

**PUBLIC SUBMISSION**

**EXECUTIVE SUMMARY AND OVERVIEW  
COMPONENTS**

**PRODUCTIVITY COMMISSION ACCESS  
TO JUSTICE ISSUES PAPER AND DRAFT  
REPORT 2013-2014**

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<sup>1</sup> Please refer to my list of submissions to the public arena and informal submissions to numerous statutory and/or non-statutory authorities including many fulfilling a public role, successive Ministers under successive Governments and my extensive Bibliography and Reading List supporting concerns about public policy gaps and other matters

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## 1 Executive Summary

We should retain the concept of seamless access to justice at least as an aspiration goal but set about refining the definitions. I have posed some annoying challenges to lexicons and have drafted my own, explaining why I felt the need to do so.

Freedom to navigate the system is an option for most of us if we are prepared to be disappointed. Unless you would prefer to be Behind Prison Walls<sup>2</sup> Or an Exonoree? Or an administrative detainee. In which case things could hardly get worse and complaining under the civil justice system about treatment in prison futile.

Just in case prison issues interest you or other socioeconomic impacts on unmet legal need and representation, I have tried to address this as a subset of Section 10 Understanding and Measuring Legal Need and Representation, including 10.3.7.6.2.

I agree with many that there should not be such a clear-cut demarcation between the civil justice and criminal justice system, whilst recognising that the Commission's Terms of Reference were restricted.

Treatment in the prison system or in other forms of detention, within the mental health area of the immigration arena under administrative detention, is very much a civil issue. Would you kindly explain to me what prisoners exonorees and other detainees may rely upon when seeking redress about their treatment in detention and what accountabilities exist and how they may be accessible? This may be an Australian Inquiry with narrow constraints but the question is just as applicable to the international arena, wherein persons deemed to have breached the law are inhumanely and unjustly treated? What about them? What about those we detain in the name of saving their lives?

I note that many stakeholders have raised concerns about the absence of focus on the criminal justice system and the many overlaps with the civil justice system. If the Commission has been offered valuable insights and opinions on such issues it is a gold opportunity to have access to information ahead of any specific inquiry. The Commission is also in a position to make recommendations about the focus of future enquiries.

The Australian prison system is not operating as it should and nor is the wider context of Detention, arbitrary or otherwise. I have discussed this in Section 12.3 along with some 17 discrete categories of specific of unmet legal need within demographic populations labelled as vulnerable, disadvantaged marginalised and disenfranchised. The Commission has had directly from some individuals who have tried to get their voices heard, despite denial of access to technological facilities. Please do not over-estimate the value of these facilities. Not everyone can access them.

The discussion about Leal Aid Services and adequate funding should be read with my commentary under my extended Section 12, where I begin under the heading Understanding and Defining Legal Need with my usual approach of addressing lexicon and interpretative issues, followed by brief commentary on survey methods, use of statistics and possible distortions; and some matters relating to the embryonic field of behavioural economics

The remainder of Section 12 is divided into discussion of selected issues such as the plight of unrepresented parties, with some examples of outcomes for such parties provided by case study

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<sup>2</sup> Behind Prison Walls Yeah I hear the Train: Jonny Cash A Concert Behind Prison Walls  
<http://www.youtube.com/watch?v=sfKdwvuR50Y>

The recent submission of Stan van de Wiel, [subdr218]<sup>3</sup> describes the appalling state of affairs within the legal profession and institutions illustrated through his direct experiences of attempting to defend himself against a government body. In this submission the author suggests that “*a person who defends himself has a fool for a client*”

The problem is that for most people including the articulate, the option does not exist for representation at all. In terms of legal aid funding for civil matters is virtually non-existent and the approaches are mostly about “*strategic funding*” rather than on the merits of the case.

After discussing the issues related to the plight of unrepresented parties and how they are received within a culture that has always been legalistic and onerous, with creeping legalism in tribunal settings, despite their self-perceptions, at Section 12.3 I focus especially on a range of categories of particular need in vulnerable and marginalised populations.

This sub-section begins with broader discussion of the impacts of deep and persistent disadvantage and marginalisation, quoting for example from the work of David Adams in his award winning Sir George Murray essay “*Poverty: A Precarious Public Policy*” [2002a] [in which he also speaks of governance matters including structural issues]

This preamble material is followed by examination of the particular problems faced various categories of vulnerable groups, with some discussion of the issues raised by several community organizations involved in either policy advocacy or provision of direct services. Each category is separately addressed with limited case study references

Section 12.3 concludes with an examination of the Objectives of National Competition Policy and the Public Interest Test. Here I divide the discussion into subsections and provide scanned copies of some material by respected authors highlighting the deficiencies in aspects of public policy that contribute to socioeconomic detriments in the general population and especially in vulnerable groups.

Gavin Dufty for example as Manager Research and Social Policy at St Vincent de Paul Society has examined the philosophies of the Essential Services Commission Victoria [ESC] as described by the then Chairperson of the ESC John Tamblyn, who went on to become Chairperson of the AEMC and then joined a group of three experts known as the Energy Expert Panel, providing advice to the newly formed COAG Council on Energy [which replaced the Standing Committee on Energy and Resources [SCER] which had replaced the Ministerial Council on Energy [MCE

The views of the ESC in meeting the single objective of protecting “long term interests of consumers” appear to be startlingly divorced from those objectives, which are enshrined as policy dogma of little real meaning in multiple instruments including those relating to essential fungible goods and services. I introduced discussion of these matters in my Overview Section 6 under Support Services: Defining the long term interests of consumers” and continue some of the discussion towards the end of Section 12.

There are many categories of vulnerable populations who will never be able to benefit from the renewed emphasis on information provision, especially through technological means. Homogenisation can only get so far when seeking to redress unacceptable imbalances.

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<sup>3</sup> van de Wiel, S [Capt] Submission to Productivity Commission Access to Justice Issues Paper [sub218] Aggrieved litigant against government agency. Corrupt legal profession. 21 May 2014 2 pages  
[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0009/137178/subdr218-access-justice.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0009/137178/subdr218-access-justice.pdf)  
<http://www.pc.gov.au/projects/inquiry/access-justice/submissions/>

As to accessible formal legal structures as they stand, well I have a view on this. I hardly need to point out to the credible and articulate responses, mostly from legal academics on the need to effect a major re-vamp of the legal system all the way through, not only to address perceived creeping legalism within tribunals, despite denials, but throughout the current system of mostly passive response to whatever is thrust before the judiciary by parties facing clear imbalances in resources, skill and capacity to present a case, let alone get past the other barriers to seeking not merely access to justice [however weakly that may be defined]; but actual delivery to justice.

I leave aside that major reform is not on this year's map for reform, as suggested by Evan Whitton<sup>4</sup> [Our Corrupt Legal System} and his numerous supporters

I have read with interest the recent submission to the Commission's Inquiry, including that from the latest appointment to the Office of the Victorian Ombudsman Deborah Glass as of March 2014<sup>5</sup> who has suggested that seed funding to assist the statutory ombudsman community to establish a similar body to the Australasian Council of Auditors-General. I support that goal, since it could then provide:

*"evidence .. to underpin the development of rigorous approach to benchmarking"* [final paragraph, page 18 of 18 newest Victorian Ombudsman]

I support the position that the entire system needs a shake-up, rationalisation, and to be blunt ruthless scrutiny and re-revamp, kicking and screaming if needs be.

I absolutely refuse to accept homogenisation between those with statutory ombudsman stature and those clinging on to coat-tails by adoption of misleading labels such as industry-based Scheme Ombudsman and Offices, meaning the half-baked unaccountable complaints handling landscape or its characterisation and mapping. I provide my reasons in detail, not only in Sections 6.5 [Overview] and Section 10.

I have already provided below a fairly lengthy overview section that is divided into a number of headings that do not exhaustively cover all the issues I raise in the body of this submission. I will resist the temptation to provide headings here but urge consideration of all components of this submission including ancillary material for the sake of embracing the principles of continuity and inter-relatedness.

The ancillary material has been grouped into batches that are topic-related and many components overlap with sections. A complete listing of this is provided indicating the contents of each folder. This is attached to the electronic bundle on a USB, with a further copy of the bibliography. Of these there are two particular items that I wish to highlight as they are case studies that augment particular matters that I wish to air. Some material has also been provided as hard-copies. I can provide further material upon request.

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<sup>4</sup> Whitton, E [2013b] Second submission to Productivity Commission's Access to Justice Issues Paper [042] [November] [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0004/129226/sub042-access-justice.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0004/129226/sub042-access-justice.pdf)  
<http://www.pc.gov.au/projects/inquiry/access-justice/submissions>  
See <http://www.netk.net.au/whittonhome.asp>

Supporters or those with similar views are not limited to Christopher Enright, Annette Marfording, John Joseph, Paul Evans to name a few

SALUTE

<sup>5</sup> Victorian Ombudsman [2014a] Submission to the Productivity Commission's Draft Report Access to Justice Inquiry 18 pages  
[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0020/136613/subdr176-access-justice.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0020/136613/subdr176-access-justice.pdf)



Over the years I have battled with a poor commitment by government departments and agencies to uphold the principles of transparency, and I found that I was unable to provide verifiable links to certain material that ought to have remained publicly available. In many cases I had downloaded my own copies, and to make the task of the Commission easier I have provided a sizeable proportion of PDF and hard copies in addition to listing all material relied upon in my Bibliography and Reading list.

Whilst I have addressed many of the issues the Commission has addressed in its Issues Paper and Draft Report, I have introduced many topics that may be beyond the immediate scope of this Inquiry. There is a dearth of reliable data out there through which public policy can be better informed. I believe that an opportunistic approach to accept information that may be helpful in future similar enquiries or other concurrent inquiries is a good plan to adopt.

I cheerfully proffer more than you asked for and hope that despite far exceeding usual document size constraints that it will be published in its entirety. It has been cross-referenced throughout the document and certain matters will lose impetus if there is not an easier way of accessing the material than ploughing through 32 separate chapters.

My intent is to target other authorities with similar material where there is overlap between regulatory frameworks.

This summary does not aim to cover all the material that is addressed in this submission, but rather highlights particular issues. The Overview section at 6 is divided into chunks under headings and walks through topics addressed in more detail in later sections.

The 220 submissions made to this Inquiry to date have covered a lot of ground, but not necessarily on the matters that I wish to highlight. I have referred to numerous opinions from the submissions made and included all of those in the bibliography material.

I start with the complaints arena since there have been few inputs on this topic other than those from self-interested complaints schemes promoting their wares. I regret that I cannot accept their collective views. I also think the structural arrangements are messy and lack coordination.

I firmly believe that there is a need to re-evaluate the extent to which governance and structural issues may be perversely contributing towards unmet legal need, decision-making bottle-necks and perceptions of an uncoordinated approach to addressing public policy design and delivery.

I have focused on a selection of governance issues throughout the submission and from Section 21 onwards have broadened my approach to include matters that were not part of the Inquiry parameters, but I hope that some consideration will be given to those issues.

The inter-relationships between authorities, the corporately-badged public sector, complaints mechanisms of varying degrees of accountability, if any have a direct impact on service delivery. Amongst the hot spots are the interactions between corporately-badged economic regulators and various complaints schemes, most of them industry-based.

In some sectors, including the utilities arena, the tensions between overseeing regulators and the complaints schemes that were established under their respective enactments have become acute enough for the schemes to be motivated to express this publicly in the context of public submissions. Whilst my examples have mainly been taken from these sectors, it is likely that extrapolation to other arenas is appropriate.

I have spoken of squashed community expectations, tiered policy inertia, the accountability shuffle, information asymmetry, the non-consensus malaise, unaddressed conflicts of interests and sustainability of government institutions, aside from sustainability of the social fabric of society and how this may be impacting on perceptions of availability to services and avenues through which the elusive access to justice pathways may be navigated.

Professor Mary Noone and others have referred to justice as including the quality of the experiences of those attempting to navigate the system. On page 2 of her submission she described justice as

*“encompassing how people navigate and are treated in the many transactions [with legal consequences] that compromise everyday life, particularly those that are administered or involve government agencies. It is in these encounters that equality before the law’ is experienced by most people.”*

In recognition of that broader concept, I have dealt not only with examining the plethora of complaints mechanisms available and whether the Commission’s predictions that the incidence of unmet legal need will be deliverable simply by lifting awareness of their existence, but whether under current structural arrangements and governance, the quality of service delivery is sufficient to deliver desired outcomes.

What are the questions that we should be asking about at least adequate alternative dispute resolution solutions in the effort to minimize demands on the formal system of justice and apparently deeply flawed formal legal process that represents a pathway to upholding the rule of law and access to justice?

What should be made of the notion of promoting access to a deeply flawed alternative pathway in the pursuit of access to civil justice and related criminal justice arena?

Why should we rely on self-perception of the parameters of service delivery including impartiality, efficiency; effectiveness or accountability; or self-perceptions of jurisdictional powers;

In relation to industry-based complaints handling mechanisms [note my reluctance to dignify them with the term ombudsman or Office as industry associations would like to see happen]; I strongly support nationalisation and absorption of all industry-schemes into a statutory framework with a juristic basis. This will meet with the expected resistance and already has. There are questions to be asked whether there is a sufficient level of collective insight into the parameters of own performance to make it possible for self-interest in self-promotion to be a reliable indicator of the level of service quality.

Existing ancient Benchmarks that are not Australian Standards and do not meet community expectations or relevance in the 21<sup>st</sup> Century are relied upon as policy dogma that cannot be substantiated in the theory to practice translation, and lack the quality assurance parameters through which service delivery and performance may be objectively measured.

I note that the 18-page submission from the Victorian Ombudsman’s 18-page response to the Draft Report deals with the issue of the existence of a **network of complaint handling bodies** minus vision and governance in a single framework where consistency and a modicum of accountability can be achieved. I am pleased to see this choice of phrasing since complaints handling and justice or access thereto are not synonymous. My headings for sections and sub-sections throughout my submission will reflect how I view the categorisation of various complaints handling mechanisms.

The Victorian Ombudsman, Deborah Glass, has mainly compared levels of demand for service within the statutory framework, listing on page 11 as comparative graph that five statutory authorities and one industry-based scheme, the Public Transport Ombudsman Scheme, which is

industry-based. He noted that the other Victorian bodies listed did not receive more than ten per cent of the volume of complaints as did the Victorian Ombudsman.

Whether this is just a matter of awareness is not easy to assess, but an indicator is a survey conducted by the Australian Communications Consumers' Action Network in 2012,<sup>6</sup> as referred on page 17 of the CHOICE submission to the CCAAC Review of the 1997 Benchmarks that showed that

*“Among consumers who had an unresolved complaint against their service provider, 46% were aware of the existence of ‘an Ombudsman’ or Telecommunications Industry Ombudsman [Scheme] [TIO] Of those who did not take their complaint to the TIO, only a small proportion [10%] cited a lack of awareness as the reason.”*

The Victorian Ombudsman receives over 30,000 approaches each year, with the next highest amongst the complaints bodies being about \$10,000 to best knowledge. [page 11 of submission dr176]

On the issue of the proposal that contribution to be made by government agencies against whom a complaint is made towards the cost of complaint-handling, the Victorian Ombudsman believes that this recommendation is

*“not appropriate in a public sector context and would have unintended consequences that are contrary to the public interest and could place vulnerable members of the community at risk.”*

If it is the case that complaints against statutory authorities are likely to be against those dealing with the most vulnerable, and if financial penalties for complaints may lead to avoidance of acceptance of complaints by those agencies [being those that can least afford such penalties according the Ombudsman], then the advice should be heeded that approaches and incentives in the commercial sector may not be appropriate for the statutory sector.

In passing I direct attention to my discussion in Section 10 of perceived conflicts of interest when a Statutory Ombudsman wears multiple hats and concurrently holds a Scheme Ombudsman role in an industry-based scheme. Either an industry scheme is separate or the concept of industry-based schemes is demolished and all complaints handling comes under one umbrella with a juristic basis..

This means that a single statutory Office can have divided duties to address complaints against government authorities and complaints that are industry-related but not industry-managed since all manner of untended consequences may arise when industry-based schemes see themselves as unaccountable other than to their management boards, whilst statutory services are required to deliver more accountability. This inequity needs to be addressed. I have long been a supporter of streamlining of services and parity in the accountability and transparency benchmarks.

The comparison between the role and scope of parliamentary ombudsmen is a chalk and cheese one, and I have resisted the notion of homogenization whilst schemes are operating outside statutory accountability parameters.

Frankly if the Commission wishes to recommend promotion or industry-based schemes minus juristic basis or quality standards of international standing, whilst using the terms Ombudsmen or Office, please forgive me for saying, you have lost my vote. This is rank manipulation. How little respect the government and industry must have for end-consumers of goods and services of any description.

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<sup>6</sup> Australian Communications Consumers' Action Network [ACCAN [2012a] National Consumer Perspectives Survey pp 66 available at <https://acan.org.au/files/ACAN20%National20%Survey-1.pdf> c/f page 8 Submission of 7 June 2013 from CHOICE to the CCAAC Review of the 1997 Benchmarks

Could we please lift the bar of community expectation?

I totally agree with the Victorian Ombudsman that:

*“The major impediment to real progress has been the varying nature of the jurisdiction of each of the state and commonwealth ombudsmen.”*

I would go further in my concerns that on the one hand industry-based schemes as a self-interested self-promotional measure have assumed the name of “*ombudsmen*” or Office implying stature power and accountability that does not exist, and on the other they wish to be considered altogether unaccountable to governments or to external scrutiny unless they are seeking top-up funds.

I have illustrated this in the case of the Victorian Scheme known as the Energy and Water Ombudsman [Victoria] Ltd [with an incorporated overseeing management board enjoying a separate legal identity] and have provided to this entity a high-beam spotlight through which my numerous concerns may be used to draw attention to the structural and governance issues of concern, including the lack of juristic basis for these schemes.

The myriads of industry-ombudsman schemes mushrooming like toadstools without juristic basis will ensure that equity and service quality will be variable and the discrepant political wills to deliver a more effective impartial service compromised.

I strongly support the Victorian Ombudsman’s reflection regarding the requirement for enhanced accountability and transparency for statutory Ombudsmen.

I am also pleased to see that with great restraint this Ombudsman seems to have drawn a line by avoiding discussion of schemes assuming the Ombudsman label, which conveys a subtle message about labelling. In her concluding paragraph the Victorian Ombudsman has asked for seeding funds to establish a body similar to the Australian Council of Auditors-General. This would be an excellent plan, rather than the current arrangement of associations such as ANZOA, which attracts personal membership from industry and some statutory authorities in a scheme to elevate the status of the industry-based schemes.

The image of statutory ombudsman is not enhanced by that arrangement, which in any case only offers personal membership to post-holders of the key positions and is not an organizational membership. Therefore such schemes have no direct sanction control over the staff of such schemes particular with regard to performance.

I have devoted some sections to discussing labelling, perceptions and mapping of complaints entities and to this end have also mostly in Section 10, sub-divided discussion of these according to role and function. I have made no bones about my objection to the application of the term Ombudsmen or Office for industry-based schemes without juristic basis.

The bar has been set too low for community expectations and I do not accept that the schemes are performing consistently to standard. There is no hope whilst weak ineffectual old and tired Benchmarks are upheld as appropriate or relevant. I have also discussed this in section 10 comparing these with Australian Standards published by Standards Australia and International Standards, in both cases recognizing the differences between standards for internal and external complaints handling with a focus on consumer-centricity, quality assurance, operational and performance criteria that is based on the SMART principles with detailed implementation plans and external accountability.

At present the inputs of professional external industry consulting firms is hampered by the lack of implementation plans, including effective operational manuals against which any benchmarks at all may be measured.

I vigorously oppose the rationale provided by EWOV and any other industry-based schemes or associations to retain the current hutch-potch governance, if that is the correct word to use. I have provided hard copies and scanned PDF copies of EWOV's Constitution and Charter with discussion and other material as ancillary documentation which may serve to identify a certain long-standing resistance to the parameters of external accountability and transparency, mostly addressed in Section 10, but also discussed under Section 22 "Reflections on Government Accountability and Transparency."

I thank the current Victorian Ombudsman for highlighting the need for accountability and transparency benchmarks to be raised, though she has discretely focused on statutory authorities, and for suggesting that a model which:

*"provides for Audit Offices" [as in the case of the Australasian Council of Auditors-General [ACAG]<sup>7</sup> to improve their own effectiveness and efficiency by such means as may be agreed from time to time, including a professional quality assurance peer review program, benchmarking surveys, targeted reviews of particular functions and operations." [page 17 Victorian Ombudsman submission subdr176]*

My concerns about governance and accountability of both statutory authorities and industry-based complaints handlers are extensive. My material including case studies aims to illustrate these concerns.

If the system is to be overhauled a more balanced view of the effectiveness of the current system and schemes needs to be obtained than that which is projected through self-interest through the schemes themselves and their associations.

I have minimised my reference to "Alternative Dispute Resolution" and to "Appropriate Dispute Resolution" except where I explain the differences in lexicon usage and my preference for definitional and mapping parameters that may not suit mainstream Plain Language Movement proponents, many from academia with a particular ideological and political stance.

I have discussed alternative views on mapping and definition of both the complaints handling arena and with regard to the mapping and definition of the role of consumer advocates. In particular I believe that advocacy without grounding is meaningless and potentially dangerous.

I have refuted the views of Chris Field in his ADR and Advocacy mapping approaches. In support, I have presented the views of David Tennant, former Director of Care Inc. Financial whose eloquent rebuttal of the views of Chris Field at the 2006 National Consumer Congress deserve to be highlighted again.

To augment the arguments presented I have presented an academic model of grounding, relying on the Theory of Grounding espoused by UK economist Edmund Chattoe<sup>8</sup> [1995a] who has asked the question "Can Sociologists and Economists Communicate?" This is mostly addressed in Section 18 Advocacy Issues, but it is applicable to all other arenas, and particularly to the arena of public policy design.

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<sup>7</sup> Australian Council of Auditors-General [ACAG] [2013a] About Us downloaded by the Victorian Ombudsman on 16 May 2014 and cited on page 17 of her submission to the Productivity Commission's Access to Justice Draft Report of May 2014

<http://www.acag.org.au/about.htm> on 16 May 2014

<sup>8</sup> Chattoe, E [1995] Can Sociologists and Economists Communicate? (examining the Grounding Theory)

<http://www.kent.ac.uk/esrc/chatecsoc.html>

c/f Kingston, M 2010d Grounding theory. As embraced by David Tennant previously Director Care Financial Inc. Taking the Consumer out of Consumer Advocacy" 2006 National Competition Congress c/f subdr242part3 PC CFP.

David Tennant has demonstrated that it is entirely possible to put grounding theories into practice if the political will exists. The current Consumer Movement has the potential to be better governed. I have supported the views of David Tennant, the Foundation for Effective Market Governance [FEMG] and others in calling for the urgent establishment of a truly independent [though accountable] National Consumer Congress along UK lines, such as was proposed at the 2006 National Consumer Congress in presentations made by David Tennant after the Think Tank. As this material is less accessible now, I have provided scanned and hard copies of this material and discussion in Section 18 Advocacy Issues and elsewhere.

I make no apology for using different lexicons, but I do take the care to explain my rationale and my own glossary of terms, notably in Section 10 where I examine both statutory and industry-based schemes.

This is unachievable in a governance model that permits schemes to do as they wish and establish charters and constitutions from which public input and accountability are excluded notwithstanding the inclusion of niche-focused consumer representatives on scheme board most without voting rights and no visible or measurable influence

I reject without qualification the claims made by such bodies as EWOV regarding the desirability of retaining private and unaccountable corporate structure

I especially reject EWOV's claims to efficiency and effectiveness no matter how many educative schemes they have promoting their services

Please see extensive case study material and discussion at Section 10.8 and my direct experience of this scheme over a 21 month period. I have alleged ongoing perceptions of bias incompetence and accountability and have support this with independent accounts and credible reports not associated with my direct experiences in a third party complainant capacity. Please see the disturbing report researched and prepared by social researcher and author Dr Andrea Sharam<sup>9</sup> after obtaining access to documents on FOI.

Though written ten years ago and glancing back approximately five years prior that, that is as relevant now as it ever was. I have provided a scanned copy in-text with Case Study 2D in Section 10, a hard copy and an electronic copy on USB.

The report examined the accountability and reporting parameters of the Essential Services Commission Energy and Water Ombudsman Retailer Non-Compliance 'Capacity to Pay' parameters, the total lack of triangulation in the reporting and accountability of own performance by both corporatized entities, and the outcomes for hardship consumers relying on this scheme and its overseeing regulator.

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<sup>9</sup> Sharam, A [2004a] for Energy Action Group [EAG] Energy Action Group and Sharam E [2004b] "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 -included as attachment 1 with Energy Action Group [EAG] [John Dick] [2007a] Some Late Brief Observations to the MCE Legislative Package 2006 and Advocacy Arrangements [23 Jan] <http://www.ret.gov.au/Documents/mce/ documents/EnergyActionGroup20070123103540.pdf>

In particular Dr Sharam demonstrated that many hardship clients seeking “*conciliation*” through EWOV’s services found themselves in worse spiralling and unaffordable plans recommended, with outcomes that worsened rather than improved their dilemma. These concerns are repeated in her Book Report *Power Markets and Exclusions* [Sharam, A 2004b]<sup>10</sup> and other material as included in a discrete selected list of her publications and the work of other authors including Carat and Bingham [2002a].<sup>11</sup>

I have in strong terms discussed the implications of an entity however corporately badged or an individual providing financial counselling services to vulnerable people without training, accountability, juristic basis or anything else that would justify this kind of input under the guise of “*conciliation*.”

It has been found that retailers are indifferent to their obligations under mandated hardship policies pursuant to energy codes and guidelines, and that EWOV has been entirely ineffective in negotiating reasonable and affordable instalment repayment plants. The consequences for many have been irreversible debt.

There is no reason why EWOV cannot keep a file open and appropriately refer hardship clients to an accredited and experienced financial counselling service to see what can be done through them, though sadly Dr Sharam has reported that where these services have been utilized without EWOV’s involvement, it has been very difficult to achieve compliance with hardship policies, and in many cases, essential goods and services have never been reinstated.

Schemes that are so enamoured with themselves and their self-perceptions of performance and their associations lack the insight grounding skills and political will to deliver at least adequate services or to recognise accountability

The impressions I have gained from a variety of sources, including others who have used the scheme; from credible reports; and from the public submissions made by EWOV in particular have led me to conclude that this body operates more as an industry association than an impartial complaints scheme. I have gone as far as suggesting sustained perceived bias

I note from EWOV [Victoria] Ltd second input into this Inquiry, dated 21 May in response to the draft report opposes nationalisation of the complaint mechanisms that involve industry-based complaint bodies on the grounds that not all jurisdictions have agreed to participate in the National Energy Customer Framework [NECF] legislative package under uniform legislation known as the National Energy Retail Law [South Australia] 2011, which in embracing a tripartite contractual governance model, and despite its title implying applicability to retailers alone, a mandated tripartite reciprocal system of determining rights and responsibilities between distributors retailers and customers and/or end-users. I clarify that customers are not always end-users, but may be middlemen or others not directly consuming gas electricity or water as goods not services.

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<sup>10</sup> Sharam A [2004b] *Power, Markets & Exclusions assessing the effectiveness of social protections in deregulated markets: an electricity case study from Victoria* / Financial & Consumer Rights Council Victoria Inc.  
[Report written and researched by A Sharam] ISBN 1875506217 Dewey No. 363.6086942 Libraries Australia ID 25651802. National Lib Australia ID 25651802. State Library Victoria ID 1156145 held, academic libraries x 9 VIC, NSW x3, Qld, WA  
<http://catalogue.nla.gov.au/Record/3083705> and  
<http://trove.nla.gov.au/work/33546746?q=Andrea+Sharam+Power+Markets+and+Exclusions+2004&c=book&versionId=41527364>; <http://www.vcross.org.au/images/reports/Full%20Report.pdf>

<sup>11</sup> 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]

Conversely, end-users of utilities may not be customers in situations where a body corporate, including a community association managing strata-titled property or business premises may be the customer and contractually liable.

My 21 months of unsatisfactory dealings with the EWOV Scheme was a valuable learning experience. The merits review could not have been less appropriately handled and the case management was so deficient as to make a mockery of perceptions of independence, fairness, accountability transparency efficiency and effectiveness

The only conclusion that I can draw is that we have a deeply corrupt complaints and regulatory framework to contend with whilst plans are underway to promote schemes that in many cases cause more harm than good. My experience with this scheme has cured me of any desire to bring complaints forward in any capacity or to recommend usage

There is no argument that will shake my perceptions on the following matters, as discussed in considerable detail with case study examples in Section 10, notably 10.8 and all subsections thereof

- a. absence of effective redress, compounded by the lack of juristic basis and the lack of effective governance, if any; including through approaching statutory authorities, either with a perceived overall governance role; or with a statutory role to protect the general and specific rights of consumers pursuant to generic laws, including the Australian Consumer Law and fair trading provisions;
- b. impotence of various Good Faith Memoranda of Understanding between entities notionally embracing reciprocal cooperation with a focus on consumer protection. The Handshake Method has been repeatedly shown to be of less value than the paper upon which these arrangements are printed;
- c. serious unaddressed governance and oversight at all levels; specifically a dysfunctional governance arrangement wherein over many years it has been found that the regulator is derisive of any and all attempts to bring systemic issues to its attention.
- d. Systemic jurisdictional limitations accompanied by lack of insight into the inherent weaknesses of such impediments to effective complaints handling over a range of issues other than for minor complaints more readily dealt with
- e. [EWOV has made two Binding Decisions in 13 years, the last being in 2003, eleven years ago; is restricted as to the types of matters in which such rare decisions or determinations may be made, the ceiling amount of compensation and the circumstances; with requirement to consult with the regulator, whose attitude to consumer protection and rights is not generally seen to be consumer-centric.
- f. On the other hand, if the Scheme were left to its own devices with greater power; given the matters I have described and discussed at length in Section 10.8, the outcomes are hardly likely to be much different. Actual or perceived bias in favour of industry must be taken into account and indeed it is a legislative requirement that both actual and perceived bias must be avoided]



- g. bias and manipulation, including legal stancing and posturing, heavy-handed conciliatory techniques [such as threat of closure of the file if legal advice were to be sought on behalf of the Complainant, written “*strong recommendations*” [taken to be veiled threat] to capitulate in favour of the scheme member the subject of complaint a host retailer on the board of management]; I note that the same attitudes were mirrored by the regulator when the matter was directly referred for intervention
- h. parallel perceived bias in the regulator;
- i. poor skilling;
- j. inadequate understanding of the legislation or of comparative law considerations,
- k. lack of understanding of the technicalities and legalities that are required for proper assessments of complaints
- l. poor identification of systemic issues; failure to refer;
- m. perceived lack of political will;

In a system where the regulator appears to have:

- a. careless regard for its obligations to monitor the market and enforce
- b. its relationship with the complaints scheme notionally under its control is such that the any reliance on appropriate consultation, oversight and addressing of system issues is misplaced, and further, perhaps most importantly
- c. where the policies adopted by the statutory policy-maker and regulator, including the content of codes guidelines and license provisions are seen to be either deliberately or perversely fanning market distortions and rendering inaccessible the enshrined rights of individuals community associations and businesses as consumers of goods and services;

I would never recommend the EWOV scheme to anyone and have broader concerns about the structure and governance issues generally with the “*private company*” model to which EWOV has once again referred in public submissions.

I note the ANZOA has seized the opportunity to promote its members again in its second submission of May 2014, this time to the draft report. Prior to reading that I had already refused, mostly in Section 10, a number of presumptions made about the accountability independence efficiency and effectiveness of many of the industry-based schemes.

I note that this member-based association that offers membership on a personal not organizational basis to a mix of industry-based schemes with no accountability; some statutory ombudsman, and one or two statutory complaints bodies, now styles itself not only ombudsman according to the usual practice that I believe is misleading, but also an Office, implying statutory status juristic basis and accountability

In its opening paragraphs of the second response ANZOA makes these statements

*“ANZOA agrees that evidence demonstrates Ombudsman offices are effective in promoting access to justice and generally perform well on measures of timeliness, service costs and complainant satisfaction.”*

I suggest that ANZOA is unfamiliar with what is happening on the ground with service delivery or of the disturbing reports and other evidence of gross failure.

By way of blowing trumpets for its members, ANZOA has especially selected the EWOV Scheme to illustrate or at least to suggest that systemic issues are being appropriate referrals are being made where matters are out of jurisdiction and that they have enough insight to recognize that a fair proportion of the users of the service and others making objective reports without the baggage of complaint, third party or others, have a very different view.

ANZOA's May submission<sup>12</sup> makes these observations in responding to Draft Recommendation 5.1 which refers specifically to legal assistance services not complaints handlers without statutory status or accountability; not limited jurisdiction industry-based schemes who believe they are private companies because a certain governance approach believed that corporatization and self-managed schemes such as these would deliver "justice"

I quote from the predictable response from ANZOA

*"For most Ombudsmen, their title suggests their role. For example, Energy and Water Ombudsmen deal with energy and water complaints, and the vast majority of complaints made to those offices around Australia are about energy and water issues within the office's jurisdiction.*

*That said, referral of out-of-jurisdiction matters is an established part of the role of all Ombudsman offices. Where someone contacts an Ombudsman office and the office cannot assist, the person is provided with detailed contact information for an appropriate dispute resolution service — be that another Ombudsman, Fair Trading or Consumer Affairs, a tribunal or court, or another body. Where the person has rung an Ombudsman's office, in many cases their call is transferred directly to the appropriate agency. The offices of ANZOA members regularly*

I can only assume that ANZOA believes what it wants to believe and does not wish to read inconvenient reports about the performance of its members. I should again stress that membership is personal to members and not to the scheme or its staff. A clique of senior representatives of schemes, who seek peer support and validation. An exclusive club if you will to aid personal professional development.

I assume that ANZOA is unaware of reports dating back years that found demonstrable failure in reporting and referring and entrenched dysfunctionality in the triangulation of performance reporting between the Scheme and its overseeing regulator, which body never did respond in any case to such matters as were brought before it.

I had to make my own referrals during by 21 months of abortive dealings with EWOV in third party complaint matter detailed in Section 10 Case Studies and 2B. Buck-passing, confusion of roles and responsibility of plain and simple statutory and non-statutory apathy and unresponsiveness were evident in the whole of the handling of the complaint by four case managers in a row.

EWOV Scheme staff unable to figure out the boundaries of their own jurisdiction for 18 months before file closure and progression to a botched merits review process that failed to review either the substantive issues of complaint, or the additional complaint about case management, errors/omissions in the so-called investigation for matter in in which they had no power; and perceived bias.. I have said enough here. For details please read the case studies and extensive discussion in Section 10.

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<sup>12</sup> Australian and New Zealand Ombudsman Association [2014a] Submission to Productivity Commission Access to Justice Inquiry Draft Report  
[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0007/136744/subdr200-access-justice.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0007/136744/subdr200-access-justice.pdf)

I feel entirely unable to endorse the perception that these schemes are what they are made out to be on the basis of self-perception and those of their association, with a duty to promote the interests of its members, and I am disappointed over the recommendations made in the Draft Report to promote these schemes as a pathway to justice.

In relation to Draft Recommendation 5.1 which is intended for legal services, I see nothing wrong with heading for a structural process by which data may be collected and reported more objectively.

ANZOA has argued that their members have so much depth of knowledge about the nuances of the industry that no-one else could do at least the data gathering as well.

I found that the staff were singularly ill-informed about the legislation relevant to them, that there had little understanding of the technicalities, and that comparative law considerations had never occurred to them, even if they were legally qualified. How then would one expect them to know what to refer, where it should be referred and how to ensure that breaches that may cross regulatory framework boundaries were dealt with?

I note the structure of the ANZOA report, providing a copy of the dated Benchmarks in place that schemes assert they are upholding. There appears to be acceptance that this is occurring or that there is any in-built quality assurance in the existing CCAAC 1997 Benchmarks that are purported to be Australian standards simply because they began life in a government department.

In the earlier parts of the May submission ANZOA seeks to homogenise the work of State Ombudsman and their wide powers of investigation with the limited powers of complaints handlers in schemes. This is achieved by the use of the misleading term ombudsman, capitalised, frequent use of the term Office which implies a statutory standing with accountability; and glowing recommendations for certain schemes.

However the bulk of the examples provided are not matters in which industry-schemes are the remotest involvement in, but instead were extensive investigations conducted by State Ombudsman of systemic issues within the statutory sector.

As a marketing exercise to hang on to coat-tails in the incessant and tiring self-praise that one has to endure from schemes and their associations is an irritation to those who have experienced the service beyond quick-fix issues that may be possible to turn-over quickly.

EWOV in particular has made public statements about its confusion over loyalties in such discussions as hinged on extension of their jurisdiction to include unlicensed parties of all descriptions on a contractual basis. This did not sit well with their strong need to secure financial stability through funding arrangements that could guarantee this. They also considered denying additional scheme members voting rights, and mentioned the issues of parity if their members had different controls imposed on them as opposed to the absent controls that EWOV would theoretically have if they were fully paying members.

The very matters that are likely to arise from the small-scale licencing or exempt selling regime are those for which EWOV has no jurisdiction. I cannot see how government funding to set up a structure and legislative package that would theoretically facilitate access to “informal” assistance for a wider range of complainants will help to deliver effective outcomes in the absence of political will and given the regulator’s entrenched position on such matters. EWOV is subservient to both its Board and the regulator whose history since establishment in 2001 has not demonstrate a robust consumer protection approach in its regulatory functions. I have discussed these concerns in many segments, including in specific Overview sections discussing how best “*the long term interests of consumers*” should be interpreted and delivered.

I repeat that as an informed and articulate user of the service I did not appreciate the bullying tactics and legal stancing and posturing, threat of closure of file and general incompetence in case management at all levels.

Submissions such as those from ANZOA are calculated to obscure the theory and practice gaps as if by floating a list of vague benchmarks in the air it must be a given that the practical implementation will be guaranteed.

I note that Victoria has to date resisted participating in national uniform energy legislation under retail provisions and as a consequence the plan to have all energy-related schemes embrace a superior set of Standards, or to access any of the protections such as do exist in that package.

Those impact by the detriments that arise from inappropriate asset management practice, alleged third line forcing activities, entrenched long-term contracts of questionable legality will have access at all to anything resembling justice. Even if these schemes morphed into something else altogether overnight, they do not have the power or the political will to cater for these groups of complainants. I refer to Case Studies 2A-2D and to ancillary case studies as well as discussion of some of the technicalities at the end of Section 22.

I refer to ANZOA's response to recommendation 24, suggesting that customer satisfaction may be one of the data sets considered in evaluation. One has to wonder just how selectively surveys are since I certainly was not requested to provide feedback [proxy] customer feedback.

I read the ANZOA submissions as being full of rhetoric and little substance. It is a tailored desperate plea for validation. I am unable to proffer that as an end-user.

I agree with the Victorian State Ombudsman that there is an extensive "*network of complaint handling bodies*" but decline to style them as ombudsman and especially not the industry-based schemes. I also agree with the VSO that there is room to revamp rationalise and streamline the provision of complaints handling under a single umbrella that will be provide with adequate governance and mandated accountability pursuant to administrative law in the same way as the non-corporatized public services must be accountable.

It is more than time to challenge the perception held of public entities fulfilling a public role, after being established under statutory provisions that they are "*private companies*" with no accountability other than to the industry-based management boards, [with some niche-based consumer group representation minus voting power or discernible influence] If they have been deliberately set up to escape scrutiny and accountability then there is something inherently wrong in the governance model and legislative provisions that allowed this to happen.

I am not the first comment on the remarkable uncertainties as to the juristic basis of these schemes and will not be the last. If a revamp is on the cards, let us please avoid shooting from the hip and rushing over in an expensive promotional exercise that will not necessarily be cost effective or effective in any other way.

The CHOICE submission to the 2013 CCAAC Review of the Benchmarks for Customer Dispute Resolution Schemes directed attention to a 2012 survey in which it was found that only a very small proportion of those who did not complain to these schemes were unaware of the service. A host of reasons may be in play, including unwillingness to expend the time and effort required; preoccupation with other more pressing issues such as daily survival or other pressures; anecdotal accounts from friends or other associates of negative experiences. Where complaints may have been lodged in the past, burnt fingers may ensure that it does not happen again.

Launching a nation-wide campaign at the expense of the public purse before examining whether the rosy self-perceptions of these schemes and their associations have any basis in truth. I have tried to provide anecdotal and other more formal evidence that the garden is not all that rosy, and believe that we should start calling roses by their names, and spades as they should be described.

It is my view that the alleged “*independence*” of these private companies on the basis of corporate structure leaves the gate wide open for them to operate not as impartial accountable complaints schemes, but instead as industry associations with a perceived bias leaning in favour of industry. These perceptions do not bode well for improved confidence within the general population, no matter what consumer representations may say.

On the sensitive issue of consumer group representation [CRG] in various arenas, including on boards of management of industry-based schemes [where they mostly, if at all have no voting rights and no measurable influence, if at all]; and on similar representation on the Consumer Group Consultative Committees auspices by various regulators, I believe there is room to question effectiveness.

In this regard I have discussed the risks of organizational capture and the impacts of “*institutionalisation*” of consumer representatives absorbed into a system where their separate or collective identity may be eroded. I have also spoken about synergistic influences, choosing a handful of examples.

I have addressed the niche-focus interest of the not-for-profit sector. It is not my intent to undermine the work that is done both by policy advocates and by those predominantly offering grassroots direct services to the some 12.5% of the population facing multiple disadvantage vulnerability marginalisation and/or disenfranchisement. This is necessary and valuable work and should be adequately funded and resourced so that those services can be continued and enhanced as a measure to minimise unmet legal need and the correlation between socioeconomic impacts on unmet legal need in accessing services and representation.

I do not consider representation to mean minor assistance with engrossment of documents for lodgement in formal proceedings. In a legal sense this normally means direct court-based advocacy through legal professionals. Because of the primary costs, the risk of cost awards and the legal risk it is rare for community groups such as Community Legal Centres to go further than offer a supportive role.

Turning to the sorry state of affairs in the statutory system, not only has this been developed in an ad hoc manner with overlap in jurisdictional powers between statutory authorities and state ombudsmen with parliamentary accountability, but the legislative instruments that established a plethora of Councils, Commissioners and a variety of complaints handling officers and mechanisms have disempowered those offers such that it is rare for any decision or determination to be made. At the end of the day if the option is to give the system a try to test the waters and discover whether toothless tigers have a place in the 21<sup>st</sup> century.

I have illustrated that those who have approached statutory mechanisms including regulators with a bounden and mandated duty to monitor and regulate and market as well as enforce the law have come away burnt and disappointed.

The new meaning for regulation and enforcement is not to “*protect*” consumers but rather by “*empowering*” them with a pamper shower of printed and unprinted written material and/or cursory oral advice and constant re-direction from one inadequate service to another. I have discussed some of these matters in Section 10 in analysing the scope, objectives, goals functions and policies of selected statutory authorities

There are some industries in which regulatory slackness is more evident than in others. In order to avoid turning this into a tirade of rhetoric I have selected a number of case studies through which my concerns may best be illustrated. In some cases I was directly involved in a third party capacity. Please refer to my Case Studies 2A-2D in Section 10; and to other studies recounting the experiences of others who have fruitlessly tried to navigate the statutory or non-statutory complaints mechanisms.

I note from several submissions made to the Commission's Issues Paper and Draft Report that even articulate and qualified unrepresented parties face enormous impediments. One of these is Kev Rothery a Tasmanian victim of workplace bullying who had initially sought statutory complaints and conciliation inputs, and whose self-case study I have highlighted in Section 12 with the case of Kev Rothrey also discussed in Section 12 at subsection 12.2.2.7.8.1 as Case Study 4C<sup>13</sup> [unrepresented competent self-litigant Workplace Bullying [Tasmania] the barriers were not of the kind normally identified by consumer advocates or community agencies

Margaret Singleton a competent and articulate senior pensioner who faced impediment after impediment within the statutory complaints arena before taking her matter to VACT before the Building List. There she found that court-directed mediation was a stressful and intimidating experience. She was brow-beaten into accepting Terms of Settlement in a mediation process that she described as "*scandalous.*" She also referred to cronyism and maladministration with the statutory system.

Her submission to the Commonwealth Consumer Affairs Advisory Committee's [CCAAC] 2013 Review of the Benchmarks for Customer Dispute Resolution Schemes details her experiences, which I have highlighted in my own submission as Case Study 4D<sup>14</sup> Building Dispute Statutory Complaints then VCAT and apparently 'scandalous pre-Tribunal mediation meeting In the Singleton family's case [Section 12. 2 Unrepresented Parties 12.2.2.7.9.1 and again in Section 15 Legal Institutions: Structures and Processes.

Her experience was given further credibility in the articulate submission made by the Building Compliance Reform Association [BCRA]<sup>15</sup> which exposed the deficiencies in the existing statutory complaints mechanisms with particular regard to the building industry. Even when breaches of regulations are blatant it is rare for anyone to secure a timely response to concerns, to investigate specific allegations of breaches, and to respond proactively in such a manner as to fan not diminish community confidence. This is not occurring.

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<sup>13</sup> Rothery, [2013] Submission to Productivity Commission Access to Justice Issues Paper sub 022  
[http://www.pc.gov.au/\\_data/assets/pdf\\_file/0003/129108/sub022-access-justice.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0003/129108/sub022-access-justice.pdf)

<sup>14</sup> Singleton, M [2013a] Submission to Commonwealth Consumer Advisory Committee [CCAAC] Review of Benchmarks for Customer Dispute Resolution [June] [Building Dispute, internal, external [statutory] and Tribunal VCAT  
<http://ccaac.gov.au/2013/04/24/review-of-the-benchmarks-for-industry-based-customer-dispute-resolution-schemes/>

Margaret Singleton's submission to the CCAAC Review of the 1997 Benchmarks presents an eloquent case study of the plight of owners maladministration and cronyism in the building industry and inadequate informal redress or tribunal outcomes

<sup>15</sup> Building Compliance Reform Association [2013a] Submission to Commonwealth Consumer Advisory Committee [CCAAC] Review of Benchmarks for Industry-Based Customer Dispute Resolution Schemes: Issues Paper 2013 [June] [21 pages]  
<http://ccaac.gov.au/files/2013/06/BuildingComplianceReformAssociation.pdf>  
<http://ccaac.gov.au/2013/04/24/review-of-the-benchmarks-for-industry-based-customer-dispute-resolution-schemes/>

The BCRA submission referred to disturbing reports by the Victorian State Ombudsman, the Attorney-General and the recent KPMG Report on Fraud and Corruption within the building industry.

This is fundamentally an issue of governance and leadership such that the bar is set high enough to be expected to deliver, and if that does not occur, there should be a penalty system.

The central problem with lumping the entire complaints mechanism area under a collective label in the same breath as mentioning access to justice, is that the matters become blurred and homogenised. The functions role and service delivery parameters of each group needs to be discretely examined, with less reliance on self-perceptions of self-interested parties using the public consultation area as a free marketing exercise.

As to the ancient Benchmarks authored by the Consumer Affairs Advisory Committee, this sorry document floating in Cyberspace without auspices is not an Australian or International Standard and would never meet even the most modest expectations of quality assurance in complaints handling. There is a clear distinction made in Australian and International Standards between parameters for internal and external complaints handling. Without the detail that will facilitate implementation, broadly cushioned key principles and practices leaving enough room for interpretation to mean anything one wishes it to mean will hardly substitute for a more accountable system where staff selection training and accreditation methods, customer satisfaction parameters [other than tick box “*resolution statistics*” and a clear set of guidelines on operational parameters. Designing of standards as a specialist task.

I have discussed these matters comparing existing Australian and International Standards in Section 10 and comparing them with what passes for an adequate set of Benchmarks. I have also discussed the legislative changes that will compel energy-specific industry-schemes in jurisdictions that have embraced the National Energy Customer Framework NECF legislative package through uniform application laws to replace the flimsy benchmarks with an Australian Standard AS-ISO-10002-2006, albeit that this was designed for internal complaint handling, whereas ISO-10003-2007[E] is the appropriate standard for external complaints schemes.

For too long complacency with weak frameworks for statutory and industry-based complaints schemes has lowered standards of expectation, unless I am mistaking that for sheer apathy, which is a cousin of complacency but lower down the pecking order of acceptable attitude.

Legal Aid Centres, which should be far better funded adopt a mixed model approach predominantly relying on pro bono services that do not represent a bottomless pit. I admire the work done by many taking on pro bono services. Over-reliance on a system already over-burdened and dependence on a number of factors including availability; legal risk; cost-award risks and the like, and therefore can only be seen as relatively ad hoc, and dependent on effective triage management for such services.

Because of eligibility criteria that is restrictive and designed to exclude rather than include those in particular need of legal advice and representation, many amongst the marginalised and vulnerable are forced to appear unrepresented with cursory duty lawyer advice where4 the complexities of a matter cannot be examined or optimal representation achieved.

The LAC models appear to rely mostly on provision of discrete services, information provision, minor assistance and referral elsewhere. The quality on input provided in those circumstances cannot go far enough. In Section 10.10, I have examined the service provision parameters and views of three Legal Aid Centres including perceived drawbacks

Later, in discussing governance accountability and transparency issues at Sections 21 and 22, I further discussion with some general observations and commentary followed by more specific discussion, many related to the utility arena.

The material at Section 22 Reflections on Public Accountability and Transparency includes analysis of theory models in identifying the Gaps in the Internal Energy Market principally based on a credible literature review undertaken in 2005 by Mark Jamison and colleagues from the Public Utility Research Centre, followed by more specific discussion of hot spots in the Australian setting labelled Missing Steps in Completing the Internal Energy Market analysis at Section 22. Subsection 22.3.9. and further discussion Specifics 22.3.9.10.4

At the end of that section I examine specific issues to illustrate my view of the state of disarray and poor governance at a policy level, choosing specific examples of gross multi-sector market distortion seen to be fanned by flawed public policy and regulation at jurisdictional and national levels.

Some of these have led to:

- a. steady erosion of consumer and business rights,
- b. breaches of fiduciary duty under the common law as illustrated in the landmark decision in 2007 before the New South Wales Supreme Court [NSWSC] 527” 2007 delivered by McDougall J on 30 May 2007 with implications for the whole of Australia
- c. perceived breaches of cartel provisions, perceived collusive behaviour that is not restricted to industry
- d. other erosions of general and specific consumer and businesses

I have not only suggested corruption in regulatory and policy design but have gone as far as suggesting that the direct and indirect impacts of appalling policies and inclusions in license provisions for energy providers, for example could be seen as matters of vicarious liability when the impacts are such that enshrined rights of consumers and businesses are hampered by undermining of any chance of accessing justice.

These matters are poorly understood across the board, and especially by the regulators and policy-makers responsible, by industry-based complaints schemes; by statutory complaints mechanisms and by the niche-focused consumer representatives, rarely exposed to wider matters of concern to the community which may be outside the reach of their focus on vulnerable groups alone.

I have exemplified amongst others the bizarre bulk hot water arrangements that permit disregard for trade measurement provisions; for protections under tenancy provisions, albeit well-nigh impossible to access when third parties are involved in utility matters including inappropriate imposition of deemed contractual status on the wrong parties, using the wrong instruments of trade, the wrong Standard Units of Measure; and a deeply flawed interpretation of the deemed provisions for the sale and supply of gas and electricity.

This leads to allegations of deemed “*illegal usage*” of goods not supplied at all, and in which the principles of legal traceability in trade measurement and the provisions contained in all other provisions other than those representing policy derogations in codes guidelines and licences. There are flow-on consequences with unjust and unwarranted imposition of both contractual obligation unilaterally imposed but false claims of debtor status with far reaching consequences for the weak and the strong, the vulnerable and the remaining population of some 87.5% according to ACOSS figures published in 2012.



I have alleged that the Essential Services Commission Victoria may have over-stepped the boundaries of jurisdiction in explicitly sanctioning questionable arrangements and misinterpretations of the deemed provisions within energy laws, notably the *Gas Industry Act 2001*, the *Electricity Industry Act 2000* and authorising conduct that may be breaching other regulatory provisions in other frameworks and with non-statutory provisions including the common law and the rules of natural justice.

I have provided commentary and some hard-copy and/or scanned material in support of my claims, and case study material in both Section 10.8 in ancillary material including two Appendices as Case Study 1A The BOOT System of Operation [buy own operate and transfer] and related Case Study 2B The Soda Water Argument dealing with some of the policy implications. These mainly refer to asset management practices that could be interpreted as third party line forcing with respect to service arrangements and sale and supply arrangements imposed on innocent parties purchasing or occupying property in multi-occupied developments, including strata-titled property managed by a community association; and in other settings such as business parks and shopping centres; caravan parks, rooming houses, rented blocks of flats that are not strata-tiled and others

Asset management has become a popular side-line for utility providers and for various other sectors such as holding companies, trust companies, investment banks; solicitors' trust funds; property developers and builders; real estate managed funds and property management; service providers in the energy, water and communications arenas, and a plethora of miscellaneous groups known as Metering Data Service Providers pursuant to a new category of market participant under the AEMC Rule Change ERC0092 of 2010-2011 to which I made four submissions in April and July of that year, in addition to further material provided orally at public workshops and by telephone and correspondence to the AEMC SCER and the AER amongst others.

When evidentiary material of extensive market distortions came my way, I became motivated to examine the matter a bit further but was unsuccessful in my attempts to secure the attention and proactive input of statutory authorities

Ultimately I decided to try my luck at gaining standing leave as an unrepresented party before the Australian Competition Tribunal [ACT] in a gas access matter for which merits review of a decision made by the AER in a gas access determination with cost allocation, and in which Jemena Gas Networks [NSW] Ltd [JGN] sought arbitration

The history of success with gaining standing leave in such matters, and especially for gas illustrates that the hurdles are significant and that the legislation is calculated to be as exclusionary as possible. I was not directly impacted by the issues raised but in a spirit of community duty as a private individual I proceeded with a formal application for standing leave, meeting vigorous opposition from the regulator's legal representatives; from the Applicant in the matter a major gas network service provider with synergies with asset management company[ies] including Jemena Asset Management [JEM] [which provides on contract to other parties including retailers] expert asset management advice and service arrangements

My primary allegation in the substantive matters that I wish to raise beyond arguing for standing leave, was that the regulator AER had far exceeded the boundaries of its jurisdiction by inappropriately granting recoverable cost allocations by way of massive OPEX and CAPEX costs to the Applicant JGN for the unnecessary purchase installation and maintenance of water infrastructure, including water meters otherwise known as hot water meters, and hot water flow meters.

This gadgetry does not form part of the distribution and transmission systems over which the regulatory has control has no technical capability for measuring either gas volume or quantity or electricity quantity [both goods not services under generic and energy laws].

The use of these instruments in stationary boiler tanks used to centrally heat water to reticulate to individual premises is inappropriate when deeming consumption of gas or electricity. The use of puffery terms like hot and heat or heated water serves to misleadingly convey the impression that there are inherent capabilities in these instruments to measure either gas or electricity, or heat representing the alleged amount of gas or electricity deemed to be consumed. Not only are these instruments incapable of measuring heat [temperature] but heat is an attribute not a saleable commodity.

I have referred to national trade measurement provisions definitions of measurement when referring to descriptive terms, and the requirement to use legally traceable means to calculate consumption of goods that are measurable and provide in trade

I will leave out in this executive summary the technical explanations but direct you to case studies in Section 10 case studies in ancillary material and the tail end of Section 22 where I discuss the bulk hot water arrangements that are legally, scientifically and technically unsustainable, but are widely used throughout the nation whether or not there are explicit directives such as in the case of Victoria, which so far as not come on board with joining the national energy consumer protection framework reflected in uniform legislation to be adopted under application law in participating states and territories.

As I am uncertain how much of my material will be published even within the main document, given size, I have included discussion of some of these matters within the main document mostly in Section 10 and 22.

These are all matters that the usual array of industry-based complaints schemes are precluded from dealing with because they relate to policy, tariff design, legislative provisions and other matters for which they have no jurisdiction at all.

In an industry environment where the norm is to provide exempt licenses to numerous parties who seek loopholes through which to exploit enshrined rights of consumers and businesses as consumers, there is room to be fearful that access to justice will become further eroded and confidence in regulatory and policy frameworks impossible to restore.

Though I have addressed vulnerability issues, the thrust of much of my material is about the contribution that is made to unmet legal need and erosion of rights by flawed public policy, spurning conflicts and disputes that can turn nasty and protracted.

I have referred to the principles of vicarious liability of statutory and non-statutory authorities or other entities if nothing is done to stem the flow of provisions and policies given the wrong signals to industry, indicate failure to use common sense or accurate interpretation of the law, directly facilitating either deliberately or inadvertently market distortion and express exploitation of the enshrined rights of individuals

At the end of the day, no single State of Commonwealth statutory provision will affect other rights or remedies

At the end of the day attempts to limit access to or otherwise attempts to undermine enshrined rights will not succeed, even in the name of "*competition policy*" that permits the lightest regulatory touch, if at all, in the alleged long-term interests of consumers and businesses; or any other such guise, under any circumstances, howsoever engrosses, structured, intimated or otherwise conveyed within such provisions, or for that matter terms of commercial agreement between one party or another, including between government authorities and other entities.

Expressly, such attempts **WILL NOT**:

- a. **affect or limit a civil right or remedy**, apart from such an Act, whether at common law or otherwise, save and except for the expense and inaccessibility issues the subject of the Productivity Commission’s Access to Justice inquiry;
- b. **exonerate from liability including under the common law**, such recourses, including through compliance with any given legislative Act or ancillary provision, including misguided Codes and Guidelines that appear to be fanning rather than limited misconduct;
- c. **hamper restrict or remove civil or other rights or obligations under other statutory provisions**, notwithstanding any misguided transparent or hidden warranties or guarantees [for example any warranties or guarantees entered into during the disaggregation of infrastructure or other assets);
- d. **over-ride recourse to seeking justice under enshrined rights** within the written or unwritten laws, including under the common law and rules of natural justice;
- e. **imply or create limitations as to culpability and/or liability** by the mere existence of perceived exoneration under one enactment or ancillary provision [or for that matter terms of any commercial agreements {whether or not between government or other statutory authorities, including during the disaggregation and sale of infrastructure assets; specific legal provisions under state, local government or federal laws or generic laws;
- f. **in any way limit a court’s powers** under the *Penalties and Sentences Act* “*without limiting subsection (1) compliance with this Act does not necessarily show that a civil obligation that exists apart from this Act has been satisfied or has not been breached.*”

**Numbered list of ancillary documents some 340 in total**

Some of these are also provided as hard copies

**Appendix 1**

**Case Study 1A BOOT system of operation [buy own operate and transfer**

**Appendix 2**

This study has been expanded since it was publicly submitted to the Australian Energy Regulator [AER] on 21 January 2013 with 15 other appendices in three groups and a substantial main submission covering some of the matters included in this submission and appendices

I have covered quite a bit of in in-text including Section 22

The matter relates to a dispute between an Owners' Corporation and a Service Provider appointed by an Inerim Body Corporate Guardian Property Developer of a major development complex designed in stages to accommodate some 300 strata titled units known as the Oasis Inkerman Development of Henry Kaye notriety [See ASIC decision 2010 to ban Henry Kaye from managing corporations for 5 years]

The dispute has implications for alleged breaches of fiduciary duty under the common law and may be usefully studied in the context of the New South Wales Supreme Court decision delivered by McDougall, J on 30 May 2007 in the Arrow Asset Management Case <sup>16</sup>

New South Wales Supreme Court Community Association DP No 270180 v Arrow Asset Management Pty Ltd & Ors [2007] NSWSC 527 delivered by McDougall J on 30 May 2017, an [Case] = NSW Supreme Court Community Association DP No 270180 v Arrow Asset Management Pty Ltd & Ors [2007] NSWSC 527 delivered by McDougall J on 30 May 2017, an : NSWSC 527 2007 Community Association DP No 270180 v Arrow Asset Management & Ors : DP No 270180 v Arrow Asset Management Pty Ltd & Ors [2007] NSWSC / counsel. (Plaintiff) F C Corsaro SC/ D B Studdy (Plaintiff) per McLaughlin & Riordan Solicitors, Defendants) J S Wheelhouse SC (First and Second Defendants) per Deutsch Partners Lawyers Pty Ltd (First and Second and Mallesons N Perram SC/J S Emmett (Third Defendant). - [s.l.] :

**16** Tip of the Iceberg. But What a Decision. Arrow Asset Management Case 2007 [527:2007 NSWSC Don't you think? Evidence Fiduciary Duty.  
As we all know Common Law tenants may be quite useful pro tem, especially and not exclusively per fiduciary duty, but evidence Dear Chaps. Evidence is everything.

The Supreme Court, NSW Commercial List, 30 May 2007. - Landmark decision before the NSW Supreme Court Community Association DP No 270180 v Arrow Asset Management Pty Ltd & Ors [2007] NSWSC 527 delivered by McDougall J on 30 May 2017, analysed by Francesco Andreone and Gary Bugden

<http://www.lawlink.nsw.gov.au/scjudgments/2007nswsc.nsf/aef73009028d6777ca25673900081e8d/19fd2e5b9c7df7d2ca2572e5002269c4?OpenDocument> [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2007/527.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2007/527.html);

[http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2007](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2007)

Community Association DP No 270180 v Arrow Asset Management Pty Ltd and Ors [2007] NSWSC 527 (Decision 30 May 2007)

[http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2007/527.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2007/527.html)

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Bugden, G [2007] The Arrow Asset Management case has implications throughout Australia

<http://www.mystrata.com.au/doc-store/Arrow-Asset-Management.pdf>

Andreone, F [2009 [2011] The Implications of the Arrow Asset Management Case first published in 2009, and presented by the author at the Strata and Community Title in Australia for the 21st Century III Conference in 2011 [first published 2009]

<http://www.francescoandreone.com/uploads/4/0/0/6/4006916/paper-griffith-university-the-arrow-case-august-2009.pdf>

see <http://www.lawlink.nsw.gov.au/scjudgments/2007nswsc.nsf/aef73009028d6777ca25673900081e8d/19fd2e5b9c7df7d2ca2572e5002269c4?OpenDocu>

David Bugden, Management Rights – Are Developers Promoters? [1996] QLSJ 281 c/f Andreone, F [2009a, 2011a]

c/f Andreone, F [2009, 2011] see Bannerman's Lawyers [2008] Management Rights - Fiduciary Duties – Developers

[www.bannermans.com.au/articles/strata-and-development/139-management-rights-fiduciary-duties-developers](http://www.bannermans.com.au/articles/strata-and-development/139-management-rights-fiduciary-duties-developers)

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Other useful references, cited with the consent of AUSTRAC with all disclaimers are public legal interpretation guidelines

clarifying the use of such terms as Agent and Agency, Customer and others and providing in PLI Guideline No. 10 referene to relevant case law based on common law tenets

Australian Transactions Reports and Analysis Centre [©AUSTRAC] on behalf of the Commonwealth of Australia [2010a] Public Legal Interpretation Series No 10 Agency and the AML/CTF Act.

[http://www.austrac.gov.au/files/pli10\\_agency.pdf](http://www.austrac.gov.au/files/pli10_agency.pdf)

and <http://www.austrac.gov.au/pli.html>

As accessed online 25 February and 23 Nov 2013 with all disclaimers Public Legal Interpretation series [2010a] [©AUSTRAC]

This particular Guideline with the written consent of ©AUSTRAC has been reproduced in my Main submission and ancillary material to call attention to matters relevant to public policy, legislative drafting issues and my case study material.

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Australian Transactions Reports and Analysis Centre [©AUSTRAC] on behalf of the Commonwealth Government] [2009a] Public Legal Interpretation No. 9 Customer Identification Requirements under the AML/CTF Act

<http://www.austrac.gov.au/pli.html>

Refer also to ©AUSTRAC PLI No. 10 Agency under the AML/CTF Act. Common law tenets Agency. Arrow Asset Management case 527:2007 NSWSC. BOOT system of operation. Case studies 1A and 1B., 2A-D other material. Citations and reproduction with written consent

This document is scanned into the main document, and has also been provided as a .pdf copy with the various batches of appendices that are divided into several topic-related batches

### **Case Study 1B The Soda Water Argument**

The substance of this material has already been aired repeatedly in my multiple submissions to the public arena

I have in addition provided similr material in communictions with various relevant statutory authorities

A copy of the same case study that is 1A, but in briefer form, as published on the AER website <http://www.aer.gov.au/18677> in my extended response to the AER's Revised Exempt Selling Regiume [associated with a Legacy Program]

I have criticized the practice of providing exemption from the requirement for holding a retail licence for the sale of energy, which according to an extensive and elaborate plan to provide such exemptions is equipped to accommodate just about any party wishing to escape the enshrined legislative provisions within energy laws.

Though the relevant instruments refer to the retail sector, as has already been pointed out by industry players, the implications also have impacts for the downstream components of the supply chain.

In particular, consistent with legislative provisions under uniform legislation known as the National Energy Retail Law [South Australia] 2011 [the National Energy Customer Framework package] to be adopted by participating jurisdictions through application law in each such jurisdiction, which exclude through out-out provisions Western Australia and Northern Territory, and await decisions from Victoria and Queensland regarding participation] there is a tripartite contractual governance model that has been adopted.

This governance model recognizes a seamless contratual obligation and entitlement on distributors, retailers and customers. I have criticized the loose use of the term customer, which may not be the end-user of goods. Failure to spell this out will undoubtedly lead to ongoing and unresolved disputes. This is but a single example of sloppy legislative drafting that will contribute to unmet legal need of the kind apparently never highlighted by community agencies involved in the consumer advocacy and consumer group representation arenas.

This along with all other material is provided in good faith to augment some of the detail in Case Study 1A BOOT system of operation

### **Appendix 3**

Incidentally the participation of such groups on the management boards of industry-based complaints schemes does not guarantee of voting rights or measurable influence. In any case these matters are well beyond the jurisdiction of industry-based complaints schemes which are forbidden from becoming involved in matters relating to policy including tariff design, however bizarre and inappropriate; legislation and a host of other issues. Therefore even at best case scenario in which staff selection, training, accreditation and performance benchmarking and monitoring, numerous issues will remain untouchable by such schemes, regardless of what may be done to lift their profiles

On that basis and for numerous other reasons, I have had real difficulty responding to many of the findings and recommendations contained in the Commission's Draft Report including under Chapter 8 Alternative dispute resolution [refers to Chapters 2 and 3 of the Issues Paper on pages 52 and 53 of the Draft Report]; Chapter 9 Ombudsmen and other complaint mechanisms, Chapter 10 Tribunals; Chapter 10 Unrepresented Parties [Self-Litigants – one is either represented or not; there is no such thing as self-representation]

**[Productivity Commission note: Ms Kingston provided the Commission with a full submission (as shown in the table of contents above) and additional supporting material. These are available from the Commission on request.]**