

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

Response to Draft Report

Open submission Part 1

Executive Summary

Dynamic work in progress¹

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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 open submission. I appreciate the Commission's flexibility in accepting a formal open belated final submissions to the Draft Report, with supplementary submissions that may be best allocated new numbers to keep them self-contained and topic-related.

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 submissions dedicated to energy matters including the state of the energy market generally and Draft Recommendation 5.4, (retail default cap removal) and Draft Recommendation 5.3 (single consumer protection regime and consumer protection compromise).

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.

This material, including all appendices have been researched and prepared as a public document to inform policy-makers, regulators and the general public. The case study included has been de-identified but represents a real case. The material has been prepared in honesty and in good faith with disclaimers about any inadvertent factual inaccuracies.

I hope any criticisms and identification of weaknesses will be accepted in the spirit intended from a concerned private citizen. Specifically I do not intend to offend any one party, group, agency or body in expressing strong personal views as a private citizen in a forum designed to elicit frank discussion and stakeholder input. For example, refutation of opinions of others; opinions of poor governance and leadership or skills and the like are simply personal opinions, not intended to be damaging or accusatory or to offend.

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

One criticism of the PC’s Draft Report 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.

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 AEMC 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 all submissions there is extensive mention of consumer issues, so the 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.

For the record, I have individually targeted a number of policy and regulatory agencies and consumer protection by way of calling attention to specific issues of compromised consumer protection fairly narrowly focused on selected energy matters, but with broader implications for consumer policy generally, compromised consumer protection and redress, and selected advocacy issues.

With particular reference to energy consumer protection, it is not my opinion that consumer protection is adequate or that existing provisions for complaints handling and redress notably, in Victoria at least, through the energy-specific complaints scheme EWOV, calling itself, rather misleadingly an “*ombudsman*” or “*alternative dispute resolution*” provider, despite providing no mediation, no face-to-face discussions and despite having a Constitution that is exclusive to industry participants who pay a massive fee to be

compulsory members, and secondly pay for the length of time that a complaint remains unresolved.

I vigorously dispute any perception that current complaints and redress provisions are meeting community need or expectation or are remotely adequate, despite rosy-self-perception and the perceptions of those with particular client groups or who believe that current industry-specific complaints schemes, including EWOV are accurately described as “Alternative Dispute Resolution Schemes” or correctly labeled “Ombudsmen.”

In terms of matters that are energy-specific a number of parties have been or will be individually targeted

1. National Trade Measurement Institute (NMI) in its role in assuming policy and regulatory responsible for trade measurement at a national level (already sent)
2. Ministerial Council on Energy (MCE) Energy Reform Implementation Group (ERIG) (already sent)
3. Ministerial Council on Energy Market Reform Team (MCE MRT) (already sent)
4. Ministerial Council on Energy Retail Policy Working Group (MCE RPWG) (through the MCE Market Reform Team) for their direct attention in view of current proposals to implement non-economic reforms associated with the National Framework for Energy Distribution (already sent)
5. Selected State agencies including the Department of Primary Industries (Victoria); Essential Services Commission and Consumer Affairs Victoria² (part-material sent)

² Refer to the revised *Memorandum of Understanding 18 October 2007 between Essential Services Commission Victoria (ESC) and Consumer Affairs Victoria (CAV)*
Refer also to the revised Memorandum of Understanding between the Essential Services Commission and the Energy and Water Ombudsman Victoria (EWOV), (for all its perceived flaws including failure to mention how differences between the parties will ultimately be resolved. Refer also to s36 of the *Gas Industry Act 2001*, the *Electricity Industry Act 2000* and the *Essential Services Commission Act 2001* relating to perceptions of bias and failure to meet the mandatory prescribed benchmarks of industry-specific complaints schemes (Federal Govt 1997)
Refer to EWOV Constitution found at <http://www.ewov.com.au/pdfs/Organisation/Constitution%2030%20May%202006.pdf>
Refer to EWOV Charter found at <http://www.ewov.com.au/pdfs/Organisation/Charter%2030%20May%202006.pdf>
Refer to Department of Industry Science and Tourism (1997) "*Benchmarks for Industry-based Customer Dispute Resolution Schemes*"
Refer to Sharam Andrea (2004), *Power Markets and Exclusions* (c/f EAG-ESC Report 2004)
Refer to Energy Action Group (EAG) (2004) "*Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*"
Refer to CUAC Quarterly (2004) "*Embedded Networks: Disconnecting Consumers.*" Article by in Brook, p 11 and 12. CUAC website

6. Selected State Ministers including Victorian Minister for Energy and Resources and Victorian Minister for Consumer Affairs (part-material sent)
7. Selected Commonwealth Ministers, including Federal Minister for Competition Policy and Consumer Affairs (The Hon Senator Chris Bowen) (pending)
8. Productivity Commission (current and supplementary submissions 242 and submission 101)

The primary issues addressed in two further supplementary submissions are predominantly about energy matters,

These include challenge to the claim that competition within the retail energy market in Victoria has been successful and whether the retail safety-net (default) provision is justified as purported by both the AEMC in its several reports including the Final Report on the Effectiveness of Retail Competition in the Gas and Electricity Markets in Victoria (February 2008); and the Productivity Commission's Draft Report Review of Australia's Consumer Policy Framework. This may be of particular interest to those within the energy industry, policy makers and regulators alike and those responsible for competition and consumer issues.

Discussion of selected issues concerned flawed energy regulatory provisions and use of policies and practices that are in contravention the spirit and intent of the National Trade Measurement provisions, and which will become invalid and illegal when current utility restrictions are lifted. These issues are of a more technical nature, being focused on discrepant interpretations of existing energy regulations and terminology, contractual status, policy regulatory failure on a number of counts. The submission therefore justifies a separate supplementary submission for the benefit of interested parties.

Dufty, Gavin (2004) "*Who makes social policy – the rising influence of the economic regulator and the decline of elected governments.*" VCOSS Congress Paper (2004). Gavin Dufty is currently Manager Policy and Research, St Vincent de Paul Society

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

Refer to Energy Action Group (EAG) (2004) "*Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*"

Found a

<http://www.chronicillness.org.au/utilitease/downloads/Energy%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc>

Prepared following FOI access to Records from the Essential Services Commission

Refer to EWOV (2006) Submission to Review of Essential Services Act 2001, p4

[http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/\\$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf)

Refer to www.Complaintline.com.au

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EXECUTIVE SUMMARY

Part 1 Response to Productivity Commission's Draft Report³

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 – Overarching Objectives for Consumer Policy

The Productivity Commission's Draft Report contains many strengths. I acknowledge these. I particularly commend the PC for the care taken to explain its rationale. Countless hours and revisions have gone into preparation of the twin reports, Volumes 1 and 2.

The devil is in the detail and there are a number of perceived flaws discussed shortly. I join others who have cautiously supported the overarching objectives, which I would like to see expanded and further clarified.⁴

At this stage, without the detail it is quite difficult to know what will actually eventuate, especially if procedural barriers such as infrastructure and constitutional considerations may result in dilution of original intents.

My personal view is that the concepts of consistency, reduction of regulatory burden; where appropriate, or the need for more proactive Commonwealth Government control is at issue and it is justifiable to have these issues addressed at national level.

³ 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.

⁴ ACCC (2008) Response to PC's Draft Report; February 2007

Any goals that will achieve not only more efficient and effective ways in which to deliver justice and effect adequate consumer protection whilst at the same time enhancing the effective marketplace functioning in all industries should be enthusiastically supported and I would be the first to offer such support if it can be shown that both the theory and practice of all components of the proposed consumer protection framework will achieve such goals.

It is comforting to know that the whole process will be subjected to regular review, and it is hoped that any legislative changes made will be inbuilt with flexibility to make further changes as dynamic markets and consumer needs and expectations evolve.

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 on 18 January 2008.

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”

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

Enhanced legal aid and financial counseling services

DR 6.1 and 6.2 Supporting institutional changes

Visible consumer protection portfolio, effective coordination; linkage between consumer and competition policy

CHOICE has welcomed the Commission’s acknowledgement of the need to elevate the importance of consumer policy (DR 6.1), including through the establishment of a Ministerial portfolio combining competition policy and consumer affairs (already implemented by the Commonwealth Government), and the effective coordination of areas

of government policy development that impact on consumers (including health, telecommunications, food and energy policy).

Consumer protection according to the NCP is an integral part of competition policy not separate to it. I support the PC's recommendations to implement a more national approach with a more readily "visible, effective and influential framework."

I discuss elsewhere reservations about the capacity and willingness of the ACCC to assume the roles envisaged in upholding all generic provisions. It is unclear to the ACCC and also to the public at large whether other roles currently held by CAV, such as business regulation and licencing will also revert to the ACCC. In that event the ACCC believes that extensive resourcing needs will need to be addressed including more than one office.

CHOICE has supported recommendations designed to ensure successful implementation of a more national approach (DR 4.4). I agree with those views

DR 8.1 Defective Products

I support recommendation 8.1. Will enforcement action be mandated or will it be left to regulatory discretion? How can the public be sure that proper enforcement will occur without such mandates given the poor commitment or at least inconsistent actions of some fair trading authorities with regulatory authority but weak enforcement commitment?

DR 8.2 Defective Products

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.

I commend the Productivity Commission on undertaking further urgent enquiries on product-related injuries; hazard identification, mandatory reporting, product recall, whilst monitoring any possible impact of the recent civil liability reforms on the incentives to supply safe products.

These protections are normally used in relation to goods.

I discuss in some detail in a dedicated companion 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.

PC 8.3 Defective Products

I support this recommendation and seek assurance that enforcement will indeed be upheld and that the requirement monitoring will occur with data being collected to inform future regulatory action and reform.

DR 9.1 Access to Remedies Auzshare and web-based information

I support the recommendation that

“all consumer regulators should participate in the shared national database of serious complaints and cases AUZSAHARE”

bearing in mind the recommendations made by the Privacy Commissioner when protecting privacy. The PC has recommended ACCC providing enhanced web-based information tool for guiding consumers to the appropriate dispute resolution body as well as providing other consumer information, subject to consumer testing to ensure that it is easy to use and has the appropriate content

In principle providing enhanced web-based information is highly desirable.

As to appropriate alternative dispute resolution, I have problems with the definition of the vast majority of complaints schemes that have managed to attract the title of ADR or ‘ombudsman’ In principle I believe these terms are misleading to the public and should be named more transparently.

Industry-based complaints schemes also should be called by such a name, and it should be transparent to the public in explanatory notes that their jurisdiction is limited, that they are funded, run and managed by scheme participants and that under current structures are so excessively close to both regulators and to scheme members as to call into question the degree of alleged ‘independence’ that they claim to enjoy. This is further discussed in the body of the submission.

DR 9.6 Access to remedies – enhanced legal aid and financial counseling support

I support this recommendation to provide enhanced support for individual consumer advocacy through increased resourcing of legal aid and financial counseling services, especially for vulnerable and disadvantaged consumers.

I would like to see the term “*vulnerable and disadvantaged consumer*” to be expanded to include:

“inarticulate vulnerable disadvantaged or cultural or linguistically diverse consumers”

With some further clarification to encompass examples of categories described above, including specific mention of those with psychiatric or intellectual disability; cognitive impairment; personal circumstances temporary or permanent, including but not limited to cases where financial hardship may hamper access to essential and other services.

Further arguments are presented in body of submission including PILCH recommendations and pro bono issues.

Significant areas of concern

DR 3.1 Overarching objectives

Gaps including within operational parameters

This is discussed in this overview briefly but also has a dedicated Part 1 submission, along with behavioural economics and selected competition policy and public interest test issues

DR 4.1 New generic law with ACCC as national regulator

In their submission to the PC Draft Report the ACCC clearly states that it does not believe would be adequately resourced for the functions proposed and remain concerned whether they would also be required to take on licencing functions and the like currently held by State Fair Trading Offices

I refer to the comments made by Legal Aid Queensland to the PC⁵

We support a national generic consumer law as proposed in draft recommendation 4 but make no comment about the identity of the regulator other than to submit that it is essential that the regulator be properly resourced. Inadequate resourcing of the regulatory function renders the underlying legislative regime irrelevant to most vulnerable and disadvantaged consumers who are rarely able to take action themselves to enforce their rights.

Other stakeholders have expressed similar concerns about resourcing. I repeat my own concerns about this, and particularly emphasize the views of LAQ above regarding the impotence of provisions that are not upheld. As mentioned the worst disadvantage will always be to those most individuals or classes of consumers deemed to be vulnerable and disadvantaged. However, affordability of court redress for most average consumers whether so classes is a significant barrier to justice across the board.

⁵ Legal Aid Queensland (2008) SubDR202 Response to PC's Draft Report, p 1 found at http://www.pc.gov.au/_data/assets/pdf_file/0004/76891/subdr202.pdf

Added to this is serious concern about the gaps in existing provisions particularly with regard to procedural and substantive provisions; blocks to regulator investigation once proceedings have been filed, limiting the range of data-gathering that can be undertaken.

The scope of the enquiry and associated considerations (Terms of Reference vi Vol 1 PC Draft Report) including specific reference to:

Any barriers to and ways to improve the harmonization and coordination of consumer policy and its development and administration across jurisdictions in Australia including ways to improve institutional arrangements and to avoid duplication of effort.”

This certainly a worthy goal and I support this aim in principle, provided that the result is strengthening of rather than dilution of consumer protection and effective informed and meaningful consumer participation in all markets and proper access to redress that is not hampered by restrictions. I specifically have a problem with dilution of unfair contract provisions which I will discuss separately.

I strongly disagree with the PC’s view that

“In many respects Australia’s current consumer policy framework (Fig 2) is sound

and that

“In particular without excessive prescription the genetic regulatory regime operating through the T/A and FTA provides a board platform for consumer protection for most productions and services

I believe that the current deficiencies especially in relation to responsiveness by those responsible for upholding generic consumer protection provisions in Victoria in particular are not merely less than optimal, but significantly deficient. I am working on preparing a more detailed response to the Commission’s Draft Report published on 12 December 2007.

I do not believe cosmetic changes will addressed the poor quality of protection and redress that has developed over time. The PC is well aware of missing policy tools, many already identified as follows:

- *Regulatory complexity*
- *Costly variation in regulation with few or no offsetting consumer benefits*
- *Perverse outcomes for consumers*
- *Lack of policy responsiveness to emerging needs*
- *Problems relating to contract terms and information disclosure*
- *Complex redress arrangements for consumers wishing to pursue complaints.*

To these identified flaws in current consumer protection I add at least the following impediments to effective and efficient consumer protection delivery

- *Procedural apathy^{6/7}*
- *Poor resourcing⁸*
- *Educational⁹*

⁶ For example ignoring complaints; delaying response to complaints for 12 months or more; refusing to provide timely and appropriate feedback to complaints; refusing to take timely enforcement action

⁷ Refer for example to the numerous cases of systemic marketing conduct issues, or cases illustrating systemic flaws that have not been brought to the attention of the ESC by EWOV; the failure to fully investigate complex cases brought to the attention of EWOV or the ESC or DPI and to take swift and appropriate action to address systemic issues the appear to have been driven by flawed regulatory policy – see for example Bulk Hot Water Charging arrangements ESC Guideline 20(1)), wherein sanction is given to formation of inappropriate contractual relationships with end-users of central heated water in multi-tenanted dwellings where the contract legally and properly lies with the Owners' Corporation; and sanction of the use of bizarre algorithm calculation formulae allowing energy to be charged in cents per litre theoretically using water meters as substitute gas or electricity meters (allegedly to prevent customer price shock to end users) in the absence of contract or necessity to form one. Market conduct driven by such regulations have led to coercive threats of disconnection of water services where energy providers are licenced to sell energy not water or water-related products, using methodologies that will become invalid and illegal when existing trade measurement restrictions are lifted – as is the intent.

⁸ For example numerous cases of poor resourcing of recognised ADR services (other than industry specific complaints schemes)

⁹ For example variable standards in training of staff offering ADR, complaints handling and other services; monitored and accountable professional development; and proper instruction as to consumer rights under multiple legislative and other provisions whether or not industry-specific;

- *Attitudinal barriers amongst regulatory staff*¹⁰
- *Political and philosophical agendas*
- *Ineffectual Professional Boards*¹¹

DR 4.2 New generic law consumer law, but particularly arrangements for financial services

I not support the recommendation that due diligence requirements should be exempted from the misleading or deceptive conduct provisions of the new law. I support the recommendations of all community organizations concerning more robust provisions for financial services and in particular the views of David Tenant in his various submissions at the Public Hearing in February 2008.

I support the recommendation that *“The Australian Securities and Investments Commission should remain the primary regulator for financial services”*

DR 4.3 Enforcement of consumer product safety provisions

Responsibility for reinforcing the product safety provisions of the new national generic consumer law in all jurisdictions should be transferred to the Australian Government and undertaken by the Australian Competition and Consumer Commission.

Specifically I support the views expressed by the ACCC regarding the desirability of a single generic law covering enforcement of product safety laws because of the need of rapid response as encapsulated in the following statements by the ACCC¹².

DR 4.4. Arrangements for single regulator, resourcing and the like

Problems as identified by the proposed national regulator ACCC, and as identified in many other submissions.

The stated reluctance of the ACCC to assume the role envisaged by the PC is of huge concern. How can anything work with that perspective from the proposed regulator under generic provisions.

including poor understanding of residential tenancy rights; contractual law provisions; common law rights; rules of natural and social justice. Refer again for example to energy provisions especially bulk hot water provisions referred to above and discussed in detail elsewhere.

¹⁰ Ibid as for 6 above procedural apathy

¹¹ Refer for example to the recently report of a series of serious misconduct rape cases carrying guilty please that were inappropriate handled by the Medical Practitioners Board. The Age 5 March 2008 *“Board mishandled case of rapist”* Reporter Julia Medow

¹² ACCC (2008) Response to Productivity Commission Draft Report (Feb)

DR 4.4 – Overcoming obstacles to introduction of national regulator

“Responsibility for enforcing the consumer product safety provisions of the new national generic consumer law in all jurisdictions should be transferred to the Australian Government and undertaken by the Australian Competition and Consumer Commission

Under this point I discuss general agreement, but mention the issues raised by the ACCC regarding synergies

In addition to commenting on infrastructure and constitutional issues the ACCC in its recent response to the PC’s Draft Report has mentioned the

“likely reduction in regulatory effectiveness arising from the loss of synergies¹³ at the local level associated with the ability of the fair trading offices to utilize a variety of compliance and enforcement tools.”¹⁴

It would seem that far more than simply resourcing is required (*refer to DR 4.4 p 64 PC Draft Report*)

I wholeheartedly support this recommendation concerning access to consumer tribunals and small claims courts, but also believe that if these do not fulfill the need access to other court options should not be impeded on the grounds of cost in the interests of fairness, accessibility and equity.

I note problems in terms of aggrieved employees access justice in employment tribunals because of the diluted powers of these bodies. This should be addressed so that proper justice is restored, consistent with the new government’s stated priorities.

DR 4.4.(1) Resourcing of ACCC

¹³ Source: Wikipedia “A mutually advantageous conjunction where the whole is greater than the sum of the parts”; or “a dynamic state in which combined action is favoured over the sum of individual component actions; or “Behaviour of whole systems unpredicted by the behaviour of their parts taken separately. More accurately known as emergent behaviour”.

Found at <http://en.wikipedia.org/wiki/Synergy>

¹⁴ Ibid ACCC Response to CP, p5

Whilst I do support nationalization and harmonization in principle it is no without some caution, relating principally to:

*“notable gaps in compliance education and “production of guidelines by regulators as a means of assisting consistency and certainty”.*¹⁵

DR 5.1 Repeal of “unnecessary regulation”

Perceived gaps in adopting a balanced approach to regulatory burden reduction against proper consumer protection. As noted above, in 2005 at the NCC¹⁶ Peter Kell CEO ACA stated that that the starting point in the PC’s recommendation is a sensible one – an assessment of the effectiveness of current mechanisms.

There is one thing that stands out. In this climate of proposed change and increasing leanings towards the “light-handed” and “lighter-handed” regulatory approach, unless the first-line conceptual framework and implementation architecture is equipped to address these, however belatedly, community protections will continue to be eroded.

DR 5.2 Industry specific consumer regulation – financial services regulation

I have refrained from detailed comment on this issue except. The responsible lending guideline proposals suggested by David Tennant should be adopted at national level.

David Tennant on behalf of AFCCRA¹⁷ has discussed this at length in various oral and written submissions the value and operational principle behind section 28A in the ACT and refers to the discrepancy between borrowing parties’ capacity to pay and the amount being loaned, giving rise to many problems in the housing market. He has referred to problems.

David Tennant of AFCCRA and Gordon Renouf of CHOICE¹⁸ have both stressed the

“Genuine need for local cops on the beat”

¹⁵ Insert Ref

¹⁶ 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 delivered at the National Consumer Congress 2005 Melbourne, March

¹⁷ Tennant, David (2008) Transcript of Public Hearing Canberra 21 February 2008

¹⁸ Renouf, Gordon (2008) Transcript of PC Public Hearing 21 February 2008

I support the introduction of a licencing scheme and requirement to participate in an dispute scheme, though I still have trouble referring to the structure of existing industry-run, funded and managed schemes as ADRs or ‘ombudsmen’ for reasons described elsewhere. Most of these schemes are no more than complaints schemes, though some can apply pecuniary penalties. The few who can theoretically seek binding decisions rarely do so, and in any case require the consent of the scheme member which is rarely provided (for example on two occasions by EWOV).

DR 5.3 Single national regime for energy consumer protection

See also dedicated submission dealing with selected issues at length

There are significant gaps in examining the scope and quality of dispute and complaints handling notably in terms of consistency, performance and competency standards, notably within the industry-specific complaints scheme area; and proper access to justice, For Victoria, the Attorney-General’s Justice Statement and promise of seamless access to justice for all Victorian’s has not always been met according to community expectation, best practice, fairness or equity.

Training of staff, jurisdictional limitations, public perceptions of bias and misinformation’ excessively close relationship with regulators, themselves apparently ignorant of the need to honour enshrined consumer protections under more than one legislative provision; procedural apathy; imbalanced constitutional arrangements¹⁹

The body of the submission extensively discusses some deficiencies in the current provision of so-called ADR services which are little more than complaints schemes run and managed by industry participants, The Binding decisions that are potentially available to one or two of these providers are only enforceable by consent and binding on scheme member who rarely agrees – there have been two binding decision through EWOV.

Jurisdiction, governance, accountability, consistency of professional development issues are all of concern, as is the excessively close relationship between industry-specific complaints schemes and regulators. Enforcement is weak and often of insufficient value. See paper by Andrea Sharam (2004) and FOI findings of EAG (2004) especially in relation to energy.

Often conciliatory agreements regarding financial hardship and debt arrangements result in further entrenched debt for the consumer.

¹⁹ For example Energy and Water Ombudsman Victoria (EWOV), whose Constitution is exclusive to industry participants though there is a Committee which has some consumer representation (3 consumer organizations). Only two binding decisions have been made. These cannot be made without the scheme member’s consent and is unilaterally binding upon such agreement one party only – the scheme member.

Merely adding another tier without dramatic change of many other factors is unlikely to address consumer protection shortfalls.

Whilst supporting the use of competent and accountable ADR measures where that term is appropriately applied, I vociferously disagree with the perception that industry-specific complaints schemes are delivering adequate services, that is barely external let alone of “ombudsman” calibre.

These agencies are run, funded and managed by the industry. They have been included in the definitions of ADR providers on the basis of a supply-side analysis undertaken on behalf of the Victorian Department of Justice, and has been heavily relied upon by the Victorian Parliamentary Law Reform Committee’s ADR Discussion Paper (2007). I discuss under ADR provision a number of the reservations expressed about the paper, including whether this measure is intended to be a cut-price court alternative.²⁰

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. I support retention of the Victorian Unfair Contract provisions, and echo concerns about the use of safe harbour provisions proposed.

A dedicated companion submission focusing on aspects of energy provision and compromised consumer protection is for reading in tandem with this overview.

The appointment of a national energy ‘ombudsman’ as much as it is hard to get around the concept of such a term applying to a scheme funded run and managed by industry participants, misleading implying to the public a level of independence and impartiality that simply does not exist, may make some difference.

Perhaps not quite enough difference, if the existing schemes retain their current funding and structure, staffing and training parameters

There is a chance of “noise” interference from internal rivalry between jurisdictional schemes designed to come under a national umbrella but anything that has the possibility of improving accountability and consistency in complaints handling.

My opinion is that these bodies are little more than complaints handlers, endeavouring against the odds to make fair and equitable recommendations for complaints resolution. They are far too jurisdictionally limited and too close to both regulator(s) and scheme participants to be able to deliver consumer expectation.

²⁰ See VLAS (2007) Submission to Victorian Law reform Committees Discussion Paper

Please see from the Energy Action Group Report dated September 2004²¹ 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.

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.

DR 5.4 Removal of energy safety net default options retail energy

Discussed here and on pp65-77 and in more detail in a separate submission, together with discussion as to whether or not retail competition in Victoria has been successful despite the rosy views expressed by the AEMC and supported by the Productivity Commission.

A huge range of other internal market factors appear to have been missed altogether or incompletely assessed in the AEMC's assessment of competition and subsequent decision to remove the safety net option, the only remaining regulated price, effective from 1 January 2009. These are listed within this overview and discussed in detail in a dedicated companion submission.

Many Tier 2 retailers do not believe that the market is ready for total price deregulation. See for example Victoria Electricity's two submissions to the AEMC and a host of other internal market issues.

DR 6.2 Supporting institutional changes – COAG issues and MCCA responsibility

In principle I support the proposals for the establishment of a Ministerial portfolio combining consumer policy and competition policy.

However, I am concerned about reservations raised by the National Consumer Roundtable in their submission to the PC's Draft Report that any move to create a national energy and water ombudsman should ensure that

²¹ EAG (2004) *Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*

“consumers are able to access an external dispute resolution scheme that offers real assistance in the event of a dispute with an energy or water company.”

I am also very concerned about the issues raised in the National Consumers Roundtable on energy regarding the administrative complexity of combining energy and water into one office where it affects water regulation or pricing.

DR 7.1 Unfair contracts

UNFAIR CONTRACTS

I do not support all elements of the Productivity Commission’s recommendations regarding unfair contract terms.

Safe Harbour Provisions

I draw the attention of stakeholders and the PC in particular to the ACCC attitude to “*safe harbour*” contract terms as contained under 3.1, p 8 of the Response to the Draft Report. Dr. Carroll O’Donnell in one of her two recent submissions to the Draft Report has pointed out that the public may have little or no understanding of the meaning and implications of “*Safe Harbour Contracts*” Perhaps this could be spelled out more clearly for the public if they are to be expected to comment.

Specifically the ACCC does not support inclusion of authorization process in a new UCT provision. The reasons given are very high regulatory burden likely to be imposed upon the regulator (probably the ACCC) charged with the responsibility for administering the process. The ACCC apparently believes that the burden on this body to deal with a plethora of applications across the country by “*risk-averse*” business across the country seeking approval of their own “*safe harbour*” terms will not only raise significant resource issues for the national energy regulator (AER); as well as significant compliance costs on small businesses in seeking such “*safe harbour*” approval in terms of application fee costs.

FEMG (p4 PC DR) has recommended removal of this protection in the case of misrepresentation or material change in circumstances. Those recommendations appear to be sound.

If the safe harbour provisions are included, I do not support Safe Harbour Contracts under PC’s recommendation 7.1 in its current form.

CHOICE²² has specifically suggested a version of “*safe harbour*” provisions under specified circumstances and where a public benefit test is met and where decision-making processes are fair and consistent. I support CHOICE’s recommendations for modified safe harbour provisions.

Unfair Contract Provisions; Unfair Trade Practice considerations. Refer to body of text for all arguments and reservations

Ch 8 Defective products and services

Missing provisions under Ch 8 defective services, notably fungible services like electricity as discussed briefly here and in a dedicated companion submission on energy provisions and consumer detriment

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. I commend the Productivity Commission on undertaking further urgent enquiries on product-related injuries; hazard identification, mandatory reporting, product recall, whilst monitoring any possible impact of the recent civil liability reforms on the incentives to supply safe products.

These protections are normally used in relation to goods. 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.”

Therefore, in the companion submission dedicated to selected energy issues, whilst not delving into the details more fully discussed elsewhere, I have discussed selected issues, which is a recurring theme many of my communications – as yet apparently heard but neither understood nor acted upon.

State regulations, including those openly endorsed by such energy regulators as the Victorian Essential Services Commission (ESC) and Department of Primary Industries (DPI) apparently allow for bizarre calculation of bulk energy consumption on the basis of algorithm conversion formula using trade measurement practices that, for the purposes of national trade measurement regulations are deemed in theory to be unacceptable, and will become invalid and illegal when existing utility exemptions are lifted.

Meanwhile these practices are so far removed from best practice trade measurement and have such far-reaching effects on consumer rights under many provisions not restricted to trade measurement or energy regulations that their usage and application deserve mention at every possible opportunity.

²² CHOICE (2008) Response to PC’s Draft Report; Feb

DR 9.2 and 5.3 Access to remedies ADR

There is variable effectiveness of ADR arrangements or industry-specific complaints schemes

DR 9.2 and 5.3 Industry-Specific Schemes , ADR and Energy Consumer Protection

There is an over-reliance on industry-specific schemes, run funded and managed by industry participants; carrying unacceptable jurisdictional boundaries; inconsistent service deliver and staff training; excessive proximity to regulators and to industry participants; public perceptions of bias and even ignorance of the range of consumer protections that exist that should be upheld within and outside of a specified industry.

These schemes are not all equal in the quality of service offered, professional development and training of staff, impartiality and ability to handle complex systemic complaints.

Complains Line²³ advises:

Some schemes operate according to these principles better than others. For example many schemes allow you to lodge your complaint over the phone some prefer it in writing and some are required by legislation to receive it in writing. Some schemes issue regular public reports; others do not. Some schemes have consumer representatives on their boards/councils; others have industry representatives on them only. Greater questioning of the schemes by customers (about how they operate) may help to improve compliance with the benchmarks.

In 1997 the Federal Government established Benchmarks for Industry-based Customer Dispute Resolution Schemes²⁴ encompassing the following principles, consistent with that embraced by the Victorian Attorney General's Justice Statement (May 2004).

These include

Fairness

The scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based.

²³ www.Complaintline.com.au

²⁴ Department of Industry Science and Tourism (1997) "Benchmarks for Industry-based Customer Dispute Resolution Schemes"

Accountability

The scheme publicly accounts for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems.

Efficiency

The scheme operates efficiently by keeping track of complaints, ensuring complaints are dealt with by the appropriate process or forum and regularly reviewing its performance.

Effectiveness

The scheme is effective by having appropriate and comprehensive terms of reference and periodic independent reviews of its performance.

Proper reporting is not always undertaken; complex complaints can stay entirely unaddressed for well over a year; hand-over between conciliators can be less than robust, governance issues can be a problem. It is frequently the case that complaints handlers within these schemes *Andrea Sharam (2004)* had reported even in simpler hardship cases, when conciliatory arrangements were made under hardship policies, taking complaints to EWOV frequently leaves the customer in the position of having an unaffordable installment plan²⁵

The disturbing EAG Report²⁶ about transparency accountability and reportability speaks for itself. This is discussed in detail in the companion energy-specific companion submission.

Poor available resources for challenging regulatory deficiencies that impinge on existing enshrined consumer rights.

The appointment of a national energy ‘ombudsman’ as much as it is hard to get around the concept of such a term applying to a scheme funded run and managed by industry participants, misleading implying to the public a level of independence and impartiality that simply does not exist, may make some difference.

Perhaps not quite enough difference, if the existing schemes retain their current funding and structure, staffing and training parameters

There is a chance of “noise” interference from internal rivalry between jurisdictional schemes designed to come under a national umbrella but anything that has the possibility of

²⁵ Sharam Andrea (2004), *Power Markets and Exclusions* (c/f EAG-ESC Report 2004

²⁶ Energy Action Group (EAG) (2004) “*Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*”
Found at

improving accountability and consistency in complaints handling. My opinion is that these bodies are little more than complaints handlers, endeavouring against the odds to make fair and equitable recommendations for complaints resolution. They are far too jurisdictionally limited and too close to both regulator(s) and scheme participants to be able to deliver consumer expectation.

Please see from the Energy Action Group Report dated September 2004²⁷ 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.

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.

DR 9.2 (3) Consolidating of existing financial ADR services

I refer to and support the comments made by Peter Kell, CEO ACA at the 2005 National Consumer Congress²⁸. I agree that consolidation of financial services is warranted, and that credit regulation needs particular attention, following the Wallis Inquiry in 1999

There have been some concerns raised by other stakeholders in response to the Draft Report. In particular David Tennant on behalf of AFCCRA has raised concerns about the value of a "local cop on the beat." Perhaps this is a cooperative way to address this issue once nationalization occurs.

DR 9.3 Access to remedies

Australian Governments should improve small claims court and tribunal processes by:

- *Introducing greater consistency in key aspects of those processes across jurisdictions,*

²⁷ EAG (2004) *Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*

²⁸ 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 delivered by Peter Kell, CEO ACA at the National Consumer Congress 2005 March

including

- *Common higher ceilings for claims;*
- *Uniform subsidy rates for consumers seeking redress for small claims*
- *Equal availability of fee waivers for disadvantaged consumers; and*
- *Allowing small claims courts and tribunals to make judgments about civil disputes based on written submissions, unless either of the disputing parties requests otherwise*

Comment

I support these recommendations. There are impediments discussed under 9.4 to accessing of justice through small claims courts and tribunals for marginalized groups, for instance those with psychiatric, intellectual or cognitive impairment or for similar reasons are reluctant to deal with court and tribunal processes. The same considerations may apply to certain culturally diverse groups. However, in the case of those with genuine cognitive impairment or fear of formal proceedings, any court or tribunal can be intimidating. Most such individuals do not seek out protection and sometimes decline offers of help. This makes it very difficult for equitable outcomes to be achieved. Therefore such representation should be possible through third parties.

In the case of employment tribunal matters, dilution of the powers of such tribunals has affected proper access to justice. This applies for instance to the Australian Industrial Relations Commission (AIRC).

DR 9.4 Access to remedies – representative private class action

On Page 167 of the Draft Report Volume 2, the PC has acknowledged that

“Even with arrangements in place that enable appropriate private litigation there are strong grounds for regulators also to be able to act on behalf of consumers. This recognizes that:

- *The motivation for individuals to join a civil class action can be low if the individuals takes are small*
- *even if the aggregate costs are large;*
- *Collective private actions are based on the private benefits to those involved*
- *yet public policy is also interested in broader benefits that may not always be*

equivalent to those private benefits. Such divergence in public and private interests can arise in several contexts

- *such as when a group of consumers suffering detriment are outside the class action. This can particularly affect disadvantaged consumers who are less likely to contribute to ‘fighting funds’ or become aware of private class actions*

I wholeheartedly support this recommendation and recognition that representative action by the regulator is desirable, but has been stymied. Regulator representative action should not be delayed on behalf of a class of consumers. However, it should be the prerogative for a party to opt-out to pursue private action without prejudicing the course of representative action already in hand.

In the body of the submission I discuss in more detail some of the issues of real concern for representation and proper legal access for inarticulate, vulnerable and disadvantaged groups where, for example, psychiatric, intellectual or cognitive impediments block such access because of unwillingness to initiate any form of action, and blocks in allowing third parties to intervene on their behalf without their informed consent – which can be difficult to obtain at times. If the matter is indicative of consumer detriment generally, and affects numbers of individuals, at least in such cases representative action should be possible without the parties’ involvement.

It should not be required for parties the subject of representative action to appear in proceedings. In many cases such a requirement deters vulnerable individuals from seeking proper assistance and redress. Some are not up to the stresses of court appearances or the protracted stresses of legal or other redress measures. The PC has on p 171 of his Draft Report Vol 2 recognized that

“disadvantaged consumers have less capacity to seek redress independently. Those holding a concession card, for example have a significantly lower propensity to get help from a dispute resolution body than those without such cards (IPSOS 2007, p18 and treasury 1999, 12). They are also half as likely as other consumers to use the Internet when searching for help indicating the current limitations of this technology for providing information to this group (IPSOS 2007).

The PC has also recognized that broadly speaking, disadvantaged consumers often have lower incomes, poorer English proficiency, do not know their rights, and can be

discouraged by overly formal redress mechanisms. This is despite the fact that the ethical basis for more accessible redress is stronger for such consumers.

The PC acknowledges that this raises the issue of the adequacy of current mechanisms to assist disadvantaged consumers to access redress.

The PC has suggested consistent fee waivers where small claims are involved and the capacity of consumers to rely on written submissions when seeking redress for such matters. However, what is missed is that particular classes of consumers are most intimidated by complaints and legal processes full stop. Some find it stressful even to manage dialogue with social security officials let alone a tribunal.

Waiving of fees is but a small component to the blocks experienced.

In addition, many, notably those with psychiatric disability will not seek out third party representation such as through the mental health legal Service. Though third parties like close family members may be willing to take matters up of their behalf, there are blocks in access such a service without the direct informed consent of the affected party – which in cases where there are cognitive or other impediments can be extremely difficult to achieve.

Where systemic deficiencies lie with policy provisions representative action should be extended to address the underlying policy provisions that may have either directly or indirectly led to unacceptable market conduct.

Finally regulator commitment to enforcement, a recurring theme in concerns expressed needs to be addressed, especially given that the PC has chosen not to uphold recommendations for a super-complaints mechanism as suggested by several stakeholders, including CHOICE sub 88, p7; and Ms Nagaragan (Sub 48, p13), MCCA Working Party on Consumer Policy (Sub 75, pp 109-110), Hank Spier (Sub19, p10

DR 10.1 Enforcement –pecuniary penalties; recovery of profits from illegal conduct; banning; substantiation of trader claims; infringement notices

The PC has commented on a number of perceived weaknesses in the current generic provisions providing consumer protection. There would appear to be a number of

The body of the submissions discusses some aspects of *Corones/Christensen Report, commissioned by Productivity Commission for Consumer Policy Inquiry*, the Victorian Government's Submission

The CAV Report, on p29 referred to the Law Council findings as follows²⁹:

²⁹ Law Council of Australia (2001), "Legislation review of clause 6 of the Competition Principles Agreement and part IIIA of the Trade Practices Act 1974" by the Productivity Commission, Submission by the Law Council of Australia c/f CAV Choosing between general and industry

“...Part IIIA has been augmented to a large extent by industry specific regimes such as those developed for telecommunications gas and electricity. Industry specific regimes address industry specific issues more comprehensively than a generic access regime can ever do.

The Law Council is of the view that industry specific regimes should be encouraged to the extent that they are truly required to deal with industry specific issues. To the extent that issues are generic across industries these must be addressed by the common principles in a revised Part IIIA. (Law Council of Australia 200, p. 2)”

Please refer the views of Peter Kell as expressed in his speech at the 2005 National Consumer Congress regarding protection enforcement

DR 10.2 Review by an appropriate legal authority of the merits of giving consumer regulators the power to gather evidence after an initial application for injunctive relief has been granted, but prior to substantive proceedings commencing.

This is an important consideration but not a specific recommendation till review undertaken.

DR 11.1–Empowering Consumers information disclosure

These recommendations are commendable in principle.

However if clarification is only available by right on request or otherwise referenced, how will the needs of marginalized groups, be met, for example those with literary issues; cognitive and comprehension problems, language barriers, intellectual or psychiatric disability. If material is readily accessible in more complete form, these groups of consumers can access help in interpretation rather than being expected to ask the right questions to clarify the layered information provided.

For energy reform the AEMC has made a number of suggestions for enhancement to information mechanisms.

Effective transparent comparison of retail offers is crucial and the AEMC has acknowledged this, based on the strong support received within stakeholder submissions.

Online energy comparators that rely on certain data being available

specific regulation Research Paper No. 8 November 2006, p 23, citing Commonwealth Office of Regulation Review, bibliography p23

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Customer's existing supply arrangements compared with a new offer

Such a proposal does not allow for those leaving home, living elsewhere or with no previous comparison.

Historical consumption if used as a comparator against a new offer would need to reflect the same number of parties using the energy with an equal number of comparable appliances, otherwise distorted results will ensue.

See further discussion re comparator tools and information disclosure

DR 11.3— evaluation of consumer information and education measures – specified research; operating costs of peak consumer body; networking and policy functions of consumer groups

The PC has acknowledged the need for additional funding for consumer research to provide, and the importance of evidence-based policy making. PIAC has supported the PC's view that there is a need for greater levels of research into consumer issues. I heartily add my support to that goal, as well as the recommendation that additional funding should be subject to appropriate guidelines and governance arrangements to help ensure that it is used effectively.

'a better information base to anchor future policymaking'

The PC has mentioned that

“At a more specific level, the Western Australian Government said that the formula used by governments to resource front- line consumer organizations ties funding to service delivery, rather than policy advocacy.”

The Commission has on p255 specifically mentioned target policy areas of two groups

The CFA –“to promote the interests of consumers, in particular low income and disadvantaged consumers” and The Victorian Consumer Utilities Advocacy Centre (CUAC), which ‘sees itself as representing the interests of Victorian electricity, as and water consumers, especially low income, disadvantaged, rural and regional and Indigenous consumers’

I commend the PC for acknowledging that:

“As well as having opportunities to contribute to policy-making consumers of their representatives also need to have the means - the time money and know-how – if they are to make input that is effective.

“It is difficult for individuals to represent themselves. Whilst some do engage in policy forums – for example a number of individuals made (generally brief) submissions to this inquiry – people normally leave it to others to represent their views as consumers and/or may simply trust or hope that their interests” as consumers are given due weight by those responsible for government policies.

“...many consumer groups obtain resources for policy advocacy purposes predominantly from voluntary contributions (time or money) by individuals. In the case of CHOICE it also obtains revenue from subscriptions and sales of its magazine which contains product tests and comparisons and other advice for consumers. Government funding explicitly for the purposes of policy advocacy is limited”

The PC importantly recognizes that the ‘free rider’ problem affects consumers at all levels. Therefore 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.”

I applaud the PC for recognizing that:

“Whatever the precise cause of the resourcing difficulties faced by many consumer policy advocates ...there is a general case for governments to help ensure that consumer representatives have the financial wherewithal to make an effective input into policy. The free rider problem alone provides a prima facie rationale for government to consider assistance for such bodies.

Whilst recognizing that

“Commission’s proposal to increase funding for legal aid and other frontline individual consumer advocacy services (Ch 9) would help in this regard

The PC also recognizes that

“the resourcing issue is also relevant to consumer advocacy groups more generally.

My concern is not just for those who are disadvantaged. Those who may not be, rarely receive any sort of advocacy input.

Without intending to offend any one consumer advocacy group, I could not agree more with the PC

“consumer organizations may be perceived as not always representing all consumer interests well.”

The PC has stated that:

“consumer organizations tend to be exposed to the problems of some groups of consumers more than others which could bias their perception of consumer needs and in turn skew their advocacy activities.”

I note with concern the comments of the PC on p223 of Vol 2 in referring to the submission of Laurie Malone (a former president of AFCO) who indicated that:

“in the past some consumer organizations had pursued agendas that did not necessarily align with the views of most consumers.”

Mr. Malone went as far as to say (as cited in the PC Draft Report 223)

“In my experience there are only a few organizations which do represent the views of ‘informed consumers’ primarily such as CC (Canberra Consumers Inc) and ACA (Australian Consumers Association) when I knew them. But I am also aware of many other groups which are captured as I have said by zealots who bias their views on the direction of their political agenda. That’s what happened I think in the case of AFCO and is probably one of the main reasons why the government decided to withdraw its subsidy (sub 4, p2

Also the PC has mentioned that

“At a more specific level, the Western Australian Government said that the formula used by governments to resource front- line consumer organizations ties funding to service delivery, rather than policy advocacy.”

The Commission has on p255 specifically mentioned target policy areas of two groups The CFA –“to promote the interests of consumers, in particular low income and disadvantaged consumers” and The Victorian Consumer Utilities Advocacy Centre (CUAC), which ‘sees itself as representing the interests of Victorian electricity, as and water consumers, especially low income, disadvantaged, rural and regional and Indigenous consumers’

PIAC has highlighted³⁰ 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 is 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 Commission’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.

³⁰ Ibid PIAC (2008) Submission to Federal Treasurer 18 January 2008, p11

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.

The complaints-scheme EWOV is not an advocacy body, as specifically stated in his Constitution. Its powers are conciliatory with weak power to effect binding agreements with the consent of the scheme member which is rarely provided (it has happened twice) is not seen to be as independent as it would like to think and openly advertises, and is run funded and managed by industry-participants who have exclusive representation of the Board of Constitution³¹ though there are three community organization representatives on the Committee. This is an important distinction and one that is not recognized. The PC Report; the submission of CALV to the VPLR Committee's ADR Discussion Paper and other parties have not picked up on this distinction.

The jurisdiction of EWOV, as published on their website specifically precludes involvement in policy matters, tariffs and the like. Investigation and reporting of even serious misconduct is not consistently undertaken and weak compliance enforcement by regulators responsible compounds proper access to justice

I support any move to provide appropriately resourced advocacy and research to achieve consistency and measurable equitable outcomes for the whole community including all marginalized groups that can be longitudinally assessed. In addition, I see no justification for sacrificing the specific and general rights of individuals, whether or not disadvantaged, or for justifying outcomes of gross inequality and disadvantage to a segment of the community in the alleged interests of the "*net overall benefit to the community*"

I commend the PC's comprehensive analysis of concerns regarding avenues for ensuring that the consumer voice is given a fair hearing (p218-221 Draft Report). In addition I commend the PC on its analysis of advocacy gaps. More detailed discussion of the PC findings are included in later. Also discussed in some depth later are the views of David Tennant, Director Care Financial Inc as expressed in his rebuttal paper "*Taking the Consumer of Consumer Advocacy*"³²

DR 11.3 Adequate resourcing of a separate advocacy body providing continuity of research and advocacy for policy and as well as direct advocacy to individuals, given that complaints schemes misleadingly called 'ombudsmen' neither mediate nor advocate.

³¹ Refer to Constitution of EWOV on their website

³² Tennant, David (2006) "*Taking the consumer out of consumer advocacy*" Paper presented at the 3rd National Consumer Congress Melbourne March 2006 as a rebuttal of Dr. Chris Field's views, presented as a Discussion Paper at the same congress with the title "*Consumer Advocacy in Victoria*"

Says David Tenant:

Competition has delivered some extraordinarily positive outcomes. As a nation we are more prosperous and have more choices available to us as a result of embracing and promoting competitive markets. Competition is however a tool

Whilst agreeing with Dr. Field that consumer advocates should avoid being seen as unthinking protections, he does not accept that

“.....the way to achieve that end is to become primarily an advocate for the current dominant economic paradigm. In fact the weakest part of the entire paper for me is how consumer advocates particularly those acting for low income consumers are actually supposed to tackle instances of market failure. There are plenty of references to distributive justice and to sharing the wealth created by competition but almost nothing about articulating the failures of competition to deliver acceptably equitable outcomes and more specifically what to do when the nature of the competitive activity itself actually causes the consumer harm.

In principle, I endorse the Commission’s view that government support should ensure that such support generates advocacy that is appropriately representative and that adds real value. Further, in principle I support the recommendations of the PC to support moves to create a single consumer advocacy body.

I support in principle the views expressed by PIAC, CHOICE and others that consumer advocacy and research models should be based on the UK Model as adopted by the UK National Consumer Council. I again refer to the additional requests made directly of the Treasurer by PIAC in their submission dated 18 January 2008, discussed fully elsewhere³³

If the NCC Model has been rejected for philosophical reasons or risk factors perceived to exist in such a model, then at least funding should be adequate and continuity of research efforts policy development ensured.

³³ PIAC (2008) Submission to the Federal Treasurer 2008-2009 Federal Budget 18 January 2008
Found at
<http://www.piac.asn.au/publications/pubs/08.01.18-PIAC%20Fed%20Budget%20sub.pdf>

I also note that PC has its reasons for believing this model is not ideal and carries certain perceived risks.” I appreciate the time and care that the PC has taken to explain its rationale concerning choice of advocacy model and funding of this. I cannot help wondering whether 500,000 will be sufficient to meet the need and goals.

However, in recommending contestable funding, albeit with appropriate guidelines and governance arrangements, theoretically to help ensure that it is used effectively, will not provide the continuity either in research initiatives to gather evidence.

I particularly refer to and support the PIAC’s submission to the Treasurer supporting the PC’s recommendation with subject to these considerations:

Firstly the most effective way to fund consumer policy advocacy would be to ensure that the national peak consumer body has the ongoing capacity to undertake research consultation and give effective input to public policy development processes. This requires the commitment of more than core operating costs.

Second the contestable research fund model proposed by the Commission is not necessarily the best model for the allocation of all research funds and PIAC will be supporting a consumer-sector submission in support of at least part of the research budget being used by a standing consumer policy advisory body which might be similar to the UK National Consumer Council.”

I support CHOICE’s suggestion that their preference would be to see a statutory body undertake the role of consumer advocacy and research. However, if this is not deliverable, CHOICE has suggested that:

“....Additional resourcing and significantly improved secretariat support the Commonwealth Consumer Affairs Advisory Committee (CCAAC) could be an alternative location for advising on major consumers issues including a consumer policy research agenda. CCAAC could also directly commission and provide oversight for some consumer policy research projects. A review of the process through which members are appointed to CCAAC would need to be undertaken if it was to play this role.

CHOICE has recognized that

“in general a contestable research funding program offers transparency and may support innovation on its own it will not provide a source of coherent engaged and research independent policy advice that is most required

I support VLAS³⁴ suggestion in their response to the PC’s Issues Paper that

Uniform data should be collected and used a regulatory tool. For instance if data was made public then organisations that breach requirements could be shamed. Also data could be used to build up a body of knowledge about systemic issues and then appropriate advocacy backed up by evidence about identified trends could take place.

Finally I am concerned to note EAG’s view³⁵ that

“Appropriate checks and balances may not be in place in respect of AEMC’s AER’s and NEMMCo and ACCC’s performance of their respective functions (as outlined in the NEL and NERs). Such checks and balances are essential to ensure that these bodies fulfill the single market objective and that there are effective representation review and appeal mechanisms to allow end users fair and equitable participation.”

EAG has suggested that:

“Merits review can form a significant part of such checks, balances and the reversibility of poor decision making which is particularly important in an industry with significant natural monopolies and hence the need for economic regulation.

³⁴ VLAS (2007) Response to PC Issues Paper May

³⁵ EAG (2006) Initial Submission on National Electricity Law and National Electricity Rules 5 January 2006 to Department of Industry, Tourism and Resources (Cwlth), (DITR) Energy Market Reform Team, National Energy Market Branch

A merits review process acts as an important discipline for regulators in ensuring they undertake an objective, robust and transparent evaluation. However, it is also important to develop a ‘sound’ and ‘fair access’ merits review process (see, for example, issues of standing and funding as discussed in this submission).

The EAG is of the opinion that a merits review process given appropriate resourcing being made available to consumers, coupled rules about vexatious and frivolous appeals will lead to better decision making by the market operator and the various regulatory bodies (AEMC, AER, NEMMCo and ACCC) involved in the NEM.

The provision of Judicial Review in the NEL/NER provides for a expensive and hopeless outcome where at best “a decision is set aside” and is then sent back to the body that made the poor determination/decision in the first place. It is clear that an independent merits review should give a better outcome and provide scrutiny on poor regulatory decisions.

The issue then becomes how to resource consumers in a merits review process so they can effectively participate.

The ongoing changing ownership arrangements, management fees and related party transactions in both the gas and electricity industries, along with increasing market concentration of the largest market participants, make the provision of information requirements essential in the legislation, if consumers are to have any confidence in the regulatory and market oversight arrangements provided for in the legislation.

Currently there is a lack of certainty in relation to the regulator’s ability to access or require information. EAG would also like to suggest in the case of monopoly service providers that the confidentiality requirements by regulators be kept to a bare minimum.”

Missing provisions

CALD provisions including temporary residents such as international students

Special category vulnerability because of psychiatric, intellectual, cognitive or insight problems in access justice

Court provisions for ADR, pre-court protocols, conduct etc

Defective services – specific recommendations (Ch 8 especially fungible services such as energy

Costs for self-represented litigants

Other matters

Gaps in meeting the National Competition Policy – initial discussion

See also dedicated Part 2 submission with overarching objectives

“The Senate Select Committee had found that social services were not shown to improve during NCP.³⁶ The SSC took seriously the suggestions in many submissions that some aspects of NCP and its administration would appear to be in conflict with the principles of good health community and social welfare service provision. That Committee’s findings in terms of competition policy and its impacts are further discussed elsewhere.

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

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

³⁶ SCC 2000 *“Riding the Waves of Change”* A Report of the Senate Select Committee Ch 5 the Socio-economic consequences of national competition policy. 2000 found at http://www.apf.gov.au/Senate/Committee/ncp_ctte/report/c05.doc

The opening line of Chapter 5 of the SSC Report on the Socio-Economic Consequences of Competition Policy.³⁷

“Market forces are global but the social fallout that policy makers have to manage are local”³⁸

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

Quoting directly again from Ch 6 of the SSC Report of 2000. Without limiting the matters that may be taken into account, where this Agreement calls:

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

³⁷ Ibid SCC (2000) *“Riding the Waves of Change”*

³⁸ Western Australian Parliamentary Standing Committee on Uniform Legislation and Intergovernmental Agreements, (1999) *“Competition Policy and Reforms in the Public Utility Sector,”* Twenty-Fourth Report, Legislative Assembly, Perth, , p xvii

- h) *the interests of consumers generally or of a class of consumers;*
- i) *the competitiveness of Australian businesses; and*
- j) *the efficient allocation of resources.*

Graeme Samuels in 1999 during the dialogue about the socio-economic impacts of competition policy referred to above began his musings with observations of the more sinister aspects of the public interest – what he had previously described as attempts by those “having a vested interest to claim the retention of their vested interest. He suggested that:

“one of the objectives of competition policy is to subject those claims to a rigorous independent transparent test to see whether in fact vested interests are being protected or whether public interests are genuinely being served by the restrictions on competition that are the subject of reviews under the Competition Principles Agreement.”

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

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

Andrew Nance’s views and findings³⁹ (at the time with South Australia Council of Social Services (SACOSS) are also extensively cited and relied upon in the body of the text. I

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

³⁹ 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>

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

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

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

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

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

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

The State Ombudsman's powers should be extended to allow for addressing of policy issues where consumer detriment or poor practices are identified. This can often occur at the hands of the regulator.

One good example is the provision endorsed by policy-makers and regulators of energy to allow for the trade measurement, calculation, pricing and charging and deemed contractual issues impacting on end-users of energy whose energy consumption cannot be properly measured with instruments designed for the purpose.⁴⁰

Regulatory reform philosophies

Effective markets (safe, fair, sustainable)

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

Best practice evaluative processes – theory modes see appendix

⁴⁰ See Bulk Hot Water Charging Guidelines ESC Guideline 20(1) and associated deliberative documents and correspondence. This guideline is specific to Victoria, but similar provisions exist in other states

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

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

Lack of support for the super complaint mechanism

Many concerns are associated with reservations about enforcement commitment and political will to enforce no matter what regulations are in place or who ends up with the responsibility. I note there have been further submissions expressing concerns that anything much will change if the ACCC end up as the national enforcement agency, including the SA Government and others.

The ACCC have their own reservations. I have not yet discussed these in the Executive Summary but feel this is an important issue. CHOICE has clarified that:

“The super complaint mechanism is not intended for complaints about matters that can be handled directly by existing enforcement powers particularly single firm conduct. In that regard super complaints neither replace nor crowd out standard complaint processes.”

I believe there is a strong case for reconsideration of the super-complaints option for the reasons suggested

I support the view of CHOICE that skewing the prioritization of the regulator’s workload is not in issue, but rather another means is provided to ensure that

“Analysis of demand side or consumer problems takes place as part of an effective competition regime.”

Gaps in addressing reforms for commencing and defending proceedings

Chapter 8 – Missing provisions defective services

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 effectively stripping consumers of access to enshrined rights under numerous provisions⁴¹

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 and inappropriate application of deemed contractual status on end-users of bulk energy, mostly achieved through threat of disconnection of heated water, though the proper contract lies with the Owners' Corporation, for a multitude of reasons covered under other legislative regulations or common law contractual rights.⁴²

MISSING RECOMMENDATION DEFECTIVE SERVICES

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.

I commend the PC on undertaking further urgent enquiries on product-related injuries; hazard identification, mandatory reporting, product recall, whilst monitoring any possible impact of the recent civil liability reforms on the incentives to supply safe products. These protections are normally used in relation to goods.

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.”

⁴¹ ESC Guideline 20(1) (2005) Bulk Hot Water Charging Guidelines and all supporting documentation. Refer also to privileged material sent association with Sub101 and links to relevant policy documents

⁴² Refer to *Residential Tenancies Act 1997* (Vic, s53, 54, 55; 69 (and equiv in other States and Territories); water industry provisions notably regarding water efficient devices if end-users to be charged for water at all, hot or cold; *Owners Corporation Act 2006*

I discuss below under this section (again) 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.⁴³ 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 a dedicated companion 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.

Overarching Objectives 3.1

Brief further discussion. See also dedicated separate submission Part 2 discussed in more detail along with behavioural economic principles and public interest and national competition policies.

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

⁴³ 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.

- *to ensure that consumers are sufficiently well-informed and sufficiently confident to benefit from and stimulate effective competition⁴⁴; 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 follows⁴⁵

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.

⁴⁴ As suggested by CHOICE in their response to the Productivity Commission's Draft Report

⁴⁵ Consistent with the Victorian Attorney-General's Statement of Justice 2004

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.”

- *In court proceedings, parties have an obligation to*

assist the Court in achieving the overriding purpose –⁴⁶

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 definition⁴⁷ that the

“duty to act in good faith”

may be problematic as a concept

⁴⁶ As suggested by the Victorian Bar in its Response to the Victorian Parliamentary Law Reform Committee’s Civil Justice Review

⁴⁷ 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].

“.....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*

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.”⁴⁸

Behavioural theories – brief comment

Please see further extended discussion in dedicated submission, along with overarching objectives, public interest test and national competition principles Part 2

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

⁴⁸ 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>

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^{49/50} challenging question as to whether economists and sociologists can indeed have meaningful dialogue.

The PC's Draft Report devotes considerable effort into discussing behavioural economics theories, so it is apt to provide some feedback.

On the issue of behavioural economics Peter Kell⁵¹ refers to perceptions of the current frustrations about consumer protection policy in Australia as being based

“on a very limited and “increasingly old fashioned view of consumers derived from a narrow economic model.”

He goes as far as to suggest that consumer and competition policy is being based on a model that could be seen to be actively misleading about how consumers make decisions and how consumption takes place. He sees as central to the future of consumer policy that this situation changes. These views are further discussed in the body of this submission in a chapter entitled “Selected Behavioural Economics Theories.” Kell believes that Australia is about 10 or 20 years behind in behavioural economics thinking and compares the status of behavioural theory to the advanced stage that the US has reached He jokes about theory and practice and the economists' traditional approach which does not require empirical investigation.

⁴⁹ Edmond Chattoe, Sociologist, University of Guildford, UK,
⁵⁰ Chattoe, Edmond, (1995) “*Can Sociologists and Economists Communicate? The Problem of Grounding and the Theory of Consumer Theory*” This research is part of Project L 122-251-013 funded by the ESRC under their Economic Beliefs and Behaviour Programme. Found at <http://www.kent.ac.uk/esrc/chatecsoc.html>

Refer also to Tennant David “*Taking the consumer out of consumer advocacy.*” Published speech delivered at the 3rd National Consumer Congress (2006). Theories of consumer grounding in advocacy. Mr. Tennant, Director Care Financial inc. believes that consumer advocacy policy that is not grounded with consumers is potentially dangers and likely to be ineffective.

⁵¹ Kell Peter (2005) “*Keeping the Bastards Honest – Forty Years On.....*” Speech delivered at the 2005 National Consumer Congress Melbourne March, p6. Peter Kell is CEO of Australian Consumers Association, publisher of CHOICE) He speaks regularly and frankly at NCC events and is not afraid to identify policy gaps

The lack of empirical evidence is of concern. Until or unless prospective data-gathering in a professional and informed way takes place using best practice evaluative models in determining what the intervention should be, what data should be gathered and how interpreted, knowledge of consumer behaviour as it impacts of Australia's economy may continue to be compromised.

I discuss some issues relating to heuristics of decision-making and conduct later, with particular reference particular submissions, such as PIRAC Economic Consulting (Sub106)

I also refer to the work of Edmond Chattoe from the Department of Sociology University of Surrey, Guildford, UK, who has questioned whether sociologists and economists can communicate. I provide in one of the chapters below under more detailed discussion of grounding theories of behavioural economics some of Chattoe's insights into behavioural economics. Meanwhile I provide the abstract to his 1995 paper below.⁵²

“Abstract

“This paper addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained. The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations.

This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development.”

As suggested by David Adam⁵³ in his award-winning essay⁵⁴

⁵² 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>

⁵³ Adams, David 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>

⁵⁴ Ibid Adams, David 2001

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

Adam believes that federalism is a barrier to “*joined-up*” ways of working and that Painter’s collaborative federalism (1999) is still a way off.

Brief Discussion of regulatory reform philosophies

Brief discussion. See also dedicated separate submission

I refer to the topical published speech by Peter Kell⁵⁵ at the National Consumer Congress in March 2006⁵⁶, 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.⁵⁷

Peter Kell's talk at that NCC (2006) presents some provocative concerns about the philosophy of consumer protection and the extent to which it may be inappropriate for such philosophies to shift regulatory risk from government and/or corporations to individuals. He refers to PC's Regulation and Review 2004-05 as part of its Annual Report series.⁵⁸

Kell cites two examples where such risk is explicitly shifted in such a way – compulsory superannuation and high education costs, now borne through loan schemes provided to tertiary students in the higher education sector.

We are now seeing such shift of risk within the energy sector, an essential services without which daily living requirements cannot be met in a modern society. A study of the energy retail market in isolation without realizing the impacts that wholesale and distribution prices have on the market is to fail to undertake a robust study is a flawed analysis by any standards. This is discussed in detail elsewhere and in a separate submission.

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.

⁵⁵ 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

⁵⁶ Kell, Peter, (2006) Australian Consumers Association. "*Consumers, Risk and Regulation.*" Speech delivered at National Consumer Congress 17 March 2006

⁵⁷ 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

⁵⁸ 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, I reproduce in a companion dedicated energy submission Gavin Dufty's VCOSS Congress Paper presented in 2004 as a critical examination of the paper presented the previous year by John Tamblyn, currently Chairperson of the Australian Energy Market Commission, but at the time Chairperson of the Essential Services Commission. Mr. Dufty analyses the philosophies of the ESC apparently startlingly similar to those of the AEMC) in relation to Universal Service Obligations (USOs)⁵⁹ 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.⁶⁰

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 said⁶¹

"In all of these models the ESC⁶² 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"⁶³. 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."

⁵⁹ Dufty, Gavin "Who Makes Social Policy – The rising influence of economic regulators and the decline of elected Governments." VCOSS Congress Paper 2004 Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn's Powerpoint presentation at the World Forum on Energy Regulation, Rome Sept 2003. Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004 in a presentation entitled "The Right to Service in an Evolving Utility Market. (Are Universal Obligations compatible with

⁶⁰ 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?"

⁶¹ Dufty, G (2004). Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments. VCOSS Congress Paper 2004

⁶¹ 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.

⁶² Essential Services Commission, Review of the effectiveness of retail competition and the consumer safety net for electricity and gas, Issues paper, December 2003,p18

⁶³ Residual markets occur when various customers who are directly excluded from mainstream market offers are provided a residual service; this is usually a minimalist type service.

As observed by Mr. Dufty, the model proposed

“.....creates the opportunity for private companies to ‘game’⁶⁴ the subsidies created to address market failure. This could occur through company’s retreating from providing services to all but the most profitable customers.

The proposals made

“.....not only shifts the target groups for the concessions, but also serves to reduce minimum protections to all Victorians.

“.....seeks to erode the current framework of regulated price caps and defined minimum service standards.”

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⁶⁴ Gaming refers to the ability of companies to increase profit by shifting additional costs or low profitability/high risk customers onto third parties, such as government.

⁶⁵ Dufty, Gavin *“Who Makes Social Policy – The rising influence of economic regulators and the decline of elected Governments.”* VCOSS Congress Paper 2004 Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn’s Powerpoint presentation at the World Forum on Energy Regulation, Rome Sept 2003. Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004 in a presentation entitled “The Right to Service in an Evolving Utility Market. (Are Universal Obligations compatible with

⁶⁶ 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?”*

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 said⁶⁷

"In all of these models the ESC⁶⁸ 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 markets⁶⁹". 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."

A study of the retail market in isolation without realizing the impacts that wholesale and distribution prices have on the market is to fail to undertake a robust study.

To return to the issue of regulatory risk in Section 5 of his provocative paper about regulatory policy and reform, Peter Kell discusses the importance of effective regulators in a

"Properly resourced and independent regulators with a clear brief to address the most significant risks in the sectors they regulate, will ensure that the burden of regulation falls more heavily on non-compliant firms. Poorly resourced regulators, agencies that face constant political pressure, and those that do not have adequate powers will only frustrate businesses and make markets less efficient."

Mr. Kell stressed that the successes of aspects of current consumer protection need to be acknowledged. For example Peter Kell, CEO ACA has referred to less sensible arguments

⁶⁷ Dufty, G (2004). *Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments*. VCOSS Congress Paper 2004

⁶⁷ 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.

⁶⁸ Essential Services Commission, *Review of the effectiveness of retail competition and the consumer safety net for electricity and gas*, Issues paper, December 2003, p18

⁶⁹ 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.

used to justify less regulation. He discussed in his published speech to the 2006 National Consumer Congress the key arguments underpinning the ‘red tape’ debates are misconceived. He believes that there is a

“... A need to address some of these misdirected arguments before we can start the important positive task of looking towards the consumer protection framework that we need for the future.”

Kell argues eloquently against the tendency to shift risk away from consumers or households onto business or governments. His published speeches from both the 2005 and 2006 National Consumer Congresses provided a provocative starting point from which to examine the current Review of Australia’s Consumer Policy Framework.

Peter Kell’s findings and conclusions are further discussed in the body of the submission.

Another extremely valuable contribution made in the Queensland government’s submission to the current Inquiry is the endorsement of the principle that governments have a responsibility to ensure that ultimately the option adopted must generate the greatest net benefit for the community. Having said that the submission points out that:

Present COAG guidelines do not ensure that the allocative and distributive effects are articulated sufficiently to enable informed decision-making about shifting the cost of risk”

What is certain is that existing confusion about roles and responsibilities has allowed significant gaps in consumer protections to develop and it is more than time for these gaps to be addressed, responsibilities unambiguously clarified, even if existing state responsibilities remain in place for the foreseeable future.

There is also room for federal responsibilities and accountabilities within generic provisions so heavily relied upon in the context of the Productivity Commission’s recommendations, whilst significantly demolishing “*unnecessary regulatory burden.*”

The public remains very concerned about the unburdening part. There are certain industries that will receive particular attention, and it is of great comfort to know that these will include the energy, financial and telecommunications industries.

However, merely putting alternative community service obligation provisions in place by shifting shared responsibility between private enterprise, state and federal governments, other stakeholders and the community at large, to government agencies either assuming direct responsibility or contracting such responsibility out may not address all needs and concerns.

Governance, Accountability Leadership Professional Development Issues – further discussion

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

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

I remain gravely concerned about eroded public confidence in some of the general and specific areas of public accountability by government agencies and advisers.

In particular I share the concerns of many stakeholders about the governance, accountability, leadership, and dare I say required skills of the new energy Rule Maker the Australian Energy Market Commission (AEMC), to meet current demands and expectations, and undertake dedicated and extensive discussion of their decisions regarding energy reform. Much of this will be discussed in my companion submission of the same date addressing 5.4 and related issues within the energy market.

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

Regulators need to be made more accountable for regulations that compromise consumer rights or have been misguidedly adopted.

This matter is aired extensively within these companion submissions to the PC's Draft Report with particular reference to provisions for the trade measurement, calculation, pricing and charging and deemed contractual issues impacting on end-users of energy whose energy consumption cannot be properly measured with instruments designed for the purpose.⁷⁰

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.⁷¹

Leadership

The body of the submissions discusses selected theory models of best practice leadership embraced by *Jamison (2005)*⁷² 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

⁷² 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

Paul Society. With Mr. Dufty's kind permission I have reproduced in its entirety his Powerpoint VCOSS Congress Paper (2004) on that very topic.⁷³

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

I also cite Andrew Nance's⁷⁴ concerns when analyzing outcomes in South Australia a year after full energy retail competition was introduced in that state. Victoria represented the guinea pig for energy reform, but the next target for policies and reform that may not demonstrate wise choices.

I strongly disagree with the PC's view that

"In many respects Australia's current consumer policy framework (Fig 2) is sound

I strongly disagree the PC's perception that the current regulatory framework is largely performing adequately. I believe that the deficiencies are extensive in most areas, and that without a mandate for compliance enforcement, proper consumer protection may never occur.

The deficiencies of the existing generic provisions have been discussed by in many articulate and informed criticisms made of both these provisions in many of the submissions already made to the PC during this inquiry to date. I will refrain from repeating these but call particular attention to the following submissions:

- Carroll O'Donnell⁷⁵ Sub001 and Sub020; SubDR115 1 and 2

⁷³ 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

⁷⁴ 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>

⁷⁵ Dr Carroll O'Donnell, PhD, Med (Hons), BA Lecturer in Sociology Faculty of Health Sciences University of Sydney

- Laurie Malone, FIAM, Sub004
- Dr. Michelle Sharpe⁷⁶ Sub005
- Dr Leslie Cannold, Ethicist, Reproductive Choice Sub006
- John Firbank Sub013
- Lynden Griggs⁷⁷ Sub018
- Hank Speir⁷⁸, Sub019
- Deborah Cope, Principal PIRAC Economics Sub106
- I. F. Turnbull, Barrister SUB
- ANZ Working Group on Trans-Tasman Competition & Consumer Issues (ANZ Leadership Forum SubDR)

Other important references include the work of Christine Parker⁷⁹ who has co-authored a number of academic papers with Michelle Sharpe.

The reforms required are not superficial. There will be little gained by simply attending to the unburdening of regulation angle, diluting the unfair contract provisions, introducing safe-harbour provisions (to which several objections have been raised, even by the proposed national regulator and enforcement agency, the ACCC, and by FEAMGC. I add my support to those objections.

CHOICE has supported safe-harbour provisions with suggested modifications to allow for some flexibility and unforeseen circumstances.

⁷⁶ Dr Michelle Sharpe is at the Victorian Bar. She has a PhD from the University of Melbourne. In 2007 she took up at an appointment as Lecturer at the Law School, University of Melbourne.

⁷⁷ Mr. Lynden Griggs is Senior Lecturer in Law at the University of Tasmania. He teaches in areas that include Competition Law, Property Law and Corporations Law. Research areas are primarily in competition, consumer and property law. He has taught at the University of Tasmania since 1988 when he began as a tutor

⁷⁸ Hank Spier was, for 17 years, CEO of the ACCC and, before that, the Trade Practices Commission. He has managed many cartel cases to a successful conclusion either through the courts or in negotiated outcomes. With over 30 years experience at the ACCC and TPC, Hank Spier's knowledge of the *Trade Practices Act*, case management and compliance is unparalleled. Hank is also a regular contributor to the Trade Practices Law Journal.

⁷⁹ Christine Parker is Associate Professor and Reader, University of Melbourne Law School

It is not an easy challenge to addressing the logistics of satisfying the needs of proper protection; servicing of multiple “safe harbour” applications that may over-burden the regulator; and considering reasonable requests to stay within an acceptable framework of contractual obligation to consumers

Nevertheless in general I oppose dilution of the existing protections under Unfair Contracts and in particular do not believe that individual detriment needs to be shown

I believe that a framework that addresses issues prospectively in order to minimize expensive conflict and litigation later is desirable.

The *Residential Tenancies Act 1997* is a reasonable example of pre-empting difficulties, though the issue of addressing conflicts between co-tenants is a gap causing much angst and many unfair outcomes if both parties do not act in a fair and reasonable way.

I support Dr. Sharpe’s conclusions in her Working Paper suggested that ACCC enforcement of section 51AB, and consequently the protection of consumers. Specifically, I repeat and uphold to Michelle Sharpe’s point that

“Section 51AB can be enforced by consumers against unscrupulous corporations through the institution of legal proceedings.”⁸⁰

However, the provision is of little assistance if the consumer is ignorant of the existence of section 51AB and/or lacks the resources to engage in litigation.

That the success of the ACCC has been limited in contribution to developing the law on unconscionable conduct and sending out a clear message about what amounts to acceptable or unacceptable business conduct in this area.

“...adopting a different, harder approach when dealing with corporations who are deliberately breaching the TPA and that this may mean parliament may have to empower the ACCC with a greater range of civil and criminal penalties for such conduct; adopting a clear coherent case theory when commencing proceedings against a corporation and that this might involve seeking the advice or assistance of lawyers or counsel external to the ACCC.”

Suppliers of goods and services must think Christmas is here already with proposals to largely rely on existing generic provisions, since access to legal redress is normally too expensive an option for most consumers

⁸⁰ Under the TPA consumers may obtain an injunction or damages or any other order the court considers appropriate to enforce the TPA under sections 80, 82 and 87.

However, I am relieved to know that the PC has proposed to seek the imposition of civil pecuniary penalties; ban activities found to be breach of consumer law; issue notice substantiate the basis of claims; and issue infringement notices for minor contraventions of the law (Section 10 Enforcement).

I also believe that adoption of guidelines for conduct by the enforcement agency should be desirable though there have been some issues raised about this proposal

I vigorously support Dr. Sharpe's recommendation that there should be

“development of some kind of policy with the ACCC as to when, and to what extent, it may be appropriate to negotiate or mediate with corporations alleged to have contravened the TPA.”⁸¹

Education of the ACCC of the public about rights and obligations and taking enforcement actions”

This should be done consistently and without prevarication were warranted to provide a clear message. If feasible, the powers of the enforcement agency, if the ACCC should be extended to allow for continuance of investigation once proceedings have been filed.

Existing consumer protection framework some general considerations

David Tennant⁸² believes that there is room for a Commission for Effective Markets. He describes effective as efficient, sustainable and fair. The Australian Consumer Association shares that definition of an effective market, as do many stakeholders, myself included.

I strongly support such a proposal.

⁸¹ ACCC Enforcement and Compliance Project,⁸¹ a working paper was delivered to the ACCC assessing the impact of the ACCC's enforcement of Part IVA of the TPA (“the Working Paper”).⁸¹

⁸² Personal communication. David Tennant is Director Care Financial Inc. ACT, author of “The dangers of taking the consumer out of consumer advocacy.” Speech delivered at 3rd National Consumer Congress, hosted by Consumer Affairs Victoria Melbourne 16 March 2006 available at <http://www.afccra.org/documents/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

CHOICE has clarified that:

“The super complaint mechanism is not intended for complaints about matters that can be handled directly by existing enforcement powers particularly single firm conduct. In that regard super complaints neither replace nor crowd out standard complaint processes.”

I believe there is a strong case for reconsideration of the super-complaints option for the reasons suggested

I support the view of CHOICE that skewing the prioritization of the regulator’s workload is not in issue, but rather another means is provided to ensure that

“Analysis of demand side or consumer problems takes place as part of an effective competition regime.”

It is not public opinion that current markets are effective, especially the energy market, notwithstanding the findings and conclusions of the Australian Energy Market Commission (AEMC), the new National Rule Maker for Energy, or that proposed energy reform measures will achieve that goal. Extensive challenge to the AEMC’s finding that the electricity and gas markets in Victoria are effective is provided in a companion submission with some highlights in this one. Many stakeholders have challenged the basis on which the AEMC has made its findings and recommendations

Yet the dye seems to be cast and the market is hurtling in a direction that may injure market participants as well as further injure the general consuming public, and vulnerable and disadvantaged consumers in particular.

I have alluded to compromised consumer confidence in certain arenas and to leadership, competence, governance and accountability and competence issues and stakeholder consultation that is meaningful. These concerns are not limited to one arena, and apply across the board to government and government-funded or contracted services and advisory bodies.

I believe that an effective consumer policy needs to address such issues since poor confidence in government operations, regulatory decisions, performance measures and the like make for shaky ineffective markets as a whole and inevitably impact on consumers at large as well as other stakeholders.

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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.^{83/84/85}

⁸³ 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"*⁸³ (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

⁸⁴ 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

⁸⁵ See for example

I proffer 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 Report⁸⁶ and also cite the views of others about competition policy generally.

5.4 Removal of remaining safety-net default option energy further discussion

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

This is referred to as *removal of retail price caps* 5.4. See also extensive separate companion submission dedicated to 5.4 and selected comments in this submission

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.⁸⁷

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

⁸⁶ 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

⁸⁷ See for example Victoria Electricity (2007 and (2008)

of the market power issues have surfaced (again) and been identified in South Australia also.

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,⁸⁸ and from other concerned stakeholders.

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.⁸⁹

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

⁸⁸ 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

⁸⁹ Victoria Electricity (Infratil) Response to AEMC’s Second Draft Report; February, p1

“.....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?

These included concerns expressed by Tier 2 Retailer Victoria Electricity⁹⁰ 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 Report⁹¹ 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*

⁹⁰ 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>

⁹¹ Victoria Electricity (Infratil) (Tier 2 retailer) Response Ro AEMC First Draft Report 9 November 2007 (Tier 2 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.

by the ACCC or any competition body

7. *The South Australian Government⁹² 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.

There are subtle nuances in the proper definition of the term cartel behaviour. Some would say that a more subverted version even if not formally defined legally as such, can be demonstrable when generator-retailer integration takes place, for example within the energy industry.

Perhaps making contracts impossible to obtain, say in the procurement of gas can be referred to as questionable “*cartel*” behaviour” if not meeting defined criteria for sanction under the law.

Besides these considerations I provide a checklist of unaddressed issues in the assessment of competitiveness in the energy market as listed below and discussed at considerable length in the companion energy-specific submission:

Internal energy market and competition issues impacts

1. Examination of the whole market in context

Removal of the default “*safety cap*” prices was predicated on the assumption that retail competition had been successful in Victoria. Both the AEMC and the Productivity Commission have deemed this to be the case

Starting with the distribution end, and the price drivers that start not in the middle of the supply but at the very beginning. Apparently the AEMC studied wholesale reports as “*background reading*” and not as central to the whole pricing issue and impacts of deregulation, given that retailers do not set the price, but rather manage risks through hedging contracts, assuming they can obtain them, and secondly assuming they can afford them. Some gaps that have been suggested include the following:⁹³

⁹² Govt of South Australia (2007) through The Hon Patrick Conlon, Submission to AEMC’s First Draft Report; 5 November 2007

⁹³ Council of European Energy Regulators (CEER) found at http://www.ceer.eu/portal/page/portal/CEER_HOME/CEER_PUBLICATIONS/PRESS_RELEASE_S/CEER_PRESS_2003-10-06.PDF

- ◆ *Lack of transmission capacity (in particular, cross-border interconnection capacity)*
- ◆ *Lack of transparency in network access conditions (including network access tariffs and congestion management)*
- ◆ *Lack of transparency in the technical operation of interconnected systems*
- ◆ *Lack of robust, deep and liquid organized energy markets in most geographical areas*
- ◆ *Lack of transparency and predictability concerning rules applied to the approval or refusal of mergers and acquisitions in the energy field.*

2. **Tumultuous energy market conditions**⁹⁴
3. **Very high electricity and gas prices (wholesale)**⁹⁵
4. **Impact of future events on wholesale markets causing resulting in retail price increase**
5. **Flaws in the assessment of effective retail competition in the gas market**
6. **Vertical and Horizontal Integration Factors and advantages to incumbents**^{96,97}
7. **Examination of load growth and management factors –**⁹⁸
8. **Cost smearing** and its negative impact for the user/causer pay principle underpinning the market

⁹⁴ Infratil 2007/8 Notable Events Developments found at http://www.infratil.com/downloads/pdf/ift_results_presentation191107.pdf
 Note Infratil is the parent company for Victoria Electricity who has responded to AEMC's review (First and Second Draft Reports, notably p2 of latter response) with vociferous protests about the conclusions drawn that retail competition is effective in the current tumultuous climate with references to procurement of physical gas for injection at Longford as a major barrier to entry and growth and steps already taken to reduce competition efforts in the Victorian Market. Refers to similar happenings in SA. Not related to retail end of prices. Retails manage risk and do not set prices

⁹⁵ Ibid Infratil 2007/8 Notable Events (parent company for Victoria Electricity)

⁹⁶ Ibid CUAC (2007) Response to Issues Report

⁹⁷ The perception of the negative impacts on smaller retailers of vertical integration (generation-retailer) are shared also by some of the smaller retailers themselves – see opinions of Victoria Electricity; documented outcomes in the New Zealand energy market as a direct consequence of vertical integration and as outlined in online material published by Victoria Electricity parent company Infratil cautions expressed in the publication State of the Energy Market, 2007, AER;

⁹⁸ EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

9. **Hampered modeling through lack of long-term real time customer load and behavioural data**
10. **Hampered modeling through lack of long-term real time customer load and behavioural data**
11. **Advanced Metering Infrastructure (AMRO)**
12. **Inherent distortions in the market in the market caused by the nature of the services, as exemplified by the Retailer of Last Resort Provisions⁹⁹**
13. **The likelihood that the level of retail competition in Victoria will decrease with price rises in other states¹⁰⁰**

Selected financial issues – supply side barriers

14. **Consideration of Return on Investment (ROI) impacts at distribution level and impacts on retail competition¹⁰¹**
15. **Consideration of available capital investment to the forecast load growth over the regulatory period¹⁰²**
16. **Consideration of refurbishment of aging asset base¹⁰³**
17. **Impact on retail competition by such external factors return as on investment impacts on at distribution level (where the price-setting occurs) and at the same time ensuring that there is capital investment to the forecast load growth over the regulatory period as well as ensuring the refurbishment of an aging asset base¹⁰⁴**

Selected financial issues – demand side barriers

18. **Demand management vs income generation in assessing energy and demand sustainability as expressed by PIAC and upheld by others**
19. **Climate change policy**
20. **Inefficient investment and consumption of electricity**

Political and regulatory factors

⁹⁹ CUAC (2007) Response to AEMC's Issues Report; 10 July 2007.

¹⁰⁰ CUAC (2007) Response to AEMC's Issues Report; 10 July 2007.

¹⁰¹ Ibid EAG (2007) Submission to ACCC October direct quote

¹⁰² Ibid EAG (2007) Sub to ACCC direct quote

¹⁰³ Ibid EAG (2007) Sub to ACCC direct quote

¹⁰⁴ Ibid EAG October 2007 direct quote

21. **Possible impacts of political interference**¹⁰⁵
22. **Consideration of possible reduction of commercial capacity to network users through special regimes for construction, operation and use of merchant lines**
23. **Examination of Political Sustainability** defined as:
24. **Correlation of complex far reaching interrelated decisions**¹⁰⁶
25. **Consideration of random or otherwise unpredictable factors impacting on measured performances**
26. **Other external threats**
27. **“Political, legislative or regulatory decisions concerning energy investment and trading frameworks in one State having an impact on all States (and Territories)”**.¹⁰⁷
28. **“Full examination of the existing and proposed Regulatory Framework –**
29. **How the institutional design of the regulatory entity, the design of the government’s overall regulatory system (includes courts, checks and balances within the government etc), and the country’s relationships with other countries and multilateral institutions relate to opportunism.”**¹⁰⁸ (*Jamison et al 2005*)
30. **“Proper examination of Corruption”**
Broadly defined as the relationship between corruption and risk, and methods for mitigating risk resulting from corruption¹⁰⁹
31. **Examination of Renegotiation and Bailout factors defined as**¹¹⁰
32. **Proper coordination of transmission network planning**
33. **Consideration of impact of inter-related decisions re structure of national transmission system**

¹⁰⁵ Ibid CEER (2003) direct quote

¹⁰⁶ Ibid EAG (2007) Submission to ACCC October

¹⁰⁷ Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank*. The Electricity Journal Vol 18(6) July 2005 pp 36-35

¹⁰⁸ Ibid Jamison, MA, Holt, L, Ber, SV, (2005)

¹⁰⁹ Ibid Jamison et al (2005)

¹¹⁰ Ibid Jamison et al (2005)

34. **Consideration of transmission asset issues**
35. **Consideration of risk of badly flawed ACCC Regulatory Test consultation process if review processes are unduly compressed**¹¹¹

Selected Climate Change, Emissions Trading and Energy Efficiency issues

36. **Interaction of competition between climate change, emissions-trading, energy efficiency**^{112/113/114/115/116}
37. **Renewable energy and energy-efficiency targets**^{117/118//119120}
38. **Consideration of other unpredictable external factors**¹²¹
39. **Absence of robust evidence of retailer rivalry** to support conclusions that rivalry between retailers was sufficiently strong¹²², along the following lines, as suggested by the South Australian Government in its response to the First Draft Report
40. **Assessment of possible impacts of regulatory uncertainty for the transmission businesses** so that they can continue investing in new and replacement infrastructure with minimal dislocation to their work programs (EAG had recommended minimization of such uncertainty)¹²³
41. **“Detailed examination of existing and proposed Financial Instruments.”** 124

¹¹¹ Ibid EAG (2007 Sub to ACCC direct quote

¹¹² Ibid PIAC (2007) Submission AEMC First Draft Report Terms of Reference p 1 and 2

¹¹³ Ibid Alan Pears (2007) Submission to National Frameworks for Distribution Networks Network Planning and Connection Arrangements.

¹¹⁴ Business Council for Sustainable Energy Submission to Victorian Energy Efficiency Target Scheme, via DPI 18 May 2007, cover letter, p1

¹¹⁵ TEC online Environmental and Social Objectives for the NEM available at <http://www.tec.org.au/index>.

¹¹⁶ CUAC (July 2007) Response to AEMC’s Issues Paper 10 July 2007

¹¹⁷ Ibid, PIAC (2007) Submission to AEMC’s First Draft Report; November 2007 p1 and 2

¹¹⁸ Ibid Alan Pears (2007) Submission to NGDNNP&CA. Oct

¹¹⁹ Ibid as for citations 80,82, 83, 84, 85 and 86

¹²⁰ National Framework for Energy Efficiency Guidelines (NFEE) found at <http://www.energyefficiencyopportunities.gov.au/assets/documents/energyefficiencyopps/industry%5Fguidelines%5Ffinal%5Fweb%5Fversion20071008110144%2Epdf>

¹²¹ CALV Submission to AEMC;s First Draft Report, November 2007

¹²² Govt of South Australia (2007) Response to the AEMC First Draft Report, November 2007

¹²³ EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

¹²⁴ Ibid Jamison, MA, Holt, L, Ber, SV, (2005)

- 42. **Absence of single market objective and effective representation, review and appeal mechanisms allowing all end-users fair and equitable participation**
- 43. **Detailed analysis of demand side interaction with the market** providing sufficient evidence that competition in both electricity and gas retail markets is effective. CALV has referred to the OECD Consumer Policy Committee's comprehensive checklist and toolkit for assessing regulatory change; recognition of market failure from consumer perspective¹²⁵ (CALV)

Selected Retailer impacts

- 44. **Consideration of market complexity factors promoting 'gaming' opportunities**
- 45. **Consideration of the nature of and changes in differentiated and innovative products and services being offered in the electricity and gas retail markets**

One of the pertinent questions to ask is: Can any degree of innovation product offers address fundamental flaws on the supply side with wholesale access to gas supplies and the impact this will have on the ability of second-tier retailers to effectively compete against incumbent retailers.

Selected Demand side issues:

- 46. **Recognition of the essential nature of energy**¹²⁶ (CALV)
- 47. Recognition of market failure from consumer perspective as evidenced in part by complaints lodged, notwithstanding the poor level of awareness of the existence at all of the energy-specific complaints body. Some twenty-six percent make no complaints at all.¹²⁷ (CALV)
- 48. **Contemplation of a competition framework that enables an effective and equitable spread of the inevitable cost burden over time and across different sectors of society**¹²⁸
- 49. **Assessment of the quality of regulated services provided to customers by examining company prices and profits and trends in company's total productivity (TFP)**¹²⁹

¹²⁵ CALV (2007) Submission to AEMC's First Draft Report, November note especially p10 -11

¹²⁶ Ibid CALV (2007) Submission p10 and 11

¹²⁷ Ibid CALV (2007) Submission p10 and 11

¹²⁸ PIAC (2007) Submission to AEMC's First Draft Report 9 November 2007 Terms of Reference p 2

¹²⁹ Ibid Pacific Economics Group (2007) "*Performance Indicators and price monitoring: assessing market power*" in Network Issue 24 May 2007 ISN 1445-6044. Pacific Economics Group. A Utility Regulator's Forum.

50. Examination of Political Sustainability

Each time that I try to get into the present and look at the current agendas for reform and approaches being adopted, I slide back into a de ja vu mode looking backwards and finding how little things have changed; how valid earlier predictions were; and how much balance appears to be missing from the optimistic forecast of competition impacts and future successes.

Energy Action Group (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association October gives some insights:

I give some examples below:

1. Refer to 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 of 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 in November 2007 and February 2008 respectively.
2. Refer to JackGreen's Annual Report as a Tier 2 Retailer (2007)¹³⁰

"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."

3. Refer to EAG's view about compressed decision-making processes¹³¹:
4. Refer to numerous submissions to many arenas including ERIG by Energy Action Group
5. Refer to submissions by Australian Conservation Foundation; by numerous community agencies, including PIAC; by Alan Pearce regarding environmental and sustainability issues

¹³⁰ JackGreen (Tier 2 Retailer) (2007) Annual Report 2007

¹³¹ EAG Submission (2007) to ACCC SP/PowerNet Revenue Cap Association October

6. I quote from EAG's Report¹³² to the ACCC SP/PowerNet Revenue Cap Association

“The questions that the Commission needs to resolve are how much and what control will consumers and retailers have over their costs, particularly if the NEM Rules and Codes and the Network Control Ancillary Service Payment market are complex and non transparent. Accepting the current arrangement between SPI PowerNet and VENCORP and the NECA Hybrid interconnector Code Change proposals add to market complexity and increases consumer and retailer risk.”

¹³² Energy Action Group (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association October

This Determination needs to simplify the institutional arrangement between VENCorp and SPI PowerNet. One consideration should be the amalgamation of the two organizations and rejecting the Hybrid Interconnector Code Change proposals before the Commission.”

I refer to EAG’s views about complex inter-related decisions

“Far-reaching impact of complex interrelated decisions around the future structure of the national transmission system¹³³

“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 regulatory period as well as ensuring the refurbishment of an aging asset base.”

7. Refer to EAG’s view about compressed decision-making processes: ¹

“There have been a number of attempts to address transmission pricing issues by both the NECA and the ACCC. To date, all the work by these bodies appears to have failed to deliver the desired outcome. It is likely that this review process will do the same if the time frame continues to be unduly compressed. The process runs the risk of following the badly flawed ACCC Regulatory Test consultation process.

“One of the implicit objectives of this revenue/pricing review and possible Rule reset should be the minimization of regulatory uncertainty for the transmission businesses so that they can continue investing in new and replacement

¹³³ EAG submission to the ACCC SP/PowerNet Revenue Cap Association October 2007)

infrastructure with minimal dislocation to their work programs.”

“EAG has significant concerns that the AEMC, the MCE and the Reliability Panel are in the process of running a number of reviews concurrently. Further, that a number of these reviews interact with each other and that this convoluted process may lead to very poor policy and rule making. “

“It is EAG’s contention that the AEMC has an extremely busy work plan: that the time frame provided for in Diagram 12 and the AEMC web site is far too ambitious to carry out this joint review. We have made a series of comments in the second part of the submission to illustrate this point. “

Complex far reaching interrelated decisions.¹³⁴

The ACCC Electricity Group is currently faced with a complex number of interrelated decisions around the future structure of the National transmission system. The failure to consider each decision in relation to the others will cause problems well into the future for the transmission asset owners and the market.

This Determination, coupled with the ElectraNet Determination and the NECA Hybrid Interconnector Determination, provides the opportunity to ACCC to reduce market complexity. There is a common myth held by economists that all functions of the NEM need to be subjected to competitive pressures. The SPI PowerNet application shows that there are a number of projects, particularly the introduction of several independently owned and dispatched hybrid interconnectors and dynamic capacitor banks that are argued (wrongly in our view) to enhance the NEM transmission system.

Conclusion

The challenge facing the ACCC is to make the right decision. This decision has to ensure that SPI PowerNet can make a sufficient return on investment and at the same time ensure that there is capital investment to the forecast load growth over the regulatory period as well as ensuring the refurbishment of an aging asset base.”

SPI PowerNet owns but does not control the asset base.

The SPI PowerNet Determinations need to make a strategic set of decisions

- *ensure that minimum changes occur to the WACC equation and the methodology for determining WACC is consistent across the Commonwealth*

¹³⁴

Ibid EAG Submission to ACCC

- *ensure that newly discovered assets are not rolled into the asset base and that easements are excluded from the asset base.*
- *reject any attempt by the proponent to adjust the initial RAB*
- *minimize market complexity and possible ‘gaming’ opportunities that will be created by the move to introduce hybrid interconnectors and other exotic transmission arrangements into the NEM. A single asset owner in each region simplifies the management of transmission assets.*
- *assess the costs and benefits of integration the system planning function back into the transmission businesses.*
- *address the problems evident in both Victoria and South Australia jurisdictions where the only viable solutions to transmission augmentation*
- *Load Management, Demand Management and embedded generation are discounted as the market based solution. Currently in both Victoria and South Australia there are minimal mechanisms that can facilitate either Demand Management or ensure that embedded generation can compete with transmission augmentation as an option for system development Load Management, Demand Management and embedded generation need to be treated in an equal manner to transmission augmentation in meeting load growth requirements make provision for SPI PowerNet to develop and sustain an employee and industry skills base.*
- *A mechanism needs to be developed to ensure that all 4 options can compete equally. Currently the only viable option is transmission augmentation.*
- *One of the implicit objectives of this revenue/pricing review and possible Rule reset should be the minimization of regulatory uncertainty for the transmission businesses so that they can continue investing in new and replacement infrastructure with minimal dislocation to their work programs.”*

8. Refer to EAG comments in a formal submission concerning market complexities

“One of ACCC objectives should be to decrease market complexities so as many market participants and consumers can continue to benefit from the reform process.

The current trend to add complexity to the NEM greatly increases arbitrage and

gaming opportunities for participants.”

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. They 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 Survey¹³⁵. This is discussed in some detail in the body of this submission¹³⁶

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 Field¹³⁷ 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”

Though EWOV and other such industry-specific complaints schemes participated in the ADR Supply-Side Research Project and identified themselves as fitting such a category, in fact these schemes do not mediate, offer face to face facilitation of discussion and mediation in the hope of complaints resolution; do not advocate, and have no arbitration powers. The weak binding powers held by one or two of these, such as EWOV are

¹³⁵ Field, Chris, (2007) *Alternative Dispute Resolution in Victoria: Supply-Side Research Project* Research Report, Department of Justice, Victoria

¹³⁶ VLAS (2007) Submission to VPLR Committee’s ADR Discussion Paper

¹³⁷ Ibid Field, Chris (2007) c/f Bibliography to VPLR Committee’s Discussion Paper, -133

unilaterally binding only and can only be made with the consent of the scheme member, which is rarely given – it has only happened twice.

The use of the term “*ombudsman*” by such schemes provides a misleading impression to the public as to levels of “independence” beyond legal structure, which is normally, as with EWOV a company limited by guarantee without share portfolio in most respects subservient to the regulator who is responsible for setting up the scheme under a specific enacting.

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).

In EWOV’s own response to the AEMC’s Second Draft Report this body expressed discomfort about the manner in which their complaints data had been interpreted and referred to the serious nature of some of the complaints lodged, often indicating on the basis of a few complaints that the issues were systemic

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

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

It vigorously dispute the claim that

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

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

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

I refer to the manner in which AEMC has interpreted the data provided by EWOV, and appears to have minimized the proportion of complaints about misconduct associated with misleading or deceptive conduct and/or high pressure sales by failing to also see EWOV's feedback about complaints received in full context, remember that only a small proportion of customers ever actually complain, and the figures provided by EWOV are indicative of a much 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.¹³⁸ Please also refer to Andrea Sharam's 2004 paper *Power Markets and Exclusions*.¹³⁹

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.¹⁴⁰

¹³⁸ 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.*”

¹³⁹ 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>

¹⁴⁰ Refer to EWOV (2008) Submission to AEMC First Draft Report, January

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 2004¹⁴¹ 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.

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.

¹⁴¹ Energy Action Group (EAG) (2004) *Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code.*

I do not believe that simply adding another tier of accountability whilst retaining the existing structure of the industry-specific schemes, as recommended under DR 9.2 of the PC's Draft Report.

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.

COMPROMISED COMPLAINTS REDRESS – ENERGY brief comment

Please refer also to more dedicated submission on energy policy seen to be driving unacceptable market conduct and widespread consumer detriment with case study to illustrate the issues raised.

The general public should be able to implicitly rely on the perceived vicarious liability of agencies for bodies that have Memoranda of Understanding with statutory agencies industry-specific regulators and those such as Consumer Affairs Victoria (CAV) with regulatory responsibility for generic provisions under for example the *Fair Trading Act* and Unfair Contract provisions.

For example, the separate legal identity of industry-specific complaints schemes such as the Energy and Water Ombudsman Victoria Limited (EWOV) should not be above proper accountability or scrutiny.

Indeed this particular body has a Memorandum of Understanding (MOU) with the Essential Services Commission Victoria (ESC), undertaken in the spirit of "*prescribed agencies*" which spells out its responsibilities, accountabilities and reporting obligations.¹⁴²

This instrument is deficient to the extent that it fails to spell out what should occur if the parties disagree beyond endeavouring to resolve the issue. It should be clear to the parties and to the public as a matter of transparent policy what happens when complaint outcomes become the subject of disagreement and how this impacts on complainants and their rights. These are important issues of governance.

¹⁴² Memorandum of Understanding (2007) between Essential Services Commission Victoria and Energy and Water Ombudsman Victoria (EWOV) 21 April 2007
Found at
<http://www.esc.vic.gov.au/NR/rdonlyres/D2670BDF-80FC-4713-AC86-A8F155D46CAF/0/MOUEWOV.pdf>

The Department of Primary Industry (DPI) Victoria as the energy policy-maker has direct responsibility for the policies of both the Energy and Water Ombudsman, and his master, the Essential Services Commission Victoria.

In turn, the Essential Services Commission Victoria has a Memorandum of Understanding with Consumer Affairs Victoria (CAV)¹⁴³ updated on 18 October 2007, replacing the previous MOU of 2004, which theoretically allows for cooperative strategies between the agencies to be fostered in consumer protection, and particularly under the terms of the Fair Trading Act and Unfair Contract provisions and under the Energy Retail Code. Under Clause 4 of the MOU the role of Consumer Affairs Victoria is described as follows:

4 The role of Consumer Affairs Victoria

4.1 CAV is responsible for maintaining an effective framework for consumer protection services in Victoria and for providing an effective business licensing and registration function. The role of CAV is

(a) protect and promote the interests of consumers^{144/145}

(b) ensure markets work in the interests of consumers and the broad community; and

(c) improve access to consumer protections services, particularly for vulnerable consumers

¹⁴³ Memorandum of Understanding between CAV and ESC 18 October 2007

¹⁴⁴ It cannot be in the interests of consumers to allow unconscionable threat of disconnection of essential services to go without sanction, or for that matter any threat or coercive act relating to essential services.

It cannot be in the interests of consumers to suffer detriment because of unjust and unwarranted imposition of contractual status where the proper contractual obligation lies with the Owners Corporation.

It cannot be in the interests of consumers to have their expectations of the core values of the Attorney-General's Statement of Justice upheld in every respect. It cannot be in the interests of consumers, inarticulate, vulnerable, or otherwise to suffer any form of detriment in the name of "competition goals"

The current bulk hot water pricing and charging arrangements are unjust and unfair and have the ongoing effect of stripping end consumers of bulk energy, whether or not as embedded customers, whether or not receiving indirectly suppliers provided to Owners' Corporation entities energy supplies for the heating component of "heated water" or "hot water" depending on temperature quality' or through indirect sources through embedded networks in a more technical sense (custody changeover occurring between providers thrice over or more, rather than directly from distributor to retailer to Owners' Corporation or equivalent to end user, with the Owners' Corporation or equivalent being the proper contractual party

¹⁴⁵ It cannot be in the interests of consumers, long-term or otherwise to prevaricate or delay proper sanctions of unacceptable market conduct. Effective markets need to be safe, fair and sustainable. Compromised consumer confidence is compromised consumer protection – according to Consumer Affairs Victoria. That is a worthy goal. When can we expect to achieve this?

The objects of the new MOU between the CAV and ESC are as follows:

2 Objectives and purpose of this memorandum

This memorandum seeks to:

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

Besides these MOUs, provisions of s36 of the *Gas Industry Act 2001* and the *Electricity Industry Act 2001* have mirror provisions about broad operational parameters in terms of mandated adherence to benchmarks of alternative dispute resolution, and concerning public perceptions of bias. If these standards are breached, or perceived to be breached and reports made directly to the State Regulator or State Policy-Maker or other responsible regulator or body (after the consumer policy framework is revamped) the public should expect prompt and responsible investigation by the policy-maker in order to establish the validity of such allegations and restore public confidence.

At present there appear to be grey areas as to how and when this should occur, and how overall corporate governance factors should be embraced.

The separate legal identity of the energy-specific complaints scheme (and other such similar industry-specific schemes run funded and managed by industry-participants as a self-regulatory exercise. Its very existence is dependent on the regulator's decision to form and oversee such a scheme. There are doubts about the quality of overall governance and proper provisions to undertake this and gaps in existing MOU provisions that do not specify what should occur when the regulator and complaints scheme management disagree on issues. This is a regulatory flaw that needs to be corrected.

There is a view that industry-specific complaints schemes may be misleadingly naming themselves "*ombudsmen*" and alternative dispute resolution schemes, implying a level of independence and perceived freedom of conflict of interest and bias than may be actually the case.

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In the case of EWOV, this is a company limited by guarantee without share portfolio. Such a status is a common one in various arenas, including health services, educational bodies, complaints schemes and the like.

Notwithstanding a separate legal identity of such bodies, these bodies should not be sheltered from scrutiny and accountability' nor should the agencies to whom they are responsible for be so sheltered.

Indeed courts and tribunals have upheld the concept that the nature of the relationship between such a body and its effective master (in the case of EWOV), the Essential Services Commission, can be deemed to confer vicarious liability on the master agency for the conduct of the subservient body.

It is my view, that some such industry-specific complaints schemes misleadingly calling themselves alternative dispute resolution schemes and "ombudsmen" schemes are falling short of community expectation and need.

There appear to be perceptions of bias as referred to in previous communications under s36 of the *Gas Industry Act 2001* and that best practice management is the furthest thing from what is actually being delivered, despite rosy self-perceptions.

I strongly support reservations, as for example expressed

“burgeoning industry association based ‘ombudsman’ dispute resolution schemes”

That is assuming that the terms “ombudsman” or “alternative dispute” or even ‘appropriate dispute resolution’ are justified at all, in referring to these schemes.

Therefore I quote from Professor Luke Nottage’s¹⁴⁶ original submission to the Productivity Commission¹⁴⁷, included also as an attachment to his response to their Draft Report

“Particularly in small claims therefore a growing number of consumers are likely to turn to the burgeoning industry-association based “ombudsman” dispute resolution schemes. However these are not designed efficiently to aggregate

¹⁴⁶ Associate Professor University of Sydney Co-Director Australian Network for Japanese Law
¹⁴⁷ Nottage, Luke (2007) and (2008), Submissions to Productivity Commission’s Issues Paper and Draft Reports respectively

collective interests. Also despite regulators providing some minimum standards for these schemes there are some remarkable uncertainties surrounding such schemes. I

Since different implications follow and the Courts have not given us a clear ruling on such a hugely busy dispute resolution sector legislative intervention is necessary here too.

In particular it is unclear whether the dispute resolution processes are governed by administrative law principles (natural justice binding the scheme/association and the industry member) or arbitration law (binding the association/adjudicators industry member and consumer – once they opt in and even though not bound by the outcome) or simply contract law (binding all three relevant parties).

As mentioned at the outset, Australian consumer law – “in books” and “in action” – has been allowed to slip for too many decades in too many areas to the detriment of consumers more than firms. It urgently needs to be reassessed from first principles in light of current thinking in economics but also many other disciplines and then reformulated comprehensively to maximise its impact on all involved. In doing so however Australia needs also to become more open to developments in the laws practices and community expectations of major trading partners such as Japan and the EU. This will be hard because we had become accustomed to them coming to us for inspiration; but it is now time to learn also from them.”

In discussing accessibility for many consumers to information redress and complaints mechanisms, in its submission to the Productivity Commission’s Draft Report, COTA has pointed out that

“While the internet has, for many consumers, improved the knowledge base from which they inform their consumption choices and decisions on product purchases, retirees and pensioners are less likely to have access to, or familiarity with, such information sources. Similarly, they are very unlikely to be aware of, nor know how to pursue their rights under, the implied statutory warranty provisions of the Trade Practices Act and the various Fair Trading Acts. Complaints procedures and other redress mechanisms can also be confusing and drawn out affairs. It is important that disadvantaged consumers have ready access to parties who can support them, and act for them, in pursuing such courses of action.”

These issues are further discussed in a separate submission directed to energy protections and gaps in selected current regulations

Marginalised groups

The VLAS submission to the PC's Issues paper contained these suggestions as policy tools for targeting Indigenous Australians as a sub-set of marginalized groups. Each of those suggestions is further expanded in the body of the VLAS submission last May, but appear not to have been acknowledged in the PC Draft Report at all. These are discussed in more detail elsewhere.

Unless consumer protection provisions are robust – which they are not considered to be despite the plethora of regulations (see for example energy industry), and unless compliance enforcement is guaranteed of such rules as are in place, proper protections will not be obtainable.

VLAS argues for a strong effective suite of regulatory measures as being necessary in relation to consumer policy¹⁴⁸

“...precisely because the relative power of consumers compared to industry is so asymmetric and competition policy is handicapped in acknowledging this reality.”

Other culturally diverse groups would similar benefit from targetted strategies. 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% if those with psychiatric disability also have dual diagnosis,¹⁴⁹ access to justice can be difficult if not inaccessible.

¹⁴⁸ VLAS (2007) Response to PC's Issues Paper (May)

¹⁴⁹ 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.

Existing regulations, including the jurisdictional parameters of the HSC and MHLS, for example, preclude third party representation.

If a complaint needs to be made the “*mental health sufferer*” needs to authorize investigation in writing, not a family member, nominated representative or anyone else, barring perhaps the Public Advocate or Chief Psychiatrist. This means that for those with compromised insight, comprehension or other impediment, the theoretical access to justice may not be as accessible as it appears.

For such groups of marginalized groups targeted strategies need to be available. Third party representation to complaints processes and legal recourses need to be available, or else justice principles cannot be met. For example in many cases, those with mental illness or intellectual or cognitive impairment for whatever reason, may not see the need to seek redress or access complaints processes or have the ability to do so. Unless provisions are made for legitimate third party representation, these groups remain consumer groups whose needs cannot be met.

A further marginalized group that deserve specialist attention are international students whether fee-paying, or Commonwealth of Australia stipends,¹⁵⁰ other student stipends awarded to those from developing countries. See further discussion under access to justice, legal aid and legal advice.

Inarticulate, Vulnerable and Disadvantaged Groups

I would like to see the phrase include

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

¹⁵⁰ Such as AusAID (Australian Agency for International Development) also called development assistance, international aid, overseas aid or foreign aid, refers to the efforts of developed countries to reduce poverty in developing countries - those countries with low average incomes compared to the world average. The term 'development aid' often refers specifically to Official Development Assistance (ODA), which is aid given by governments through their individual countries' international aid agencies, like AusAID. also called development assistance, international aid, overseas aid or foreign aid, refers to the efforts of developed countries to reduce poverty in developing countries - those countries with low average incomes compared to the world average. The term 'development aid' often refers specifically to Official Development Assistance (ODA), which is aid given by governments through their individual countries' international aid agencies, like AusAID.

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.

The PC Draft report appears not to go far enough in applying the definitions of vulnerable and disadvantaged to the practical suggestions.

I uphold all the practical suggestions made by the Joint Community Submission to enhance consumer protection generally and particularly for those who are inarticulate, vulnerable and disadvantaged.

At a recent 2008 Public Hearing of the VPLR Committee’s Inquiry into ADR, several community groups^{151/152} 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.*

¹⁵¹ 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

¹⁵² Mr. George Lekakis (2008) Chairperson Victorian Multicultural Commission. Oral Presentation to Victorian VPLR Committee’s ADR Inquiry Public Hearing 25 February 2008. See also written submission supporting the oral presentation

In discussing the obstacles to creating the valued space for the above and making practical suggestions on an appropriate ADR model for Indigenous Australians, the VALS oral and written submissions to the VPLR Committee provides strong arguments in support of these proposals that could also be utilized to the benefit of other marginalized groups, including other culturally and linguistically (CALD) groups; transient visitors to Australia, including international students with or without Commonwealth grants such as AusAID; and those with psychiatric or intellectual impairment.

One marginalized group discussed at the VPLRC's ADR Inquiry Hearing was victims of crime, notably serious crime. The problems faced by these groups in obtaining best outcomes if any fro ADR inputs was aired.¹⁵³

Another specialist group accessing ADR processes was youth groups requiring youth services or youth justice facilities¹⁵⁴

Maginalized groups that have not yet had any recognition in terms of consumer needs, information needs, CALD considerations or access to criminal and civil justice are international students, notably those on Commonwealth stipends such as AusAID.

The exemplary practical experience of 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.¹⁵⁵

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.¹⁵⁶

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

¹⁵³ Crime Victims Support Association (2008) Presentation by Mr. Noel McNaramara, CEO, in support of written submission to VPLRC's Inquiry into Alternative Dispute Resolution

¹⁵⁴ 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

¹⁵⁵ Paraphrased from Victorian Aboriginal Legal Services (VALS) written submission to VPLR Committee's ADR Enquiry, p4

¹⁵⁶ Ibid VLAS (2007) submission

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.

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 Congress¹⁵⁷ was openly skeptical of the value of self-regulatory and co-regulatory approaches¹⁵⁸. 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.¹⁵⁹

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 Australians¹⁶⁰, 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

¹⁵⁷ 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)

¹⁵⁸ 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

¹⁵⁹ Ibid Peter Kell’s Speech at NCC 2005 p4

¹⁶⁰ See for example the extensive suggestions made by VLAS in their submission to the PC’s Issues Paper in the current consumer protection inquiry.

mechanisms in consumer protection. There have been some successful examples but they are more the exception than the rule. The dispute resolution schemes, in some sectors, are some of the more promising examples, but they tend to work most effectively when they are incorporated into a broader statutory framework.

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

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,¹⁶¹ 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

¹⁶¹ 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.

Tennant, and in particular from his rebuttal paper presented at the 3rd National Consumer Congress in 2006 in response to the paper on Consumer Advocacy in Victoria.

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 3rd 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*¹⁶²

¹⁶² 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

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:

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 11.3 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 highlighted¹⁶³ the conclusion in the PIAC's Submission to the PC'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:

¹⁶³ Ibid PIAC (2008) Submission to Federal Treasurer 18 January 2008, p11

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.

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 for 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.¹⁶⁴

¹⁶⁴ 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

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 a companion submission dedicated to energy matters 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.

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.

Wikipedia discusses the term federalism as one used to:

“...Describe a system of the government in which sovereignty is constitutionally divided between a central governing authority and constituent political units (like states or provinces). Federalism is the system in which the power to govern is shared between the national & state governments creating what is often called a federation. Proponents are often called federalists.

Advocates of a weaker federal government and stronger state government are those that generally favor confederation often related to "anti-federalists". The state or regional governments strive to cooperate with all the nations. The old statement of this position can be found in The Federalist which argued federalism helps enshrine the principle of due process by limiting arbitrary action from the state.

First federalism can limit government power and infringe rights since it allows the possibility that a legislature wishing to restrict liberties will lack the constitutional power. The level of government that possesses the power lacks the desire. Second

the energy component of utility supplied that cannot possibly be individually calculated legally using an instrument designed for the purpose.

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the legalistic decision making processes of federal systems limit the speed with which governments can act.”

Roger Wilkins¹⁶⁵, discusses a form of federalism that is better described as co-operative federalism in the following words:¹⁶⁶

“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.

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,*”

¹⁶⁵ 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

¹⁶⁶ Wilkins, Roger, Election 2007 Australian Review of Public Affairs Found at <<http://www.australianreview.net/digest/2007/election/wilkins.html>>

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.¹⁶⁷¹⁶⁸

Dr Wilkins emphasizes that

“Going back to the division of responsibilities implicit in the Australian Constitution before it was reinterpreted by the High Court is not practical. The thought that the commonwealth government could or would relinquish its emerging interest in education for example is simply unrealistic and may be undesirable. The issue for the future is how state and federal roles are structured so that they are clear and separate and work well underpinned and driven by the right incentives. The Principles set out (in his paper)...will not deliver an answer to that question—nor should they. But they do provide a framework for investigating and deliberating about options.”

Wilkins suggests that the key reform is obtaining clarity about the resolves and responsibilities of states, territories and commonwealth best on

“...a rational analysis of what works best rather than in an ad hoc way that is dominated by political considerations.”

He identifies critical areas of government where the responsibilities are either unclear or inappropriate as follows:

- human services, including health, aged care, child care, disability care, housing and education
- the planning, provision and regulation of infrastructure, including rail, road, ports, water, and energy

¹⁶⁷ 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

¹⁶⁸ 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

- the whole area of Aboriginal policy and programmes.

In his paper Roger Wilkins explains why clarity matters in defining those roles and responsibilities in these terms:

“Clear roles and responsibilities for commonwealth and state levels of government are a pre-condition for democratic accountability, for, to put it bluntly, knowing who to blame.

Clear roles and responsibilities are a pre-condition for good policy—if you are clearly accountable then the onus is on you to sort out the problems.

Clear roles and responsibilities are a pre-condition for efficient government. Perhaps we should add that the assignment of roles and responsibilities also needs to create the right incentives, unlike the situation currently prevailing in the health area.

Clear roles and responsibilities are also a pre-condition for sensibly determining the allocation of revenue. There has been too much futile debate about fiscal federalism.

Although important, it should be obvious that the first thing we need to know is what expenditure responsibilities governments have, before we can figure out how much money they should raise or get.”

It is a fact that Commonwealth expenditure is far lower than its income whereas the opposite is true of the States and Territories. This is discussed further shortly in referring to Roger Wilkins’ views on federalism.

The current situation where the commonwealth raises 80 per cent of total revenue in Australia but is only responsible for 60 per cent of expenditure is and for political accountability. There is a massive transfer of money from the commonwealth to the states and territories.

This means that the states and territories are not answerable to the electorate for the taxes raised to support their expenditure. And the commonwealth, which raises the taxes, is not accountable for the way the money is spent.

Author Dollery, Stewart and Worthington published a paper on Australian fiscal federalism¹⁶⁹ highlighting some of the issues of ongoing debate and concern. These authors refer to the current discontent and speculate whether this

“...stems from the inevitable ebb and flow of power between the different tiers of government in a federation and its impact on various interest groups or whether it has exogenous origins”

Similar concerns are crystalized in the paper published by Roger Wilkins, head of Government and Public Sector Group, ANZ and Citigroup and Adjunct Professor in the Graduate School of Government at the University of Sydney Australian Review of Public Affairs¹⁷⁰.

To use the eloquent words of David Adams

“.....even the deserving poor can be disenfranchised because of the greater good of the economy”

Dr Christine Parker¹⁷¹, whose views are discussed in considerable length later has expressed concerns about meta-regulatory style developments in the law because they

“will focus on corporate responsibility processes in a way that allows companies to avoid accountability for substance.”

¹⁶⁹ Dollery, Brian and Stewart, Mark and Worthington, Andrew (2000) *“Australian fiscal federalism: An empirical note on long-term trends in state and local government finance, 1969/70 to 1994/95.”* *Economic Papers* 19(3):pp. 16-27. Manuscript version found at <http://eprints.qut.edu.au/archive/00002652/01/2652.pdf>

¹⁷⁰ Wilkins, Roger, Election 2007 Australian Review of Public Affairs Found at <http://www.australianreview.net/digest/2007/election/wilkins.html>

¹⁷¹ Christine Parker is Associate Professor and Reader, University of Melbourne Law School

Dr Parker¹⁷² [63] says that

“Meta regulatory law runs the danger of hollowing itself out into a focus merely on corporate governance processes that avoid necessary conflict over the substantive values that should apply to corporations.”

Finally in this preamble section I proffer further provocative comment in the words of David Adams/¹⁷³¹⁷⁴

“The mixed economy of the welfare state armed with the new science of public administration was going to eradicate poverty. But it hasn’t and the policy influence of the idea of poverty has fallen away. I explain this by looking at the

¹⁷² The critique from the other side (those who are less sympathetic to CSR obligations, and also those who are wary of rule of law values being undermined) is that meta-regulation will appear to focus on allowing companies to set processes that meet their own needs, but so much unaccountable power and discretion will be given to regulators and other stakeholders (who might be given the right to participate in or influence corporate decision-making) that inappropriate and illegitimate substantive values will in fact be imposed on corporations in ways that would not be possible under more traditional legal regulation. See, for example, K. Yeung, *“Securing Compliance – A Principled Approach”* (Oxford: Hart Publishing, 2004), pp. 204-14. See Lobel, ‘Interlocking regulatory and industrial relations’, for an examination of the way in which US meta-regulatory initiatives in OHS have been stymied by administrative laws that impose unsuitable regulatory accountability requirements on them. I have previously addressed Yeung’s critique in Parker, ‘Restorative justice in business regulation?’ (2004). c/f Parker C, Meta-Regulation: Legal Accountability for Corporate Social Responsibility Introduction to chapter, *ibid*

¹⁷³ 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>

¹⁷⁴ David Adams Department of Cabinet and Premier Victoria; Visiting Fellow ANU Professor David Adams is a graduate of the Universities of Tasmania, Sheffield and Melbourne. He has previously been a Departmental Deputy Secretary in Tasmania (Health) and Victoria (Premier and Cabinet and the Department for Victorian Communities). He has been instrumental in Victorian policy initiatives captured in the *“Growing Victoria Together”* and the *“Fairer Victoria”* programs. His major fields of research concern the locality drivers of innovation. He has published extensively in public policy and management focusing on local governance and its links to innovation and wellbeing. In the AIRC his work focuses on the Tasmanian Community Assets survey and is based in the North and North West of the State. He is a Director of Northern Tasmania Development and a Director of the OECD-linked PASCAL Observatory on social capital, place management and learning regions

conditions under which good ideas are likely to make it to policy status.

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

The idea of eradicating poverty has lost these features. For example, for the past 20 years poverty ideas have been knocked off their perch by economic reform ideas."

"Not only are there these competing economic ideas (which are claimed to be a solution to poverty), there is also a raft of new social capital ideas making claims on policy resources.

The idea of poverty has been obfuscated such that we can't agree what it means any more or how to measure it or who is responsible for tackling it.

Which, of course, means no one can be held accountable. Out of the muddle I suggest a way forward to make the idea influential again. For example, having some national goals and agreeing some basic language and targets would be a good start." (abstract)

".....even the deserving poor can be disenfranchised because of the greater good of the economy" (p92)

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

"has poverty disappeared from the agendas of ministerial councils?"

Adams has referred to the new buzz words of the nineties

"competition" "productivity" "new public management" and "mutual obligation."

Adams believes that federalism is a barrier to "joined-up" ways of working and that Painter's collaborative federalism (1999) is still a way off.

Finally I quote from the address given by the Prime Minister Wayne Swann on 27 March on federalism and the Future¹⁷⁵. Let us hope that with modernism of the federal principles the new architecture for “modern federalism will deliver what the community expects and has been long-overdue in coming – better cooperation between States and Territories and the Commonwealth, improved accountability and enhancement of consumer protections and prosperity.

<i>Federalism and the Future</i>
<i>In finally getting federation right, after more than a hundred years of trying, we are giving this nation every chance of creating a new generation of prosperity for the future.</i>
<i>All of us here today know the economic challenges that we face are difficult, and that it will take years of foresight, and dedication to the modernisation task, for us to prevail. But we also know this: individual governments, whether Commonwealth or State, cannot tackle all of these issues acting alone.</i>
<i>I am confident that, through a reinvigorated COAG process, we can unlock the benefits of Modern Federalism, and as partners overcome these challenges. There are significant gains to be won.</i>
<i>The new financial architecture announced yesterday provides the States with the flexibility and the incentives they need to deliver the quality of services that Australians deserve. And I expect significant economic benefits to flow from the increased inter-jurisdictional competition and innovation that the financial reforms will encourage. The new architecture also provides the platform from which to launch a new wave of economic and social reform, to enhance our human capital and build a stronger nation.</i>

Perhaps we can all be encouraged by these assurances that the States and Territories will find a way to work more cooperatively with the Commonwealth and vice versa in order to achieve a truly join-up Government in the public interest.

¹⁷⁵ Swann, Wayne, (2008) “*Modern Federalism and Our National Future.*” Address to the 2008 Economic and Social Outlook Conference 27 March

Concluding Remarks

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

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

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

Here's a quote for day directly from Michael Quinn Patton^{176/177} for all those considering policy changes in the energy industry (or any other industry) that may impact on balance of power impacts.

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

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

The concern is how the Productivity Commission intends to meet the gap when the Commonwealth is required to meet the needs of the low fixed-income vulnerable and

¹⁷⁶ Patton, M. Q. (2002) *Qualitative Research and Evaluation Methods*, Sage Publications, p 276.

See also Janesick (2003) *Qual Health Res* 13: 884-885

¹⁷⁷ Michael Quinn Patton lives in Minnesota, where for 18 years he was Director of the Minnesota Center for Social Research; former President of the American Evaluation Association and the only recipient of both the Alva and Gunner Myrdal Award for Outstanding Contributions to useful and Practical Evaluation from the Evaluation Research Society and the Paul F Lazarsfeld Award for Lifelong Contributions to Evaluation Theory from the AEA. In 2001 the Society for Applied Sociology awarded him the Lester F Award for Outstanding Contributions to Applied Sociology

disadvantaged groups (not simply on financial hardship grounds), for example when energy price deregulation becomes a reality as is predicted.

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

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

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

To take somewhat out of context the words of David Russell QC¹⁷⁸, 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 Adams¹⁷⁹ in referring to Roger Wilkins’ views on

¹⁷⁸ 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>

¹⁷⁹ 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>

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”

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.”¹⁸⁰

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:

¹⁸⁰ Rand:Atlas Shrugged (1957) Random House, New York p.500, c/f Russell D, QC, “Magic Pudding or Boarding School Blancmange”

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

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

“The Government’s actions are motivated by fear.

Fear that citizens will begin to tell the Government what the law should be, instead of the Government telling the citizens what the law.”

Two hundred years ago Thomas Paine said:

“All power is a trust handed to Government by the people. Any other power is usurpation”

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

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

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

Reducing regulatory burden is a long-time goal of the Productivity Commission in Australia as well as of other bodies. It is commendable if the outcomes for all concerned are equitable. The energy industry in Australia appears to be super-enthusiastic about the changes proposed putting forward well-structured and plausible arguments in the interest of least burdensome regulatory control. What will be the consequences for consumers?

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

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

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

Ms Klein sees the situation as a strange bedfellow one where community 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.”¹⁸¹

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 2007¹⁸², still on the subject of uniform regulation and in the case of toys, for example, mandatory testing is believed to be

¹⁸¹ 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>

¹⁸² New York Times September 16 2007 Editorial Opinion. The Need for Regulation

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.*”

As reported in the New York Times¹⁸³

“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

¹⁸³ Ibid, p 2 NYT 16 Sept07 In Turnaround Industry seeks US legislation

because of under-funding and resourcing, but also perhaps because of policies that are weighted from the outset in favour of industry¹⁸⁴.

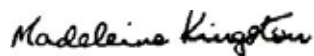
There is also the question of procedural inertia. Without a dedicated research and policy body such as has been suggested by CHOICE (ACA) and other community organizations these gaps will continue to compromise proper protection.

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.

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



Madeleine Kingston

Concerned Private Citizen, Victoria

¹⁸⁴ 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.

ABBREVIATIONS AND GLOSSARY

ACOSS	Australian Council of Social Services
ACDC	The Australian Commercial Disputes Centre, a private ADR provider body.
ACTCOSSA	ACT Council of Social Services
ADR	<p>Alternative dispute resolution, defined by NADRAC as:¹⁸⁵</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.¹⁸⁶”</i></p>

¹⁸⁵ Refer to VLRC (2007) ADR Discussion Paper, 2.1 “the definitions of ADR in civil disputes and criminal matters and VLRC Civil Justice Review (2006)

¹⁸⁶ Sourdin, Tania (2005) *Alternative Dispute Resolution* (2nd ed, 2005) 3.

ADR continued	<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>
ACA (CHOICE)	Australian Consumer Association (CHOICE)
ACCC	Australian Competition and Consumer Commission
ACI	<p>Australian Compliance Institute (NSW)</p> <p>www.compliance.org.au supporting organizations and professions Peak industry body for compliance practice in Australasia</p>
AEMA	Australian Energy Market Agreement
AEMC (Commission)	Australian Energy Market Commission (Commission)
AEMO	Australian Energy Market Operator

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

Circle sentencing	<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</i> (2004) 3</p> <p>666 National Alternative Dispute Resolution Advisory Council, <i>Dispute Resolution Terms</i> (2003) 4.</p> <p>667 Ibid.</p>
COAG	Coalition of Australian Governments
CFEM	Commission for Effective Markets
Committee of Inquiry	Committee of Inquiry into the Financial Hardship of Energy Consumers
Conciliation	<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.⁶⁶⁸</p>
Conferencing (or group conferencing)	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.
CPF	Australian's Consumer Policy Framework

CRA	CRA International
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Criminal case conferencing	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).
CSM	Coal seam methane
CUAC	Consumer Utilities Advocacy Centre
DSCV	<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 “helping people resolve disputes through communication and negotiations, 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>
2002 ESC Review	<i>Review of the effectiveness of full retail competition for electricity, conducted by the ESC in 2002</i>
2004 ESC Review	<i>Review of the effectiveness of retail competition and consumer safety net in gas and electricity, conducted by the ESC in 2004</i>
EIA	<i>Electricity Industry Act 2000 (Vic)</i>
ERA	Economic Regulation Authority (Western Australia)
ERIG	Energy Reform Implementation Group
ESC	Essential Services Commission (Victoria)
ESCOSA	Essential Services Commission of South Australia
EVALTALK	American Evaluation Society Discussion Group
EWOV	Energy and Water Ombudsman of Victoria
First Draft Report	<i>AEMC Review of the Effectiveness of Competition in Electricity and Gas Retail Markets in Victoria – First Draft Report Sydney, October 2007</i>

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

Justice Statement	<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>
KSAOs	<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>
KFFC	<p>Kildonian Child and Family Care</p>
LEADR	<p>A private ADR provider body.</p> <p>668 National Alternative Dispute Resolution Advisory Council, <i>Terminology: A Discussion Paper</i> (2002) 31.</p>
Med-arb	<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>
Mediation	<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>

Mediation continued	<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’.⁶⁶⁹</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>
MEU	Major Energy Users Association
MCE	Ministerial Council on Energy
MCE SCO NFEGDRR Issues Paper	MCE SCO National Framework for Electricity and Gas Distribution and Retail Regulation – Issues Paper
MOU	Memorandum of Understanding
MSO	Rules Market and System Operations Rules
NADRAC	National Alternative Dispute Resolution Advisory Committee: an advisory body established by the Commonwealth Government to provide policy advice on ADR.
NERA	NERA Economic Consulting
NERA Wholesale Report	Economic Consulting, The Gas Supply Chain in Eastern Australia: A report to the Australian Energy Market Commission 2007
NFDNNPCA	National Frameworks for Distribution Networks Network Planning and Connection Arrangements
NCP	National Consumer Policy
NCR	National Consumer Roundtable on Energy

NJC	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.
NMI	National Measurement Institute
NMA	<i>National Measurement Act 1960</i> and corollary regulations
OCA 2007	Owners' Corporation Act 2007 (Victoria) (previously Body Corporate Subdivision Act)
OBPR	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.
PEG	Pacific Economics Group
PJC-CFS-SSC Inquiry	Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility 2005
PC	Productivity Commission
PC Draft Report	<i>Productivity Commission (2007) Review of Australia's Consumer Policy Framework Draft Report, Canberra (12 December)</i>
PC Final Report (pending)	<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
PIAC	Public Interest Advocacy Centre, NSW
PILCH	Public Interest Law Clearing House
QCA	Queensland Consumer Association

RPWG	MCE Retail Policy Working Group
RTA 1997	<i>Residential Tenancies Act 1997</i> (Victoria)
Regulation	<p>The Productivity Commission defines regulation as:</p> <p>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>
Resolution	<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>¹⁸⁷</p>
Restorative justice	<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><i>“The conceptual and practical relationship between ‘ADR’ and ‘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</i></p>

¹⁸⁷ 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 3rd 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

	bring the parties together and attempt to negotiate an agreed outcome. ¹⁸⁸ 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.’ ¹⁸⁹
Review of ESC Act 2001	<i>Review of the Essential Services Commission Act 2001, Final Report, 2006,</i> <i>See VCOSS Response to Review of ESC Act 10 July 2007, p2</i>
Therapeutic justice	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.
OCA	<i>Owners’ Corporation Act 1997 (Victoria)</i> (previously Body Corporate and Subdivision Act)
RoLR	Retailer of Last Resort Event
PIAC	Public Interest Advocacy Centre Ltd.
TasCOSS	Tasmania Council of Social Services
TEC	Total Environment Centre
TPA	Trade Practices Act 1974
TUV	Tenants Union Victoria
SCO	Standing Committee of Officials

¹⁸⁸ Astor and Chinkin, above n 8, 82.

¹⁸⁹ 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

SEM 2007	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 http://www.aer.gov.au
SMH	Sydney Morning Herald
SSC	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>
STR	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
StVdPSoc	St Vincent de Paul Society
BPURDP	ACCC (1999) Best Practice Utility Regulation Discussion Paper,
UCW	Uniting Care Wesley
VB	Victorian Bar
VCAT	Victorian Civil and Administrative Tribunal.
VCEC	Victorian Competition and Efficiency Commission: a Victorian Government body which advises on business regulation reform.
VCOSS	Victorian Council of Social Services

VCOSS Congress Paper 2004	<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>
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VLRC	Victorian Law Reform Committee
VLRCComm	Victorian Law Reform Commission
WACOSS	West Australian Council of Social Services