

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

**Response to Draft Report**

**Pentultimate part-open submission**

**Dynamic work in progress<sup>1</sup>**

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<sup>1</sup>

Follows draft material submitted on disk on 1 and 11 February respectively

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## **PREAMBLE**

As a concerned private citizen I welcome the opportunity to address the Productivity Commission in response to its Draft Report and apologize for the lateness of this finalized open submission. I appreciate the Commission's flexibility in accepting a two formal open belated final submissions to the Draft Report.

However I had provided on disk during February in draft form a substantial proportion of the new re-structured and extended material contained herein and the companion submission focused on energy issues

Besides this lengthy submission addressing briefly all components of the Productivity Commission's Draft Report, please refer also to a companion submission dedicated to energy matters including the state of the energy market generally and Draft Recommendation 5.4.

Though this material adds to all other privileged and non-privileged material already lodged, I ask that the two further submissions each be allocated separate lodgment numbers and be published as open submissions.

Though normally it is policy to delete contact details of submitters who are private citizens, I ask that an exception be made in this case as I am happy to invite enquiries from interested stakeholders by phone or email, details provided on front sheet. Please confirm that this is acceptable.

I cannot do justice, even in a lengthy submission such as this to discussing each of the PC's recommendations in deserved detail, but have endeavoured to make relatively brief comment on each recommendation, separating 5.4 for more dedicated examination of the energy market and the implications of recommendations to lift remaining price regulatory control over the default standing offer at a time when the market cannot be dependably effective, and when in fact the volatile market has given rise to impediments to competition that are quite unrelated to standing offer issues.

Though I had prepared considerable material in response to the Second Draft Report I did not submit in the end. Instead I provided most of that material directly to the Productivity Commission in Draft Form on disk during February, and am now in a position to finalize and request open publication of a dedicated submission dealing not only with a direct response to PC recommendation 5.4 but other aspects directly related to competition issues. Though the PC's primary concern is consumer protection, the two issues are very closely related.

Throughout both submissions there is extensive mention of consumer issues, so both submissions need to be read in tandem to capture these matters and gain a more thorough understanding of the context of the concerns specific to energy.

*Madeleine Kingston*

**Madeleine Kingston**

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## EXECUTIVE SUMMARY

### Part 1 Response to Productivity Commission's Draft Report<sup>2</sup>

The Productivity Commission has gone to enormous lengths to explain its rationale. It is certainly not hard to see that the Draft Report would have needed much iteration.

Because of time constraints the issues of concern have not been addressed as thoroughly as I would like. Failure to comment on any one aspect does not imply either endorsement or rejection.

I hope any criticisms and identification of weaknesses will be accepted in the spirit intended from a concerned private citizen.

One such criticism has been the emphasis on process rather than outcomes. I share those concerns. I am also concerned about lack of detail as to 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.

There is reserved support for the proposed changes consumer policy. Whilst generally and cautiously supportive, I too have my reservations. Without knowing the detail of changes proposed, and given that the devil is always in the detail, it is difficult to be unequivocally supportive.

#### Some strengths:

The Productivity Commission's Draft Report contains many strengths. I acknowledge these openly. I particular commend the PC for the care taken to explain its rationale.

#### Advocacy Policy

A major strength has been recognition of the need for much improved advocacy policy. The structure of the proposal is not yet iterated though there has been much discussion towards the end of Volume 2 of the Draft Report about models for advocacy policy. I commend the PC for recognizing significant gaps in this area and hope that adequate resources and funding will be provided to ensure continuity in policy development and research, proper governance and enhanced consumer protection in the long-term using a non-partisan model. See submissions from CHOICE, FEAMGC, and PIAC directly to the Treasurer.

#### Defective product recommendations

(note though the comments by VLAS that

*“simplified regulation in increasing the scope for unscrupulous businesses to utilize loopholes to get around simpler legislation”*

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<sup>2</sup> For more detailed discussion of [PC Recommendation 5.4](#) and related energy market issues, refer to separate dedicate submission of same date to be read in tandem with the remainder of responses to the other ten recommendations contained in the Draft Report.

**Third party representation - some further suggestions are made in body of submission**

**Enhanced legal aid and financial counseling services**

**Some weaknesses:**

- Wording of overarching objective - some suggestions are made to include the recommendations of others and to reflect consumer rights
- Gaps in upholding the NCP (refer to Senate Select Committee report 2000)
- Gaps in addressing the need to ensure accountability of government agencies
- Perceived gaps in adopting a balanced approach to regulatory burden reduction against proper consumer protection
- Significant gaps in the examining scope quality of dispute and complaints handling schemes misleading referred to as ADR and/or ombudsman schemes
- Gaps in addressing reforms for commencing and defending proceedings
- Some issues in suggesting that the national regulator becomes the ACCC – reflecting back some of their own concerns
- Missing area relating to defective services – see in particular reference to bulk energy and flawed regulations appearing to drive unacceptable market conduct resulting in extensive consumer detriment and effecting stripping of access to enshrined rights under numerous provisions
- Flawed regulations (energy) allowing unacceptable and poor practice trade measurement, (water meters posing as gas meters; energy consumption being measured in cents per litre without the benefit of an energy meter or site specific readings; as well as practices that will become illegal and invalid when existing trade measurement exemptions are lifted under federal provisions (national Trade Measurement Act 1960). Also using flawed contractual reasoning
- Removal of remaining safety-net default option (referred to as removal of retail price caps (energy))

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 overarching 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.

### Overarching Objectives 3.1

Whilst providing the rationale and making proper attributions to those making suggestions in addition to my own I provide below some suggested re-wording of the overall objectives

The objective could possibly read

- *to ensure that consumers are sufficiently well-informed and sufficiently confident to benefit from and stimulate effective competition<sup>3</sup>; and to ensure that both suppliers and consumers exercise a duty to act honestly.*
- *To incorporate the justice principles of equality fairness accessibility and effectiveness*

Such justice principles are clarified as follows<sup>4</sup>

***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.”*

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<sup>3</sup> As suggested by CHOICE in their response to the Productivity Commission’s Draft Report

<sup>4</sup> Consistent with the Victorian Attorney-General’s Statement of Justice 2004

- *In court proceedings, parties have an obligation to assist the Court in achieving the overriding purpose –*<sup>5</sup>

*that is:*

- (i) *To minimize cost and delay*
- (ii) *to conduct litigation in a proportionate manner to conduct litigation in a proportionate manner.*

### **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<sup>6</sup> that the "*duty to act in good faith*"

may be problematic as a concept

*".....which means different things to different people in different moods at different times and in different places."*

Perhaps the PC as well as VPLR Committee; the VPLR Commission would take note of the proposal by the VB that the overriding obligation, 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*

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<sup>5</sup> As suggested by the Victorian Bar in its Response to the Victorian Parliamentary Law Reform Committee's Civil Justice Review

<sup>6</sup> 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].

There appear to be a number of gaps in PC's 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."<sup>7</sup>

### **Behavioural theories – brief comment**

I am pleased to see that consideration has been given to behavioural economic theories, at least in principle, though 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.

I examine published frank views such as those of Peter Kell as CEO of Australian Consumer Association (ACA, the publisher of CHOICE) in two recent National Consumer Congresses regarding regulatory philosophy and echo Edmund Chattoe's<sup>8/9</sup> challenging question as to whether economists and sociologists can indeed have meaningful dialogue.

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<sup>7</sup> 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>

<sup>8</sup> Edmond Chattoe, Sociologist, University of Guildford, UK,

<sup>9</sup> 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 3<sup>rd</sup> 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.



### **Brief Discussion of regulatory reform philosophies**

I refer to the topical published speech by Peter Mr. Kell<sup>10/11</sup> at the National Consumer Congress in March 2006<sup>12</sup>, 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.<sup>13</sup>

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 Productivity Commission's Regulation and Review 2004-05 as part of its Annual Report series.<sup>14</sup>

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. This is discussed in detail elsewhere and in a separate submission.

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.

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<sup>10</sup> 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

<sup>12</sup> Kell, Peter, (2006) Australian Consumers Association. "Consumers, Risk and Regulation." Speech delivered at National Consumer Congress 17 March 2006

<sup>13</sup> 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](http://www.pc.gov.au/_data/assets/pdf_file/0020/7661/cs20050707.pdf)

<sup>14</sup> 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.

With his permission, later in this submission I reproduce his 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)<sup>15</sup> 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.<sup>16</sup>

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. Though Dufty’s paper is focused on energy regulation, many of the principles can be applied to other arenas. In his 2004 analysis of the Essential Services Commission’s philosophies and approaches, Gavin Dufty, now Manager Social Policy and Research St Vincent de Paul Society said<sup>17</sup>

*“In all of these models the ESC<sup>18</sup> 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<sup>19</sup>”. 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.”*

<sup>15</sup> Dufty, Gafvin *“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

<sup>16</sup> 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?”*

<sup>17</sup> Dufty, G (2004). *Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments.* VCOSS Congress Paper 2004

<sup>17</sup> 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.

<sup>18</sup> Essential Services Commission, *Review of the effectiveness of retail competition and the consumer safety net for electricity and gas*, Issues paper, December 2003,p18

<sup>19</sup> 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.

### **Governance, Accountability Leadership Professional Development Issues**

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.

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.<sup>20</sup>

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## Leadership

The body of the submissions discusses selected theory models of best practice leadership embraced by *Jamison (2005)*<sup>21</sup> 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.

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<sup>22</sup>.

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<sup>21</sup> 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

<sup>22</sup> 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*

It would be hard to beat the eloquence with which Mr. Dufty has summed up concerns shared by many stakeholders. I add my support for those concerns, which are no less valid today than they were when written.

I also cite Andrew Nance's<sup>23</sup> 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 support recommendations made by David Tennant<sup>24</sup> for a Commission for Effective Markets. Mr. Tennant's view is that to be effective markets need to be efficient, sustainable and fair. The Australian Consumer Association shares that definition of an effective market, as do many stakeholders, myself included.

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.

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<sup>23</sup> 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>

<sup>24</sup> 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 3<sup>rd</sup> National Consumer Congress, hosted by Consumer Affairs Victoria Melbourne 16 March 2006 available at <http://www.afccra.org/documents/The dangers of taking the consumer out of consumer advocacy.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

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<sup>25/26/27</sup>

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<sup>25</sup> 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"*<sup>25</sup> (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

<sup>26</sup> 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

<sup>27</sup> See for example



I begin with some general comments about leadership and accountability, touch on the sensitive issues of reform initiatives in an environment of vertical fiscal imbalance and impacts of Government political structure (see attachment); and refer to some provocative views in the public arena regarding regulatory philosophies.

I deal at some length with competition policy issues and the extent to which current regulatory and reform programs, including those of the PC may not be altogether upholding nationally determined policy objectives for NCP. I place much emphasis on the Senate Select Committee's Report of 2000 and quote extensively from that Report<sup>28</sup> and also cite the views of others about competition policy generally.

### **Removal of residential regulated safety-net default options – (energy)**

Referred to as removal of retail price caps 5.4. See also extensive separate submission and selected comments in this submission

I vigorously oppose the proposal for removal of any *“retail price caps”* applying to default supply options still applying in contestable retail energy markets.

The imminent decision to remove energy retail regulated default options (often erroneously referred to as “residual retail price caps”) in contestable retail energy markets has been made based on a fatally flawed finding by the AEMC that retail energy competition has in fact been successful in both electricity and gas markets such that total price deregulation can be safely effected without causing significant damage to the market as a whole, not merely those who are vulnerable and disadvantaged.

The prospective casualty list is certainly not restricted to small end-consumers or businesses. The impacts on smaller Tier 2 retailers and new entrants cannot be ignored either. Some are protesting and seeking delay of the decision to effect total price deregulation till specified internal market considerations impacted by statutory rules (VENCorp) and market power imbalances are addressed

Others have commented on the implications of removal of any retail price caps applying to telecommunications products and services. Time constraints and more limited knowledge of this area preclude discussion by me of this proposal. This does not imply endorsement of the recommendation.

The focus of my energies under this recommendation is directed to the energy market, starting with Victoria, but with many of the arguments applying also to other States. Some of the market power issues have surfaced (again) and been identified in South Australia also.

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<sup>28</sup> 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

I refer to the findings and recommendations consistently made by the AEMC repeated like a mantra from woe to go in each report, without due regard to the whole of the market, the feedback from smaller second-tier retailers<sup>29</sup>

Energy price deregulation in the face of the failure of the energy market to function effectively, notwithstanding the rosy perceptions of the AEMC; the major incumbent retailers and some of the larger Tier 2 retailers; has the potential to affect the entire Australian population, not just those considered to be “vulnerable and disadvantaged” on the basis of their personal circumstances.

I will briefly provide feedback here from a Tier 2 energy retailer regarding AEMC’s findings and recommendations to price deregulate with further discussion later.

Victoria Electricity has specifically commented in its response to the AEMC Second Draft report that they are unable to support removal of price regulation effective 1 January 2009 until or unless significant problems in the wholesale gas market are remedied<sup>30</sup>

This is the opening sentence of Victoria Electricity’s Response to AEMC’s Second Draft Report headed **“Effectiveness of Competition in Gas”**

*“Victoria Electricity along with other second tier” and new entrant retailers strongly contends that the new rule requiring the procurement of physical gas for injection at Longford is a major barrier to entry and growth”*

VE’s extensive reasoning for this contention is discussed in earlier submissions, including that dated 9 November 2007 to the First Draft Report. The AEMC apparently swept aside the serious concerns expressed based on misinformation, as fully discussed on page 2 of Victoria Electricity’s submission.

It is indeed very disturbing that the AEMC has formed the unfounded belief that

*“understands that steps are being taken to address”( the) “amendments to the rules governing the operation of the wholesale gas market which.....have unintended consequence for the future competitiveness of gas retailing in Victoria”*

If errors of this magnitude have been made in the AEMC’s investigation and evaluative processes, how many other glaring errors of fact and interpretation have occurred in forming the conclusions and recommendations that have been made?

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<sup>29</sup> See for example Victoria Electricity Response to AEMC Second Draft Report, printing out deficiencies in the gas wholesale market, market power imbalances and the real threat to successful competition unless these issues are address. VE does not recommended price deregulation till those issues are fully addressed and notes there is no evidence that market rules and other factors will be addressed by 2009

<sup>30</sup> Victoria Electricity (Infratil) Response to AEMC’s Second Draft Report; February, p1



These included concerns expressed by second-tier retailer Victoria Electricity<sup>31</sup> as summarized below:

1. *The events in gas marketing during the winter of 2007, raising **concerns about the ability of the new market structures to support competitive gas retailing**;*
2. *The **impacts of dual fuel offers** on some retailers (a concern shared by the South Australian Government in its submission to the AEMC's First Draft Report)*
3. *Concerns that the removal of price caps for customers on default contracts with host retailers would only work if **unambiguous confidence can be held in competition upon the elimination of new and unacceptably high wholesale gas market risks imposed on non-incumbent retailers by new market rules and procedures.***
4. *Victoria Electricity's response to the First Draft Report<sup>32</sup> has pointed out that the physical assets and contracts in Victoria tend to be owned by vertically integrated retail incumbents and are tightly controlled and only available infrequently if at all.*
5. ***The physical dimensions of the market** leading to restrictions to growth ambitions association with Longford contracts*
6. ***Recent rule changes involving injection dependency** have created problems for new entrants, without the benefit of protection, review or authorization by the ACCC or any competition body*
7. *The South Australian Government<sup>33</sup> has expressed the view that it was important in assessing effectively competitive energy markets occurring around Australia **that the evidence be unambiguous that such markets exist, rather than providing further evidence that markets are continuing to develop.***

Please refer to extracts from the speech delivered by Senator Chris Bowen as first Minister for Competition and Assistance Treasurer at the National Consumer Congress 6 March 2008 on cartel conduct and a pending Bill of Parliament.

I commend the Treasury for taking a tough stance on cartel behaviour.

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<sup>31</sup> Victoria Electricity is a subsidiary of international utilities investor Infratil Ltd with next assets exceeding one billion. *Source: <http://www.victoriaelectricity.com.au/?Join/Business>*

<sup>32</sup> Victoria Electricity (Infratil) (Tier 2 retailer) Response Ro AEMC First Draft Report 9 November 2007 (second-tier retailer) See also Response to second Draft R indicating that existing regulatory rules not only support domination and risk of collapse of new entrant competition, but have led to active steps already that will have the effect of reducing the ability of Tier 2 retailer(s) to compete for Victorian energy customers.

<sup>33</sup> Govt of South Australia (2007) through The Hon Patrick Conlon, Submission to AEMC's First Draft Report; 5 November 2007

## Complaints Handling

The term “*alternative dispute resolution*” if defined correctly, properly resourced administered and accountable. I strongly disagree that current ADR provisions are adequate, and cannot see how industry-specific complaints schemes can appropriately be included under this heading at all or that the term ‘ombudsman’ is justified. In fact both terms are misleading. These schemes, run, funded and management by industry participants do not mediate at all. They handle complaints and endeavour to achieve conciliatory resolution. Even the so-called “binding decision” powers enjoyed by some in theory need consent to be applied. This is rarely given. Their jurisdictional powers are exceptionally limited. This is discussed elsewhere in considerable detail.

The VLAS submission to the VPLA Committee criticizes the assumptions made in the ADR Discussion paper, largely based on Dr. Chris Field’s ADR Supply-Side Survey<sup>34</sup>. This is discussed in some detail in the body of this submission<sup>35</sup>

I agree with VLAS that the Discussion Paper implies that ADR is cost effective without specifying what ADR is meant to do. VLAS refers to the Field Report on Supply Side authored by Dr. Chris Field<sup>36</sup> and the doubts that are cast on how cost effective ADR is; whether is meant to be a

“*cut-price alternative to Court*” or an

“*early intervention option which is more flexible and involves the parties in developing a solution*”

On pages 429-430 of Vol 2 of the Draft Report the PC has referred to ombudsmen schemes, suggesting low levels of complaints particularly in relation to energy (this appears to be contrary to evidence – see latest published complaints statistics and evidence of rising incidence)

I strongly disagree that dispute processes, especially in relation to utilities are operating smoothly and satisfactorily. I particularly dispute this in relation to the operations of the utility complaints scheme EWOV. I have provided direct evidence to support my view, including evidence that this body, intended as a conciliatory scheme has on occasion issued threats of closure of file if legal advice was sought, and that delays of well in excess of 12 months in handling of complaints are common.

<sup>34</sup> Field, Dr. Chris, (2007) Alternative Dispute Resolution in Victoria: Supply-Side research Project Research report, department of Justice, Victoria

<sup>35</sup> VLAS (2007) Submission to VPLR Committee’s ADR Discussion Paper

<sup>36</sup> Field, Chris (2007) Alternative Dispute Resolution in Victoria: Supply-Side Research project Research Report, Department of Justice, Victoria, cited in Bibliography to VPLR Committee’s Discussion Paper, -133

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Reporting to regulators of even serious complaints is inconsistent. Quality of input and decision-making is inconsistent

It vigorously dispute the claim that

*“only a few major difficulties have been evident and these have been satisfactory resolved” (p429 PC DR)*

In any case reliance on quantitative data out of context and without due regard to the seriousness of certain complaints and indications that even a single complaint or a handful can be indicative of systemic problems.

Though focused on the energy the following observations may equally apply to other industries.

I refer to the manner in which AEMC has interpreted the data provided by EWOV, and appears to have minimized the proportion of complaints about misconduct associated with misleading or deceptive conduct and/or high pressure sales by failing to also see EWOV’s feedback about complaints received in full context, remember that only a small proportion of customers ever actually complain, and the figures provided by EWOV are indicative of a much high level of misconduct and post-switching dissatisfaction that the AEMC is prepared to concede.

Whilst conceding that this type of conduct is serious and requires

*“an effective consumer protection framework to deter such conduct and support the functioning of an effectively competitive market in which direct marketing can play a pro competitive role in facilitating consumer choice,”*

The AEMC’s view that such an effective dispute resolution framework currently exists is not upheld by all stakeholders. The PC’s echoed view is also not upheld by all stakeholders.

In particular, the absence of effective compliance enforcement has the effect of actively encouraging misconduct. Unenforced or unenforceable regulations are useless instruments however effective they may seem on paper and in principle.

The issue of enforcement compliance is discussed in more detail elsewhere, but meanwhile refer to the EAG 2004 Report on compliance and enforcement issues.<sup>37</sup> Please also refer to Andrea Sharam's 2004 paper *Power Markets and Exclusions*.<sup>38</sup>

EWOV had expressed discomfort over the use that had been made by the AEMC of their data regarding conduct, impacts of switching behaviour, levels of dissonance and frank dissatisfaction post-switching, and other such issues. These concerns are discussed further elsewhere.

EWOV themselves had expressed concern about the manner in which their own data on complaints had been interpreted by AEMC in their Retail competition review findings.<sup>39</sup>

Another gap highlighted by the VLAS submission to the VPLR Committee's Discussion Paper on ADR is the failure to adequately address the issue of the relationship between Courts and ADR. It is suggested that recognition of the complexity and differences between forms of ADR are noted in the Discussion

*"there is no attempt to suggest that there may be a need to be some difference in approach to ADR."*

Please see from the Energy Action Group Report dated September 2004<sup>40</sup> in examining the attitude of the ESC, the total lack of triangulation in reviews of its own reporting performance and the perceived gaps in EWOV's performance and reporting. I quote directly below from the full report also for immediate reference as a public domain document

I entirely disagree that the current ADR provisions are adequate for industry-specific complaints schemes, and believe that widespread disagreement about terminology and functions of ADR for both civil and criminal matters complicates effective discussion of this area of protection. I can do no better than direct serious attention to the articulate and convincing concerns expressed by VLAS that a confusing picture exists as to the benefits of ADR.

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<sup>37</sup> EAG (2004) Report on the Essential Services Commission Energy and Water Ombudsman Victoria (EWOV) Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code. 2004

<sup>38</sup> Sharam A (2004) "*Power Markets and Exclusions*" Financial and Consumer Rights Council, Melbourne  
Found at <http://www.vcross.org.au/images/reports/Full%20Report.pdf>

<sup>39</sup> Refer to EWOV (2008) Submission to AEMC First Draft Report, January

<sup>40</sup> EAG 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.

I support all of the arguments contained in the VLAS submission to VPLR Committee's Inquiry into ADR that the existing picture as to the benefits of ADR are unclear within the Discussion Paper, The same concerns can be applied to proposals made by the Productivity Commission.

There are numerous submissions to the PC discussing the extraordinary gaps in enforcement and implementation, including but not merely limited to procedural apathy. The effectiveness of services under Victorian provisions under TPA and FTA provisions has been the subject of much angst and dissatisfaction, and has been expressed by many stakeholders during the course of this current PC enquiry.

Whilst supporting the proper use of ADR in the redress process, and responsible, trained application in endeavouring to achieve redress outcomes, I have many concerns about recommendations that greater use of ADR processes will in themselves be sufficient protection with the extreme end being reliance on generic provisions under TPA and FTA or diluted unfair contract provisions.

The existing law relating to unconscionable conduct as being limited to procedural rather than substantive issues limits proper outcomes and even incentive to use TPA recourses by both the state and federal bodies with jurisdiction under those provisions. Unless this is addressed, access to justice will not be obtainable.

VLAS raises the issue of the value of the co-mediator model

### **Inarticulate, Vulnerable and Disadvantaged Groups**

I would like to the phrase

*“inarticulate, vulnerable, disadvantaged and culturally or linguistically diverse.”*

Both vulnerability and disadvantage tend to mostly conjure up financial hardship, and this is indeed an area where protections need to be robust. Including the term *“inarticulate”* more overtly includes those with language, or cognitive barriers, psychiatric or intellectual disability, or for some other reason finds it too challenging to actively seek consumer protection.

At a recent 2008 Public Hearing of the VPLR Committee's Inquiry into ADR, several community groups<sup>41/42</sup> advocated for bridging the very significant gaps in meeting the needs of marginalized groups in facilitative information assimilation and interpretation; regulatory design (with the emphasis on ADR provisions). The groups attracting particular focus at that hearing, and in written submissions to the VLRC's ADR Inquiry as well as the PC's Consumer Policy Inquiry was focused on provisions for culturally and linguistically diverse groups, including indigenous Australians.

Cultural differences in particular highlight the need for targeted information accessibility; assistance with interpretation and comprehension of information and decision-making processes and ADR programs that will meet the needs of all individuals and groups in accessing justice, not only as consumers of goods and services but in terms of accessing equity under criminal justice parameters. See discussion also under ADR provision.

The VLAS 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.*

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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<sup>41</sup> 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

<sup>42</sup> 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

One marginalized group discussed at the VPLRC's ADR Inquiry Hearing was victims of crime, notably serious crime. The problems faced by these groups in obtaining best outcomes if any fro ADR inputs was aired.<sup>43</sup>

Another specialist group accessing ADR processes was youth groups requiring youth services or youth justice facilities<sup>44</sup>

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 VLAS 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.<sup>45</sup>

The VLAS submission eloquently discusses merits of formal equality as superior to substantive equality. Equality and fairness principles are also discussed with suggestions that challenge the current system of disproportionate penalties for the poor and the role of a combined application of formal and substantive equality.<sup>46</sup>

On page 39 of his Summary Draft Report (Vol 1) the productivity Commission discusses the option of making better and more use of ADR arrangements.

Whilst recognizing that such schemes have their limitations, the PC suggests that

*ADR can deal with many consumer complaints at lower cost than tribunals or the small claims courts.*

The PC also refers to widespread support for existing so-called ADR "*ombudsmen services.*" Such support often is upheld by those with a vested interest in upholding the efficacy of such bodies.

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<sup>43</sup> Crime Victims Support Association (2008) Presentation by Mr. Noel McNaramara, CEO, in support of written submission to VPLRC's Inquiry into Alternative Dispute Resolution

<sup>44</sup> 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

<sup>45</sup> Paraphrased from Victorian Aboriginal legal Services (VALS) written submission to VPLR Committee's ADR Enquiry, p4

<sup>46</sup> IbidVLAS submission



There is a view that perhaps deserves consideration – are industry-specific complaints schemes, misleadingly referred to as “*ombudsman*” and in my view not properly defined either as ADR either – more co-regulatory bodies.

Peter Kell in his speech at the 2005 National Consumer Congress<sup>47</sup> was openly skeptical of the value of self-regulatory and co-regulatory approaches<sup>48</sup>. In discussing the Draft recommendations contained in Productivity Commission’s Review of National Consumer Policy, Peter Kell refers to co-regulatory schemes as in most cases being no more flexible than black letter law, and in many cases, considerably less flexible.<sup>49</sup>

As to more effective and extensive use of dispute resolution services provided by government departments and the courts (through pre-hearing processes) these are worthy goals and some of the principles have been discussed elsewhere in this submission. The use of experienced private ADR providers appears not to have been discussed by the PC in its Draft Report, and neither has due attention been given to proposals made to accommodate the specialized and dedicated needs of marginalized groups such as Indigenous Australians<sup>50</sup>, and other marginalized groups, whether the issue relates to cultural or language barriers or other barriers to effective access to pre-court assistance.

*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.*

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<sup>47</sup> Kell, Peter (2005) “Keeping the Bastards Honest – Forty Years On, Maintaining a Strong Australian Consumer Movement is needed more than ever. A consumer perspective....” Speech by Peter Kell at National Consumer Congress 2005 March, p1. Peter Kell is CEO of the Australian Consumers’ Association (ACA)

<sup>48</sup> Note that industry-specific complaints schemes such as energy (so-called) ombudsmen are run, funded and managed by industry scheme members, who have the option to refuse proposals for binding decisions, rarely exercise such an option; and appear to have excessive power in that the constitution of such bodies as EWOV is exclusive to industry participants; though a Committee does have some consumer-organization representation

<sup>49</sup> Ibid Peter Kell’s Speech at NCC 2005 p4

<sup>50</sup> See for example the extensive suggestions made by VLAS in their submission to the PC’s Issues Paper in the current consumer protection inquiry.



*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.*

Other marginalized groups that may be usefully specifically targeted include:

- Culturally diverse groups other than Indigenous Australians, already covered; These include short-term residents in Australia, for example international students visiting for a period of up to 4 years, many on Commonwealth of Australia student stipends to those from developing countries, others fee-paying international students making vast contributions to the Australian economy and culture, but at sea with knowing how to properly access consumer protections suited to their needs.
- Other groups include those with cognitive impairment, intellectual disability, psychiatric disability, and the like.
- In the case of those with mental illness of one type or another, bearing in mind also that 40-60% of those with psychiatric disability also have dual diagnosis,<sup>51</sup> access to justice can be difficult if not inaccessible.

The industrial relations policies of the previous Government have rendered employment tribunals all but toothless and ineffective in achieving acceptable outcomes.

### **Advocacy Issues and Competition Policy – highlights**

Towards the end of this very length submission, under Recommendation 11.3, Empowering Consumers, I highlight with direct quotation and at great length the views of David Tennant, and in particular from his rebuttal paper presented at the 3<sup>rd</sup> National Consumer Congress in 2006 in response to the paper on Consumer Advocacy in Victoria.

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<sup>51</sup> A term denoting psychiatric illness as well as substance dependence (addiction) of one type or another. In 1991 T. D. Boscarelli identified a gene for addiction. Forms of addiction are multiple and include street drugs of all varieties; gambling, alcohol and tobacco (both legalized drugs). It is commonplace for those with either diagnosed or undiagnosed psychiatric disability to also have substance dependence). The incidence of crime amongst those with comorbidity or else simply addiction, a serious incurable, but potentially manageable illness is high. In many cases, existing consumer protection provisions are inadequate.

That paper by Dr. Field was clearly intended to influence consumer advocacy policy reform and though focused on Victoria, was a model that could be applied in other States. Whilst recognizing that Dr. Field has held many respected positions. David Tennant whilst largely critical of Dr. Field's Discussion Paper has acknowledged.

*the significant work the paper represents on Chris' part and the importance of ventilating those issues.*

I must say I am concerned about how far Dr. Chris Field's model for advocacy policy may influence decisions and outcomes. I discuss this later by referring to David Tennant's brave rebuttal of Dr. Chris Field's Discussion Paper on Consumer Advocacy in Victoria presented at the 3<sup>rd</sup> National Consumer Congress.

I do not have the respected profiles of either Chris Field or David Tennant. I am a lay consumer with strong views, and no more than that. However, one of the things I value about being a citizen of a continent with democratic political policies is that I can without shame or embarrassment be who I am, think what I wish, and freely express my views in any environment, as long as I do so with respect and without malicious intent.

So I hope that my views will be accepted in good faith and not be taken too personally. Where I support the views of others, it is because of my genuine beliefs. Where I criticize views or policies it is because in good faith or rather the spirit of "*acting honestly*" and "*without malice*," I am exercising a right to have a view and to politely express it in any arena. If I give offence to the PC, forgive me. If I give offence to others, please forgive me.

Having said that if advocacy models proposed by Chris Field are adopted, then I will be very disappointed as a private citizen and end-consumer of goods and services.

Competition policy is a tool not an end in its own right. This has been recognized by Dr. Chris Field as well as by those who do not embrace his views.

I support the goals of best practice in business, government policy and model citizen conduct. I also support the National Competition Policy (NCP).

Sadly I believe NCP policies are not always adopted in either theory or practice in the formulation of government policies. So strongly do I believe this to be the case, that I have spent much energy in identifying my concerns with direct and extensive reference to the NCP and the degree to which I believe these policies have somehow become blurred or misunderstood by government agencies, "Commissions" rule-makers, policy-makers and regulators alike.

I have been bold enough to question whether those policies have in fact been properly understood by policy makers and government advisers alike.

I realise that the mere term competition policy is emotive. I share the desire of many stakeholders to see successful, sustainable, effective markets operating with outcomes of optimal consumer satisfaction at least matched by satisfaction amongst providers of goods and service – the nearest one can get to a perfect balance between consumer satisfaction.

I go further than that. Instead of upholding “*consumer interests*” and “*advocacy reform initiatives*” so concerned did I become about the decisions of bodies with authority making decisions that may impact adversely upon the national economy, that instead of focusing on my original agenda, I took up the cause and interests of those smaller (energy) retailers in response to concerns expressed by such retailers that inappropriate findings and recommendations apparently based on misinformation had been made by rule makers.

The central theme of David Tennant’s rebuttal of Chris Field’s view of consumer advocacy is the danger of policy dogma. David has expressed concern about how consumer advocates were viewed in the context of Dr. Field’s paper and has dissected some of the attributed roles of such advocates, including that

*consumer advocacy should provide a voice for competitive markets*

This along with other suggested “*consumer advocacy*” roles in Dr. Field’s paper, according to David Tennant suggest that

*Consumer advocates should as a first principle be a voice for competition*<sup>52</sup>

*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:*

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<sup>52</sup> 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). c/f David Tennant’s Rebuttal Paper “The dangers of taking the consumer out of advocacy

David Tennant acknowledged that competition has indeed delivered some extraordinarily positive outcomes. But it is merely a tool – as also acknowledged by Chris Field.

I have brought these matters up to the forefront and regurgitate them under the heading Empowering Consumers in my more detailed response to Recommendation 11.5 for emphasis and to indicate priority concern.

This is because designing an effective consumer advocacy policy with the right governance, adequate funding and continuity in research priorities and focus are crucial elements of the proposed framework, especially in a climate of so much change and uncertainty, deregulation of essential services, and decision-making with far-reaching inter-related decisions, many would say without proper consideration, evaluative skill, leadership and accountability.

It is not my view that existing advocacy provisions are meeting community needs and expectations. I commend the PC has for acknowledging the many gaps.

PIAC has highlighted<sup>53</sup> the conclusion in the PIAC's Draft Report that with regard to consumer protection there is evidence of situations where the lack of input from consumer organizations into public policy development has limited policy development (PC Draft Report 217-266).

There is no doubt in my mind that policy development has indeed been seriously hampered by proper resourcing of consumer policy advocacy and that individual consumer presentation, even in the ever popular political arena of financial hardship I compromised. This marginalized group has pressing needs, but there should still be some resourcing left over for the remainder of the community not meeting hardship criteria. The model adopted for disbursing public funding for consumer advocacy should, in the PC's opinion:

*Seek to ensure that the advocacy supported is reasonably representative of the diversity of consumers' interests.*

That is not what is currently occurring.

This single recognition provides urgent justification for the formulation of a well governed, accountable, appropriately staffed and funded independent advocacy body that can provide continuity in designing and overseeing policy development and research, offer appropriate staff professional development; highlight community needs and be responsive to current demands, whilst not altogether neglecting future threats.

There needs to be some balance struck between immediate and future goals and responsiveness to individual advocacy – there is little available for this and in the utilities area individual advocacy is altogether missing.

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<sup>53</sup> Ibid PIAC (2008) Submission to Federal Treasurer 18 January 2008, p11

As observed by CUAC, Consumer Affairs Victoria developed a good working definition of a vulnerable consumer as

*'a person who is capable of readily or quickly suffering detriment in the process of consumption.'*

I suggest the addition of the category *"inarticulate, vulnerable and disadvantaged"*

The TUV has urged the AEMC to consider whether all classes of consumers and especially tenants will benefit from any proposed energy efficient measures that may purport to

*"ameliorate the effect of price rises occurring after the removal of price caps."*

The needs of these various groups of consumers, and residential tenants in particular are poorly met by any existing or projected provisions. This imbalance needs to be redressed.

It is believed by many stakeholders, including some smaller energy retailers; the South Australian Government and numerous other parties that the AEMC has made a misguided finding based on inadequate data as well as misinformation that retail competition for gas and electricity has been successful and that total price deregulation is warranted from 2009.

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....."?*

There also appears to be considerably compromised confidence in the general capacity of AEMC as the new national Energy Rule-Maker, capacity to make complex, inter-related and far reaching decisions that should be considered in a less hasty, more structured way through proper evaluation of the internal market and long range impacts on consumers and market participants.

Other issues of concern relate to governance, accountability; commitment to meaningful and timely stakeholder input and a thorough enough understanding of the market as a whole the new energy Rule Maker.

Compromised general community confidence in these issues appears to have resulted in equivocal support for transfer of energy regulation nationally. In principle this makes sense, as long as outcomes do not result in compromised or even more inaccessible consumer protection.

### **Defective services – missing component (and flawed regulations)**

There appear to be no current recommendations covering this issue apart from an overall goal included in the Overarching objectives and supporting key operational objectives. The goal of ensuring that goods and services are safe and fit for the purposes for which they were sold is indeed a worthy one. Intangible services such as energy as fungible essential commodities are not usually conjured up in the minds of those employing the phrase

*“fit the purpose for which they were sold.”*

I discuss below a specific issue under provision of services where those services are not fit the purposes for which sold or provided, whether or not the end-user of those services (in this case bulk hot water not individually monitored) is the proper contractual party.<sup>54</sup> This issue is discussed under a new suggested PC recommendation for urgent consideration. This matter is long over-due for policy attention and restoration of consumer protection. It has consistently been swept under the carpet by policy-makers and regulators alike. It is time for this to be taken seriously in the interests of proper consumer protection.

I discuss in some detail in the body of the submission concerns about protections regarding services and particular refer to bulk hot water provisions, unacceptable market conduct and trade measurement practice, poor quality of product/service; licence matters since energy providers are not licenced to sell water products or value-added products and direct infringement of a range of consumer rights. Unacceptable market conduct appears to be driven by regulatory policy. This needs urgent correction.

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<sup>54</sup> In the case of bulk hot water provided to centrally heat water provided to residential tenants in multi-tenanted dwellings, the contractual party is properly and legally the Owners' Corporation, notwithstanding flaws regulations and perceptions that this party should be the end user. Nevertheless, leaving aside contractual considerations, if water is provided as part of a tenancy agreement as being hot it should be consistently so. Currently energy providers not licenced to sell water at all are endeavouring by sleight of hand methodologies apparently endorsed by flawed regulatory provisions and policies to charge for “heated water” and also to threaten disconnection of same if an explicit contractual relationship is not formed between end-user and energy supplier for the energy component of utility supplied that cannot possibly be individually calculated legally using an instrument designed for the purpose.

**Some best practice evaluative principles (see Appendix to submission 1)**

**Federalism and Anti-federalism – some reflections on vertical fiscal imbalances and implications – refer to Appendix 1**

An appendix 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.

Roger Wilkins<sup>55</sup>, discusses a form of federalism that is better described as co-operative federalism in the following words:<sup>56</sup>

*“Federalism which accommodates ‘diversity within unity’ is the type of system that can deal with the dual challenges of globalisation 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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<sup>55</sup> 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](http://www.aimnsw.com.au/about-aim/board-of-directors/board-of-directors_home.cfm)  
<sup>56</sup> 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.<sup>5758</sup>

As suggested by David Adam in his award-winning essay cited above.

*“has poverty disappeared from the agendas of ministerial councils?”*

He 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.

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?

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<sup>57</sup> 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

<sup>58</sup> 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



To take somewhat out of context the words of David Russell QC<sup>59</sup>, 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 topic

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 in an appendix, referring also to the views of David Adams<sup>60</sup> in referring to Roger Wilkins’ views on federalism and anti-federalism and seek 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”*

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<sup>59</sup> David Russell QC, “*Essential Services Legislation Magic Pudding or Boarding School Blancmange.*” Found at <http://www.hrnicholls.com.au/nicholls/nichvol5/vol512es.htm><http://www.hrnicholls.com.au/nicholls/nichvol5/vol512es.htm>

<sup>60</sup> 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>

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.”<sup>61</sup>*

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:

*“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

*“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.”*

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<sup>61</sup> Rand:Atlas Shrugged (1957) Random House, New York p.500, c/f Russell D, QC, “Magic Pudding or Boarding School Blancmange”

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 organisations 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.”<sup>62</sup>*

It is more than interesting that some of this thinking is reflected in the conceptual model proposed by Arthur Allens Robinson in the Consultation Framework recommendations.

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**<sup>63</sup>, 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. 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 fit 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 heed 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.”*

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<sup>62</sup> New York Times September 16, 2007 In Turnaround Industry seeks US legislation <http://www.nytimes.com/2007/09/16/washington/16regulate.html?pagewanted=2&th&emc=th>

<sup>63</sup> New York Times September 16 2007 Editorial Opinion. The Need for Regulation

As reported in the New York Times<sup>64</sup>

*“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*

said Jenny Scott, vice president for food safety programs of the Grocery Manufacturers Association.

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<sup>65</sup>.

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.

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.

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<sup>64</sup> Ibid, p 2 NYT 16 Sept07 In Turnaround Industry seeks US legislation

<sup>65</sup> 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 Market. Victoria’s Experience to Date.

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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 or tokenism in seeking community input.

*Madeleine Kingston*

**Madeleine Kingston**

**Concerned Private Citizen, Victoria**

## ABBREVIATIONS AND GLOSSARY

<b>ACOSS</b>	Australian Council of Social Services
<b>ACDC</b>	The Australian Commercial Disputes Centre, a private ADR provider body.
<b>ACTCOSSA</b>	ACT Council of Social Services
<b>ADR</b>	<p>Alternative dispute resolution, defined by NADRAC as:<sup>66</sup></p> <p>Processes, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable parties to prevent or manage their own disputes without outside assistance.</p> <p>VPLR also discusses the alternative definition for ADR proposed by Professor Sourdin as follows:</p> <p><i>“Processes that may be used within or outside courts and tribunals to resolve or determine disputes (and where the processes do not involve traditional trial or hearing processes) ...</i></p> <p><i>ADR describes processes that are non-adjudicatory, as well as adjudicatory, that may produce binding or non-binding decisions. It includes processes described as negotiation, mediation, evaluation, case appraisal and arbitration.<sup>67</sup>”</i></p>

<sup>66</sup> Refer to VLRC (2007) ADR Discussion Paper, 2.1 “the definitions of ADR in civil disputes and criminal matters and VLRCComm Civil Justice Review (2006)

<sup>67</sup> Sourdin, Tania (2005) *Alternative Dispute Resolution* (2<sup>nd</sup> ed, 2005) 3.

<b>ADR continued</b>	<p>It is easy to see how debates may arise in defining ADR and how varying perceptions can impact on feedback on analysis and proposals. It is unclear who decides what is “appropriate” or what this really means, if the “A” in ADR is taken to mean “appropriate.”</p> <p>Discussion of the ADR process in particular and application of the myriads of definitions utilized makes it difficult to comment. For the purposes of the VPLR Committee’s discussion paper, ADR appears to encompass. Information provision; complaint handling; facilitation; conferencing; mediation; conciliation, arbitration; expert appraisal and determinations. Negotiation, as the most frequently used method of resolving all types of dispute falls outside the Committee’s inquiry since it cannot be said to rely upon a third party in a facilitative, advisory or decision making role. Since there are no agreed definitions about the term ADR and other terms used within the VPLRC’s discussion paper, it is difficult to know how to comment and respond. Though binding decisions can be made by two of these operating in Victoria, not only are these rarely made, but they are binding on the scheme member only, and only if the parties agree. These decisions do not constitute “arbitration”</p> <p>Most industry-specific schemes do not mediate either or facilitate conferencing. Industry-specific complaints are not equipped to provide expert appraisals or determinations</p>
<b>ACA (CHOICE)</b>	Australian Consumer Association (CHOICE)
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>ACI</b>	<p>Australian Compliance Institute (NSW)</p> <p><a href="http://www.compliance.org.au">www.compliance.org.au</a> supporting organizations and professions</p> <p>Peak industry body for compliance practice in Australasia</p>
<b>AEMA</b>	Australian Energy Market Agreement
<b>AEMC (Commission)</b>	Australian Energy Market Commission (Commission)
<b>AEMO</b>	Australian Energy Market Operator
<b>AER</b>	Australian Energy Regulator



<b>AIRC</b>	Australian Industrial Relations Commission
<b>ALRC</b>	Australian Law Reform Commissions (ALRC)
<b>ANU</b>	Australian National University
<b>ATA(1)</b>	Alternative Technology Association
<b>ATA (2)</b>	Australian Toy Association
<b>ANZOA</b>	Australian and New Zealand Ombudsman Association.
<b>Arbitration</b>	NADRAC defines arbitration as: A process in which the parties to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a determination. <sup>667</sup> Industry-specific complaints schemes, often misleading using the term “ombudsman” do not arbitrate at all.
<b>BHWCG</b>	Bulk Hot Water Charging Guideline ESC Guideine20(1) 2005
<b>Commission (or AEMC)</b>	Australian Energy Market Commission
<b>CALC</b>	Consumer Action Law Centre
<b>CALD</b>	Culturally and linguistically diverse.
<b>CAV</b>	Consumer Affairs Victoria
<b>CCCL</b>	Centre for Credit and Consumer Law, Griffith University Qld
<b>CEER</b>	Council of European Energy Regulators
<b>CFInc</b>	Care Financial Inc. ACT

<b>Circle sentencing</b>	<p>Based on traditional North American sanctioning and healing practices, circle sentencing provides the opportunity for broad participation (for example, victims, offenders and community members) in deliberations for an appropriate sentencing plan.</p> <p>Currently being utilised in New South Wales.</p> <p>665 National Alternative Dispute Resolution Advisory Council, <i>Who Says You're a Mediator? Towards a National System for Accrediting Mediators (2004)</i> 3</p> <p>666 National Alternative Dispute Resolution Advisory Council, <i>Dispute Resolution Terms (2003)</i> 4.</p> <p>667 Ibid.</p>
<b>COAG</b>	Coalition of Australian Governments
<b>CFEM</b>	<b>Commission for Effective Markets</b>
<b>Committee of Inquiry</b>	Committee of Inquiry into the Financial Hardship of Energy Consumers
<b>Conciliation</b>	<p>NADRAC defines conciliation as:</p> <p>A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.<sup>668</sup></p>
<b>Conferencing (or group conferencing)</b>	A meeting of the offender, victim (where they choose to attend) and communities to discuss and determine collectively the approach to be taken to a crime.
<b>CPF</b>	Australian's Consumer Policy Framework
<b>CRA</b>	CRA International

<b>Criminal case conferencing</b>	Use of mediation in criminal cases. Matters that may be addressed at a conference include identifying the issues, the making of admissions and the prospects of conviction or acquittal. Currently being utilised in the Supreme Court of Western Australia (see section 4.3).
<b>CSM</b>	Coal seam methane
<b>CUAC</b>	Consumer Utilities Advocacy Centre
<b>DSCV</b>	<p>Dispute Settlement Centre Victoria: a program of the Department of Justice providing advice, education and dispute resolution information.</p> <p>The DSCV website describes its services as <i>“helping people resolve disputes through communication and negotiations</i>, helping to reduce costs delays and legal action; tip for dealing with one’s own matters; as well as provision of neutral objective mediators to help resolve disputes of any size or complexity, but the list of issues does not specify consumer grievances of any kind</p>
<b>2002 ESC Review</b>	<i>Review of the effectiveness of full retail competition for electricity, conducted by the ESC in 2002</i>
<b>2004 ESC Review</b>	<i>Review of the effectiveness of retail competition and consumer safety net in gas and electricity, conducted by the ESC in 2004</i>
<b>EIA</b>	<i>Electricity Industry Act 2000 (Vic)</i>
<b>ERA</b>	Economic Regulation Authority (Western Australia)
<b>ERIG</b>	Energy Reform Implementation Group
<b>ESC</b>	Essential Services Commission (Victoria)
<b>ESCOSA</b>	Essential Services Commission of South Australia
<b>EVALTALK</b>	American Evaluation Society Discussion Group
<b>EWOV</b>	Energy and Water Ombudsman of Victoria
<b>First Draft Report</b>	<i>AEMC Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria – First Draft Report Sydney, October 2007</i>

<b>First Report</b>	<b>Final</b>	<i>AEMC Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria – First Final Report Sydney, 12 December 2007</i>
<b>FEAMG</b>		Foundation for Effective Markets and Governance Canberra <i>See especially their entire submission to the Productivity Commission discussing many aspects of concern relevant to the AEMC Review</i>
<b>FRC</b>		Full retail competition
<b>FTA</b>		<i>Fair Trading Act 1999</i> (Victoria)
<b>FCLCInc</b>		Footscray Community Legal Centre Inc
<b>GIA</b>		<i>Gas Industry Act 2001</i> (Vic)
<b>Hilmer Committee</b>		Hilmer Committee, <i>Independent Committee of Inquiry into National Competition Policy</i> August 1993
<b>Host Retailer or Incumbent Retailer</b>		A retailer that is also one of the three first tier retailers, being: AGL, Origin Energy and TRUenergy
<b>IAMA</b>		The Institute of Arbitrators & Mediators Australia, a private ADR provider body.
<b>IPP</b>		Information Privacy Principles: principles covering the collection, storing and use of personal information. 11 national IPPs are contained in the <i>Privacy Act 1988</i> (Cth) and apply to the Commonwealth and ACT government agencies. In Victoria there are 11 IPPs under the <i>Information Privacy Act 2000</i> (Vic) which apply to Victorian public sector agencies and local councils. IPP may apply to ADR providers (see section 7.6.6).
<b>ISR-SUT</b>		Institute of Social Research, Swinburne University of Technology
<b>Issues Paper</b>		<i>AEMC Review of the Effectiveness of Competition in Gas and Electricity Markets –Issues Paper</i> June 2007
<b>JSS</b>		Jesuit Social Services: a community-based organisation that operates group conferencing programs in the Children’s Court of Victoria.

<b>Justice Statement</b>	<p>Victorian Attorney-General's Justice Statement 2004</p> <p>Department of Justice, (2004) Victoria New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement</p> <p>Encapsulates equality fairness, accessibility and effectiveness</p> <p>Is there a theory and practice gap? How can this be corrected in a real and measurable way beyond lip-service?</p>
<b>KSAOs</b>	<p>Knowledge, skills, abilities and other attributes: a list of requirements which may act as a tool to assess whether an ADR practitioner is demonstrating competence in the performance of their tasks.</p>
<b>KFFC</b>	<p>Kildonian Child and Family Care</p>
<b>LEADR</b>	<p>A private ADR provider body.</p> <p>668 National Alternative Dispute Resolution Advisory Council, <i>Terminology: A Discussion Paper</i> (2002) 31.</p>
<b>Med-arb</b>	<p>A hybrid process in which an ADR practitioner first uses one process (<i>mediation</i>) and then a different one (<i>arbitration</i>)</p>
<b>Mediation</b>	<p>NADRAC defines mediation as:</p> <p>A process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.</p>

<b>Mediation continued</b>	<p>An alternative is ‘a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute’.<sup>669</sup></p> <p>Note: Most industry-specific schemes do not mediate. EWOV specifically states this, but rather sees its role as conciliatory.</p> <p>Though technically empowered to effect binding decisions, this body as with other industry-specific bodies with such theoretical powers, rarely effect these. In any case, such a decision can only be made with the parties’ consent, and is binding only on the industry scheme member.</p>
<b>MEU</b>	Major Energy Users Association
<b>MCE</b>	Ministerial Council on Energy
<b>MCE SCO NFEGDRR Issues Paper</b>	MCE SCO National Framework for Electricity and Gas Distribution and Retail Regulation – Issues Paper
<b>MSO</b>	Rules Market and System Operations Rules
<b>NADRAC</b>	National Alternative Dispute Resolution Advisory Committee: an advisory body established by the Commonwealth Government to provide policy advice on ADR.
<b>NERA</b>	NERA Economic Consulting
<b>NERA Wholesale Report</b>	Economic Consulting, The Gas Supply Chain in Eastern Australia: A report to the Australian Energy Market Commission 2007
<b>NFDNNPCA</b>	National Frameworks for Distribution Networks Network Planning and Connection Arrangements
<b>NCP</b>	National Consumer Policy
<b>NCR</b>	National Consumer Roundtable on Energy

<b>NJC</b>	Neighbourhood Justice Centre: established by the Department of Justice in 2007 as a three year pilot project, the NJC provides a court, on-site support services, mediation and crime prevention programs. The NJC aims to enhance community involvement in the justice system and to increase access to justice and address the underling causes of offending.
<b>NMI</b>	National Measurement Institute
<b>NMA</b>	<i>National Measurement Act 1960</i> and corollary regulations
<b>OCA 2007</b>	Owners' Corporation Act 2007 (Victoria) (previously Body Corporate Subdivision Act)
<b>OBPR</b>	Office of Best Practice Regulation: a Commonwealth body that advises the Commonwealth Government, departments and agencies in relation to the development of regulatory proposals and the review of existing regulations.
<b>PEG</b>	Pacific Economics Group
<b>PJC-CFS-SSC Inquiry</b>	Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility 2005
<b>PC</b>	Productivity Commission
<b>PC Draft Report</b>	<i>Productivity Commission (2007) Review of Australia's Consumer Policy Framework Draft Report, Canberra (12 December)</i>
<b>PC Final Report (pending)</b>	<i>Productivity Commission's Pending Final Report Review of Australia's Consumer Policy Framework after public consultations commencing from 11 February</i> Report date to Treasurer 28 April 2008
<b>PIAC</b>	Public Interest Advocacy Centre, NSW
<b>PILCH</b>	Public Interest Law Clearing House
<b>QCA</b>	Queensland Consumer Association
<b>RPWG</b>	MCE Retail Policy Working Group



<b>RTA 1997</b>	<i>Residential Tenancies Act 1997</i> (Victoria)
<b>Regulation</b>	<p>The Productivity Commission defines regulation as: Including any law or ‘rule’ which influences the way people behave.</p> <p>It need not be mandatory.(notation 670</p> <p>The range of models which may exist in the regulation of ADR are set out in figure 2 in chapter 7.</p> <p>669 National Alternative Dispute Resolution Advisory Council, above n 666, 9.</p> <p>670 Productivity Commission, <i>Business Cost Calculator: User Guide</i> (2006) 46.(notation 670)</p>
<b>Resolution</b>	<p>The VPLR Committee’s ADR Discussion Paper states that</p> <p><i>“some authors are particular about the use of the term ‘resolution’ while others use it interchangeably with conflict ‘settlement’ and ‘management’. ‘According to Sir Laurence Street and NADRAC, the concept of ADR may encompass conflict avoidance, conflict management and conflict resolution.’”</i><sup>68</sup></p>
<b>Restorative justice</b>	<p>Programs which involve meetings of offenders, victims (where they choose to attend) and communities to discuss and determine collectively the approach to be taken to a crime.</p> <p>The VPLRC Discussion Paper on ADR notes that</p> <p>“The conceptual and practical relationship between ‘ADR’ and</p>

<sup>68</sup> Chris Field, (2007) *Alternative Dispute Resolution in Victoria: Supply-Side Research Project Research Report*, Department of Justice, Victoria c/f VPLR Committee’ ADR Discussion Paper (Cit15). This paper was the subject of rebuttal by Mr. David Tennant at the 3<sup>rd</sup> national Consumer Congress. See *“The dangers of taking the consumer out of advocacy”* discussed at length in the body of this submission, and referred to in the Executive Summary

<sup>69</sup> Astor and Chinkin, above n 8, 82.

	<p>'restorative justice' is complex and challenging. Restorative justice practices such as victim-offender and community conferencing resemble civil law ADR processes such as mediation in that they bring the parties together and attempt to negotiate an agreed outcome.<sup>69</sup></p> <p>However, McCrimmon observes that 'it is argued that there is no true 'dispute' which can be resolved – the dispute occurred in the past and entirely on the offender's terms.'<sup>70</sup></p>
<b>Review of ESC Act 2001</b>	<p><i>Review of the Essential Services Commission Act 2001, Final Report, 2006,</i></p> <p><i>See VCOSS Response to Review of ESC Act 10 July 2007, p2</i></p>
<b>Therapeutic justice</b>	<p>A principle focused on maximising therapeutic outcomes for people involved in the criminal justice system. A therapeutic justice model seeks to address the causative factors underlying offending behaviour. Therapeutic jurisprudence has informed the development and operation of problem-solving courts in Victoria such as the Drug Court and the Koori Court.</p>
<b>OCA</b>	<p><i>Owners' Corporation Act 1997 (Victoria)</i></p> <p>(previously Body Corporate and Subdivision Act)</p>
<b>RoLR</b>	Retailer of Last Resort Event
<b>PIAC</b>	Public Interest Advocacy Centre Ltd.
<b>TasCOSS</b>	Tasmania Council of Social Services
<b>TEC</b>	Total Environment Centre
<b>TPA</b>	Trade Practices Act 1974
<b>TUV</b>	Tenants Union Victoria
<b>SCO</b>	Standing Committee of Officials

<sup>70</sup> McCrimmon, Les and Lewis, Melissa *"The Role of ADR Processes in the Criminal Justice System: A View from Australia"* (Speech delivered at the Association of Law Reform Agencies for Eastern and Southern Africa Conference, Uganda, 6 September 2005), p10

<b>SEM 2007</b>	State of the Energy Market 2007, AER, Essay A Stocktake of Energy Reform. Report by Firecone Centures Pty Ltd provided in April 2007, p23 found at <a href="http://www.aer.gov.au">http://www.aer.gov.au</a>
<b>SMH</b>	Sydney Morning Herald
<b>SSC</b>	Senate Select Committee 2000 <i>“Riding the Wave of Change”, A Report of the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy Committee 2000 Includes</i> <i>Ch 4, The Public Interest Test and its Role in the Competition Process</i> <i>Ch 5</i> <i>Ch 6</i>
<b>STR</b>	Second Tier Retailer – other than one of the three first tier retailers, (i.e. other than AGL, Origin Energy and TRUenergy)  Note some second-tier retailers are larger and more established than others. Examples include International Power and Australian Power and Gas
<b>StVdPSoc</b>	St Vincent de Paul Society
<b>BPURDP</b>	ACCC (1999) Best Practice Utility Regulation Discussion Paper,
<b>UCW</b>	Uniting Care Wesley
<b>VB</b>	Victorian Bar
<b>VCAT</b>	Victorian Civil and Administrative Tribunal.
<b>VCEC</b>	Victorian Competition and Efficiency Commission: a Victorian Government body which advises on business regulation reform.
<b>VCOSS</b>	Victorian Council of Social Services

<p><b>VCOSS Congress Paper 2004</b></p>	<p>Paper presented by Gavin Dufty on behalf of VCOSS at the 2004 VCOSS Congress entitled:</p> <p><i>Dufty, G (2004). "Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments." VCOSS Congress Paper 2004</i></p> <p><i>Refutation of the philosophical position of the Essential Services Commission in Dr. John Tamblyn Powerpoint presentation World Forum on Energy Regulation, Rome September 2003</i></p> <p><i>"Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition"</i></p> <p><i>John Tamblyn (then) Chairperson Essential Services Commission Victoria. Now Chairperson AEMC</i></p> <p><i>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</i></p>
<p><b>VEOHRC</b></p>	<p>Victorian Equal Opportunity and Human Rights Commission</p>
<p><b>VLRC</b></p>	<p>Victorian Law Reform Committee</p>
<p><b>VLRCComm</b></p>	<p>Victorian Law Reform Commission</p>
<p><b>WACOSS</b></p>	<p>West Australian Council of Social Services</p>