should transfer this requirement and make the Law and Rules explicit. This means re-arranging requirements to hold contractually liable those who are receiving to their premises heated water communally heated and allocating contractual status to the Landlord, however calculations for consumptions are made. In those circumstances, only a single reading of the gas or electricity meter is required without the necessity to rely upon hot water flow meters to calculate deemed gas usage through conversion factors., expressing bills in cents per litre and converting this to a gas rate in megajoules per litre or kilolitre; and similar conversions for electricity

Conclusions: Supply charges

Retailers are applying massive supply charges and meter reading charges even for water meter reading, though site specific reading was rejected as an option because of cost and inconvenience. Bundled charges will make billing practices and accountability less transparent.

Even if readings do occur of both water meters and bulk gas meters (energization points), retailers are incorporating higher fees for water meter reading fees because they claim distributors are charging these. Yet for settlement purposes only a single supply and billing point apply.

The most vulnerable individuals in the community, not restricted to hardship issues, are being threatened with access to heated water supplies and/or energy as a penalty for allegedly having deemed contractual status an impliedly taking unauthorized supply of energy. This is simply not the case. They are taking up occupancy in rented apartments with an implicit belief in their enshrined rights under tenancy and other provisions. Their heated water costs are factored into their rental leases under mandated provisions.

They are facing the stresses of threatened disconnection of essential services, being hot water supplies because of flawed interpretations of the deemed provisions on contractual, technical and regulatory overlap grounds.

It does not seem acceptable for policy-makers and regulators to either implicitly or explicitly through policy provisions uphold requirements, including under retailer licence provisions that directly contrive the provisions of the *Essential Services Act* s15 and s16; the provisions of the MOU with the CAV that surely could not have been spuriously undertaken; or that consumers be left in continuing detriment, so say nothing of retailers in continuing confusion about what they should do to resurrect compromised consumer confidence. Compromised consumer confidence is compromised consumer protection

The BHW arrangements current and proposed have enormous implications for all parties involved. Despite licence provisions and transfer to the VERC the fundamental reasoning behind these provisions needs to be carefully considered in the light of how this may affect the integrity of the market, consumer confidence; conflict with energy providers either upstream or downstream

The implications of ignoring the requirement to avoid regulatory overlap current and proposed are serious as are unjust imposition of contractual status on the wrong parties and will have detrimental impacts on end-consumers and on their enshrined rights. They may also place energy providers at risk as discussed and despite instructions to adopt practices that are appear to be legally and technically unsound.

In particular the NECF is urged to explicitly exclude from the application of *"deemed status"* those end-consumers of heated water products who cannot in all fairness be seen to be receiving unauthorized or illegal supplies of energy, justifying disconnection of either heated water services or of energy to communally heat that water supplied by the Landlord, the cost of which is already included in the rents paid by residential tenants under mandated residential tenancy leases.

In addition, it should be clearly provided for in current and proposed Laws and Rules that Landlords be made accountable contractually for supply and consumption costs of energy supplied to a single energization point on common property infrastructure, used to heat water in hot water services (water storage tanks) which is then reticulated to individual apartments.

The Law under tenancy provisions already expects Landlords to pay for these costs in the absence of dedicated energization points and evidence of transmission pipes effecting the flow of gas or transmission of electricity to individual apartments and flats. What they receive is a composite water product in water service pipes from which the heating component cannot be separated. The cost of this composite utility is already factored into the rents being paid. The arrangements have had no impact on curtailing rent hikes twice a year as permitted under residential tenancy provisions, so tenants are paying twice for the same commodity.

Conclusions: VERC 3.3 Denied Access to Meters (see also NECF TOR)

The expectations that residential tenants provide safe convenient and unhindered to any meters behind locked doors is unreasonable and unjust. Most landlords do not allow residential tenants access to such meters. This mainly applies to water meters being used to all intents and purposes as substitute energy supply points. These are the meters that generally reside with the boiler tank behind a locked door. If the current methods are to be perpetuated regardless of regulatory overlap, contractual and technical matters, it is far more sensible for energy providers to have energy key access through the Landlord of OC. The contact details of the latter are usually transparently available on the outside of buildings housing multiple residential tenants using bulk hot water provisions, and those for which energy meters are for some reason also behind locked doors.

Jurisdictions, and in this case the VERC, as well as the NECF are urged to exclude from provisions the perception of denied access to meters behind locked doors where this applies to residential tenants generally; and more particularly those who have been unjustly imposed with contractual status for consumption and supply charges for energy that is in fact being supplied to Landlord or delegate on common property infrastructure to a single energization point.

In most cases the only meters that may be inaccessible are hot water flow meters that do not measure gas volume or electricity supply; or heat (energy) but rather water volume only. Neither do they provide data on ambience, heating value; regulator accuracy; or any other service quality standards. Not even gas meters measure these factors, especially heat (energy).

Hot water flow meters are no more than water meters able to withstand heat.

Gas meters can measure gas volume only, not heat (energy. Bills are expressed in energy.

These gas meters are often referred to as Master Gas Meters for no particular reason, since for BHW there is only one gas mater to measure the quantity of gas that passes through it and its associated metering equipment to filter control and regulate the flow of gas that passes through it and that equipment.

There is no subsidiary gas meter, and in any case supply points and ancillary supply points are taken as one. The occupant's apartment address in multi-tenanted dwellings receiving BHW communally heated have no energization points; supply or connection points; transmission pipes, embedded or otherwise, delivering gas or electricity in any transmission pipe. The gas is delivered in a transmission pipe to a communal boiler tank on common property infrastructure. From there heated water, from which the heat cannot either be calculated or separated, is delivered as a composite product in water pipes to individual apartments.

Allegations of denied access to meters, which throughout the remainder of energy provisions and proposed promises implies a gas or electricity meter not a for water flow meter.

Therefore it is inappropriate to allege denial of access to meters when this is the case.

Recommendations – denial of access to meters (BHW exclusions) and residential tenants generally

It should be explicitly stated within the Law and Rules that those receiving BHW from communal water tanks centrally heated are Landlord responsibility for consumption and supply charges, as is already provided for in residential tenancy laws, and that any interpretation of denial of access to meters is misguided. In these cases it is access to hot water flow meters that is sought. These are rarely if every read, but ownership by retailers encourages them to believe that there is a contractual relationship with end-users of the heated water. The current provisions in three jurisdictions encourage this misguided belief.

As to residential tenants generally, this is not the first submission emphasizing that this class of end-consumer of utilities cannot reasonably be expected to provide access to meters in the care custody and control of landlords. It is or should be usual practice to seek energy keys from the Owners' Corporation or Managing Agent or Landlord. The contact details for the first two groups are normally displayed transparently on the buildings that are occupied by multiple tenants or other occupiers. The OC laws are in place for a good reason. They use and legitimacy should be respected by other jurisdictions.

Comment: VESC 3.4 Refusal to provide acceptable ID or refundable advance

Under the Victorian provisions disconnection is allowable after 10 business days notice is provided of intent to disconnect energy, and if the customer continues to refuse identification.

The Victorian recommendation (as opposed to the NECF TOR) is supported that connection take place then disconnection if no acceptable identification is provided, except in the case of those receiving heated water.

This is on the basis of all of the arguments presented to show that the end user of heated water is not the relevant customer, despite interpretations of provisions and incorporation of the BHW provisions into the VERC. This provision in the first place represents gross regulatory overlap with other schemes and interferes with the enshrined contractual rights of residential tenants under the mandated terms of their tenancy leases.

The landlord is the proper contractual party. From the moment the Landlord authorizes an energy installation, and that installation is in place, he commences to take supply. A supply charge applies from that moment, long before any occupancy by a transient population of residential tenants in individual apartments who may turn on a hot water tap.

Those with BWH systems are generally living in older sub-standard private rental stock. They receive heated water supplies but no direct energy and no legally traceable methods can be utilized to show their consumption of energy. receipt of a composite water product through water service pipes does not represent receipt of energy authorized or unauthorized.

Conclusions Refusal to provide acceptable ID or refundable advance (conditions precedent and subsequent)

These tenants normally have separately provided dual fuel contracts where they have the choice of provider and individual gas or electricity meters. These are generally located centrally in the care park of a block of flats and readily accessible gas or electricity meters, with possibly a few exceptions where there re locked gates and security doors in the higher end of the market.

It is these tenants who are being threatened with disconnection of their hot water supplies by energy providers acting as billing agents for Landlords, with regulator sanction, where the Landlords are already legally responsible for both consumption and all supply or associated costs in these circumstances.

In some circumstances the threats of disconnection may be considered to be unconscionable and causing material detriment. In the case of heated water, there are some circumstances where access to heated water is not a matter of life support, but is required for medical reasons that have not been identified within the law. It would be expected that an energy law needs to consider water products in this area of protection, but continuity of heated water supplies is being threatened for those receiving bulk hot water without energization points or transmission pipes facilitating gas flow or electricity transmission pipes to their apartments. Therefore the threat of disconnection of their heated water, or indeed energy is inappropriate.

In some cases, individuals require continuity of heated water because of medical conditions that may include poor healing of wounds, as in the case of peripheral vascular disease, diabetic complications, persistent infection, compromised immunological status that may be caused by prescribed medication (such as chemo9therapy) or other reasons.

In other cases the unjustified threat of continuity of essential services may in particularly vulnerable individuals, notably those with low thresholds for stress, past suicide attempts or psychiatric history, precipitate serious risk to health and life, including further suicide attempts as in the case of the case study cited.

It the mere existence of water meters, and regardless of ownership considerations, that can only measure water volume, not gas, electricity or heat, can be used as levers through which continuity of hot water supplies can be threatened in circumstances where not energy, but heated water supplies are being supplied through a communal water tank, this is unacceptable conduct and unacceptable regulation, no matter how pragmatic it may be to use derived costs. The costs, whatever they are, belong squarely with the Landlord or Owners' Corporation. As discussed at length and justified by legal, contractual, technical, regulatory overlap and other arguments throughout this and other similar submissions to a number of arenas.

Recommendations: Refusal to provide acceptable ID or refundable advance (conditions precedent and subsequent)

The Law should explicitly exclude from deemed status and therefore obligation to provide acceptable ID or refundable advance from those who receive bulk hot water supplies as part of their mandated lease arrangements under tenancy laws. This class of consumers have no energization point, supply point or transmission pipe that facilitate the flow of gas or electricity to each apartments. Though they do receive heated water products, the cost of this is covered within the existing terms of mandated lease provisions.

Energy laws need to recognize existing residential tenancy rights and all other rights of individuals. There is in any case a mandated requirement to avoid regulatory overlap with other schemes present and future under s15 of the *Essential Services Commission Act 2001* (v 30 No 62 of 2001, up to 1 July 2008) and the Memorandum of Understanding between CAV and VESC dated 18 October 2007.

Energy is an essential service. Water is an essential commodity. Care should be taken to ensure that responsible best practice regulation and compliance enforcement does not put these commodities at risk in terms of continuity of supply.

Conclusions: Billing matters; Derived formulae (Attn MCE NPWG)

The proposal to include on bills certain information may not go far enough to informing the public. Few will know how to access further information. Many will not have the skills to do so by accessing the Energy retail Code. Even then, the information will be minimal since all explanatory notes about how calculations are made will become more obscure and inaccessible upon the repeal of Appendices 1 and 2.

The proposed inclusion on billing includes under 4.2 of the ERC a requirement to indicate on a bill whether the bill is based on a meter reading or is a wholly an estimated bill. In the case of BHW the original deliberative documents that led to their adoption, it had been claimed that site specific reading of meters was too expensive and inconvenient for retailers to adopt despite providing more transparency, and notwithstanding in the first place that water meters are not supply points or ancillary energy point (which in any case are taken as one within the legislation and elsewhere) or suitable devices through which individual energy consumption can be measured.

The proposed provisions may not meet the general requirement for a minimum number of meter reads under bill smoothing arrangements (5.3 VESC RR DD) and Meter Reading (NECF TOR).

Bill smoothing, overcharging and undercharging issues are impacted impact by the issues raised.

This is claimed on the basis that meter readings may not be undertaken at all, of either water volume or gas volume, and that if these occur they do not occur regularly, yet bills for the alleged heating *"hot water consumption"* by individual tenants imply that at least water volume is precisely calculated if not gas; the proposed provisions for billing do not meet the requirement for a minimum number of meter reads of either satellite hot water meters on common property infrastructure of Landlords or OCs (which measure water volume only not gas or heat) or of the single bulk energization point on common property of Landlords or OCs (which supply point measures gas volume only not heat, meaning energy, and not hot water consumption.

In addition, if bill smoothing in proposed jurisdictional provisions relies on a 9-month period; and 12-months within the proposed NECF TOR, this means that those on low fixed incomes will be disadvantaged by have to find funds for which they have had no chance to budget. In addition, if estimates of water consumption (upon which gas or electricity consumption is based through conversion factor formulae) is based on estimated or actual consumption of previous tenants in the same apartment, this cannot be a fair way of calculate costs. Residential tenants are a transient population. In any given period a single apartment can house anything from one to several parties using variable quantities of water. Under the current imprecise and infrequent calculation proposals, leaving aside contractual debate and calculation methods, this produces equity and legal traceability issues based solely on the billing cycle and bill smoothing arrangements proposed.

Though information relating to how often water meters and gas meters will be read, and information on brief calculation details is implied within the ERC very few end-users residing in sub-standing buildings still using communal bulk hot water systems will ever know of or be directed to the ERC to check how things are done. In addition, if the explanations for calculation methods and formulae are to be concealed, it is less likely that transparency of any description will be achievable. This is unacceptable.

These matters also have implications for transparency ; informed consent about practices adopted, even if a “deemed status” imposition is adopted or explicit contracts obtained with or without coercive threat of disconnection of heated water.

Overcharging is a common feature. There was no mandate to read meters at all. The hot water flow meters that measure water volume only not gas or heat (energy) seem to be in place for looks and as levers through which disconnection of heated water can be threatened by way of securing an explicit market contract between retailer and end-user of composite heated water products reticulated in water pipes.

During 2004-2005 many concerns had been expressed about overcharging of supply charges and also about transparency by DOI who had previous oversight. Specific Orders in Council also reflected the same concerns in 2003.

Only one supply point/supply address/connection point exists for energization – at the outlet of the meter on common property infrastructure of Landlords. For VenCorp Distributor-Retailer purposes only a single supply and billing point exists for all BHW supply points supplying energy to a communal water tank from which heated water as a composite products is reticulated to various apartments and flats.

Individual tenants are being charges massive supply charges either explicitly identified or as rolled over bundled charges. Only one supply charge should apply – applicable to the Landlord. The Landlord under conflicting regulatory schemes, notably residential tenancies and OC provisions is the proper contractual party also for consumption charges of the energy supplied to the single supply point on common property infrastructure.

Recommendations: Billing Matters, Derived Formulae (attn MCE NPWG)

At the very least, the bills should explain that water meters are being used to calculate derived costs for deemed gas usage. Currently bills do not achieve that. The Recommendations made will not solve all issues regarding information consent and understanding that the hot water flow meters can only calculate water volume not gas or heat provided individually.

The Law should state that only one supply charge should apply – and be billed to the Landlord as recipient of energy on common property infrastructure to a single energization point that for Distributor-Retailer purposes represents a single supply point/supply address and billing address, consistent with current legislation and VENCorp settlement practices.

The manner in which supply charges are being calculated for BHW should be further examined.

Tenants in rented accommodation with BHW systems be freed under the Law from badgering under deemed provisions to form explicit contracts where the proper contractual party is the Landlord.

The 12-month settlement period should be reviewed. Twelve or six month settlement periods both seem too long. Bills should be issued every three months, at least for those on low incomes to help with budgeting. The public is accustomed to quarterly bills. Those who are particularly vulnerable with poor budgeting skills will find the 12-month settlement period impossible to manage. The consequence will be exchanging economies in more regulator billing for the expense of dealing with overdue bills and hardship policies.

Recommendations: MCE arenas (RET; NECF; RPWG; NPWG; ERIG)

Contractual governance issues – clarification and proper protection

I urge The NECF to consider further clarifying the contractual governance model bearing in mind the issues raised, especially with regard tor recipients of heated water supplies (BHW) and those in embedded situations (similar but technically different – no energization for those receiving BHW and no transmission of energy to premises deemed to be receiving energy)

I urge the NECF to explicitly allocate contractual responsibility to Landlords and owners who are receiving energy to heat communally heated water tanks in multi-tenanted apartment blocks, with energy provided to a single connection point on common property infrastructure.

I urge the NECF to explicitly exempt residential tenants from obligations that already rest with Landlords, particularly with regard to access to meters behind locked doors. Currently demands are made for access to water meters, allegedly under the ownership of retailers seeking to impose deemed contractual status on end-users of water communal heated and reticulated in water pipes to individual apartments. The implications for conditions precedent and conditions subsequent are obvious. Disconnection is being threatened by retailers of hot water supplies in endeavours to enforce a contractual relationship, apparently with policy-maker and regulator sanction.

The contractual party should be the Landlord or Owners, consistent with other regulatory schemes and common sense. The Landlord or Owners are supplied with energy to a single energization point on common property infrastructure considered under current legislation and by VENCorp for Distributor-Retailer settlement purposes to be a single supply point/supply address, and a single billing point. Supply and consumption charges are Landlord/Owner responsibility. This should be explicitly stated and any calculation formulae or method adopted by jurisdictions need to reflect this. The use of water meters as devices to effect such calculations would become redundant if a single reading of the bulk hot water gas or electricity meter were read and charges applied to the landlord/Owner.

I urge the NPWG to consider the implications of adopting, or implicitly sanctioning policies that cannot show legally traceable means of measuring energy consumption. This mainly applies to methods relying on deriving costs through theoretical reading of hot water flow meters that measure water volume, not gas, electricity or heating values. They measure water volume only and are the primary instruments used for calculating energy consumption against the spirit and intent of trade measurement provisions. The practices will soon become formally illegal with high penalties and are inconsistent with the entire energy framework other than BHW arrangements, and with community expectations.

Better protection for consumers is required, especially within the energy industries to reconsider the position with regard to avoidance regulatory overlap and best practice trade measurement practice. These considerations will also be of interest to the National measurement Institute.

I urge the NECF to consider explicitly requiring policy-makers and regulators to avoid regulatory overlap with other schemes and with the protections under the common laws, including the rules of natural and social justice and contractual matters (with particular emphasis on residential tenancy provisions). This is already an explicit but ignored provision under s15 of the *Essential Services Commission Act 2001* and the terms of the MOU dated 18 October 2007 between CAV and VESC.

Disconnection issues associated with contractual matters above

I urge the NPWG to consider more explicitly covering disconnection procedures within the Law with particular regard to practices that endorse inappropriate disconnection of hot water services to occupants of multi-tenanted dwellings receiving reticulated heated water rather than energy to their individual premises.

I urge the NPWG to re-examine the small scale licencing provisions and eroded consumer protections

I urge the RPWG to carefully consider in relation to the NECF the impacts of disconnections as discussed elsewhere, including the implications parties who are unlicenced using hot water flow meters to calculate gas consumption; metering maintenance responsibilities; wrongful disconnection processes regarding disconnection of heated water, which in the first place should not be a tacitly sanctioned process in any event, since energy laws are about sale and supply to energy to the said premises, which does not occur with the supply of energy to a single supply point/supply address/energization point on common property infrastructure supplying heat to a communal water storage tank. All energy supply takes place on common property. The heated water is reticulated in water pipes to the premises threatened with disconnection of water supplies.

I urge the RPWG to consider specific gaps in consumer protection in relation to water industry provisions; licencing (hot water flow meters); safety; maintenance standards. Though ownership of the hot water flow meters used to calculate deemed gas usage by end users of communally heated water, there are no transparent guidelines governing how these hot water meters are maintained, replaced and authorized for use by the responsible authorities, such as the relevant water authority. (see submission of TUV to VESC Small Scale Licencing Review[595] and case studs, cited elsewhere in full

[595] Submission by Tenants' Union Victoria (TUV) (2006) to Essential Services Commission Small Scale Licencing Framework Issues Paper 2006. Found at *http://www.tuv.org.au/pdf/submissions/Small_Scale_Licensing_Review_ESC_082006.pdf*

That submission by the TUV submitted that

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

The comments above are about embedded customers. What is missed is that those receiving communally heated water, for the most part in Victorian in private rental property using gas bulk meters for the heating process, are not embedded customers at all. They receive no energy of any description to their premises. The Landlord receives the energy on common property to heat a single communal water tank. The heated water is reticulated in water pipes, not gas transmission pipes or electrical lines, regardless of network arrangements, to the premises of end users of the heated water deemed to be receiving energy

I urge the RPWG in the context of the NECF to consider the gaps in wrongful disconnection processes which are heavily weighted in terms of outcomes associated capacity or willingness to pay, though some disconnections occur as a result of administrative errors, including accuracy of data bases regarding addresses and the like. Further the procedures in place are weighted in terms of technical breaches of processes rather than the policies, social and moral obligations driving disconnections.

Outcomes for disconnection of heated water are not reported in industry-specific reports by EWOV or the regulator. Therefore it is not possible to know how many occur and somehow justified despite the absence of any supply of energy to the premises deemed to be receiving that energy on the basis of reading hot water flow meters that measure water volume not gas or electricity or heat. No connection point or transmission pipe transmits energy to the premises of those using heated water communally heated. Ownership of transmission networks (electricity only) is irrelevant. Ownership of the hot water flow meters is irrelevant. The absence of supply of energy facilitating the flow of energy to the premises is the only valid consideration when determining the validity of disconnection of either heated water supplies.

There are numerous considerations discussed under Embedded networks, an area of regulatory uncertainty and consumer detriment. Though BHW provisions are not appropriately considered under this heading, the VESC has commented and made recommendations that have been discussed and challenged in relation to their philosophical beliefs that will effectively treat the BHW provisions in a similar way. Please see full discussion and selected dissection of the VESC Final Recommendations re Small Scale Licencing. The OIC has not worked. There are numbers hairy issues. Consumer protection and best practice issues are at risk.

Besides the BHW provisions the whole area of small scale licencing should be more carefully considered and a plan made for more comprehensive prospective data collection than has been recommended in order to better understand the market and possible future market failure outcomes. The cost-benefit analysis does not seem to have been as robust as it could be, whilst recognizing that for certain providers a lighter approach to compliance may be warranted unless new market failure issues arise

I urge the RPWG to consider the implications of lack of advocacy and redress options for gas and also for the implications of achieving some balance in the equitable distribution of available advocacy funding. Redress through the industry-specific complaints scheme and regulator are not options in view of legally and technically unsustainable policies now under DPI control. Policy matters and tariffs are outside EWOV's jurisdictional control whose decisions on these matters when they are made are normally directed by the VESC, but with BHW may not be the DPI

As mentioned under the dedicated section on Wrongful Disconnections above, disconnection and decommissioning have particular meanings under all existing provisions, as shown in the *Gas Distribution System Code* (Victoria). Those definitions do not extend to disconnection of water services.

The implications for proper protection and proper practices are far-reaching and need to be urgently addressed. The Law needs to be quite explicit on this matter.

Upon reflection it does not surprise me at all that complaints and compliance reports make no mention of what has been happening with disconnection of heated water seen to be by policy-makers and regulators as part of the energy provision and protection arena, under energy laws, though there is a reluctance to spell out where disconnections may be happening that are out of order, mistakenly undertaken, or undertaken of the wrong commodity.

How can the public have any faith in energy provisions that appear to prevent such a distorted interpretation of sale, supply and contractual liability of energy under such conditions and through such policies?

Some Advocacy and Research Parameters Observations and Recommendations – for all arenas, MCE SCO, Productivity Commission, Minister for Competition and Consumer Affairs, other consumer bodies

In general my views are that there should no exclusionary practices of philosophical beliefs should hamper equitable distribution of advocacy funds and inputs.

A more grounded approach to advocacy and consumer representation is warranted. There needs to be a balance between internal research and actual consumer advocacy, which should include representation instead of mere supplication for policy change.

As observed by EAG, there are currently no provisions for gas users. This results equity issues and disadvantage to those seeking advocacy input, including vulnerable, disadvantaged and inarticulate consumers of utilities. This is a significant gap. The Panel should not e exclusive to gas or electricity but deal with advocacy more wholistically. Often the same arguments apply to both. Given the MCE SCO's tendency to use the term *"energy connection"* and *"energization", "flow of energy"* this should also be reflected in terms of how energy advocacy is undertaken.

Those unjustly imposed with contractual status on the basis of water volume consumption but charged for "delivery of gas bulk hot water" should be entitled to advocacy through gas advocacy funds if available, since the dispute is with gas retailers and other energy providers claiming a contractual relationship for gas. This anomaly in previsions appear not to be addressed anywhere at all in the advocacy models proposed or already adopted and a blind eye generally seems to have been turned to the implications of BWH provisions, frequently mistaken as *"embedded network"* customers.

The term embedded is exclusive to electricity, and in any case is not applicable to end users of composite water products reticulated in water pipes. Therefore deferred decisions pending Network Policy Working Group deliberations may not throw sufficient light on these issues unless the matter is urgently placed on the agenda as a separate issue to embedded network economic and non-economic policy planning present and future

A robust understanding of the legalities and technicalities involved is essential to informing better policies including advocacy models and how this group of utility users can best be assisted to regain their enshrined rights and have proper access to advocacy through available funds.

Others, such as Energy Action Group for example, in the submission to the MCE SCO 2006 Legislative Package have expressed some serious concerns, for example about advocacy models, staffing, parameters; funding and research. Refer for example to their submission to the MCE SCO 2006 Legislative Package.[596]

EAG believes that it is also worth mentioning at the outset is that there is a tendency in the advocacy reforms being advanced by the MCE to seeing a need for the Panel to be accountable to the MCE, via the AEMC. EAG has a serious concern that the MCE has ignored the need for the Panel to be accountable to end users. The major objective of the Advocacy Panel is to ensure that end users are intended to be the beneficiaries of the advocacy that the Panel funds and end users are providing the funds that the Panel disperses. The MCE has not provided for accountability back to end users.

EAG has suggested that "*In effect, end user advocacy around the appeals process will become integral to effective regulatory outcomes in terms of the electricity and gas market objectives, a point recognized by the MCE in terms of the access it has provided to end users in relation to appeals. If end users are unable to take part in the appeals process due to an inability to access advocacy funds for this purpose, then the benefits of earlier advocacy on an issue (and the use of advocacy funds) will be jeopardized.*

EAG had suggested that certain features of the previous Advocacy Panel need to be retained, using these words on p4 of the submission:

"The most important benefits of the previous Advocacy Panel arrangements that must be retained are

> *The Panel did not discriminate in terms of favouring particular types of end users.*
>
> *The allocation of funds recognized that funding for end user advocacy came from actual users via NEM fees, so that **ALL** end users contributed and should have a right to benefit from the allocation of advocacy funds. "*

In relation to the South Australian Bill, EAG had made the following recommendations in its submission to the MCE SCO 2006 Legislative Package

All other comments and recommendations contained in the EAG 2006 Legislative Package submission cited should be revisited. The submission has been given a lot of thought and reflects knowledge and experience of the industry that should be highly regarded. I have previously mentioned that a sufficient knowledge of how the market operates is crucial to enhancement of advocacy skills.

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596 EAG (2006) Submission to MCE 2006 Legislative Package found at *http://www.mce.gov.au/assets/documents/mceinternet/EnergyActionGroup20070123103540.pdf*

Hardship issues are over-emphasized in relation to advocating for effective regulation that is not based on retrospective ad hoc knee jerk response. Far-reaching strategic plan using acceptable evaluation models are required, remembering that evaluation is not an end-point in planning, but the very first step. It goes far beyond information-gathering activities.

Whilst on the topic of regulatory determinations, it is of real concern, as observed by EAG that:

"….a number of Australian regulators bias their determinations in favor of the regulated entity to minimize the risk of appeals. To reiterate: if Section 291 (1) remains in the draft legislation no consumer who assesses the risk involved in this section will wish to appeal a determination. So the current legal appeals paradigm where the industry applicant vs the regulator appeals process will continue, this process provides a tilted playing field towards the applicant providing substantial rewards to ensure that asymmetric appeals against the regulator will continue into the future. Unfortunately this process has already set a number of precedents that will need to be overturned in the future by another legislative package (p13 EAG submission to MCE 2006 Legislative Package)

I support the concerns expressed and believe that future reform plans should take this into account and the extent to which this may be hampering effective consumer protection and effective regulatory policies

Recommendations: National Measurement Institute

Parts 2A and 2B of this submission were intended to call attention to some of the trade measurement anomalies that are giving rise to consumer detriment,; poor trade measurement practice and contradiction of the spirit and intent of trade measurement laws

Perhaps this need to be taken into account if any tightening of wording is envisaged under the current provisions and once remaining utility exemptions are lifted as is the intent. This has already happened for some utilities.

It cannot be acceptable practice for a water meter to be used as an instrument through which derived costs for energy supply can be made. In any case the current practice endorsed by policy and regulatory sanction involve measuring the volume of water consumed (if site-specific reading is taken at all) in order to make a guestimate based on a consumption rate of megajoules of gas per litre or kilowatt-hr per litre. The bills are to be expressed in both cents/litre (for water volume measured), and megajoules per litre. The readings for the water meters and gas meters are taken by different meter readers some two months apart, if any reading takes place. Otherwise a mere guess is made based on the total storage capacity of a water storage tank.

Energy suppliers are deeming end-users of heated water products contractually liable for guestimated energy based on a derived fixed rate conversion factor formulae. In addition, either explicit or bundled costs to cover “water meter reading fees” supply charges, network charges and the like are making for crippling bills for end-users of heated water who are already protected under residential tenancy laws, such that the Landlord is legally liable for all charges for utilities that cannot be measured with an instrument fir and designed for the purposes. Water meters cannot achieve that. They measure water volume not gas or electricity. Gas meters measure gas volume. Bills are expressed in energy. No measurement can be made of heat, heating value, pressure, ambience, regulator accuracy or anything else that may contribute towards guaranteeing water quality in terms of pressure and heat.

There appear to be no rules or monitoring in place to ensure that the water meters relied upon are delivering what they should. No monitored records seem to be maintained about hot water flow meter replacement. These instruments are often owned by energy retailers, seeking to establish a contractual relationship for the sale and supply of energy based on their ownership of the meters and instructions from the policy-makers and regulators to apply charges in a certain way based on derived formulae.

For goods there is better monitoring and enforcement. Preston market produce sellers were recently issued with high infringement fines for delivering goods that were mismatched in weight to the alleged weight on the scales. However, if one is deemed to be an "energy customer" it seems that any sort of approximation is acceptable – as long as instructions from the policy-maker or regulator give the practice a blessing.

The submission outlines what the National Energy Consumer Framework considers a customer service connection to require. These are:

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

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

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

In terms of calculating gas or electricity consumption by individuals in multi-tenanted dwellings with a single communally heated hot water system (storage tank) energized by a single energy connection point on common property infrastructure, the proposed additional definition for meter for "the delivery for gas hot watery" or "delivery of electric hot water" (BHW provisions VESC Guideline 20(1) about to be repeated and placed within the Energy retail Code) the following definition of meter is used:

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

A hot water flow meter is designed to withstand heat but not to measure gas or electricity consumption. These are energy laws and regulations, not water industry provisions

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

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

the connection of the premises to the distribution network to allow the flow of energy between the network and the premises[597]

- *where a physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energization' of the connection;*
- *maintaining the capability of the network to allow the flow of energy between the network and the premises through the connection; and services relating to the "delivery of energy to the customer's premises."*[598]

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

Best practice trade measurement practice goes beyond using accurate trade measurement instruments. It is about proper accountability and legal traceability for goods and services that are measurable.

Whilst it may well be that energy suppliers are being permitted to adopt certain practices and that part of the issue needs to be addressed at regulatory level, it is also a fact that at least for energy the Essential Services Commission is requirement under its own enactment *Essential Services Commission Act 2001* s15 to avoid conflict and overlap with other schemes. The existing provisions, now under the policy control of the Department of Primary Industries, appear to represent such conflicts, including with the spirit and intent of trade measurement laws.

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597 There is no energy connection to the premises of end-users of heated water supplied with that water in water pipes from a communal water storage tank. The connection is associated with supply of water not energy. The energy connection is a single supply point that for billing purposes in VenCorp Distributor-Retailer settlement arrangements and consistent with current legislation, is also a single billing point – the outlet of a gas or electricity meter on common property infrastructure

598 Water pipes do not delivery energy even when delivering heated water supplies from a communal water tank to individual flats and apartments. The water certainly must be heated. The delivery of energy occurs at the outlet of the gas meter or electricity meter on common property infrastructure. From there the gas is reticulated in gas transmission pipes to a communal water tank on common property infrastructure. Likewise, electricity is delivered through electric lines to the same destination – not the individual apartment or flat hat is occupied by a renting tenant or some other party; but to the water storage tank owned by the Landlord/Owner on common property infrastructure. Thereafter transmission of the composite water product occurs in a delivery system that has nothing to do with delivery of energy.

My aim is to raise awareness amongst all agencies and entities responsible for policies and regulations, including legislation that will enable the adoption of the highest standards of regulatory and business practices that will help to give the community as a whole confidence in the integrity of the systems of governments and quasi-government operation, and in the commercial marketplace as a whole.

In the ACCC Corporate Plan and priorities 2008-2009, the Chair of the ACCC has made these statements about the year ahead and proposed reforms.

"The year ahead will see a range of reforms debated and introduced, if parliament agrees, relating to the three key pillars of competition law—provisions relating to anti-competitive agreements (particularly cartels), anti-competitive mergers and the abuse of market power. Other reforms being discussed will affect the entire framework of consumer protection law with the proposal for a single national law and a significant strengthening of that law."

As stated by the ACCC this federal body ACCC

"*contributes to the development of federal and state policies and procedures that promote compliance with competition, fair trading and consumer protection laws. We provide guidance to industry about trade practices compliance initiatives, in particular voluntary industry codes of conduct.*[599]

In the same document, ACCC Corporate Plan 2008-09m, in relation to proposed reforms, the ACC has advised as follows:

> *'Further reforms by COAG resulted in the establishment under the Act of the Australian Energy Regulator (AER) on 1 July 2005. The AER is Australia's independent national energy market regulator. To assist in providing a broad competition perspective, the AER is part of the ACCC although it is a legal entity in its own right. The ACCC is charged with administering the (Trade Practices) Act and associated legislation without fear or favour. As competition and consumer protection policy and law continues to evolve, we are committed to meeting the challenges it presents for promoting and encouraging competition and fair trading in the interests of all Australians.*

Competition goals and consumer protection cannot possibly be met without confidence in the systems of government operation and business practice. Compromised consumer confidence is compromised consumer protection. These principles need to be borne in mind these principles in mind in any policy of legislative reform measures envisaged

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[599] ACCC 2008-2009 Corporate Plan (10 October 2008) *http://www.accc.gov.au/content/item.phtml?itemId=845527&nodeId=925d10dd5b31bfa060f4b834dc467c5a&fn=Corporate%20plan%20%20and%20priorities,%202008%E2%80%9309.pdf*

It has been my direct experience in my protracted dealings at jurisdictional level that the terms of Memoranda of Understanding may not be taken as seriously as they might be. I have discussed this in the body of the submission, with particular regard to the MOU dated 18 October 2007 between CAV and Essential Services Commission (VESC), the latter to hand over residual regulatory functions to the AER on 1 January 2010.

The MOU between CAV and VESC was intended merely to reinforce and enhance the existing provisions under s15 and s16 of the *Essential Services Act 2001* to avoid regulatory overlap and conflict with other regulatory schemes. It is implicit also that the enshrined rights of individuals under the written laws, including the rules of natural and social justice must also be covered.

In addition to its existing responsibilities for certain energy provisions, the AER will also soon inherit retail responsibilities for gas and electricity provision in 2010. It is my no means too early for a proactive role to be taken in relation to jurisdictional regulations and reforms envisaged, bearing in mind the move to nationalization and the proposals of the National Energy Consumer Framework.

This component submission has raised a number of issues in relation to perceived weakened consumer protection not merely because of market conduct, but because of existing policies seen to be hampering rather than enhancing proper consumer protection that appear to be legally and technically unsustainable; and that appear to be facilitating unacceptable market conduct under generic and other provisions.

It is of great concern has discussed in more detail elsewhere, that jurisdictional regulators and complaints schemes appear to see themselves as unaccountable externally merely on the basis of their corporate structures. Some are not aware of accountabilities under the *Public Administration Act 2004* and equivalents. Some may never have heard of the State Services Authority values which reflect those contained in the PAA. Certain weaknesses appear to exist which have given rise to discrepant interpretation as to which bodies are or should perceive themselves as public bodies or entities. Re-badging is a common strategy including corporate identity, but it would be a pity if corporate structure were to cloud perceptions of responsibility for bodies fulfilling a public role. These matters deserve further clarification and reinforcement at all levels and inculpated into staff training initiatives.

In its Corporate Plan and priorities 2008-2009, the ACCC has openly acknowledged that the AER is part of the ACCC, despite its corporate role. At no stage has it been implied that direct accountability is non-existent for the AER.

The ACCC, AER and CAV have a reciprocal Memorandum of Understanding covering inter-agency cooperation. In addition the CAV has an MOU with the VESC, with EWOV, presumably with the DPI and numerous other bodies under the 40+ enactments that it administers. EWOV has an MOU with the AER.

The CAV has the option to refer enforcement matters to the ACCC. Compliance enforcement is not the only issue.

In this case jurisdictional policy-makers and regulators admit to providing under licence instruction, codes, and guidelines, directives to undertake practices that unmistakably represent regulatory overlap with other schemes and make enshrine consumer rights inaccessible or at best expensive, stressful and time-consuming exercises.

Nevertheless it is the contention of this submission also that unacceptable market conduct has resulted as a result of adopting those policies.

Retailers and distributors are required to adopt all laws and provisions, not simply those that are energy-specific. Policy and regulatory instructions that create confusion, debate and risk of infringing on other laws may need to be revisited as to their appropriateness.

There are sound reasons why recourse through s55 of the *Residential Tenancies Act 1997* is not an ideal or suitable option as a quick-fix pragmatic solution that fails to address fundamental regulatory flaws; regulatory overlap or unacceptable market conduct

I list below the reasons why the s55 RTA option is a barely adequate solution, if at all.

The CAV has often relied on existing provisions under s55 of the *RTA*[600] as a retrospective, expensive and ineffective means of redressing unfair terms that are essentially part of regulatory design within energy provisions. These reservations are discussed shortly in this section.

The view of the TUV is that these matters are not ideally dealt with on a piecemeal basis through VCAT under s55 of the *RTA*, though they have had great success in achieving cost-recovery alone if a matter of reimbursement is brought against the Landlord. VCAT is not well-equipped otherwise to deal with third parties in landlord-tenant disputes, and other issues of conduct and flawed policies cannot be addressed through that recourse, which in any case creates unnecessary burdens on end-consumers, particularly those who may be inarticulate, vulnerable or disadvantaged and intimidated by legal proceedings, even if represented by third parties.

The cost of filing fees often offsets the cost of recovery and tenants have to form a contract, accept other unacceptable contractual obligations (such as provision of safe unhindered and convenient access to water meters); and pay upfront, waiting 28 days before exercising an option to reclaim utility costs that properly belong to the landlord. If the Landlord disputes any charges, the onus and contractual obligation unfairly rests with the tenant.

[600] And equivalent tenancy provisions in other jurisdictions

The CAV had become involved in this matter in the first place because of the regulatory overlap considerations that had been brought to their attention in the course of lodgment of a complaint concerning both policies and market conduct involving coercive demands for an explicit contract to be formed under pain of disconnection of heated water services that were an intrinsic part of the tenancy lease, in the absence of either a gas or eelect5icity meter through which energy consumption could be measured through legally traceable means.

The tenant was receiving heated water not energy at all. No bills had been issued. The threats of disconnection were considered to be an appropriate means through which an explicit contract could be formed.

The deemed provisions of the *Gas Industry Act 2001*, under s46 had been distorted to unilaterally impose contractual status on an end-user of heated water products where the relevant contractual party was the Landlord or Owners' Corporation. This is extensively discussed in legal and technical terms throughout Parts 2A and 2B of this submission.

The case remained unresolved after 18 fruitless months of inadequate intervention by the complaints scheme EWOV, whose jurisdictional limitations and limited understanding of the legal and technical complexities hampered the case management of the matter as a complaint. In addition, despite the involvement of the VESC during 2007 at the time of policy intervention of the CAV; and despite re-involvement of the VESC for five months during 2008, the matter remains unresolved and contested.

In any case the central issues were about policies in place that appeared to be facilitating unacceptable market conduct. The matter was closed after 18 months even after the VESC had become involved.

In this case, the end-user of utilities was a particularly inarticulate , vulnerable and disadvantaged end-consumer of utilities in sub-standard and poorly maintained private rental accommodation experienced direct material detriment because or his reaction to coercive letters of threat dignified as *"vacant consumption letters."* The essence of the threat was that disconnection of hot water services would be effected if the tenant did not sign an explicit contract with the supplier of energy, who in fact supplied the energy to the Landlord on common property infrastructure to a single energization point hating a communal boiler tank.

Even after the supplier had been alerted to the vulnerabilities of the end-user with a long psychiatric history and a history of suicide attempts, the process of *"disconnection warnings"* continued whilst a complaint remained open before EWOV. Far from being an administrative error, the supplier had persisted with stating intent to disconnect hot water services after due process was followed on the basis that the Tenant, through a representative, refused to provide identification details.

Twenty months later, the matter remains contested though EWOV's books were closed after 18 months.

Many inarticulate, vulnerable and disadvantaged end-consumers of utilities are intimidated by tribunal or court involvement even with third party involvement to assist with the protracted and often time-consuming and expensive process. The ones most in need of input rarely seek it or even know of their rights. The filing fees in cases such as this are likely to outweigh the costs recovered that should have been Landlord responsibility in the first place if policy-makers and regulators recognized the requirement to avoid regulatory overlap.

Recommendations: CAV, AER, ACCC and other parties re MOU arrangements

I urge all those working together behind the scenes to achieve proper protection for consumers, especially within the energy industries to reconsider the position with regard to avoidance regulatory overlap and best practice trade measurement practice. These considerations will also be of interest to the National Measurement Institute.

It is recommended the issue of strengthening of MOUs between prescribed bodies, regulators and others should be considered by the CAV, ACCC, AER and by the Productivity Commission in its current Review of Regulatory Benchmarking Stage 2.

It is recommended that the CAV directly take on board the consumer policy issues raised within this submission, bearing in mind the moves to nationalization and the advanced stage of negotiations over the National Energy Consumer Framework. There seems little point in reminding regulators and others of their obligations to avoid regulatory overlap and conflict with other schemes present and proposed without reinforcement if these principles are not adopted.

I repeat here that there is a moral and social obligation on statutory and quasi-government agencies to adopt regulation that is consistent with community expectation; that does not represent regulatory overlap to at all times strive to adopt benchmarked regulatory principles and best practice; and to provide a credible, responsible regulatory framework.

The issue of avoidance of regulatory overlap current and proposed is already covered under s15 of *Essential Services Commission Act 2001.*

The Memorandum of Understanding dated 18 October 2007 between the CAV and the *Essential Services Commission* reinforces a pre-existing legal obligation under an Act or Parliament to avoid regulatory overlap present and future. These obligations may benefit from further reinforcement, especially since the BHW arrangements are about to be reinforced by transfer to the *Energy Retail Code*.

This is a tip of the iceberg case. The provisions impact on some 26,000 Victorian consumers of energy. Some of these live in public housing where the arrangements are different for billing. Because of high subsidies, tenants in such accommodation are charged a service fee which covers many other service facilities in such premises. Similarly residential tenants in two other jurisdictions are impacted.

For the rest of the community, the arrangements have done absolutely nothing to stem *"consumer price shock."* Landlords continue to raise rents twice a year, and get away for the most part with their obligations because energy policies have allowed energy suppliers to act as billing agents recovering costs from innocent tenants instead of billing the Landlords direct.

The matter is compounded because of policies in place.

The TUV has attempted in vein to call attention to gaps not unlike the ones that I have raised, with emphasis on those who are technically called "embedded network customers." The term strictly applies to those actually receiving energy, regardless of ownership and operation of electricity networks. The term is exclusive to electricity. Retailers of gas must be licenced. If licence provisions change, consumer protection and other gaps may arise.

All of this makes resolution of such matters troublesome and often irresolvable, causing market unrest; expensive complaints handling; expensive government enquiry or enquiry with independent regulators; and the possibility of private litigation.

The trade measurement considerations are not inconsequential. They have been extensively discussed within this submission. Practices in place will become formally illegal when existing utility restrictions are lifted. These matters have been on a back burner for years unaddressed. Proper attention to them is long overdue at all levels. Common practice does not make for acceptable or best practice or regulation benchmarking. Consumers should expect, indeed demand far more in their protection and in the interests of improved regulation.

Recommendations: CAV, AER, ACCC and other parties re MOU arrangements and enforcement within all proposed laws

For all of these reason proactive policy responses are sought from the CAV and other consumer protection bodies to deal with the matter from a policy perspective, fighting for the fundamental community expectation that no regulatory overall or conflict with other schemes occurs. Any outcome short of that would represent failure of community expectation; result in market outcomes that are unsatisfactory, and compromised consumer confidence to say nothing of marketplace uncertainty in a climate of regulatory uncertainty during major structural reform

I believe that the ACCC and the CAV have formal roles to play in proffering guidance to jurisdictions and taking an action when there is any evidence that responsibilities under statutory enactments are not being upheld. One such example is the express provisions under s15 of the *Essential Services Commission Act 2001* regarding avoidance regulatory overlap and conflict with other schemes

Not all issues that deserve attention are hardship cases, though it is often the case that recipients of communally heated water (BHW) in sub-standard residential accommodation are also disadvantaged because of low fixed incomes. They cannot afford additional costs when they are struggling in the first placed with their essential needs and rental costs. This submission is targeted at a number of agencies in the hope that a note of responsiveness will be triggered in the light of the community detriments.

The technical information may extend beyond the requirements of the CAV, but are provided in the context of submissions to energy-specific arenas state and federal, and also because of the numerous regulatory and consumer protection issues raised. A better understanding of the technicalities may aid responsiveness and more clearly help to enunciate the issues involved which point to unfair contract provisions that are sanctioned at policy and regulatory level. Therefore please see this as an opportunity to re-examine the issues and the consumer protection issues, as well as regulatory reform possibilities that would provide more equitable and just outcomes. There is no point in Unfair Contracts provisions unless they become accessible to the community at large through responsible regulation and improved market conduct. Generic laws need to be enforced equitably without undue weight on goods rather than services.

The substantive terms of some regulations are giving rise to unfair contract provisions that, if they were formulated and adopted by commercial companies rather than statutory-policy-makers and/or regulators would be considered to be unfair

Some of the weaknesses in generic laws identified during the course of the Productivity Commission's Review of Australia's Consumer Policy Framework included those in relation to recourses to redress against substantive provisions

Material detriments are apparent as a direct consequence of some of the provisions in place adopted at statutory level. It is of great concern to the community at large that these appear to be facilitated by statutory and regulatory policies seen to be flawed and in conflict with other schemes

Retailers and distributors need to have confidence that the instructions they are given within codes, guidelines, licence provisions, Orders in Council and any legislative or other provision, or in implicit instructions (such as disconnection of water supplies when no energy is being supplied to the premises in question). These providers of services need to abide by all laws not merely those that are energy-specific. Instructions that include policy practices that infringe or likely soon to infringe national measurement laws, for example, represent regulatory overlap with other schemes, and are appear to be legally and technically unsustainable are not sound policies. They need to be re-examined. The BHW provisions in particular appear to fall into that category.

I urge all responsible matters providing policy guidance, formulating or upholding laws and planning for the future to take all these matters into account and deliver more equitable outcomes in consumer protection, whilst recommending the adoption of practices that are fair and equitable and seen to be so. The community will not readily accept anything less than that. The markets need to be fair, sustainable and effective at all levels. Compromised consumer confidence is compromised consumer protection

APPENDIX 1

CHECKLIST OF INCOMPLETELY OR ALTOGETHER UNADDRESSED ISSUES IN ASSESSMENT OF EFFECTIVENESS OF COMPETITION IN THE GAS AND ELECTRICITY MARKETS IN VICTORIA[601]

Internal energy market

1. Examination of the whole market in context

Starting with the distribution end, and the price drivers that start not in the middle of the supply but at the very beginning. Apparently the AEMC studied wholesale reports as *"background reading"* and not as central to the whole pricing issue and impacts of deregulation, given that retailers do not set the price, but rather manage risks through hedging contracts, assuming they can obtain them, and secondly assuming they can afford them. Some gaps that have been suggested include the following:[602]

- *Lack of transmission capacity (in particular, cross-border interconnection capacity).*
- *Lack of transparency in network access conditions (including network access tariffs and congestion management).*
- *Lack of transparency in the technical operation of interconnected systems.*
- *Lack of robust, deep and liquid organized energy markets in most geographical areas*

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601 Principles may be extrapolated to other States.
See *http://www.aemc.gov.au/electricity.php?r=20070315.165531*
South Australia is the current target – refer to Submission by South Australian Government to AEMC's Second Draft Report
http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/submissions/014Minister%20for%20Energy,%20the%20Hon%20Patrick%20Conlon%20MP.pdf
See also Victoria Electricity (VE) to AEMC Issues Paper (2007), AEMC First Draft (2007) and AEMC Second Draft Report (2008) respectively
See two-part submission to AEMC First Draft Report Madeleine Kingston (November 2007). Found at
http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/submissions/013Madeleine%20Kingston%202nd%20Submission%20Part%202.pdf

602 Council of European Energy Regulators (CEER) found at
http://www.ceer.eu/portal/page/portal/CEER_HOME/CEER_PUBLICATIONS/PRESS_RELEASES/CEER_PRESS_2003-10-06.PDF

- *Lack of transparency and predictability concerning rules applied to the approval or refusal of mergers and acquisitions in the energy field*

2. Tumultuous energy market conditions[603]

3. Very high electricity and gas prices (wholesale)[604]

4. Impact of future events on wholesale markets causing resulting in retail price increase:

> ***"Future events:*** *this is an evolving market. The impact of carbon pricing and interval meters on the effectiveness of competition in the wholesale market is as yet unclear although coupled with capacity and input constraints we can expect upward pressure on retail prices to increase."*[605]

5. Flaws in the assessment of effective retail competition in the gas market

Failure to address injection hedge dependency issues, notably at Longford, as a major barrier to entry and growth that has already resulted in at least one second-tier retailer taking steps that will have the effect of reducing ability to compete for Victorian energy customers.

Apparent omission of a wide range of assessment criteria, as for example identified by the Government of South Australia in their submission to the Second Draft Report (discussed in more detail shortly under the heading "Competition Issues – Barriers to Entry"

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603 Infratil 2007/8 Notable Events Developments found at *http://www.infratil.com/downloads/pdf/ift_results_presentation191107.pdf*
Note Infratil is the parent company for Victoria Electricity who has responded to AEMC's Review (First and Second Draft Reports, notably p2 of latter response) with vociferous protests about the conclusions drawn that retail competition is effective in the current tumultuous climate with references to procurement of physical gas for injection at Longford as a major barrier to entry and growth and steps already taken to reduce competition efforts in the Victorian Market. Refers to similar happenings in SA. Not related to retail end of prices. Retailers manage risk and do not set prices

604 Ibid Infratil 2007/8 Notable Events (parent company for Victoria Electricity)

605 Ibid CUAC (2007) Response to AEMC's Issues Paper 10 July 2007

6. Vertical and Horizontal Integration Factors and advantages to incumbents[606]/[607]

- *Transparency and predictability or lack thereof concerning rules applied to the approval or refusal of mergers and acquisitions in the energy field*[608] *(EAG)*

- *Development of new interconnectors normally of little interest to vertically integrated utilities*[609] *(CEER)*

- *Acquisition investment or trading decisions by one energy undertaking as impacting upon all*[610] *(CEER)*

7. Examination of load growth and management factors – [611]

Refer to recommendations by EAG as far back as 2002 in cautions to the ACCC (discussed in more detail under Load Growth Management

"In particular EAG recommended to the ACCC the 'to resolve are how much and what control will consumers and retailers have over their costs particularly if the NEM Rules and Codes and the Network Control Ancillary Service Payment market are complex and non transparent.' Cautions were also expressed that Code Change proposals add to market complexity and increase consumer and retailer risk."

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606 Ibid CUAC (2007) Response to Issues Report

607 The perception of the negative impacts on smaller retailers of vertical integration (generation-retailer) are shared also by some of the smaller retailers themselves – see opinions of Victoria Electricity; documented outcomes in the New Zealand energy market as a direct consequence of vertical integration and as outlined in online material published by Victoria Electricity parent company Infratil cautions expressed in the publication State of the Energy Market, 2007, AER;

608 EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

609 Council of European Energy Regulators (CEER) (2003) found at *http://www.ceer.eu/portal/page/portal/CEER_HOME/CEER_PUBLICATIONS/PRESS_RELEASES/CEER_PRESS_2003-10-06.PDF*

610 Paraphrased from ibid Council of European Energy Regulators found at

611 EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

8. **Cost smearing** and its negative impact for the user/causer pay principle underpinning the market *(see also AIMRO rationale as presented by EAG, discussed in more detail elsewhere)*

Refer to the views of Energy Action Group (EAG) as expressed at the October 2007 International Metering Conference[612] concerning the

> *"Lack of concrete information on the table for consultation, given the resources put into the AIMRO exercise to date*
>
> *The lack of long term "real time" customer load and behavioural data, making modeling difficult and*
>
> *The fact that Cost smearing does absolutely nothing for the user/causer pay principle underpinning the market."*

I quote directly below from the Executive Summary of the Pareto Report prepared for the Energy Action Group concerning the proposal by the Essential Services Commission to roll out interval meters. More extensive citation on this issue and this particular report is provided under the section on Smart Metering

> ***Smearing of peak-load energy costs***[613]
>
> *Summer peak load growth also adds to energy costs and retailer risk costs in the NEM. The use of price caps (deemed standing offers and the like) by some jurisdictions further increased retailer risk.*

9. **Hampered modeling through lack of long-term real time customer load and behavioural data**

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612 Energy Action Group (John Dick) (2007) *"Allocating Risks in a Gross Pool Market"* PowerPoint Presentation at Metering International Conference 24 October 2007

613 Pareto Associates (2003) *"Smart Meters for Smart Competition: Will Current Proposals Hand Back Power to Consumers?"* 2003 Update. Executive Summary. Full report available on *http://www.esc.vic.gov.au/apps/page/user/pdf/IMRO%20EAG%20-%20Pareto7%20April%2003.pdf*

613 See also Sharam, Andrea (2003) Interval of Smart Meters. *"Smart Meters for Smart Competition: Will Current Proposals Hand Back Power to Consumers?"* 2003 Update produced for the energy Action group by Pareto Associates Executive Summary. This page last altered 30 April 2003
Found at *http://home.vicnet.net.au/~eag1/Intervalmeters.htm*
Full Report available at
http://www.esc.vic.gov.au/apps/page/user/pdf/IMRO%20EAG%20-%20Pareto7%20April%2003.pdfsts

(a) Refer to recommendations by Energy Action Group (EAG) as far back as 2002 in cautions to the ACCC (discussed in more detail under Load Growth Management)

> *"In particular EAG recommended to the ACCC the "issues to resolve are how much and what control will consumers and retailers have over their costs particularly if the NEM Rules and Codes and the Network Control Ancillary Service Payment market are complex and non transparent"*
>
> *"Cautions were also expressed that Code Change proposals add to market complexity and increase consumer and retailer risk."*

10. Advanced Metering Infrastructure (AMRO) – straw-grasping based on estimated values in the analysis of AMRO without adequately thinking through the issue?[614]

Absence of concrete information on the table for consultation

(given the resources put into the AIMRO exercise)

11. Risk-innovation aversion

John Dick, President, EAG said:[615]

> *"It is clear and transparent to most that the Australian regulatory environment has not delivered an avalanche of innovative ideas to date in fact the regulators and the industry appears to be almost completely risk adverse to innovation and has to be dragged shouting and screaming to implement even small changes."*

614 Ibid EAG (2007)
615 Ibid EAG (2007) Submission to the ACCC direct quote
615 Ibid EAG (2007) Submission to ACCC direct quote

12. **Inherent distortions in the market in the market caused by the nature of the services, as exemplified by the Retailer of Last Resort Provisions**[616]

Instead of proffering as an explanation for recent RoLR events or distressed sales; or else suspension of active competitive activity in the Victorian market that regulated standing offer prices have stifled growth; perhaps the AEMC would have benefited from considering in considerable detail the impacts of the whole sale market; existing rules that have hampered procurement of physical gas; and the impacts on second-tier retailers of being unable to offer duel fuel products.

13. **The likelihood that the level of retail competition in Victoria will decrease with price rises in other states**[617]

Selected financial issues – supply side barriers

14. **Consideration of Return on Investment (ROI) impacts at distribution level and impacts on retail competition**[618]

15. **Consideration of available capital investment to the forecast load growth over the regulatory period**[619]

16. **Consideration of refurbishment of aging asset base**[620]

17. **Impact on retail competition by such external factors return on investment impacts on at distribution level (where the price-setting occurs) and at the same time ensuring that there is capital investment to the forecast load growth over the regulatory period as well as ensuring the refurbishment of an aging asset base"**[621]

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616 CUAC (2007) Response to AEMC's Issues Report; 10 July 2007.
617 CUAC (2007) Response to AEMC's Issues Report; 10 July 2007.
618 Ibid EAG (2007) Submission to ACC October 2007 direct quote
619 Ibid EAG (2007) Sub to ACCC direct quote
620 Ibid EAG (2007) Sub to ACCC direct quote
621 Ibid EAG October 2007 direct quote

Selected financial issues – demand side barriers

18. Demand management vs income generation in assessing energy and demand sustainability as expressed by PIAC and upheld by others

PIAC and others have pointed out to:

> *"failure to take into account impacts on Australia's energy demand and sustainability taking into account possible compromise in commitment by private companies to address demand management in the face of clear incentive to generate income"* (PIAC)[622] *taking into account possible compromise in commitment by private companies to address demand management in the face of clear incentive to generate income."* (PIAC)[623]

(upheld by PIAC[624], Alan Pears; BCSE (ref 113); EAG; AC[625] CUAC;[626] CALC[627] numerous others)

19. Climate change policy

Alan Pears[628] has commented in a submission elsewhere that[629]

> *"Given the urgency, driven by climate change policy and the need to aggressively respond to growing peak electricity demand, it is critical that this process delivers real outcomes quickly. Good intentions are no longer sufficient. Fines and incentives should be applied to ensure action.*
>
> *The outcomes of this process are critical to overcoming the barriers to demand-side action and distributed generation that have marred the energy market since its inception.*
>
> *Indeed, the fact that it has taken this long to address these issues indicates a serious failure of public policy process."*

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622 PIAC (2007) Submission to AEMC's First Draft Report 9 November 2007 Terms of Reference p 2

623 Ibid PIAC (2007)

624 CALV (2007) Response to AEMC Issues Paper, Consumer Action Law Centre. 28 June 2007

625 ACF (2007 Strong ALP renewable energy target good for jobs and the environment 30 October 2007 found at: *http://www.acfonline.org.au/articles/news.asp?news_id=1498*

626 CUAC (2007) Response to AEMC Issues Paper 10 July 2007, Key issues.

627 Ibid CALV (2007) Response to AEMC Issues Paper, Consumer Action Law Centre. 28 June 2007

628 Alan Pears is an engineer and educator who has worked in the energy efficiency field for twenty years. He is Senior Lecturer in Environment and Planning School / Work Unit, Global Studies, Social Science and Planning

629 Alan Pears (2007) Submission National Frameworks for Distribution Networks Network Planning and Connection Arrangements. Found at <*http://www.mce.gov.au/assets/documents/mceinternet/Alan_Pears20071019124200.pdf*>

20. Inefficient investment and consumption of electricity

TEC has raised the issue of

> *"Inefficient investment and inefficient consumption of electricity"*

In its submission to the AEMC Rule change proposal TEC discussed demand management[630] and transmission networks, making the following observations:[631]

> *"The focus of the proposals is on correcting the major bias against demand management (DM) in the National Electricity Market (NEM).*

On the other hand, John Dick President of Energy Action Group[632] believes that there is no evidence that demand side response will address the problem:

> *"…evident in both Victoria and South Australia jurisdictions where the only viable solutions to transmission augmentation Load Management*
>
> *Demand Management and embedded generation are discounted as the market based solution. Currently in both Victoria and South Australia there are minimal mechanisms that can facilitate either Demand Management or ensure that embedded generation can compete with transmission augmentation as an option for system development Load Management*
>
> *Demand Management and embedded generation need to be treated in an equal manner to transmission augmentation in meeting load growth requirements.* [633]

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630 TEC defines demand management (DM) as follows:
"Demand management in this proposal can be read to include 'demand response', 'demand side management', 'demand side response', 'energy efficiency' and 'non-network solutions'. In general, DM can include both the management of peak loads and energy efficiency as a way of meeting capacity requirements with the greatest cost-efficiency. It includes a diverse array of activities that meet energy needs, including cogeneration, standby generation; fuel switching, interruptible customer contracts, and other load-shifting mechanisms."

631 TEC (2007) Submission to AEMC Rule change proposal – demand management and transmission networks. 6 November 2007

632 EAG, is a membership based, not-for-profit incorporated association representing the interest of less than 160MHh consumers across the National Electricity Market, in its Submission on the AEMC Scoping Paper on Transmission and Pricing Rules Initial Consultation Scoping Paper (funded by an NEM Advocacy Panel Emergency Grant).

633 EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association October 2007

Political and regulatory factors

21. Possible impacts of political interference[634]

22. Consideration of possible reduction of commercial capacity to network users through special regimes for construction, operation and use of merchant lines

> *"Special regimes applied to the construction operation and use of merchant lines may reduce the commercial capacity available to network users in general and discourage the expansion of public networks"*[635]

23. Examination of Political Sustainability defined as:

> *"Approaches for increasing the political sustainability of policies and institutional mechanisms, including the application of pro- poor policies"*

24. Correlation of complex far reaching interrelated decisions[636]

As observed by the EAG in the same paper:[637]

> ***"Complex far reaching interrelated decisions.***[638]
>
> *The ACCC Electricity Group is currently faced with a complex number of interrelated decisions around the future structure of the National transmission system. The failure to consider each decision in relation to the others will cause problems well into the future for the transmission asset owners and the market.*

634 Ibid CEER (2003) direct quote
635 Ibid CEER October 2003 direct quote
636 Ibid EAG (2007) Submission to ACCC?SP Powernet October 2007
637 Ibid EAG (2007) Submission to the ACCC
638 Ibid EAG (2007) Submission to the ACCC October 2007

This Determination, coupled with the ElectraNet Determination and the NECA Hybrid Interconnector Determination, provides the opportunity to ACCC to reduce market complexity. There is a common myth held by economists that all functions of the NEM need to be subjected to competitive pressures. The SPI PowerNet application shows that there are a number of projects, particularly the introduction of several independently owned and dispatched hybrid interconnectors and dynamic capacitor banks that are argued (wrongly in our view) to enhance the NEM transmission system."

"EAG has significant concerns that the AEMC, the MCE and the Reliability Panel are in the process of running a number of reviews concurrently. Further, that a number of these reviews interact with each other and that this convoluted process may lead to very poor policy and rule making.

It is EAG's contention that the AEMC has an extremely busy work plan: that the time frame provided for in Diagram 12 and the AEMC web site is far too ambitious to carry out this joint review. We have made a series of comments in the second part of the submission to illustrate this point.

There have been a number of attempts to address transmission pricing issues by both the NECA and the ACCC. To date, all the work by these bodies appears to have failed to deliver the desired outcome. It is likely that this review process will do the same if the time frame continues to be unduly compressed. The process runs the risk of following the badly flawed ACCC Regulatory Test consultation process. One of the implicit objectives of this revenue/pricing review and possible Rule reset should be the minimization of regulatory uncertainty for the transmission businesses so that they can continue investing in new and replacement infrastructure with minimal dislocation to their work programs."

In 2003, in discussing infrastructure projects, emerging economies and Government reneging, author Ravi Ramamurti, of the Department of Business Administration, Northeastern University, Boston, USA summarizes his paper as follows:[639]

> *"Despite deregulation and privatization, governments in emerging economies continue to play important roles in private infrastructure projects, thereby exposing private investors to the risk of government reneging. The government's role as deal maker—and deal breaker—in infrastructure investments stems from its role as financier, customer, supplier, competitor, and/or regulator. (The only role governments have shed as a result of recent economic reforms is that of producer.)*
>
> *Based on the literature, I propose three explanations for government reneging: (1) economic uncertainty, which necessitates contract renegotiation; (2) the logic of the "obsolescing bargain," which makes deals less attractive to governments ex post than they were ex ante; and (3) political change, which puts new leaders in charge with incentives to renege on old promises.*
>
> *I assert that these risks can be contained, respectively, through contract design, investment strategy, and institutional design. Using this framework, I conclude that Enron's strategy in the controversial Dabhol project in India was sensitive to first of the three factors and relatively less mindful of the other two.*
>
> *The policy implication for MNCs is that they should be attentive to all three factors that cause government reneging rather than just one or two.*

Jamison (2005) summarized the Internal Energy Market as follows:

> *"The Internal Energy Market provides new opportunities to energy consumers and to energy undertakings. It has the potential to increase economic and technical efficiency, as well as security of supply, thus improving European welfare and the competitiveness of European industry. It can also be an important tool to reinforce political and economic links with Eastern European and South Mediterranean countries, thus contributing for stability and development in these areas.*

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639 Ramamurti, R (2003) *"Can governments make credible promises?"* Journal of International Management 9(3) 2003, pp253-269. Insights from infrastructure projects in emerging economies institutions and international business.

"If the Internal Energy Market is not properly organized, and if the increasing interaction between national political, economic and institutional decisions is not duly taken into account, it may engender inefficiencies, leading to high energy prices and poor quality of service and even endangering security of supply.

"Completion of the Internal Energy Market is a complex and relatively slow process. It is strongly influenced by the different speeds of national legal, institutional and industry developments. The present stage of the Internal Energy Market is a critical one.

It is the duty of energy regulators to point out the present difficulties and to suggest appropriate solutions leading to fair, efficient, secure and integrated energy markets in the European Union."

"Should consumer policy be administered separately from competition policy or should institutional arrangements reflect the synergies between the two?"

Some people believe that the Internal Energy Markets magnifies the risks and reduces opportunities. The CEER thinks the opposite is true. Therefore, we will endeavour to complete the Internal Energy Market as soon as possible, according to the mandate which was given to us by the Member States, by the European Parliament and by the Council. The CEER are working towards the completion of the Internal Energy Market to ensure that European consumers obtain the full benefits of liberalised markets as well as secure supplies of energy.

Rome, October 6, 2003"

Political, legislative or regulatory decisions concerning energy investment and trading frameworks in one Member State have a potential to impact upon all member states.

This paper provides a framework of some of the strategies governments can use to mitigate regulatory and political risk to private companies investing in infrastructure projects in developing countries.

One section of the paper focuses on strategies that can improve transparency, independence, competence, and credibility of the regulator, but other aspects of government, as they affect regulatory and political risk, are also discussed.

Jamison et al (2005) have drawn attention to the paper by *Kaufman et al (2004)*[640] examining six dimensions of government for 199 countries and territories in four time intervals between 1996 and 2002 using an unobserved components model, using 250 individuals measures taken from 25 different sources, including international organizations, political and business risk-taking organizations, think tanks and nongovernmental agencies. The governance indicators examined are:

1. *voice and accountability (political process, civil liberties, and political rights)*
2. *political stability and absence of violence*
3. *government effectiveness*
4. *regulatory quality*
5. *rule of the law, and*
6. *control of corruption*

The limitations of margins of error were acknowledged by the authors because of reliance on subjective perceptions and for certain dimensions given the context were unaccompanied by reliable objective data – those of corruption, confidence and property protection.

Despite the context, many of the issues examined may be relevant in examining current parameters.

Jamison's (2004) choice of *Kurtzman et al's 2004* paper[641] may be helpful were it examines five indictors:

1. *corruption*
2. *efficacy of the legal system*
3. *deleterious economic policy*
4. *inadequate accounting and governance practices, and*
5. *detrimental regulatory structures*

640 Kaufmann, Daniel, Aart Kraay, Massimo Mastruzzi. (Revised 2004). *"Governance Matters III: Governance Indicators for 1996-2002,"* World Bank c/f Jamison (2005)

641 Kurtzman, Joel, Glenn Yago and Triphon Phumiwasana. (2004). *"The Global Costs of Opacity."* *MIT Sloan Management Review* 46(1): 3844. c/f Jamison (2005)

25. Consideration of random or otherwise unpredictable factors impacting on measured performances:

> *"Random or otherwise unpredictable factors that affect these measured performances including conflicts that may have different implications regarding firm's potential exercise of market power."* Kaufman[642]

26. Other external threats including those identified by Ravi Ramanurti,[643] who summarizes certain risks that can be contained, respectively through contract design and investment. These include:[644]

> *1. economic uncertainty which necessitates contract renegotiation;*
>
> *2. the logic of the "obsolescing bargain which makes deals less attractive to governments ex post than they were ex ante; and*
>
> *3. political change which puts new leaders in charge with incentives to renege on old promises.*

27. "Political, legislative or regulatory decisions concerning energy investment and trading frameworks in one State having an impact on all States (and Territories)."[645]

28. "**Full examination of the existing and proposed Regulatory Framework**"

How the institutional design of the regulatory entity, the design of the government's overall regulatory system (includes courts, checks and balances within the government etc), and the country's relationships with other countries and multilateral institutions relate to opportunism."[646] *(Jamison et al 2005)*[647]

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642 Kauffman, Larry, (2007) *"Performance Indicators and price monitoring: assessing market power"* in Network Issue 24 May 2007 ISN 1445-6044. Pacific Economics Group. A Utility Regulator's Forum.

643 Ravi Ramanurti Department of Business Administration, Northeastern University, Boston, USA

644 Management 9(3) 2003, pp253-269 Insights from infrastructure projects in emerging economies institutions and international business.

645 Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.* The Electricity Journal Vol 18(6) July 2005 pp 36-35

646 Ibid Jamison, MA, Holt, L, Ber, SV, (2005)

29. "Proper examination of Corruption"

Broadly defined as the relationship between corruption and risk, and methods for mitigating risk resulting from corruption[648]

30. Examination of Renegotiation and Bailout factors defined as [649]

> *"Approaches for dealing with unforeseen events or failures in institutional design corruption prevention measures or sustainability approaches that may trigger contract renegotiations or bailouts including strategies for avoiding such situations"*

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[647] Mark A Jamison, PhD, University of Florida 2001; MS Kansas State University 1980 BS Kansas State University 1978. Areas of expertise: Leadership and Strategy, Competition and Pricing, Cost Analysis, Universal Service
Dr. Mark Jamison is the director of the Public Utility Research Center (PURC) at the University of Florida and also serves as its director of Telecommunications Studies. He provides international training and research on business and government policy, focusing primarily on utilities and network industries. He co-directs the PURC/World Bank International Training Program on Utility Regulation and Strategy

Dr. Jamison's current research topics include leadership and institutional development in regulation, competition and subsidies in telecommunications, and regulation for next generation networks. He has conducted education programs in numerous countries in Asia, Africa, Europe, the Caribbean, and North, South, and Central America. Dr. Jamison is also a research associate with the UF Center for Public Policy Research and with Cambridge Leadership Associates, where he provides consulting and training on adaptive leadership. He is an affiliated scholar with the Communications Media Center at New York Law School. Dr. Jamison is the former associate director of Business and Economic Studies for the UF Center for International Business Education and Research and has served as special academic advisor to the chair of the Florida Governor's Internet task force and as president of the Transportation and Public Utilities Group.

Previously, Dr. Jamison was manager of regulatory policy at Sprint, head of research for the Iowa Utilities Board, and communications economist for the Kansas Corporation Commission. He has served as chairperson of the National Association of Regulatory Utility Commissioners (NARUC) Staff Subcommittee on Communications, chairperson of the State Staff for the Federal/State Joint Conference on Open Network Architecture, and member of the State Staff for the Federal/State Joint Board on Separations. Dr. Jamison was also on the faculty of the NARUC Annual Regulatory Studies Program and other education programs.

Dr. Jamison serves on the editorial board of *Utilities Policy*. He is also a referee/reviewer for the *International Journal of Industrial Organization, The Information Society, Telecommunications Policy,* and Utilities Policy.

[648] Ibid Jamison et al (2005)

[649] Ibid Jamison et al (2005)

31. Proper coordination of transmission network planning

> *"Some degree of coordination among those responsible for transmission network planning and construction is necessary if "patchwork" solutions are to be avoided"*[650]

32. Consideration of impact of inter-related decisions re structure of national transmission system

> *"Far reaching impact of complex interrelated decisions around the future structure of the national transmission system*[651]

33. Consideration of transmission asset issues

> *"Failure to consider each decision in relation to the others will cause problems well into the future for the transmission asset owners and the market"*[652]

34. Consideration of risk of badly flawed ACCC Regulatory Test consultation process if review processes are unduly compressed[653]

> *".....if review processes of all descriptions continue to be unduly compressed the process runs the risk of following the "badly flawed ACCC Regulatory Test consultation process"*[654]

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650 Ibid CEER October 2003 direct quote

651 EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

652 Ibid EAG (2007) October 2007 Sub to ACCC direct quote

653 Ibid EAG (2007 Sub to ACCC direct quote

654 Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

Selected Climate Change, Emissions Trading and Energy Efficiency issues

35. Interaction of competition between climate change, emissions-trading, energy efficiency [655][656][657][658][659]

36. Renewable energy and energy-efficiency targets[660][661][662][663]

(PIAC; Alan Pears[664] TEC[665][666]; ACF; [667][668], BCSE[669];CUAC[670]

> ***Energy inefficiency***
>
> *"As there is a strong relationship between energy efficiency and energy affordability we would argue that this is not so much a separate customer group as it is a way of addressing energy affordability and assisting customers in chronic financial hardship. Tenants in the private property market are a class of consumers particularly vulnerable in this regard. They do not constitute a homogenous group. However it is well documented that there are more low income consumers in rental properties than amongst home purchasers/owners and there is a positive relationship between tenants and utility stress."* [671]

655 Ibid PIAC (2007) Submission AEMC First Draft Report Terms of Reference p 1 and 2

656 Ibid Alan Pears (2007) Submission to National Frameworks for Distribution Networks Network Planning and Connection Arrangements.

657 Business Council for Sustainable Energy Submission to Victorian Energy Efficiency Target Scheme, via DPI 18 May 2007, cover letter, p1

658 TEC online Environmental and Social Objectives for the NEM available at http://www.tec.org.au/index.

659 CUAC (July 2007) Response to AEMC's Issues Paper 10 July 2007

660 Ibid, PIAC (2007) Submission to AEMC's First Draft Report; November 2007 p1 and 2

661 Ibid Alan Pears (2007) Submission to NGDNNP&CA. Oct

662 Ibid as for citations 80,82, 83, 84, 85 and 86

663 National Framework for Energy Efficiency Guidelines (NFEE) found at *http://www.energyefficiencyopportunities.gov.au/assets/documents/energyefficiencyopps/industry%5Fguidelines%5Ffinal%5Fweb%5Fversion20071008110144%2Epdf*

664 Ibid Alan Pears (2007) Submission to NGDNNP&CA, Oct

665 c/f TEC online Environmental and Social Objectives for the NEM

666 c/f TEC online "Australia to Dump Environment and Social Goals in Power Shake Up available at http://www.tec.org.au/index.php?option=com_content&task=view&id=561&Itemid=316

667 ACF *"ACF's National agenda for sustainability"* Found at http://www.acfonline.org.au/default.asp?section_id=215

668 Ibid ACF

669 Ibid as BCSE (2007) Submission to Vic Energy Efficiency Target Scheme18 May 2007

670 CUAC (2007) Response to AEMC Issues Paper 10 July 2007. See page 13.

671 Ibid CUAC (207) Response to AEMC Issues Paper 10 July 2007. See page 13.

37. Consideration of other unpredictable external factors[672]

> *"The impact of carbon pricing and interval meters on the effectiveness of competition in the wholesale market is as yet unclear although coupled with capacity and input constraints we can expect upward pressure on retail prices to increase."*

38. **Absence of robust evidence of retailer rivalry** to support conclusions that rivalry between retailers was sufficiently strong,[673] along the following lines, as suggested by the South Australian Government in its response to the First Draft Report.

39. **Assessment of possible impacts of regulatory uncertainty for the transmission businesses** so that they can continue investing in new and replacement infrastructure with minimal dislocation to their work programs (EAG had recommended minimization of such uncertainty).[674]

40. **"Detailed examination of existing and proposed Financial Instruments."**[675]

Financial Instrument are defined as

> *"Instruments such as risk mitigation insurance guarantees and other risk reallocation products that decrease investor risk given the set of institutional instruments."*

Though the need for risk mitigation is discussed broadly in the AEMC First Draft Report, the specifics and assessment of whether the instruments in use are effective, sufficient risk protection in the current climate of uncertainty and volatile wholesale prices, and clear evidence of market failure from a retailer perspective in certain areas

672 CALV Submission to AEMC's First Draft Report, November 2007
673 Govt of South Australia (2007) Response to the AEMC First Draft Report, November 2007
674 EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote
675 Ibid Jamison, MA, Holt, L, Ber, SV, (2005)

41. Absence of single market objective and effective representation, review and appeal mechanisms allowing all end-users fair and equitable participation

> *"Absence of appropriate checks and balances in respect of AEMC's, AER's, NEMMCO's and ACCC's performance of their respective functions as outlined in the NEL and NER's in order to ensure that these bodies fulfill the single market objective and there is effective representation, review and appeal mechanism to allow end users fair and equitable participation?*[676]

42. "**Impacts on Australia's energy demand and sustainability,** taking into account possible compromise in commitment by private companies to address demand management in the face of clear incentive to generate income." (PIAC)[677]

43. Detailed analysis of demand side interaction with the market providing sufficient evidence that competition in both electricity and gas retail markets is effective. CALV has referred to the OECD Consumer Policy Committee's comprehensive checklist and toolkit for assessing regulatory change; recognition of market failure from consumer perspective[678] (CALV).

Selected Retailer impacts

44. Consideration of market complexity factors promoting 'gaming' opportunities

Further market failure is likely to be the outcome of failure to consider market complexity factors that may promote 'gaming' opportunities that will be created by the move to introduce hybrid interconnectors and other exotic transmission arrangements into the NEM. A single asset owner in each region simplifies the management of transmission assets:[679]

> *"EAG has significant concerns that the AEMC the MCE and the Reliability Panel are in the process of running a number of reviews concurrently. Further that a number of these reviews interact with each other and that this convoluted process may lead to very poor policy and rule making.* [680]

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676 Ibid EAG (2007) Submission to ACCC October 2007

677 PIAC (2007) Submission to AEMC's First Draft Report 9 November 2007 Terms of Reference p 2

678 CALV (2007) Submission to AEMC's First Draft Report, November 2007 note especially p10 -11

679 Ibid EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

680 Ibid EAG (2007) Submission to ACCC direct quote

45. **Consideration of the nature of and changes in differentiated and innovative** products and services being offered in the electricity and gas retail markers.

One of the pertinent questions to ask is: Can any degree of innovation product offers address fundamental flaws on the supply side with wholesale access to gas supplies and the impact this will have on the ability of second-tier retailers to effectively compete against incumbent retailers.

The Government of South Australia has already questioned the extent to which second-tier retailers may be endeavoruing to compete against themselves rather than within the market as a whole. Can they achieve this with the power imbalances as they stand? It is clear from Victoria Electricity's submissions to the First and Second Drafts that this company

> *"……(and possibly others) have already had to take steps that will have the effect of reducing their ability to compete for Victorian energy customers."*

Selected Demand side issues:

46. **Recognition of the essential nature of energy**[681] (CALV)

47. Recognition of market failure from consumer perspective as evidenced in part by complaints lodged, notwithstanding the poor level of awareness of the existence at all of the energy-specific complaints body. Some twenty-six percent make no complaints at all. [682] (CALV)

48. **Contemplation a competition framework that enables an effective and equitable spread of the inevitable cost burden** over time and across different sectors of society[683]

49. **Assessment of the quality of regulated services provided to customers by examining company prices and profits and trends in company's total productivity (TFP)**[684]

50. **Examination of Political Sustainability** defined as:

> *"Approaches for increasing the political sustainability of policies and institutional mechanisms, including the application of pro- poor policies"*

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681 Ibid CALV (2007)Submission p10 and 11

682 Ibid CALV (2007) Submission p10 and 11

683 PIAC (2007) Submission to AEMC's First Draft Report 9 November 2007 Terms of Reference p 2

684 Ibid Pacific Economics Group (2007) *"Performance Indicators and price monitoring: assessing market power"* in Network Issue 24 May 2007 ISN 1445-6044. Pacific Economics Group. A Utility Regulator's Forum.

APPENDIX 2

SELECTED RELECTIONS ON IMPACT OF PRICES AND PROFIT MARGINS ON ENERGY RETAIL COMPETITION IN VICTORIA[685]

The CRA International Price and Profit Report *"Impact of Prices and Profit Margins on Energy Retail Competition in Victoria Final Report"* (85 pages) commissioned as a quantitative analysis by the AEMC for the current Retail Competition Review (Victoria) is briefly discussed below, mostly in terms of its limitations.

In the First Draft Report (2.5, p19), the AEMC had expressed intent to

> "*consider the evidence in more detail once the final results were available and interested parties had had the opportunity to comment on the analysis undertaken." (p19 First Draft Report)*

Unfortunately since the report was not published online till 8 November, on the even of the deadline for responses to the First Draft, it was unreasonable to expect any stakeholder to have any chance to incorporate considered responses to this important component of commissioned findings.

Presumably a draft report had also been made available to the AEMC but this was not made publicly available to stakeholders who should have had the same opportunity to study preliminary material as the AEMC to allow more time to digest even preliminary results, given the tight deadlines.

On an issue of procedure, the CRA Report was positioned along with other commissioned Consultant Reports on the home page of the AEMC Retail Competition. However, my guess is that most people accessing the home page to look for submissions or relevant reports would instinctively click on the link at paragraph 2 to look at more information, without scrolling down. Therefore the positioning of the report and failure to supply a link on the next screen may have made it difficult for stakeholders to even be aware that such a report was available at all. For those already registered for e-mail alerts, it may have been helpful to flag the publication of this report or any others relevant and to provide links in more than one place on the site.

I stumbled on the report by accident minutes before sending my submission electronically to meet the deadline. It may well be that the location of the report and its late publication has prevented stakeholder input on this topic.

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

This issue is raised here simply because effective consultation cannot occur under rushed deadlines, eleventh hour access to important protocols and commissioned reports. Participation is not a favour to stakeholders.

It is a crucial part of achieving valuable feedback from the public at large to Reviews and Commissions, so it needs to be placed in context and nurtured with an attitude of flexibility and spirit of cooperation, more especially when last minute reports are provided

The public had expected additional time to provide feedback on the CRA Report – indeed the AEMC had promised this, but again time has run out and the COAG deadlines are descending.

Because of the last-minute publication of this Report it would not have been feasible for any stakeholder to make a meaningful response to this report to meet the 9 November deadline for response if anyone noticed it at all online. It would have been helpful if at least an em-mail notification had been sent to all existing registered stakeholders who had provided email details. Best practice requires that all evaluative material recognizes its own limitations and publicly highlights the limitations of any piece of study or research.

The Commission appears to have a set mind and has found suitable justification for what certainly appear to be pre-determined decisions based on a series of theoretical assumptions that may not stand up to closer scrutiny. On that basis there may be limited value in examining in detail the arguments put forward put this is my best shot within the time constraints. Others far better qualified may have had valued input to make in this technical area of financial forecasts and pas analyses, but the CRA Report was not made available in a timely way for stakeholder input. Not that more timely opportunity and robust counter-argument would necessarily have gone far in reversing the AEMC's assessments.

The Draft AEMC reports profit margins as follows[686]

2.5 Profit margins

One of the outcomes of effective competition is that there is pressure for prices to converge towards efficient costs over time. This implies that retail profit margins under market contract prices should be consistent with a competitive return for risk and financing costs.

[686] AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report,* October 2007, Sydney. p19

The Commission engaged CRA International (CRA) to provide quantitative analysis on energy retail margins in Victoria as a basis of assessing whether the margins available under the market contract prices are consistent with the expectation of margins in a competitive market. While this work is ongoing, CRA's preliminary results suggest that competition has placed sufficient pressure on retailers' market offer prices to maintain margins at levels that would be expected in a competitive market. However, these results are preliminary at this stage of the Victorian Review.

On p11 under the heading "Terms of Reference, The CRA Report of 8 November was careful to provide a caution about interpreting the effectiveness of competition on the basis of that report but suggested references to all other reports being prepared for and by the Commission. In particular the CRA Report noted that analysis of retail prices and margins represent only one aspect of a wide range of considerations that should be taken into account in a retail competition review, and it would not be appropriate to draw conclusions regarding the effectiveness of competition from this study in isolation from all those considerations.

In another section devoted to the stakeholder consultation process, I have commented on the importance of availability to all stakeholders in a timely way all data relied upon. This was intended to refer not only to reports commissioned for this Review, but all other ancillary data whether or not addressed to the Review or commissioned for the review. That is because of the enormous degree of overlap in various market reform initiatives that make it imperative for a considered, organized and structured approach to be applied in the interests of achieving robust stakeholder involvement.

In passing I note the strong reservations and disclaimers made in the CRA Report about the quality or completeness of the data available. This is further discussed under the section in passing Prices and Profit Margins.

Cursory observation is made here that the CRA Report was based on best estimates only in the absence of actual data from retailers and that much reliance was placed from publicly available information and on historical data dating back to 2003.

CRA International are to be congratulated for acknowledging the limitations of the data and estimates presented in this report on the basis of paucity of available actual data and other considerations. CRA has professionally and diplomatically handled the issue of the poor quality of data available.

How could this reputable firm have been expected to produce reliable and accurate results under the circumstances? Has much strategic planning went into the exercise of determining the criteria that would be needed for robust assessment of the market?

One burning question is, whether CRA sufficiently assisted with data that was or should have been carefully gathered not as a snapshot exercise but as a consistent best practice approach to collected pertinent data longitudinally after receiving best advice on evaluative design in assessing the impacts of competition? Can of proper assessment of such matters possibly be effected if undertaken a matter of months before regulatory change and price deregulation is undertaken.

In good faith, perhaps an interpretation can be placed that these reservations and disclaimers are so significant as to possibly have the effect of appreciably diluting any weight placed on the report as showing how successful competition has been in a financial sense from retailer perspective.

These reservations summarize real concerns:

- CRA was forced to rely on publicly available information and historical data in order to assess the revenue and cost components that determine retailer margins;
- CRA was unable to obtain actual data from retailers;
- CRA was forced to rely on broad range estimates only because of unavailability of robust data in particular actual data;
- CRA was forced to rely on historical energy retail margins, and information in the public domain to assess the revenue and cost components that determine retailer margins; in particular revisiting of the previously analysis that was undertaken to calculated a regulated price path in 2003, with substitute for CRA's best estimates only of cost outturns for the years 2004-2007.
- CRA was forced to place reliance on average consumption levels of those on standing offers in order to assess retailers' revenues from customers on standing offer contracts. The material was partly sourced in August 2007 from retailers' websites with 'some input' from retailers describing their market offers that were available at the time. Typical discounts were assumed.
- CRA conceded the likelihood that actual results are more likely to be nearer to the midpoint or at the lower end of the ranges quoted in CRA's *"best estimates"* CRA have specified how their estimates were formulated for the different cost item as follows:

CRA's analysis begin with using retail cost estimates that had been used in providing advice to the Essential Services Commission in 2003 relating to current price paths for electricity and gas, commencing in 2004.[687]

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[687] Impact of Price and Profit Margins on Energy Retail Competition in Victoria C11383-00, p7008 8 October 2007. Report commissioned for AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report*, October 2007 Sydney. This was based on the fact that the standing offer price levels were based on the assumptions, estimates and projects of cost that were made at the time, plus net margins that the Victorian Government considered to be reasonable

The current analysis was updated on the basis of that earlier data and estimates. It had originally been comforting to know of the AEMC undertaking that given the paucity of the data available, not will take account of the precision of the estimates of margins when deciding how much weight to place on this source of evidence.

The AEMC has used these precise words under Section 8.1.1.

> *"As any estimate of a benchmark wholesale energy purchase cost is based upon an assumed risk management strategy and an estimate of the value of the residual risk exposure of the retailer the potential for material error in the estimate of the wholesale purchase cost exists. Similarly regulators or governments have needed to make assumptions about efficient retail operating costs when setting the existing price controls over retail prices."*
>
> *"The paucity of data available means that little robust analysis has been undertaken into this cost item again leaving open the potential for material error. The Commission will take account of the precision of the estimates of margins when deciding how much weight to place upon this source of evidence."*[688]

In addition the AEMC has also made the following statements and disclaimers, emphasizing that the observations (in the First Draft Report) are only preliminary at this stage, noting the need for caution. That admission is given below verbatim.

> *"The Commission is mindful, however, that a reasonable margin for the average customer does not imply that all customers are profitable under the existing standing offer tariff, given that the cost of serving a customer can vary as a result of location, tariff type or levels of consumption. Accordingly, the Commission considers there remains some risk that the structure and level of the standing offer tariff is inhibiting the further development of competition."*
>
> *"The Commission emphasizes that these observations are only preliminary at this stage. It also notes the need for caution when interpreting estimates of margins and drawing inferences from them about the effectiveness of competition given the inherent imprecision in the exercise.*

[688] AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report*, October 2007 Sydney., p246-247

CRA admitted to paucity of more current data so it is difficult to know whether the new estimates had any real basis given the changes in the market since that time; the fact that many investors have exited the scene, and the number of market changes generally. This is a climate of wholesale price volatility.

The CRA Report details costs as follows:[689]

> ***Energy purchasing costs:*** *For electricity, these costs have been estimated using historical published contract prices for a fully contracted retailer. In the case of gas they estimated that energy purchase costs had increased by CPI+2 percentage points each year over the last four years.*
>
> ***Network charges:*** *For both electricity and gas, CRA estimated transmission and distribution charges on the basis of the published regulated network charges*
>
> ***Fees and levies:*** *These arise in both electricity and ahs and were estimated from public sources.*
>
> ***Retailer operating costs.*** *These were costs that an energy retailer incurs in the course of carrying out its business and include a wide range of items, including billing, call centre, credit management, trading and IT costs, as well as corporate overheads.*

Their **estimates of these costs** is the same for gas as for electricity, and based on an assessment of recent regulatory decisions and other information in the public domain.

Much emphasis is placed on comparisons between electricity margins for standing offers and market offers, and the market as a whole, under varying wholesale energy cost conditions.

It is not clear on cursory glance at the first few pages of the report what data had been relied upon in determining **wholesale energy cost conditions**, including load growth factors; infrastructure maintenance and the like.

The margins are not discussed in detail here except to comment on how wide they are and to refer again to the quality of the data made available for best estimate calculations.

The CRA estimates were based on 60% of customers being on market contracts and this being maintained.

As pointed out by Mr. Dufty in his submission another way of putting this is that 30% of domestic and 40% of commercial customers that took up market offers indicated that these contracts did not meet their expectation.

CRA acknowledged the likelihood that actual results are more likely to be nearer to the midpoint or at the lower end of the ranges estimated as *"best estimates."*

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689 Ibid CRA Report to AEMC Retail Competition Review October 2007 p708

This presumption based on the quality of the data, and the fact that retailers that adopted a less than conservative hedging strategy than assumed in the study may have experienced high wholesale electricity purchase costs. Those presumptions were consisted with the EBITDA's reported by Origin Energy and AGL in their annual reports of the past several years.

The broad estimates provided, given the frequently acknowledged data limitations in the CRA Report must count for reasonable grounds to take a pause and make an honest assessment of whether results such as these in the absence of accurate and reliable actual data are sufficient grounds for removing standing offers and lightening regulatory burden to the extent of possibly compromising the broader goals of competition that are not by any means restricted to monetary gains and profit margins.

The AER Publication State of the Energy Market (2007) now long out of date in many respects[690] makes the following observations about the outcomes from the development of the National Electricity Market:[691]

- Lower electricity prices overall
- More cost reflective prices, so that prices have **risen for households** and fallen for business
- Greater convergence of prices across the market

Based on comparative trends between 1990-91 and 2005-06 for Australia as a whole, households have experienced an average 4 per cent real increases, whilst business have had an average 23 per cent real reduction in price.

Since it is fully expected that in order to allow further headroom in what may be an already crowded market, prices will increase even more, those4 most likely to suffer are domestic users

The indicators relied upon that there is significant competitive activity in the retail market for electricity and gas for small-volume users in Victoria have been sited as follows:

> ***"The Victorian retail electricity and gas markets have experienced significant levels of new entry[692]"***

Comment

That is true. There has been competitive activity. There has also been significant evidence of market failure.

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690 It is most encouraging to see a weekly snapshot of the market approach to show new developments, though snapshots in themselves can have drawbacks and fail to give the predictability that may be required for longer- range decision-maker. A volatile energy market cannot offer such predictability, especially not in a climate of regulatory uncertainty and major reform across the board.

691 State of the Energy Market 2007 AER, p 33. Published July 2007

692 CRA Final Report *"Impact of Prices and Profit Margins on Energy Retail Competition in Victoria. Competitive Trends in Victoria* 8 November 2007, p 4 *"Competitive Trends in Victoria."*

Jackgreen's Chairman John Smith has commented in this send-tier niche retailer's Annual Report[693]

> *"The group of second tier retailers which includes Jackgreen are themselves becoming targets for the larger players or business consolidation. Earlier this year Ergon Energy (Qld) paid $105M for Powerdirect the country's inaugural second tier retailer."*
>
> *"The disconnect between the National Energy Market Management Company (NEMMCO) and the national pricing saw the wholesale energy prices in June this year reach a staggering 8 times their monthly June average and 10 times the prices paid in early months of 2007. With high concern from the market regulators and energy user groups no-one including our Governments were willing to act!"*

This is an important consideration when assessing how quickly new entrants and more established second-tier retailers might fare when full price deregulation becomes a reality.

And further from the same Annual Report 2007:

> *"The ACCC the master of the new National Regulator confirmed that they would review the performance of individual companies in the market with a view to determine if any "gaming" of wholesale prices had occurred. It's clear to Blind Freddy that it had occurred; the question was who caused it and who benefited from it? Again the market activity is fairly transparent and somewhere north of the Murray and south of the Brisbane River will find those most active.*
>
> *The fallout was immediate NSW based independent Retailer Energy One handed back all its customers took a big $ hit and their share price dropped by 400% the same week.*
>
> *Momentum Energy sold off 15, 000 unhedged residential customers to get out of that market. In one fell swoop the contestable market lauded by successive Governments had come back to bite them."*

John Smith Chairman of Jackgreen, has made an honest assessment and appears to be only too well aware of the pitfalls of the decisions being made and premature decisions about market trends.

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693 Jackgreen, a greenenergy specialist retailer currently selling electricity only though with licences in NSW and South Australia to sell gas

The recent is evidence also of market failure RoLR event where 11,000+ customers were transferred under those provisions; and again when another 15,000 unhedged residential customers were found to be unprofitable and sold off *(see comments of Jackgreen's Chairman above).*

As observed by Gavin Dufty in his November 2007 Submission to the current Review, the AEMC Report appears to ail to discuss and analyze the multifaceted nature of the standing offer (such as RoLR provisions).

The estimates were based on 60% of customers being on market contracts and this being maintained.

CRA figures and AEMC's findings (as commented on by Gavin Dufty) emphasize that

> *"….of the 60% have taken market offers 70% of domestic and 60% of commercial customers said contracts had met expectation.*

As pointed out by Mr. Dufty another way of putting this is that 30% of domestic and 40% of commercial customers that took up market offers indicated that these contracts did not meet their expectation.

On page 2 the November 2007 Submission to the AEMC Review on behalf of St Vincent de Paul Society, Mr. Dufty has pointed out that:

> *"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% (58-64%) of customers in the Victorian energy market believe is has either failed their expectations of there are not actively participating."*

Further Mr. Dufty commented as follows:

> *The AEMC draft review also failed to ascertain the nature of the issues that may be affecting this group. Such an analysis could reveal where potential or actual market failure exists. A key issue in ensuring that all households regardless of income or location have access to affordable and appropriate energy contracts. Mr. Dufty has specifically asked what evaluation was undertaken that customers were actually getting what they believed they were offered*

Other reservations expressed by Mr. Dufty for St Vincent de Paul include failure to:

> *"measure the level of sophistication of customer behaviour for example the quality of decision making as an indicator of market maturity.*

He points out that:

> *"when such an analysis was undertaken in the UK it was found that 20% of those who switched with the specific goal of seeking a lower price in fact had switched to a contact that resulted in high prices. A similar analysis should be undertaken here.*

The snapshot approach has also been targeted by Mr. Dufty as a flaw in evaluative design as a "point in time" approach to evaluate what is both a very dynamic energy market and the broader changes in the community such as ageing of the population.

Mr. Dufty specifically mentions the data gathering stage as:

> *"a snapshot of the market during this specific period in time (mid-2007) – a time where the full impact of volatility in the wholesale energy market was yet to be experienced, a period of time that has yet to see the impact of carbon trading regime, and a period of time prior to the introduction of smart meters."*

Mr. Dufty predicts that that all these factors

> *".....will significantly change the nature of the Victorian energy market and hence the nature of competition."*

One might ask what plans there are for proper longitudinal evaluation of post-decision dissonance by customers who made switching choices, based perhaps on incomplete understanding of the choices being made.

What seems to have been omitted from the AEMC Draft Report is factual data about the correlation between complaints received by EWOV and retail competition issues. It is clear that there have been numbers of problems identified in this process that deserve closer scrutiny.

I quote directly verbatim from the EWOV views on retail competition[694]

> *Extract from* EWOV Annual Report 2005/06[695]
>
> *"Retail competition*
>
> *All Victorian customers are able to choose their electricity, natural gas or dual fuel retailer. All electricity customers have had choice since January 2002. All natural gas customers have had choice since October 2002.*
>
> *At 30 June 2006, there were 10 electricity retailers marketing to residential and small business customers in Victoria. Five of these retailers also sold natural gas.*
>
> *During 2005/06, 812,865 Victorian customers switched energy retailer — there were 507,455 electricity transfers and 305,410 natural gas transfers. Compared with 2004/05, this was up 12%, from a total of 722,925.*
>
> *We continue to see a loose correlation between switching activity and the number of cases EWOV receives about retail competition issues."*
>
> *Most common retail competition issues*
>
> - *Transfer*
> - *26% error, down from 43%*
> - *20% contract terms & conditions, up from 10%*
> - *16% information, up from 12%*
>
> *Marketing*
>
> *37% door-to-door sales, down from 55%*
>
> *37% phone sales, up from 28%*

694 EWOV Annual Report 2005/2006 Retail Competition (correlated to complaints received and nature of complaint) See further figures in Complaints and Complaints pp34

695 EWOV Annual Report 2005/2006 Retail Competition (correlated to complaints received and nature of complaint) See further figures in Complaints and Complaints pp34

What were the most common transfer issues?

Error 557

Contract (terms & conditions) 419

Information 339

Delay 319

Billing 265

Cooling off rights 92

Offer 27

Objection 17

Total 2,143

Details of the figures for the first half of 2008 are shown in Component 2A.

Apparently despite recommendations by the Consumer Utilities Advocacy Centre[696] and others, that robust follow-up studies by undertaken to ascertain from those who were included in the Wallis Consumer Survey about their experiences after switching to assess whether they made a choice that was in their best interests, the AEMC chose not to do so. Therefore, as noted by CUAC, the survey represents little more than a tool to demonstrate how consumers were approached, not how they actually fared.

The CRA Report further observed in a brief analysis of Competitive Trends in Victoria on page 4 of their report:

"There is virtually universal access to market offers that provide discounts to the standing offers across all the electricity networks and the major gas networks"

In Chapter 6 of The Australian Energy Regulator's publication State of the Energy Market discusses retail price outcomes as follows"[697]

696 AEMC Backs competition CUAC Quarterly Issue 9 October 2007, p2

697 State of the Energy Market 2007 Australian Energy Regulator p189 6.3

"Retail customers pay a single price for a bundled electricity product made up o electricity transport through the transmission and distribution networks and retail services. Data on the underlying composition of retail prices is not widely available

In Figure 6.13 the chart provides indicative data for residential customers in Victoria and South Australia based on historical information. These charges indicate that wholesale and network costs account for the bulk of retail prices. Retail operating costs (including margins) account for around 12 per cent of retail prices."

Whilst retail price outcomes are of critical interest to consumers the interpretation of retail price movements is not straightforward. First trends in retail prices may reflect movements in the cost of any one or a combination of underlying components – wholesale electricity prices transmission and distribution charges or retail operating costs and margins. The costs of each component may change for a variety of reasons

Similarly differences in retail price outcomes between jurisdictions may reflect a range of factors differences in fuel costs and the proximity of generators to retail markets) industry scale the existence of historical cross-subsidies differences in regulatory arrangements and different stages of electricity reform implementation.

Second there are differences in jurisdictional regulatory arrangements that affect price outcomes. In New South Wales

Victoria South Australia and the Australian Capital Territory the electricity prices paid by residential customers are a mix of price set (or oversighted) by governments and regulators and prices offered under market contracts. In other jurisdictions all residential prices are regulated.

Regulated prices can reflect a mix of social economic and political considerations that are not always transparent. To better facilitate efficient signals for investment and consumption governments are considering removing price caps and more immediately aligning them more closely with underlying supply costs."

This report proffers particular warnings about interpretation of retail price trends in deregulated markets. Questions have been asked whether the AEMC studied this document and heeded this advice. Here it is verbatim taken from p190:

"Particular care should be taken in interpreting retail price trends in deregulated markets. While competition tends to deliver efficient outcomes, it may sometimes give a counter-intuitive outcome of high prices as in the following examples."

- *Energy retail prices for some residential customers were traditionally subsidized by governments and other customers (usually business customers). A competitive market will unwind cross-subsidies, which may lead to price rises for some customer groups*
- *Some regulated energy prices were traditionally at levels that would be too low to attract competitive new entry. It may sometimes be necessary for retail prices to rise to create sufficient 'headroom' for new entry."*

Figure 6.13 wholesale the composition of a residential electricity bill in Victoria as follows:

Victoria:[698]

Wholesale electricity costs 41%

Network costs 44%

NEMMCO charges 3%

Retail operating costs 12%

South Australia[699]

Wholesale electricity costs 35%

Network costs 44%

Retail operating costs 8%

Retail margin 4%

GST 9%

[698] State of the Energy Market AER p 190. These published figures for Victoria as at July 2007 were sourced from two CRA sources for Victoria, viz CRA 2003;, Electricity and gas standing offers and deemed contracts 2004-2007.

[699] Ibid State of the Energy Market AER p 190. These published figures for Victoria as at July 2007 were sourced from South Australia ECOSA, Inquiry into retail electricity price path, Discussion paper September 2004

Under Section 6.3.1 on p190 of the State of the Energy Market publication, there is an open acknowledgment of data paucity in the following words:

> *"There is little systematic publication of the actual prices paid by electricity retail customers. The ESSA previously published annual data on retail electricity prices by customer category and region but discontinued the series in 2004*
>
> *At the state level:*
>
> - *All jurisdictions publish schedules of regulated prices. The schedules are a useful guide to retail prices, but their relevance as a price barometer is reduced as more customers transfer to market contracts*
> - *Retailers are not required to publish the prices struck through market contracts with customers, although some states require the publication of market offers*
> - *The Victorian and South Australian regulators (ESC and ESOSA) publish annual data on regulated and market prices. The ESC and ESCOCA websites also provide an estimator service by which consumers can compare the price offerings of different retailers (section 6.2.1)"*

The Draft AEMC reports profit margins as follows:

> ***2.5 Profit margins***
>
> *One of the outcomes of effective competition is that there is pressure for prices to converge towards efficient costs over time. This implies that retail profit margins under market contract prices should be consistent with a competitive return for risk and financing costs.*
>
> *The Commission engaged CRA International (CRA) to provide quantitative analysis on energy retail margins in Victoria as a basis of assessing whether the margins available under the market contract prices are consistent with the expectation of margins in a competitive market. While this work is ongoing, CRA's preliminary results suggest that competition has placed sufficient pressure on retailers' market offer prices to maintain margins at levels that would be expected in a competitive market. However, these results are preliminary at this stage of the Victorian Review.*

The Commission will consider the evidence in more detail once the final results are available and interested parties have had the opportunity to comment on the analysis undertaken.

The Commission also asked CRA to examine the margins that are available under the current standing offer tariffs to assess the impact retail price regulation may have had on entry and competition. For example, a low margin under the standing offer tariffs may itself be a barrier to effective competition. CRA's preliminary results suggest that, for electricity, the level of the current standing offer tariffs have not prevented efficient new entry from being profitable, at least when considered on average across all customers in a distributor's service area. However, the results at this stage indicate that the scope to offer discounts off the standing offer contract price for gas for some customers may be limited.

Overall, retailers actively seeking new customers and growth in the proportion of the total customers they serve appear to be able to earn sufficient margins to offer attractive price and non-price incentives relative to the standing offer tariff.

However, the Commission is mindful that a reasonable margin for the average customer does not mean that all customers are necessarily profitable under the standing offer tariff. CRA's ongoing analysis of the retailer profit margins should provide further information on this issue and will be considered by the Commission when the results are available.

On the following few pages I proffer a compiled list of incompletely addressed factors and others not at all addressed in the assessment of effective retail competition in the gas and electricity markets in Victoria.

Though this material is the subject of more dedicated discussion in a separate component, it is pertinent to repeat here since many of the economic decisions being made and policy matters the subject of ongoing and rapid review are predicated on the perceptions of the success of the market.

This includes the advanced smart meter roll out and long range implications for the community and the economy.

It may be too late to bolt the door after the horse has bolted, but community duty to express concern weighs me down, so here it is for the record. It is a document that has been published in other arenas and to be expanded.

APPENDIX 3

SOME CONSUMER PROTECTION APPEAL AND FUNDING ISSUES

REPRODUCTED SUBMISSION BY ENERGY ACTION GROUP TO MCE SCO 2006 LEGISLATIVE PACKAGE

Some Brief Late Comments to the Ministerial Council on Energy Standing Committee of Officials by the Energy Action Group on the 2006 Legislative Package and the Consumer Advocacy Arrangements

Another EAG non Advocacy Panel funded submission to MCE processes

Introduction

The Energy Action Group is a twenty eight year old, membership based, not for profit, incorporated consumer group attempting to represent the interests of less 160 than MWH and 10 TJ gas consumers across the East Coast gas and electricity markets. EAG has

made submissions and representations to most jurisdictions and jurisdictional regulators across the east coast of Australia since the current reform program started in 1990.

It is worth noting that the EAG convened the first national small consumer round table but subsequently withdrew from what has become the National Consumers Round Table due to the direction the meetings were taking.

The major emphasis of the Round Table appears to consist of three elements

a)

The protection of low income consumers. Low income consumers constitute around 5% of the NEM energy load. Two jurisdictions - Victoria and NSW - fund low income advocacy for gas, electricity (and water). Victoria provides $ 500,000 into what appears to be dysfunctional CUAC funding and advocacy arrangements with a further $30,000 to $40,000 of short term funding to VCoSS. The NSW government provided something like $ 200,000 worth of funding to the PIAC UCAP program. The other NEM jurisdictionally based organizations, including ACoSS, rely on inadequate Advocacy Panel funding to provide less than adequate and, in some cases, less than competent, input to NEM consultation processes.

b)

Consumer protection writing and reviewing NEM and the jurisdictional Rules and Codes. The two organizations underpinning the Round Table legal contributions are the Qld based Consumer Credit Legal Centre with some assistance from the Queensland Consumers Association and the Victorian Consumer Action Legal Centre both heavily rely on Advocacy Panel funding to make a contribution to NEM and jurisdictional .reviews.

EAG has a long history of being actively involved in a number of jurisdictional licensing rule and code changing consultations. The major point of difference between EAG and the Round Table participants is that our views have been formulated from experience and case work. It is EAG's basic contention that un-enforced licences rules and codes are worthless to consumers and that an emphasis on the minor tweaking of the Rules and Codes without enforcement doesn't particularly help consumers deal with utilities. Attachment 1, a 2004 EAG investigation into the relationship between the Victorian Ombudsman scheme and the Essential Services Commission of Victoria, demonstrates that many systemic problems do not get addressed by the statutorily responsible organization. Unfortunately for Victorian consumers this position has not changed since Attachment 1 was written.

EAG is aware that in several jurisdictions market participant retailers and distribution companies are having difficulties in billing customers, have customers on the wrong *"use of system"* charges or fail to comply with the relevant codes relating to estimated billing procedures.

c)

The other important area activity of the Round Table's focus and Advocacy Panel Funding is so called "Capacity Building". The outputs of this process given the resources invested are far from spectacular [700][1]

Having witnessed a number of public performances by other organizations purporting to represent small consumer interests associated with the National Consumers Round Table, EAG took the decision that the organization would not have the time and resources to devote to the National Consumers Round Table given the lack of knowledge of any of the members about most of the issues surrounding the electricity and gas industry. EAG believes that there are considerably more issues facing the NEM than representing just the interests of around 5%[701][2] of the energy sales across the market.

The other point of difference between EAG and the groups represented by the National Consumers Round Table is the strong active working relationship with EUAA and the MEU. EAG is the only active small consumer group working with the Major Energy Users Limited and the Energy Users Association of Australia on issues of common interest. A very conservative analysis indicated that at least 85% of the issues across the market are common for large and small consumers.

In EAG's experience in working with both organizations this figure is more likely to be 90 to 95% of issues. EAG experience in working with these two groups shows that large consumers have the same problems as households and in many cases see and identify problems well before they become apparent to National Consumers Round Table participants. Unfortunately some market observers have the perception that EAG has one or another of the representatives of large consumers directing the organization's views and performance. This perception is incorrect. EAG forms its views on the information available. The EAG does however have a policy position of creatively addressing issues and the organization has been at the forefront of highlighting some of the gas and electricity market deficiencies on a range of issues. EAG also has a reputation for being outspoken but able to work collaboratively with a number of industry players across the gas and electricity market.

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700 [1]EAG declined to join NEMChat, one of the vehicles used by the Round Table to capacity build, on the grounds that the then Consumer Law Centre Victoria, now Consumer Action Legal Centre, had the right to control who participated in the "egroup" and what contents were acceptable for the group to discuss. Our position on this issue would appear to be vindicated with the subsequent removal of one member of the group correctly claiming that they represented large consumers on a number of issues. However the same individual

a) had a lot to offer to small consumers with their knowledge of gas and electricity issues

b) more importantly has a formal position representing the interests of less than 160 MWh electricity and 10 GJ gas consumers on an Ombudsman scheme.

701 [2]EAG was instrumental in helping the Victorian Government set up a number of innovative low income programs starting in the 1980s, programs like the Victorian Winter Energy Concessions. This program is contributing around $ 40 M/a to low income Victorian consumers; other states have followed this lead.

END USER ADVOCACY

The MCE has also proposed a set of changed arrangements to cover advocacy by end users. The MCE has had the existing arrangements under review since 2005 and its proposed changes cover:

Improved governance and accountability by the Advocacy Panel; and

The inclusion of funding for end user advocacy on gas (previously limited to NEM issues only).

The EAG's history of funding failure with the NEM Advocacy Panel clearly supports the need to review the existing advocacy arrangements. EAG has been one of the main proponents of the need for such a review.

The existing arrangements suffered from a number of fundamental flaws that, in conjunction, meant that they are inefficient, ineffective and dysfunctional in providing effective support for end user advocacy. Among the major flaws are:

A very significant lack of gas and electricity industry knowledge amongst Panel members. Currently one panel Member has gas experience, another has been a Commissioner of a vertically integrated state owned utility.

Ongoing poor and ineffective performance by the Panel in terms of its procedures, allocation of funds, and myopic decision-making which did not match the needs and priorities of end user advocacy, and lacked accountability in governance and its relationship with key end user bodies;

The massive levels of funding required for administering a relatively small budget. The AP administrative budget is around 15 times EAG total annual expenditure. Given the role that the Advocacy Panel plays in the NEM and their future contribution in the development of a national gas market over $500,000 of expenditure on administration is outrageous.

The most important benefits of the previous Advocacy Panel arrangements that must be retained are

The Panel did not discriminate in terms of favouring particular types of end users.

The allocation of funds recognized that funding for end user advocacy came from actual users via NEM fees, so that **ALL** end users contributed and should have a right to benefit from the allocation of advocacy funds.

EAG hoped that the approach of the MCE would be to reform the significant flaws in the existing advocacy arrangement whilst preserving the good points. This would have been logical and rational. Sadly this is not the case under both the MCE policy and the implementation of the appointment of Advocacy Panel Members by the AEMC.

Unfortunately what the MCE is proposing is itself subject to some fundamental flaws that will hinder and harm consumer advocacy into the future, and contribute to an unstable and dysfunctional advocacy arrangement, as well as to a more inefficient, ineffective and

inequitable use of funds. The consequence of both the AEMC Panel appointments and the MCE's policy work on consumer advocacy is to almost guarantee that the reform process will suffer and consumers will get second best outcomes.

One of the most disturbing parts of the MCE proposed reform package of the Advocacy Panel is that several jurisdictions have prevailed on the rest to fund small and medium sized consumers at the expense of large consumers to cover many of the jurisdictional consumer advocacy oversights and the systemic failure not to fund low income programs and environmental issues. The solution of legislating funding for small and medium sized businesses will not be solved by directing most of the Advocacy Panel funding in this area. Unfortunately it takes many years to develop the skills and knowledge sets to have an effective input to the consultation and decision making processes in the electricity and gas industries. The relatively low levels of community sector pay ensure that people with the right skills sets are attracted to the industry or to regulatory bodies. EAG finds that the MCE decision to fund small and medium consumer advocacy programs at the expanse of large consumers who represent around 70% of the NEM revenue inequitable and not in the short or long term interests of the groups that the MCE believes that they are assisting by making this decision.

EAG believes that it is also worth mentioning at the outset is that there is a tendency in the advocacy reforms being advanced by the MCE to seeing a need for the Panel to be accountable to the MCE, via the AEMC. EAG has a serious concern that the MCE has ignored the need for the Panel to be accountable to end users. The major objective of the Advocacy Panel is to ensure that end users are intended to be the beneficiaries of the advocacy that the Panel funds and end users are providing the funds that the Panel disperses. The MCE has not provided for accountability back to end users.

Areas of Agreement with the MCE proposals

EAG supports the following areas of the MCE's Advocacy Panel reform program:

- The appointment of a Chair and members who will be appointed *"on the basis of relevant expertise and experience, including knowledge of the energy sector."* However, EAG is of the belief that the AEMC has failed to achieve this objective with their round of recent appointments.
- The inclusion of gas in the areas that will be eligible for funding;
- The inclusion of the provisions that will (hopefully) have the effect of avoiding conflicts of interest within the Panel structure, operations, decision-making and advice, including:
    - The Panel will not be subject to any direction or control by the AEMC or MCE, which should ensure the independence of its decisions;
    - The Panel will be required to develop "guidelines for the allocation of grants"

- The Panel is to prepare an annual budget and subject its draft budget to scrutiny via the consultation procedures set out in the Regulations, noting the utmost importance of involving end users in that process (this latter point should be clearly specified in the legislation or otherwise in the regulations);

The need for the Panel to furnish an Annual Report and report on its operations within two months of the end of each financial year;

•The need to provide some dedicated resources, albeit kept to a modest and reasonable level, to assist the Panel in its functions. Not a budget of around $500,000 which currently costs around 25% of the organization's funding.

EAG does not necessarily oppose the MCE requirement for the AEMC to hold all funds received for end user advocacy. However EAG would comment that on the surface the Panel appeared to have at least managed this operation reasonably well to date.

Areas of contention with the MCE's proposals

The EAG along with other user groups has a number of important areas of disagreement with the MCE's proposal and seek a change to them before they are legislated.

The inclusion of a Research function

The MCE has proposed that the Panel have a function to identify areas of research that would be of benefit to end users.

Given the role of the former Advocacy Panel in commissioning research in the past, EAG do not believe that there is a need for a research function to be commissioned by the Panel and note that none has been provided in the material released by the MCE. If research is necessary it should be the preserve of consumer advocacy bodies, not the Panel. The Panel is removed from end users and has limited contact with them, whereas end user advocacy bodies, especially those with a member base, are representative of end users, in regular contact with them and far better placed to identify matters needing research than the Panel.

Another example of this model already exists in the NEM, the Consumer Utility Advocacy Centre (CUAC), which has a role in commissioning its own work and undertaking research. Unfortunately, it has a poor track record of doing worthwhile work and has wasted funds on internal work to the exclusion of advocacy. Some of the CUAC commissioned work failed to adequately address the commission and it seems the consultants have not understood some of the issues that were being researched and reported on. EAG contends that in some cases they have not only not understood the issue but seem to have started a new process of inventing history in CUAC's or the consultant's own view. It would be a poor outcome if the Advocacy Panel followed in CUAC inauspicious footsteps.

EAG therefore strongly recommends that this function be removed and that all Panel funds for research and advocacy be allocated to end users.

Further EAG strongly opposes the narrow, discriminatory and inequitable allocation of funds under the proposed Section. 30 of the Bill:

In performing its functions–

(b) The Panel must pay primary regard to benefiting small to medium consumers of electricity and gas.

The MCE explanation fails to provide any reason as to why this provision has been included and what purpose it is proposed to serve. The MCE needs to clearly and specifically set out its reasons and the logic behind them if this clause has any credibility.

The effect of this clause strongly enhances the artificial divide between large and small consumers amply demonstrated in submissions from non membership based organizations purporting to represent small consumers.

EAG strong believes that this clause completely contradicts an important and accepted original objective of the NEM Advocacy scheme, which was based on the principle that ALL end users had a right to be represented in debates and a right to access advocacy funds. This was accepted after a thorough review by NECA, which had direct involvement from end users across the spectrum and had to overcome strong industry resistance to the notion of funding advocacy. The MCE's proposal denies this right, whilst the MCE's process has had a peripheral engagement with end users and in part exhibits a strong sense of trying to placate small consumers and build a small consumer advocacy base to cover the jurisdictional failure in developing adequate advocacy arrangements. EAG would like to point out that there are at least two examples of advocacy organizations funded by jurisdictions that have been less than helpful representing their constituency over time.

EAG also would like to contend that it is also inconsistent with the direction of energy reform, which is intended to benefit ALL end users. The Council of Australian Governments recognized this in their statement of:

> *"COAG also recognized that energy markets should operate to maximize provision of reliable energy services and that the effective operation of an open and competitive energy market contributes to delivering benefits to households, small business and industry."*

Further EAG would also like to point out that the move to specific funding of small and medium consumers is also inconsistent with the Single Market Objective of the National Electricity Law, which states that*:*

> *"The national electricity market objective is to promote efficient investment in, and efficient use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability and security of supply of electricity and the reliability, safety and security of the national electricity system".*

Neither of these statements from CoAG nor the legal objective under the National Electricity Law passed by all NEM jurisdictions suggests any bias or favouritism in respect of particular types of energy users.

Our reading of them is that COAG and the MCE intend that ALL consumers be treated equally and in an unbiased manner. EAG has the belief that all consumers in the end should benefit from reform and have the ability to provide input into deliberations about the market and the directions that the market takes. The provisions of the advocacy arrangements that the MCE proposes clearly contradict this proposition.

It also ignores the fact that all end users contribute to the advocacy fund through their NEM fees (a component of their electricity bills along with their gas bills in the future) and should have a right to expect access to the funds and to be treated equally in doing so, not in the biased manner being proposed by the MCE:

The MCE may not be aware that larger users provide at least 70 percent of the funds made available for end user advocacy and should be entitled to benefit from the advocacy that is funded by the Panel. EAG strong believes that large users have a right to feel they are being poorly treated by the MCE's proposal which almost completely fails to comprehend the real purpose of advocacy and how it can be made to work most effectively for most end users. The role of the National Consumer Round Table appears to have exacerbated this problem;

If the MCE wishes to favour a particular group in allocating advocacy funding, it should either provide advocacy money through the public purse or else only levy the group of consumers who are benefiting. This proposition clearly applies to the funding of low income and environment groups in a number of jurisdictions outlined above.

EAG notes that the wording describing this provision in the draft Bill is quite different to that used in the MCE Communiqué outlining their original decision on advocacy reform and in the material released by the MCE explaining the proposed new advocacy arrangements:

> *"In undertaking its functions, the Panel will have regard for all energy users with a focus on "small to medium consumers."*

The wording in the Bill does not give effect to the MCE's decision and there is confusion as to what the MCE real intention is. This mixed message needs to be clarified.

The MCE is probably not aware that most advocacy on issues central to the NEM and how it impacts on end users has hitherto been undertaken by bodies representing larger users or that the EAG collaborating with large end use organizations the EUAA and the MEU on a wide range of issues and, if it were not for these efforts, all end users would have been virtually unrepresented in these debates. The MCE may be under the impression that the National Consumers Round Table represent "small to medium consumers". In fact, they currently represent consumer protection bodies, socially disadvantaged consumers groups or environmental groups, and have tended to receive grants for more narrow or 'capacity building' type projects. Whist some of these groups may have legitimate claims to access the advocacy funds, it would be foolhardy for the MCE to believe that they have the capacity (or experience) to contribute to the central elements of the energy reform process.

Moreover, many of these bodies do not have an energy consumer-focused membership base – some have no membership base at all – and do not represent the bulk of ordinary household consumers or SMEs. This should be a matter of serious concern to the MCE but their proposal will do nothing to ensure that households or SME consumers benefit from effective advocacy. On the contrary, it may well end up diverting significant funds to unrepresentative and narrowly focused groups.

It is unclear from the material released by the MCE how they intend to ensure that the above problems will not eventuate, or if they are even aware of them? Certainly, there is nothing in the draft Bill to provide us with any comfort on this.

The MCE should be made aware of the fact that much of the advocacy undertaken on issues central to the NEM has been by groups representing business users but that it is impossible to confine the benefits of this advocacy to their immediate constituents. It is in the nature of such advocacy that any benefits will more often than not be distributed widely across energy consumers. For example, the beneficial impact of advocacy on a review of network charges will be to keep these lower than would otherwise be the case but these benefits will be dispersed across a wide range of such charges and a wide range of energy consumers.

Regulators want to hear from all end users but won't get a broad range of consumer inputs or get even more selective input as a result of restricting funding to just small consumers. EAG has worked jointly with larger consumer organizations on a wide range of regulatory inquires to ensure that all consumers have a voice in regulatory determination across the NEM and on gas market issues.

EAG also believes that the MCE proposal on restricting advocacy is also in direct contradiction to and completely inconsistent with Section. 31 of the draft Bill, which clearly says:

The Panel is not subject to direction by the AEMC or MCE in the performance of its functions.

Yet the MCE is directing it in respect of how it is to perform its functions in allocating funds to small consumers.

As a matter of record, EAG members and business users will be disadvantaged by this proposal but will still be required to pay for advocacy, and we object in the strongest terms to this biased and inequitable proposal. EAG therefore strongly oppose it. EAG believes that this decision will seriously disadvantage business users in future advocacy and, in our view, is likely to result in poorer and less representative advocacy that is biased towards input from only a small sub-set of groups who do not represent the bulk of actual energy users. This is a matter that should be of serious concern to the MCE if, as EAG believe to be the case the MCE is genuinely interested in well informed and sound policy decisions with input from all relevant stakeholders.

Given the above EAG urges that the Bill introduced into the SA Parliament should:

1. Provide for an Advocacy Scheme that treats all end users equally and allocates funds on a competitive basis.

2. Ensures that organizations making applications for funds are required to demonstrate their legitimate claims to be representing end users of energy.

3 The draft Bill also provides that funds allocated to advocacy on behalf of both electricity and gas users and for Panel administration will be drawn from both sources.

3. Alternatively, provide for a mechanism whereby users can elect to direct their share of funding to the Advocacy Panel or to a nominated organization. This could be done annually via their bills (with a form and an explanatory note included briefly setting out the options available and their claims for funds).

4. If the MCE persists with this proposal, then it must ensure that the funding mechanism used only levies consumers who will be represented by the advocacy undertaken, that is, in support of small and medium consumers and that it specifically exempts users (eg > 4 GWh for electricity and 100 PJ pa for gas) who are effectively precluded from the benefits of such advocacy funding.

Source of advocacy funding

The draft Bill proposes to allocate funds for advocacy from two sources:

Those allocated to advocacy on behalf of electricity users will be drawn from NEM fees (as is the case with the existing advocacy fund); and

Those allocated to advocacy on behalf of gas users will be drawn from funds provided from moneys allocated to the AEMC.3

There is no explanation as to why this was deemed necessary.

Whilst EAG acknowledge that this is one method of providing funds – and that the lack of any agreement on the so-called 'industry levy' may have affected decision-making EAG can see a number of problems with this method:

Whilst it relates funds for electricity advocacy directly to electricity consumption, it does not do so for gas (the use of AEMC funds does not provide such a relationship); •The use of multiple funding sources is messy and will create difficulties in terms of setting budgets, seeking amendments to budgets, the need for any additional funding during funding years, the allocation of funds between projects by the Panel, and Panel administration; and

It will also create difficulties for advocacy by groups as between gas and electricity and could detract from advocacy efforts.

EAG believe it would be far better to draw all the advocacy funds from NEM fees, which would overcome these difficulties. Many users consume both electricity and gas and any equity considerations involved would seem to be very minor given the small proportion of NEM fees that advocacy funds comprise.

The draft Bill provides for the Panel to be assisted by an Executive Director and a "small secretariat" to provide administrative and research capacity.

EAG has already argued that the provision of a research capacity is a risk given the history of the former Advocacy Panels Commissioned reports and the CUAC experience outlined above. EAG has a significant concern that this is the start of a 'Panel bureaucracy' and that it is clearly an 'overkill' response by the MCE. To date, the Panel has survived quite well (although there have been substantial increases in administrative costs, constituting around 25% of Panel revenue over time) with the services of an Executive Officer and by outsourcing its other administration needs, even though the costs associated with this activity are extraordinarily high compared to other organizations administrative expenses.

EAG can see no reason why this can't continue to be the case! The Panel's workload will expand somewhat due to the inclusion of gas issues and a broader range of electricity issues, but as the MCE material makes clear this is not considered to be a significant increase in work load..

EAG also have concerns with the Panel staff being employed by the AEMC and believe that the Panel should employ its own staff as it has done in the past. There is no reason given in the material released by the MCE as to why this practice cannot be continued.

Need to supplement Advocacy Panel funding

EAG also believes that the Bill should make provision for the Panel to request supplementary funding during the course of a financial year if necessary. The levels of funding required for the ongoing reform program vary from issue to issue and the number of issues being worked on at the same time. Work requirements can vary dramatically from time to time. This becomes a major issue particularly when the reform work load is added to access and revenue regulatory determination across the NEM. Alternatively, the Panel should be given the flexibility (with MCE consent) to draw down on funding for the following year. EAG's main concern here is that unforeseen situations arise which put a drain on funding and there should be a mechanism that deals with this. One case in point is the recent ERIG process, which was unforeseen at the beginning of the Panel's funding year, but there have been other examples.

This year, three AER transmission revenue inquiries start along with the NSW electricity distribution business revenue determination, plus a number of AEMC Rule changes and the MCE agenda.

Scope of advocacy

The draft Bill refers to electricity and gas advocacy in general terms and does not seem to place any limitations on its scope, so long as they are related to energy reform or regulatory matters. We believe that this is appropriate and that the existing advocacy scheme was far too narrow in being confined to the NEM.

However, we note that the NGL is currently limited in its scope to gas access matters (although it is envisaged that wholesale market issues will be included later). We would

not support limiting gas advocacy to the NGL/NGR, or limiting electricity advocacy to the NEL/NER.

Responding to grant applicants

EAG has had a history with the former Panel of a high level of rejection of applications without any significant feed back as to why. EAG strongly believes that the Panel should have a responsibility to respond to grant applicants (successful or not) with their decision (and any details of it) in an expeditious manner. In the case of rejected or deferred applications this should also include reasons.

Although the Panel has done this as a matter of procedure in a very cursory manner in the past, EAG believe that it would be useful to enshrine it as a responsibility of the Panel, either in the Bill or in Regulations.

Limited merits review

The current legal paradigm faced by gas and electricity market participants, with one exception, is the aggrieved company versus a regulator determination arguing an error at law before the relevant Appeals Tribunal. This adversarial arrangement places a regulator (and consumers who underwrite the determination) at a relative disadvantage. The worst outcome for the appellant is that the tribunal rejects the application and the evidence presented by the applicant. In all most every case so far in gas and electricity cases before Appeals Tribunals, the applicant has had wins that have significantly outweighed their (not inconsiderable) costs. The only exception has been the EPIC Dampier to Bunbury Gat Transmission Pipeline Action.

EAG understands that many of the senior council appearing for the industry applicants in Tribunal hearings can cost up to $12,000/day plus the costs of the junior. It was rumoured that ACCC had to pay something like $ 36,000 /day for AGL's counsel in the AGL's ACCC Loy Yang case before the Australian Competition Tribunal, where the decision awarded costs against the Commission.

The one exception referred to in the previous paragraph relates to the appeal by GasNet against the ACCC revenue determination before the Australian Competition Tribunal. To date this is the only instance of a consumer group successfully attempting to get involved in a case by a market participant against a regulatory determination. EAG intervened and argued, as did GasNet, that ACCC had made errors in the determination. EAG successfully argued that ACCC had ignored some of their own consultant's reports when they made the Weighted Average Cost of Capital determination. GasNet withdrew their contention that ACCC had erred by not taking all the facts into contention in their decision. However as an intervener EAG was not able to raise important issues around the ACCC decision relating to depreciation on the Longford to Melbourne gas transmission pipeline.

The legislative packages released by the MCE on gas and electricity provide for a form of limited merits review on regulatory decisions. They also enshrine the rights of end users to access the limited merits review structure either as appellants or as interveners. This includes bodies representing end users.

However, EAG would like to draw to the MCE's attention that groups representing end users are not financially capable of supporting an appeal. This has been a major issue preventing access to appeals mechanisms in the past. And it is far too cumbersome and complex to arrange for direct contributions from consumers, especially within the limited time periods provided for the lodgment of appeals against determinations and decisions.

These circumstances conspire to bias the appeal process in favour of regulated entities and against regulators and end users. This cannot be good for achieving efficient and

balanced outcomes from regulatory decisions that give effect to the Single Market Objective of the NEL and its equivalent in the NGL.

It is therefore of major concern to EAG that the advocacy reforms proposed by the MCE do not specifically allow for advocacy funds to be distributed for appeals-based advocacy. Being able to access advocacy funds for such purposes would be consistent with the objectives in the NEL/NGL, would support the objectives of energy reform (ie that all users should benefit from the reform process), and would support the objectives for advocacy (ie that it "should benefit consumers of gas and electricity (or both)"). EAG would also draw to the attention of the MCE that the inclusion of the limited merits review mechanism is likely to increase the incidence and importance of appeals as part of the regulatory processes in both electricity and gas.

In effect, end user advocacy around the appeals process will become integral to effective regulatory outcomes in terms of the electricity and gas market objectives, a point recognized by the MCE in terms of the access it has provided to end users in relation to appeals. If end users are unable to take part in the appeals process due to an inability to access advocacy funds for this purpose, then the benefits of earlier advocacy on an issue (and the use of advocacy funds) will be jeopardized.

Unfortunately Section 291 (1) of the draft Legislation in relation to indemnity costs against end users completely negates all the previous provisions and places any consumer group who tries to appeal a decision before the Australian Competition Tribunal in a position to bankrupt if their appeal is dismissed by the Australian Competition Tribunal. EAG understands that the intent of this Section was to dissuade consumer groups from appealing a regulatory or AEMC determination. As it stands the inclusion of this section in the Bill will work to achieve the no consumer appeal outcome. This section works completely against the Single Market Objective and is almost an unprecedented action in recent Australian legal history.

EAG therefore recommend that the draft Bill on Advocacy Reform include specific allowance for funding of appeals-based advocacy. EAG further recommend that applications for such advocacy be supported by information showing that the appeal is soundly based and that eligibility be limited to end users or to bodies that are representative of them and will have standing.

EAG believes that a number of Australian regulators bias their determinations in favour of the regulated entity to minimize the risk of appeals. To reiterate: if Section 291 (1) remains in the draft legislation no consumer who assesses the risk involved in this section will wish to appeal a determination. So the current legal appeals paradigm where the industry applicant vs the regulator appeals process will continue, this process provides a tilted playing field towards the applicant providing substantial rewards to ensure that asymmetric appeals against the regulator will continue into the future. Unfortunately this process has already set a number of precedents that will need to be overturned in the future by another legislative package.

Information Disclosure

EAG believes that the provision of information disclosure requirements in the legislative package are fundamental to the regulation of both gas and electricity markets. Two cases have been run against the Essential Services Commission Victoria by Alinta in relation to related party transactions by United Energy. The first decision by the Essential Services Commission Appeal Tribunal (Victoria) greatly restricted the ESCV access to related party transactions. The ESC then had to "model" the Alinta/United Energy third party transactions. The resultant modelling then provided further evidence of "errors of fact" in the United Energy appeal against the ESCV Electricity Distribution Pricing Determination of 2005.

Another case against the ESCV is listed later this year by Alinta again who want to deny the Essential Services Commission Victoria information on related party transactions to Multinet, a Victorian gas distributor.

The ongoing changing ownership arrangements, management fees and related party transactions in both the gas and electricity industries, along with increasing market concentration of the largest market participants, make the provision of information requirements essential in the legislation, if consumers are to have any confidence in the regulatory and market oversight arrangements provided for in the legislation.

Currently there is a lack of certainty in relation to the regulator's ability to access or require information. EAG would also like to suggest in the case of monopoly service providers that the confidentiality requirements by regulators be kept to a bare minimum.

Form of Regulation

EAG believes, on the evidence available to our organization, that the first option for the **Form of Regulation** should be the Expert Panel Option 3. "Light handed regulation without price monitoring".

EAG does however does have reservations in promoting Option 3. There a number of systemic problems experienced by market participants associated with the NEMMCo MSATS and B2B systems requirements of the various Retail or Supply and Sale Codes required by the jurisdictions that then flow through to consumers lowering their confidence in the regulatory arrangements. The steadily increasing numbers of Ombudsmen complaints across the NEM highlight the nature of the problem when there is a lack of enforcement of the various Rules and Codes.

There is also a strong relationship between information disclosure requirements and the form of regulation. If the information disclosure requirements are weak then informed consumers will have little faith in the regulatory regime.

EAG is also sensitive to the issue of very poor quality explanations and information disclosure in many of the jurisdictional reports required by jurisdictional regulatory requirements. It is almost impossible to assess how any distribution business across the NEM sets up their tariffs and charges. Ongoing work by the AER or a delegated jurisdictional regulator needs to be carried out on issues around the quality of supply and the regulatory reporting requirements and retail and distributor market processes.

The best approach to date across the market has been work by the Essential Services Commission Victoria on the NEMMCo MSATS Customer Transfer arrangements.

If consumers are to have any faith in the AER/AEMC regulatory arrangements then the AER needs to develop a skill set and a quality control regime to examine a range of NEM and gas market practices and procedures over time.

As a further precaution EAG suggests that the MCE require that the AER provide resources for a non legislated trial period of time (say three years), where any valid comments made by consumers about deficiencies, oversight or poor behaviour by market participants are investigated and publicly reported on a regular basis (say half yearly) by the AER over the funded period.

EAG has a number of important reservations around implementation of the regulatory accounting guidelines approach under the Australian light handed incentive regulation. The various jurisdictional regulators, ESC (V), IPART and the ACCC, have had considerable difficulties in developing a common data set to compare information across two regulatory cycles. This problem makes it very difficult to compare regulatory determinations. It is almost impossible to compare the two ACCC Transgrid transmission determinations or the 1999 and 2005 ESC of V Electricity Distribution pricing determinations.

One of the objectives of the legislative package should be the development of data sets that allow the assessment of the effectiveness of the regulatory regime.

John Dick
President
Energy Action Group
23rd January 2007

APPENDIX 4

ENERGY ACTION GROUP[702]
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
September 2004

Background

Under the *Electricity Industry Supply and Sale Code 1997* retailers were required to take account of a customer's capacity to pay when negotiating an instalment plan.
Instalment plans were required to be offered before disconnection could take place.
This Code was reviewed in anticipation of full retail competition. The new Code commenced on 1 January 2001. *The Electricity Retail Code 2001* means that retailers have the right to recover debt but customers are protected against disconnection in cases of incapacity to pay. In incapacity to pay cases retailers are required to offer the customer an 'affordable' instalment plan that must account for on going consumption. This protection is known as the 'hardship' provision. Similar provisions exist for gas. The customer can take disputes regarding the Retail Codes to the Energy and Water Ombudsman Victoria (EWOV)

The EWOV reports systemic issues appearing in complaints to the regulator. Schemes such as the EWOV use the ASIC definition of systemic:

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> At a broad level, systemic issues can be distinguished from those issues that have no implication beyond the immediate actions and rights of the parties to the complaint (ASIC 1999)

The regulator (the ESC) is supposed to address systemic issues.

For many years community organizations and the EWOV (and its processor) have been bringing retailer non-compliance with the capacity to pay provisions of the Retail Code to the attention of the Essential Services Commission and its predecessor, the Office of the Regulator-General.

In 1998 the Financial and Consumer Rights Council (FCRC) collected 215 cases from financial counsellors detailing how privatisation of the gas and electricity companies was resulting in harsher treatment of customers experiencing 'incapacity to pay'. The report *Unfair Deal* (Kliger 1998) argued that there were unacceptable debt collection practices; that the State government's consumer protection obligations were inadequate; and that the consumer complaint scheme was inaccessible.

In 2001 the EWOV held a special conference on 'hardship' "Getting Connected – genuine utility-consumer partnership" 9th November 2001 – aimed at encouraging better and more flexible initiatives in debt collection, payment options and development of hardship policies – and in response to high disconnection rates appearing in the EWOV complaints.

In 2004, two years after household competition had been introduced FCRC revisited the issue. This time FCRC interviewed financial counsellors to gain an indicative understanding of caseload relating to utilities, and to capacity to pay issues. Case studies were used to highlight the variety of problems that had emerged. This report *Power, Markets & Exclusion* (Sharam 2004) suggested that there were likely to have been thousands of cases of retailer non-compliance with the Retail Code.

In 2004 VCOSS was approached by the ESC to make a special presentation on 'fuel poverty' as part of the Commission's investigation into performance indicators. A working group meeting was convened on 6th February 2004 in order that this presentation could be made and so that the ESC could formally consult with members of its Customer Consultative Committee performance indicators relating to 'hardship'. This meeting was

recorded, and it was intended that the transcript should be placed on the ESC website. During the discussion after the presentation one of the customer advocacy organizations raised the issue of customers not being able to obtain affordable instalment plans. The response of the senior officer was that such treatment was not permitted under the Retail Code. Another participant pointed out that the issue of retailer non-compliance with the 'hardship' provisions of the Retail Code has been brought to the attention of the ESC on a number of occasions, not least by FCRC's report *Power, Markets & Exclusion*. The Energy and Water Ombudsman confirmed that EWOV had also raised this issue with the ESC many times. The ESC officer refused to discuss the matter closed the meeting early. The transcript published on the ESC website did not include any of the discussion.

Following this meeting the Energy Action Group requested under Freedom of Information legislation documents held by the ESC relating to matters brought to it by the EWOV/EIOV that concerned hardship, retailer compliance and affordability.

The ESC and the EWOV have a Memorandum of Understanding and meet monthly. The ESC does not take formal minutes of these meetings. The FOI officer advised EAG that

> "I have been advised that no minutes per se are taken at these meetings between the ORG/ESC and EWOV. However, at each meeting, these agendas are updated under the "Outstanding actions/issues" column to reflect discussions at the previous meeting. You are in receipt of all agendas which contain these updates" (Taft, 15 July 2004)

The EWOV produce the agenda and update the action items. After further correspondence with the ESC regarding the apparent incompleteness of these 'working agendas', the ESC advised

> "Your request was for documentation related to "hardship", "affordability" and "retail compliance with the capacity to pay provisions of the Electricity Retail Code and the Gas Retail Code". The material sent to you covers these areas" (Taft, 21 September 2004).

The EAG was seeking to understand whether or not 'hardship', 'affordability' and/or more formally retailer non-compliance with the incapacity to pay provisions of the Retail Codes was reported by the EWOV to the ESC and whether the EWOV reported these as a 'systemic' issue which then would have then required the ESC to act.

What did EAG learn?

The following excerpts show that the ESC was made aware five years ago that there was a problem with disconnection relating to handling of the 'incapacity to pay' provisions of the Codes. Whilst the EWOV was inconsistent in the way it handled the matter it did alert the regulator to the systemic nature of the problem – widespread retailer non-compliance with the Retail Code – and kept putting it on the agenda. The ESC apparently would never acknowledge that there was a systemic problem.

1.	Letter from EIOV to ESC 3 March 1999 Subject: re Customer Complaints
The main areas where we see problems with customer service are *** Billing: inflexibility about arrears arrangements, hasty disconnections without proper consideration of debt management, rigid application of standard payment rules instead of individual focus on particular customer situation, incorrect and inadequate tariff advice**	

2.	Report to the Office of the Regulator-General from the Energy Industry Ombudsman Victoria 1 March 2000 EIOV Gas Disconnection Cases Received 1999
Many of the cases that come to the EIOV have indicated an inflexible response by the companies to customers who are experiencing payment difficulties. The EIOV has received cases in which customers are told what payment arrangement the company will accept and when the customer advises they cannot afford it, the	

company states that they must either accept or be disconnected… The companies state that they are reticent to establish plans which result in debt accumulation, however, simply extending the repayment of the arrears and leaving current consumption payments in place can frequently reduce the impact of debt arrears so that the customer can get over a particular financial crisis. If on the other hand, customers accept payment arrangements they know they cannot afford, they cannot keep to them and are then disconnected. Company records of customer payment histories often show a string of broken payment plans and disconnection. These in turn often further damage the ability of the customer to negotiate in the future…financial counsellors claim to have repeatedly attempted unsuccessfully to negotiate reconnection or payment arrangements on behalf of customers. Financial counsellors often report the same types of issues of inflexibility that customers report.

3.	Letter to ORG from EIOV 20 April 2000 Re: Electricity/Gas Performance reporting –EIOV Complaints
Of concern was the proportion of *Affordability* gas cases which involved imminent or actual disconnection. The EIOV received twice the rate of gas disconnection cases to electricity disconnection cases in 1999. The EIOV is looking at this issue to see whether gas company policies or procedures may need improvement to lower case numbers.	

4.	OUTSTANDING ISSUES EWOV/ORG Friday 10 August 2001C:\TEMP\ORG-EWOV Outstanding Issues.doc	
Issue		Issues for Office-EWOV liaison and referral protocols
High gas disconnection rates The EWOV has reported to the Office regarding higher gas disconnection rates since mid 2000. EWOV discussed with		**The EWOV asks whether it is appropriate for the Office to conduct an audit of gas companies' compliance with the former Gas Customer Service**

the Office that the gas companies' billing information systems did not have the capacity to check compliance with the account collection cycle. The EWOV has continued to report to the Office higher disconnection rates for gas compared to electricity. The EWOV acknowledges that, as part of its recent review of the Gas Customer Service Code, the Office has now delayed the introduction of the shortened collection cycle on advice from EWOV that this may have detrimental affect on gas disconnection rates. EWOV also acknowledges that the Office has focussed attention on disconnection rates in both its electricity and gas Comparative Performance reports.	**Code/new Gas Retail Code disconnection procedures. This has been suggested previously.**

5.	ORG – EWOV working agenda –September 2001H:\ORG\ORG EWOV working agenda 1 September 2001.doc
Current General Issues	Outstanding Actions/Issues
High gas disconnection rates The EWOV has reported to the Office regarding higher gas disconnection rates since mid 2000. The EWOV has continued to report to the Office on higher disconnection rates for gas compared with electricity. The EWOV acknowledges that, as part of its recent review of the Gas	The EWOV asks whether it is **appropriate for the Office to conduct an audit of gas companies' compliance with the former Gas Customer Service Code/new Gas Retail Code disconnection procedures. This has been suggested previously.**

Customer Service Code, the Office has now delayed the introduction of the shortened collection cycle on advice from EWOV that this may have detrimental affect on gas disconnection rates. EWOV also acknowledges that the Office has focussed attention on disconnection rates in both its electricity and gas Comparative Performance reports.	

6.	ORG – EWOV working agenda – October 2001\\EIOV\exec\ORG\ORG EWOV working agenda October 2001.doc
Current General Issues	Outstanding Actions/Issues
High gas disconnection rates The EWOV has reported to the Office regarding higher gas disconnection rates since mid 2000. The EWOV has continued to report to the Office on higher disconnection rates for gas compared with electricity. The EWOV acknowledges that, as part of its recent review of the Gas Customer Service Code, the Office has now delayed the introduction of the shortened collection cycle on advice from EWOV that this may have detrimental affect on gas disconnection rates. EWOV also acknowledges that the Office has focussed attention on disconnection	The ESC advised the EWOV at the September 2001 Office/EWOV meeting that it had reported in Gas Performance report on this issue and had discussed the matter directly with OE. OE has advised that it will be taking actions on this issue. The Office to advise the EWOV of any further progress regarding this.

rates in both its electricity and gas Comparative Performance reports.	

7.	ORG – EWOV working agenda – November 2001 H:\ORG\ORG EWOV working agenda November 2001.doc
Current General Issues	Outstanding Actions/Issues
High gas disconnection rates The EWOV has reported to the Office regarding higher gas disconnection rates since mid 2000. The EWOV has continued to report to the Office on higher disconnection rates for gas compared with electricity. The EWOV acknowledges that, as part of its recent review of the Gas Customer Service Code, the Office has now delayed the introduction of the shortened collection cycle on advice from EWOV that this may have detrimental affect on gas disconnection rates. EWOV also acknowledges that the Office has focussed attention on disconnection rates in both its electricity and gas Comparative Performance reports.	The ESC advised the EWOV at the September 2001 Office/EWOV meeting that it had reported in Gas Performance report on this issue and had discussed the matter directly with OE. OE has advised that it will be taking actions on this issue. The Office to advise the EWOV of any further progress regarding this.

8.	C:\documents and Settings\sm\Local Settings\Temporary Internet Files\OLK3\ESC EWOV working agenda May 2002.doc
Finalized Issues/Papers since July 2002)	Summary of outcomes
High gas disconnection rates XXXX	The ESC advised the EWOV at the

The EWOV reported to the Commission re this issue and provided the Commission with case statistics that for the 2001 calendar year. The case statistics indicate that XXXXXX Gas disconnection cases remain high and are significantly higher than XXXXXXXXXXX	monthly meeting of 5 April 2002, that the ESC was reviewing the disconnection rates of gas retailers and would be writing a "please explain" letter to XXXX regarding its continuing high level of disconnections. The ESC is also currently drafting the Gas Comparative Performance Report, and the disconnection rates will be published in the Report and in relevant press releases. The EWOV requests advice as to XXXX response to the ESC's letter.
Electricity disconnection rates 2001 An analysis of electricity disconnection cases reveal that there was a1465 increase in disconnection cases received for investigation in 2001, compared with 2000. XXXX Electricity disconnection cases accounted for 39.5% of all electricity disconnections cases received in 2001. These increases were evident in both six monthly periods of 2001. The EWOV provided the ESC with relevant case data re this issue.	The ESC advised the EWOV on 5 April 2002, that this would be reviewed and outlined in the next Comparative Performance Report. The ESC will discuss this matter further with the EWOV in the report preparation.

9.	C:\documents and Settings\mr\Local Settings\Temporary Internet Files\OLK3\ESC EWOV working agenda June – July 02.doc
Current General Issues	Outstanding Actions/Issues
High XXXX gas disconnection rates	The ESC advised the EWOV at the

The EWOV reported to the Commission re this issue and provided the Commission with case statistics that for the 2001 calendar year. The case statistics indicate that XXXXXX Gas disconnection cases remain high and are significantly higher than XXXXXXXXXXX	monthly meeting on 10 May 2002, that it awaiting a response to a "please explain" letter the ESC had written to XXXX. The EWOV requests advice as to XXXX response to the ESC's letter.

10.	Energy and Water Ombudsman Victoria Information paper for Essential Services Commission Customer Consultative Committee 17 June 2002
General Issues The EWOV meets with the Essential Services Commission on a monthly basis to discuss systemic issues and individual cases requiring ESC regulatory interpretation. In addition to the issues raised above, the current systemic issues listed for discussion include: * Upward trend in electricity and gas disconnection cases	

11.	
Current General Issues	Outstanding Actions/Issues
High XXXX gas disconnection rates The EWOV reported to the Commission re this issue and provided the Commission with case statistics that for the 2001 calendar year. The case statistics indicate that XXXXXX Gas disconnection cases remain high and are significantly higher XXXXXXXXXXX	The ESC advised the EWOV on 12 July 2002, that following XXXX response to the ESC's "please explain" letter to XXXX John Tamblyn was to meet with XXXX to discuss this issue and XXXX proposed actions to address this matter. The EWOV provided case data to the ESC regarding XXXX disconnection

	cases in the last 18 months. The ESC advised on 12 September 2002, that XXXX had undertaken to address this issue. The ESC was to review XXXX response and undertakings in the following week. The EWOV requests an update from the ESC on this issue.

12.	Energy and Water Ombudsman Victoria Information paper for Essential Services Commission Customer Consultative Committee 18 September 2002
General Issues The EWOV meets with the Essential Services Commission on a monthly basis to discuss systemic issues and individual cases requiring ESC regulatory interpretation. In addition to the issues raised above, the current issues listed for discussion include: * Gas and electricity disconnection and restriction rates	

13.	C:\documents and Settings\sm\Local Settings\Temporary Internet Files\OLK3\ESC – Finalized items 1 July 02 – 30 June 03.doc
Finalized Issues/Papers since July 2002)	Summary of outcomes
High XXXX gas disconnection rates The EWOV reported to the Commission on this issue on 23 March 2002, and provided the Commission with case statistics that XXXX Gas disconnection cases remained high and were significantly higher than the other 2 incumbent gas retailers.	On 29 November 2002, the ESC advised the EWOV that it had met with XXXX about this matter. The ESC advised it was taking no further action on this matter at this stage, due to: • XXXX disconnection numbers being 75% in 2002, c/w 2001; • XXXX establishing a hardship policy; • ESC believed that XXXX had

	changed its behaviour regarding disconnections. ESC advised that it would continue to monitor this issue through the performance regime.

14.	Energy and Water Ombudsman Victoria Information paper for Essential Services Commission Customer Consultative Committee 4 December 2002
General issues The EWOV meets with the Essential Services Commission on a monthly basis to discuss systemic issues and individual cases requiring ESC regulatory interpretation. In addition to FRC [full retail competition] issues, matters recently raised include: * An analysis of the EWOV's disconnection /restriction cases involving 'capacity to pay' issues.	

15.	E mail from EWOV to ESC 3 December 2002 Subject: FW: Confidential – Draft Electricity Retail Report
10. The increase in disconnection cases received by EWOV may be partly attributable to…**A higher number of disconnection cases may also reflect a less flexible approach to negotiating payment plans.**	

16.	Email from EWOV to ESC 13 February 2003 Subject: ESC Audit of Energy Retail Businesses
3. disconnection and capacity to pay (ERC [Electricity Retail Code] and GRC [Gas Retail Code] clause 11.1 and 11.3). On 26 November 2002, the EWOV provided the ESC with a paper entitled Research into Disconnection and Restriction cases (Residential Customers) received by the EWOV from January – September 2002. **This report highlighted the prevalence of capacity to pay issues in the EWOV's 2002 casework.** The EWOV's paper also explores why it can be difficult to assess a	

retailer's compliance with clauses 11.1 and 11.2 of the Retail Codes. Please refer to the EWOV's paper for more information.

17.	Letter from EWOV to ESC 8 April 2003 Subject: EWOV statistics for the ESC's Electricity and Gas Comparative Performance reports covering 2002
3. Electricity cases received by the EWOV in 2002 As a general comment, Affordability issues remain prevalent in the EWOV's electricity cases. Disconnection cases form a significant part of the 'Affordability' issue category 4. Gas cases received by the EWOV in 2002 As a general comment, **Affordability issues remain prevalent in the EWOV's electricity cases**. Disconnection cases form a significant part of the 'Affordability' issue category	

18.	H:\jb\esc\ESC – Working Agenda April 03.doc
Current General Issues	Outstanding Actions/Issues
Disconnection/restriction – rate of EWOV case receipt * The EWOV has regularly kept the ESC informed about disconnection/restriction issues. This has occurred through working agenda reports, information/comments by EWOV for ESC public performance reports, and EWOV public reporting and briefing sessions. Disconnection/restriction rates are of high importance both to the EWOV and the ESC. **The EWOV has**	The ESC requested that the EWOV provide a detailed research paper on industry compliance with disconnection/restriction regulations. This arose from discussion held at the September 2002 meeting of the ESC's CCC. The EWOV provided this paper in November 2002. **The EWOV made a number of recommendations as part of the paper, however it did not receive any feedback from the ESC.** The ESC has now established a

been concerned for some time that its reporting of increases of disconnection/restriction cases raises a risk issue for the EWOV and the ESC regarding public perception about any action or non action to address these issues. The EWOV suggests that monitoring of disconnection issues remain as an issue of high importance on the working agenda, with regular review.	disconnection working group. At the ESC's request, the EWOV will be providing the working group with a de-identified version of its disconnection research paper. The EWOV is happy to participate in the meetings of the disconnection working group.

19.	R:\Intranet documents\ESC EWOV working agenda\Current.doc
Nature of Issue	Outstanding Actions/Issues
	Working Agenda Meeting Update 26/3/04 At the 26 March 2004 meeting, EWOV tabled report titled Disconnection $ Restriction – July to December 2003 Cases and Case Trends. On 8 April 2004, EWOV XXXX provided ESC XXXXXXXXX with further details requested by ESC, namely de-identified retailer details **re cases involving *potential* compliance issues to do with capacity to pay issues**. EWOV requests feedback after esc has had an opportunity to review EWOV's report.

20.	EWOV data for ESC electricity and gas (energy) comparative performance

	reports covering 2002 Compiled 3 May 2004
Note 2 ….'Affordability' includes billing issues relating to account arrears, backbills, concessions, credit assessment, delays, direct debit, disconnection, easyway payments, estimated bills, high bills, reconnection, refunds, refundable advances, service charges and tariffs, as well as transfer issue relating to access to supply.	

21.	Email from EWOV to ESC 10 June 2003 Subject: FW Performance Indicators – Disconnection and Customers in Financial Hardship
The EWOV suggests that one of the deliverables on the consultant's report should be whether or not the **Retail Code(s) can be clarified to assist electricity, gas and water providers to understand their obligations in relation to capacity to pay issues**. This point is explored at pages 5-6 of the EWOV's research paper.	

22.	EWOV Report to the Essential Services Commission Disconnection and Restriction: July – December 2003 Cases and Case Trends March 2004
EWOV's random sample reviews of 25% of electricity disconnection cases received from July – December 2003 found that 58% of Enquiries and 77% of Cases for Investigation **clearly involved capacity to pay issues** EWOV's random sample reviews of 25% of gas disconnection cases received from July – December 2003 found that 78% of Enquiries and 71% of Cases for Investigation clearly involved capacity to pay issues The substantial number of cases being received by EWOV and the results of EWOV's sample reviews strongly suggest that the hardship programmes implemented (or being implemented) by a number of electricity and gas retailers are not yet sufficiently accessible to customers or comprehensive in detail to proactively address capacity to pay issues…More specifically: A number of customers stated they were placed on payment plans that they clearly could not afford…The electricity case studies in	

section 5.4 of this report (below) provide some practical examples of where an electricity **retailer does not appear to have adequately taken into account the customer's capacity to pay when seeking to establish a payment arrangement** … The gas case studies in section 5.4 of this report (below) provide some practical examples of where an electricity retailer does not appear to have adequately taken into account the customer's capacity to pay when seeking to establish a payment arrangement .

23.	Energy and Water Ombudsman Victoria Information paper for Essential Services Commission Customer Consultative Committee 15 March 2004

Issues raised and discussed with ESC

The EWOV regularly holds discussions with the Essential Services Commission in relation to systemic issues and individual cases requiring ESC regulatory interpretation. In addition to FRC [full retail competition] issues noted above, a number of matters continue to under discussion, including:

* Disconnection and restriction cases - EWOV is preparing a report on recent disconnection and restriction cases involving 'capacity to pay' issues.

24.	Email From EWOV to ESC 8 April 2004 Subject: EWOV's Disconnection + Restriction Report to ESC – further details

As requested, please find following further details regarding EWOV's report. In particular, please find further details regarding the electricity and gas cases that EWOV identified in its sample reviews of **cases as involving potential compliance issues in relation to 'capacity to pay'**. In the cases detailed below, it appeared that the retailer either:

- Did not take into account customer's capacity to pay when seeking to establish a payment arrangement; or
- Did not *adequately* take into account the customer's capacity to pay.

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.

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 organization. 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 organizations 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) 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

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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.vcoss.org.au/images/reports/Full%20Report.pdf

APPENDIX 5

GENERAL COMMENT ON VESC CONSULTATION PROCESSES

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

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

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

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

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

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

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

There was a submission from EWOV the industry-specific complaints scheme funded and managed by industry participants. Utility Choice a price comparison service made a submission to the Open Stakeholder invitation. All other participants were industry based, including ERA, Origin Energy, Simply Energy, SPAusNet; TRUenergy, and United Energy Distribution, Alinta AE and Multinet Gas, who are now under Alinta, taken over by the consortium Babcock and Brown and Singapore Power, the latter government-owned. AGL is part of that group. Jamena is no the name for Alinta-, part of the B&B-Singapore Power consotrium.

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

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

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

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

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

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

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

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

It is of concern that though I ultimately obtained a personal copy of the Issues Paper, it was sent with notation that it was a confidential document and citation or dissemination disallowed.

This cannot possibly be the right attitude with a public consultative process.

In the section on accountability above I have referred to concerns expressed by others about disclosure and transparency generally, and have cited the views expressed by Energy Action Group (EAG) in their submission to the MCE SCO 2006 Legislation Package which is also shown in its entirety in an Appendix within this submission.

I repeat that I have no connection with the EAG, or major or minor user groups, beyond being an independent stakeholder prepared to read and assimilate when time permits, submissions from various stakeholders to the energy and other arenas, as well as to actively participate in the consultative processes, also when time permits.

What concerns me most is the principle of exclusionary practices that appear also to be either implicitly endorsed by the Essential Services Commission in their consultative processes.

For example there is the question of the practices and processes that are adopted in consumer consultative initiatives, which I touch only briefly in the section on VESC Consultative Processes.

I experienced considerable difficulty, despite being an entirely independent registered stakeholder in effectively participating in the consultative process in the current Regulatory Review conducted by the VESC. Though registering my serious interest in participation in time to be included in all public forums and meetings, I was disabled from doing so, and from an early stage that policies were exclusionary and less than optimally transparent. I discuss this further in the section of VESC consultative processes.

Policies that include tabling of Issues Papers for the use of those on the large but elitist Consumer Consultative Committee (CCC), but not publishing such a document online need to be reviewed with a view to establishing whether such policies meet public expectations of public disclosure.

Worse than that the Victorian *"Independent Regulator",* when sending me a personalized copy of the May issues Paper too late to take into account in time during response to the Regulatory Review held the perception that the Paper was privileged and therefore could not be cited or disseminated.

This makes nonsense of public consultation. No public consultation documents can possibly be regarded as privileged or exempt from citation with that forum or others provided proper acknowledgement is included.

The May Issues Paper for the current VESC Regulatory Review is still inaccessible online, as are all of the Working Paper documents. Therefore I dispute that the VESC consultative process on this occasion, and possibly others has met public expectations of accountability, transparency and disclosure.

I do not believe I am the first to comment on these issues, and in support of my impendent views have cited EAG's views above from a publicly available document to the MCE arena.

The matter is not about supporting any one agency individual or group, whether or not deemed to be a *"consumer"* representative, but simply about exclusionary principles and the degree of control that should be permissible when publicly funded agencies are participating in capacity building, consultative processes or any other activity.

Therefore I am concerned to hear from reading certain submissions of practices that exclude consumer representatives of any description, whether supporting business or individual consumers, should be excluded from any such process.

The meeting publicly advertised on line for 17 June 2008 was one that I wished to attend, and registered my interest in time to be included. I was informed by e-mail that that meeting and others similar were exclusive to a Consumer Consultative Committee comprising representatives from government organizations, industry and nominated consumer groups, some without any member-base at all, involved solely in policy and research activities.

I was not interested in private meetings, but wished by views to be publicly heard or read and to actively participate in the regulatory Review in a transparent manner. At the time of expressing an interest I was led to believe that there would be ample further opportunities to participate in such a way down the track as this was merely the first round of

I was not notified of the next public meeting in August, nor did I receive confirmation

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

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

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

All such consultative initiatives should embrace the principles of robust consultation with adequate lead time.

The MCE policy of publicly disclosing its Working Paper documents for further public comment represents the minimal public expectation. The gap in jurisdictions should be immediately corrected so that transparency, disclosure and accountability principles are upheld and seen to be upheld.

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

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

This is to be immediately followed by a further Draft Decision on another clutch of instruments to be reviewed, repealed or changed in some way. The response burden on all stakeholders is considerable. Those documents are not yet available.

The IT system is down for a while but these matters are apparently now being corrected. This has affected the ability of interested stakeholders including myself from effective participation or access to public documents on the ESC website.

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

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

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

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

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

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

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

APPENDIX 6

PARODIED PARAPHRASED VERSION OF LETTERS OF THREAT

Providing modified informed consent under threat

Perhaps this more extended paraphrased version of the implicit messages contained in the two intercepted threats of disconnection of essential services.

"The Policy-Maker and Regulator has allowed retailers directly or through various "metering services" and "billing services" to use water meters to pose as gas meters.[703] *It would take too long to explain to you the confusing practically unintelligible algorithm formula used to calculate the deemed heating component of your heated water consumption.*

In Victoria the calculation formulae to be used is subject to change by the policy-maker Department of Primary Industries. The repeal of the Guideline will mean that the Guideline itself and the crucial documents providing information about how calculations are made may not be as available as before online. Whilst I cannot predict precisely how the formulae will work, I know a little about the rationale that was adopted without altogether understanding how the formulae works.

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703 Policy guidelines and deliberative documents do exist. These carry no weight in law. Transfer from deliberative documents and Guidelines to an Energy Code will not help to validate them any further. The energy legislation refers to a meters as instrument that measure the quantity of gas that pass through that instrument and its associated metering installation to filter control and regulate the flow of gas through that equipment. Water meters are not such instruments, but they pose well as ancillary gas meters and they are allocated them proper meter numbers under the *"gas usage"* column of the bill so everything looks to be in order. The actual energy meter is given a number with an MIRN prefix, and there is normally only one of these in a bulk hot water gas installation. However, many apply supply charges just the same; and some apply commodity and water meter reading charges as well, which escalate the costs

Algebra was never by strong point at school so no use asking me how to interpret it all. In any case I am only the messenger as the energy supplier has offloaded these unattractive duties to third parties

As far as I can recall, the formulae goes something like this, but don't ask me to explain what each of the letters mean, I couldn't tell you and I am no good at maths as I said

Definition

*Cost of supply (Charge) 'theoretical' revenue = (B) = (L * X) + (M * Y) + (N * Z)*

No site readings necessary but we can charge supply and other commodity charges to everyone and perhaps even water meter readings. We do not have to declare each component of non-energy charges.

Where L = megajoules recorded as master meters (supplied by retailers)

X – Tariff 10 commodity charge (as per government gazette)

M= Tariff 10 commodity charge (as per government gazette)

Y = Tariff 10 per site supply charge (as per government gazette)

I don't understand the Guideline myself and I don't have any copies to provide you or the deliberative documents that explain it further but the Regulator will confirm that this practice is just fine. They will stand by us on this so we have every confidence that you will eventually be forced to accept this deemed contract. Most of the contents of the Guideline are soon to be transferred to the Energy Retail Code which will make it look more formal

Even though gas does not pass through water meters we have been allowed to make a magical calculation by dividing this number by that in a process of complicated algebraic algorithm formulae.

We were even told that we don't need to undertake any site readings of meters, but we've installed water meters just in case. This allows us to apply water meter reading charges as well as gas reading charges and/or supply charges or commodity charges directly or through our contracted service every two months. The charges will be in cents per litre even though gas does not pass through water meters and gas is normally measured in megajoules. But will place MJ/litre also on the bill so if looks as if gas is involved in the calculation. However, all we are required to do theoretically is to read the water meters. Site reading is not essential though.

You will be charged according to how many litres of hot water is registered on your hot water flow meter, even though we cannot precisely measure the amount of gas used or how hot or satisfactory it is, or whether you were actually residing in the apartment during part of all of the billing period. The simple dividing and multiplying formulae mean that we don't have to bother about any of those issues which saves processing time and means we can outsource metering and billing issues, factor in the add-on costs and still make a profit – at your expense.

Some retailers charge for a water meter reading fee because the distributor charges for that so they have to make a cost-recovery, even though we are not licenced to sell water. However, for settlement purposes VENCorp regards the gas meter as a single supply point. In addition, as far as I know the Gas (Residual Provisions) Act 1994 regards supply points used to heat communal water tanks as single supply and billing points, but these new rules mean we don't have to bother about those things.

For our purposes we regard your apartment as being the supply address. Some people say that supply address/supply point are technical terms meaning connection point, we prefer to use it as a postal term referring to your premises. We know you do not have a supply point in your appoint associated with your bulk hot water supplies, and that the water is reticulated to your premises in water pipes through which no gas can pass.

In any case the water meter does a pretty good job as a substitute ancillary meter so we just measure the quantity of hot water you consume and work out by a deemed guess how much gas it took to heat it. However, we can't vouch for water temperature or quality or anything else and there seem to be no real rules about water meter maintenance

You probably would not buy a bag of apples if someone tried to weigh this in an oil funnel but this is just hot water and there are many ways to find out how much gas you use to heat that water that don't rely on a separate gas meter for you, and despite the provisions of the Residential Tenancies Act or any other scheme that you think demonstrates regulatory overlap. We are using one of those ways and we need you to agree to a contract if you want your hot water supply to be continued. Maybe the peak Victorian consumer body can help with the regulatory overlap bit. It's worth a shot. These things are very complex.

We have concluded that as there are ten apartments on this block by counting up the letter boxes.

The quickest way for us to let everyone know what we expect is to send a "vacant consumption letter" like this to everyone by making a letter box drop. It may sound like a threat to you but its all part of a normal day for us. It's not intended personally so you should not let if upset you. You have 7 days to pay up but we can stretch it to 10 to meet the regulatory requirements, but that is all. Sign up or lose your hot water services altogether. Our excuse is that you have not provided your personal identification details or provided access to the water meters that we use to calculate your gas consumption.

These letters are addressed to "The Occupier" until we can get someone to sign an explicit contract. Most people feel a bit intimidated by the prospect of losing their hot water within a week to ten days, so they give in without a fuss. After that it is plain sailing because we can quickly set up an account for you and make you contractually responsible.

Though we are licenced only to sell energy, we arranged to purchase satellite water meters so that we could claim that we are monitoring your "hot water consumption" for the water used and if necessary force you into a contract by threatening disconnection of your hot water.

The meters are there for looks because we are not actually required to read any meters on site. This was thought to be too expensive an exercise and time-consuming and may lead to price shock to end-consumers. Many claim that they are not legally contractually obligated in any case, and the bills should go to the landlord or Owners Corporation, but that is beside the point.

We just divide volume of water used by the number of tenants on the block and that is how we calculate how much gas was actually used to heat the water you are using. We don't concern ourselves too much about heating value, ambience or any of the other technical details since the focus of our trade measurement practices is simply water volume and guestimates about individual usage by tenants in apartment blocks and flats

Some say that there is an important relationship between the energy supplied to a customer versus the volume supplied to a customer. The meter records gas volume. The gas bill normally is based on energy supplied.

Ambient pressure and temperature also affect the relationship between volume and heating value supplied. For example, a 2.7 degree Celsius change in air temperature will result in a 1% change in accuracy of gas supplied.

However, these are not matters that can be addressed when considering water quality and temperature, since our focus is on water volume only

The regulator told us this would be a fair and reasonable way so we can just determine how much water in total everyone has used and then make a guess as to how much gas was used to heat that water and then determine how much deemed hot water you actually received.

Just for our protection we need you to take contractual responsibility for paying all gas consumption for the heating of bulk hot water and also individual supply charges that are read through the single bulk meter on the wall of the car park. The main thing is that we can individually monitor your consumption through your water meter.

The energy policy-maker and regulator says it is OK for us to bill you in the form of heated water so we are in the clear with that. But to be sure you should check your rights with the Residential Tenancies Act. The Water Authority sells the water to the Owners Corporation at the outlet of the mains meter and after that it is a free for all. The commercial opportunities are huge.

Metering services have become a new and mushrooming industry, and does not carry as much risk as the hedging arrangements that retailers are obliged to cover. The distributors set the price; retailers carry the risk and arrange for the marketing of energy, metering services can focus on issues that carry minimal risk

In outsourcing metering, backroom and IT tasks to others we have to up the costs to cover middlemen expenses, but we just add this to your end-user costs and don't have to bear this cost personally as a commercial company. We have enough to worry about with hedging arrangements so can't take on all price shocks and feel these should be equally shared.

Even if you have an arrangement with the landlord and your lease indicates that heated water is included in your rent because of the standard lease protections in the Tenancy Act and the absence of a separate gas meter for the heating component, that is a matter for your and your landlord.

I don't know anything much about the Residential Tenancies Act, but someone mentioned that if you think these arrangements are unfair you can always pay us upfront, give the bill to your landlord, allow him 28 days to pay and if he does not agree to reimburse you can pay filing fees to VCAT every three months to reclaim the money. We know it's inconvenient and costly and your filing fees over several visits might diminish or even cancel out the value of reimbursement. But that's the best we can suggest for you. Life is full of things that are unfair and VCAT understands that. That is what s55 is for.

It's just that we don't have the time to chase up the landlord and he is never around when we need to get to the meter, so we need to hold someone responsible.

Therefore once you sign up with us and provide your personal identification details and those of your landlord, we will hold you responsible to provide us with safe unhindered and convenient access to the water meters that are theoretically used to calculate your gas usage for the heated component of the water you actually use. Some of the information required is beyond what the Energy Code actually requires but we need this for our own records.

We know you don't have keys to the boiler room and probably don't feel very comfortable about a contract which forces you to recognize the water meter as an appropriate instrument through which gas can be measured for your individual consumption of the heated component of your water.

The Guideline that the Regulator provides says we don't have to actually do any meter reading because site visits are too expensive for us and mean two trips to read the gas meter on the wall of the car park and also the water meters in the boiler room. These readings are often taken two or three months apart so very difficult to match up dates and actual consumption and does not take account of any tenant movement or absence from the property. We knew there would be some inequities built in to the scheme but we can't please everyone

We just do the best we can with estimates and deemed consumption and notify you of your deemed status just as soon as we are able.

We need the water meters so that if we find that a tenant is not really cooperative about signing up we can threaten to disconnect his hot water supplies. That is a strategy that normally works but you are not meant to take it personally; it's just part of the process.

Even though we don't have to take a meter reading, we are entitled to charge each tenant on the block for water meter reading, but sometimes it is just call it a supply charge, rolled over charge or commodity charge. This is because the gas (or electricity) distributor charges the retailer. There is really only one bulk gas meter with a single number called an MIRN, but we believe it is OK to charge supply charges to each tenant so that we can make the best possible profit.

The charge for manual reading is much lower than for remote reading, but we only have to worry about manual reading if your meter was installed before July 2003. Eventually for those using electricity and hopefully also gas they will be able to make a remote disconnection so it saves us all this walking around and extra costs. You will have to be a bit more diligent about protecting your rights when the remote control options for disconnection become available.

Even though there is only one gas bulk meter and VENCorp deems it to be a single energy supply point for settlement purposes between distributors and retailers, since we can charge for water meter reading costs we can charge each tenant for calculating their gas consumption. That is part of the deal.

These arrangements were to prevent price shock to you. However, the landlord is still entitled to raise your rent.

No-one has taught us much about contract law or informed consent or your common law rights, human rights issues, of regulatory overlap matters but if you need a lawyer I am sure Legal Aid or one of the community agencies can get you the advice you need about that.

I shouldn't be saying this but you won't get far with any complaints made as the industry complaints scheme and regulator usually take no action over these matters. The main thing is that competition goals are properly met.

The disconnection part is tricky. If we cut off the gas everyone on the block is affected. If we cut of heated water, we can target just the one tenant but it does mean cold showers and very few comforts. No-one is game to face that especially in winter.

So the bottom line is that you need to form a contract with us or risk having your hot water services cut off altogether. To do that all you need to do is to provide all your personal details, the date that you moved in, landlord name and contact details, so that we can hedge our bets as to who pays.

If you don't sign up and don't pay then we will consider you to be a bad debtor under a deemed contract. At least that is what I believe the regulations will allow, but no-one is clear enough about the how the deemed provisions should apply, the contract law part; the conflict with the residential tenancies act; your common law or human interest rights. I am just doing as instructed because of the Guidelines.

Are there any other services that we can offer you today whilst we are discussing your deemed contract with us for deemed use of gas for heating the apartment block's bulk hot water that is centrally heated and supplies multiple tenants?

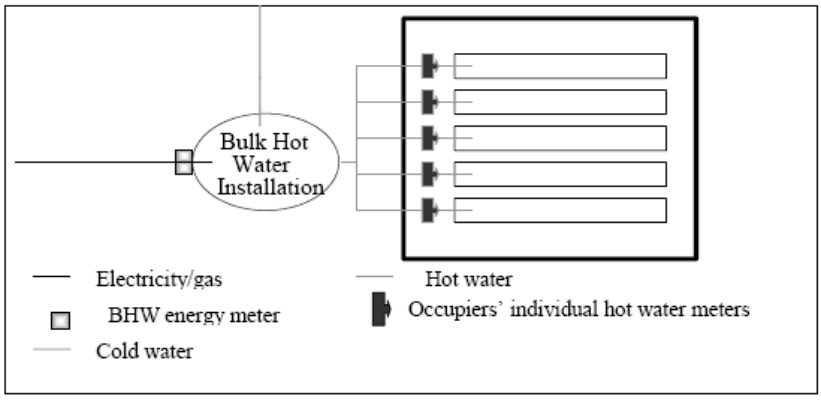
APPENDIX 7

BULK HOT WATER PRICING AND CHARGING ARRANGEMENTS BY CONVERSION ALGORITHM – CONFUSOPOLY IN ACTION

Note water meters are posing as gas meters, theoretically to calculate gas consumption in cents per litre through gas and electricity do not pass through water meters Site specific readings were rejected. Massive supply charges are being applied, some provided using embedded networks are being exempted from licences and there are highly compromised complaints redresses. End-users not legally obliged to accept contractual status are being imposed with such status under pain of threat of disconnection. Such market conduct is seen to be driven by existing energy policies in Victoria and other states.

Regulators, policy-makers and complaints schemes run funded and managed by industry participants apparently believe these arrangements to be fair and reasonable and in accordance with best practice. Those who are not controlled by licence conditions have a bigger and better ball with the rules. End-consumers are the casualties.

Figure 2.1 Bulk hot water flow of energy



Conceptual diagram only

Extract from deliberative documents ESCV

Applicable Term: CONVERSION FACTORS

Definition`

*Cost of Supply (Charge) 'theoretical' revenue = (B) = (L * X) + (M * Y) + (N * Z)*

Where L = mega joules recorded at master meters (supplied by retailers)

X = Tariff 10 commodity charge (as per government gazette)

M = number of gas bulk hot water sites (as provided by retailers)

Y = Tariff 10 per site supply charge (as per government gazette)

N = number of gas bulk hot water customers (as provided by retailers)

Z = per customer hot water meter charge (as charged in South Australia to recover additional infrastructure support costs, including meter installation, maintenance and readings)

When A < B, a retailer has recovered less revenue than the theoretical revenue

When A > B, a retailer has recovered more revenue than the theoretical revenue

The BHWCG 2005 Appendix 1 apparently permits:

"Retailer provided gas bulk to water per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant gas bulk hot water unit divided by the number of customers supplied by the relevant gas bulk hot water unit. Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff."

Further the definition of customer gas bulk hot water charge (cents) is shown as below in the Guideline:

"customer gas bulk hot water charge (cents) = "the customer's metered consumption of hot water (litres) (not energy measured in cu metres or megajoules), at a gas bulk hot water price (cents per litre) + customer's supply charge (cents)

The conversion factor in the said guideline is shown as:

CF = the gas bulk hot water conversion factor = 0.49724 MJ per litre, with the gas bulk hot water tariff shown as "the market tariff applicable to the bulk hot water unit"

"Option 2 Fixed conversion factor (ADOPTED) (See Final Report Review of Bulk Hot Water Arrangements (September 2004) (ESCV) and Bulk Hot Water Guideline (2)(1).

*Fix the conversion factor at the historic level of 0.49724 MJ per litre in the GTO (or current equivalent). The billing arrangements for gas BHW then would require the retailers to include the conversion factor and cents per litre hot water rate in the annual gazette of scheduled gas tariffs (along with the appropriate gas BHW tariff, that is, Tariff 10/11).*Another way of expressing this adopted FCF option could possibly be as follows, taken directly from explanations provided during 2001 Gas trading Arrangements Working Group (GTAWG) for the Victorian Retail Rules Committee assessed issues associated with gas bulk hot water billing

"Flat rate: All hot water consumption is billed at a flat rate per litre (rate derived from natural gas tariff and multiplied by the conversion factor).

However, confusion reigns, at least in the minds of end-consumers of bulk energy endeavouring to interpret bills when presented with these other alternatives.

"Billing in mega joules (1): this formulae involves reading from a master Cold Water and Master Gas Meter to derive litres per mega joules

Billing in mega joules (2): This formula is used where no cold water meter is required by the sum of all hot water consumed is divided into the gas consumed from the Mast Gas Meter to give a litres per mega joule rate. The gas tariff is then applied to this individual consumption by reading individual (hot water) meters.

The conversion factor in the said guideline is shown as:

CF = the gas bulk hot water conversion factor = 0.49724 MJ per litre, with the gas bulk hot water tariff shown as "the market tariff applicable to the bulk hot water unit"

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Sources:

ESC Energy Industry Guideline 2005 20(1) Bulk Hot Water Charging Guideline (1) (December) found at

http://www.esc.vic.gov.au/NR/rdonlyres/C0E6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf

ESC Final Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (December) (23 pages) found at *http://www.esc.vic.gov.au/NR/rdonlyres/4554EA66-6F9E-49C8-934E-1E8232D989AC/0/FDP_EnergyRetailCodeAmendmentsFinalDec05.pdf*

ESC Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August)

http://www.esc.vic.gov.au/NR/rdonlyres/37078658-5212-4FA7-8A8E-AC42AB12BDDC/0/DDP_EnergyRetailCodeTechAmend20050810_CommissionPap_C_05_8007.pdf

ESC 2004 Final Report Review of Bulk Hot Water Billing Arrangements (September) found at

http://www.esc.vic.gov.au/NR/rdonlyres/20C3454F-0A47-428B-845B-1D7D85FBE572/0/FinalReviewBulkHotWaterBillingSept04.pdf

ESC 2004 Draft Report Review of Bulk Hot Water Billing Arrangements (July) found at *http://www.esc.vic.gov.au/NR/rdonlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf*

Correspondence between February and August 2004 between Department of Primary Industries {DPI} (Victoria) and VESC February – August 2004, notably dated 13 May; 16 July; 11 August 2004 respectively from Richard Bolt, then Exec Dir Energy and Security DPI expressing concerns about BHW billing arrangements Other DPI correspondence and replies from VESC same sources not available online as submissions and concerns from DPI on this matter.

Response to ESC re Draft Report Review BHW Billing dated 29 July 2004 from the Supplier supporting non-site visit billing and supporting option 2, fixed conversion factor without site visits for meter reading CF historic level; 0.49724 MJ per litre in GTO would require retailers to annually gazette CF and cents per litre hot water rate plus appropriate BWH tariff, i.e. Tariff 10/11 all based on conceptual model of billing.. Site specific rejected as too expensive to measure and collect data from meters as input Bulk HW meter; hot water consumed (satellite meters); and total hot water consumed by all the residences (thus turning the billing process into a water meter exercise contrary to the spirit and intent of trade measurement provisions)Found at

http://www.esc.vic.gov.au/NR/rdonlyres/CD7E8430-868E-4C42-A937-08E7082F57CA/0/Sub_TXU_BulkHotWaterJuly04.pdf

Response to ESC Draft Report Review BHW Billing dated 6 August 2004 from AGL ES&M re transparency of cents per litre rate; site number inconsistencies and off-peak rate for electric BHW (customers paying full general rate. Mentions site-specific billing too hard in projected FRC environment – a decision taken as read. Response dated 19 September 2005 from EWOV on Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August).

Response to ESC from St Vincent de Paul (SVDP dated 27 July 2004. Confirms lack of transparency in arrangements especially re conversion factor; compliance enforcement forthwith of repayment of overcharging as specified in Retail Code and as previously applied to TXU (now TRUenergy); confirms desirability for site specific reading to counter-act price-shocks to individuals especially for those with poorly maintained residential premises including Office of Housing, DHS; suggests new and replacement installations be site specific. Found at

http://www.esc.vic.gov.au/NR/rdonlyres/6BE152A1-1F27-47C2-B47A-0C32825670F3/0/Sub_StVincentDePaul_BulkHotWaterJul04.pdf

1. Option 1: adjustable conversion factor: rejected
2. Option 2 Fixed conversion factor (adopted*)* based on a conversion factor at a cents per litre hot water rate as gazetted
3. Option 3 – Site specific Option – REJECTED a portion gas measured at the site-specific master meter to each individual customer based on their hot water use **–**