

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

Open submission Part 2

**Detailed discussion of Over-arching
Objectives 3.1 and**

Inter-relationship with NCP

MADELEINE KINGSTON

APRIL 2008

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

Madeleine Kingston

(03) 9017-3127

Or email mkin2711@bigpond.net.au

PREAMBLE

CHAPTER 2

This Chapter follows on from the Executive Summary already published but is intended to represent a stand-alone section addressing more extended discussion on the over-riding objectives.

It is divided into sections, one generally analyzing over-arching objectives as proposed by the PC and highlighting from submissions already made (pp6-32), and the other focused on over-arching objectives and their relationship to the public interest test and corporate social responsibility with liberal quotes from other submissions, and from the Senate Select Committee's 2000 findings (33-70)

Would readers please forgive any repetition from the Executive Summary as the principles and citations are expanded and discussed.

The intent is to allow this chapter to stand on its own merits without the necessity to refer back to the Executive Summary, so the repetition is intentional.

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

The same disclaimers apply as before. The material has been prepared in honesty and in good faith with disclaimers about any inadvertent factual inaccuracies.

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

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

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.

2 of 90

Madeleine Kingston

Madeleine Kingston

ANNOTATED CONTENTS

Cover sheet	
Preamble	2
Annotated Contents	3-5
Further general analysis of overarching objectives	6-32
Misleading and deceptive – the need for further clarification	6
Incorporation of Attorney-General’s Statement of Justice (2004) in overall objectives Equality, fairness, accessibility and effectiveness	7-8
Well-being of the community as a whole Examines behavioural economic approaches in assessment of criteria Highlights from submissions to PC on the role of Behavioural Economics beyond recognition of its existence and academic examination of its application is a crucial part of developing an overall consumer policy framework, designing overarching objectives and determining what is really meant by “ <i>The well being of the community as a whole</i> ”	9-16
Sufficiently informed consumers	17-19
Meaningful stakeholder engagement	19-21
Standards of Conduct	22-24
Inarticulate vulnerable disadvantaged and culturally or linguistically diverse; competition impacts	24-32

Overarching objectives and relationship to public interest test and corporate social responsibility

23-70

Findings of Senate Select Committee¹ in relation to NCP impacts on social services were not shown to improve during NCP. Ethical and sustainability, and socially responsible and financial considerations. Expressly, proper regard for local, social, community and environmental interests and financial considerations

Lack of understanding of NCP policies;

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

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

lack of transparency of reviews; and

lack of appeal mechanisms

“*Competition goals*” and fiscal economic ideologies will not in themselves serve to appease community anxieties. What is more, measures to meet fiscal goals and economic reforms based on reducing regulatory burdens at all costs will quite simply not serve to engage community support for policies that may be transparently ignoring community need, expectation and proper access to justice.

Less than 10 per cent of corporations demonstrate a developed understanding of the relationship between corporate social responsibility and business.

¹ 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

<p>Consumer empowerment issues – see for example the views of Nagarajan, Vijaya (2007) Response to PC’s Issues Paper – selected citations included</p> <p>The level playing field. Discussion of components the VLAS submission to the PC Draft Report² Particular mention of the premise that regulation may be “<i>too expensive.</i>” Implications of skepticism about the need to protect consumers because of regulatory cost</p> <p>Suggestion that regulation is unaffordable and ineffective compared to empowerment. (VLAS)</p> <p>Endorsement of VLAS’ informed view that “<i>intervention to empower and protect consumers is necessary, and it supports formal regulation of the market through legislation etc as opposed to market self-regulation</i>”</p> <p>Rationales for Government Intervention (VLAS highlights)</p> <p>Competition law and policy as an accepted as an essential tenet of a market oriented economy</p> <p>Discussion of PILCH Submission to PC Executive Summary Overview</p> <p>Examines the “nature, extent, scope and incidence of corporate social responsibility in Australia. It also considers the legislative and policy frameworks that variously encourage or discourage corporations with respect to conducting their business and affairs in a socially and environmentally responsible and sustainable way”</p>	
<p>³ PILCH discussion of “Fundamental human rights, there is a strong public interest in the conduct of business and corporate affairs to impact positively not only on relevant financial interests, but also on relevant social and environmental interests.”</p>	

² Submissions by Victorian Aboriginal Legal Services (VLAS), to Productivity Commission’s Issues Paper (2007) and Draft Report (2008) respectively; and written (2007) and oral presentations (2008) to Victorian Law Reform Committee’s Alternative Dispute Discussion Paper (Researcher Ms Greta Clarke)

³ PILCH (2005) Submission to the Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility (July)
Found at
http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/submissions/sub04.pdf

Risk mitigation (in passing) (from <i>Jameson et al (2005)</i>)	
Abbreviations and Glossary	71-83

SECTION 1 Part 2

MORE DETAILED COMMENT ON

OVERARCHING OBJECTIVES FOR CONSUMER POLICY

Chapter 3 Objectives for consumer policy: Some general concepts in more detail

PC Draft Recommendation 3.1

Australian Governments should adopt a common overarching objective for consumer policy: *“to promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith”*

PC Draft Recommendation 3.1 proposes to support the proposed overarching objective for consumer

“to promote the confident and informed participation of consumers in competitive markets in which both consumers and suppliers trade fairly and in good faith”

In support of these recommendations, the PC has made six specific recommendations with the aim of providing

“more specific guidance to those developing and implementing consumer policy.”

“The consumer policy framework should efficiently and effectively aim to:

- *Ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition;*
- *Ensure that goods and services are safe and fit the purposes for which they were sold*
- *Prevent practices that are unfair or contrary to good faith⁴*

⁴ On the issue of good faith, please see further comments about discrepant interpretations of such phrase by the Courts and others, and refer also to the views of stakeholders on the use of this phrase. Perhaps, consistent with the recommendations of the Victorian Bar to the Victorian Parliamentary Law Reform Commission’s ADR Discussion Paper, a definition of *“a duty to act honestly”* (e.g. to minimise cost and delay) and secondly *“a duty to assist the Court in achieving the overriding purpose”* (e.g. *“to conduct litigation in an appropriate manner”*) may be a more

- *Meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage;*⁵
- *Provide accessible and timely redress where consumer detriment has occurred and*
- *Promote proportionate risk-based enforcement*⁶

Comment

As mentioned in the Executive Summary (Part 1), 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.⁷

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

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

Leaving aside for the moment the

“concept of confident and informed participation of consumers...”

I would prefer to see the term “*good faith*” phrased differently as recommended by the VB on the basis that this terms *means different things to different people* and can give rise to discrepant interpretations, as could the terms “*misleading and deceptive.*”⁸ This is

appropriate way of phrasing the overall guideline of preventing practices that are “unfair of contrary to good faith”

⁵ I would like to see this phrase expanded to include at least the terms “*inarticulate, and culturally or linguistically diverse*” with further clarification of those with mental illness, intellectual incapacity or cognitive problems. There is insufficient clarification of vulnerable and disadvantaged which appears to be interpreted differently by different people at different times

⁶ The implications of the clause *Promote proportionate risk-based enforcement* seem to be unclear
⁷ ACCC (2008) Response to PC’s Draft Report; February 2007

⁸ Victorian Bar (2006) Response to Victorian Parliamentary Law Reform Issues Paper. See reflection of Professor Michael Bridge’s definition cited in this submission by the Victorian Bar

discussed further shortly. See also other comments in that section concerning standards of conduct.

I feel that the over-arching objective usefully be extended to acknowledge core values such as contained in the Justice Statement⁹ Such justice principles are clarified as follows¹⁰:

Equality – all citizens should be equal before the law. This is promoted by the independence of the judiciary from the other arms of government, accessible justice and respect for human rights.

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

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

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

The objective could possibly read:

- *to ensure that consumers are sufficiently well-informed and sufficiently confident to benefit from and stimulate effective competition¹¹; and to ensure that both suppliers and consumers exercise a duty to act honestly.*
- *To incorporate the justice principles of equality accessibility and effectiveness*

In court proceedings, parties should have and obligation

(a) to assist the Court in achieving the overriding purpose –¹²

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

¹⁰ Consistent with the Victorian Attorney-General’s Statement of Justice 2004

¹¹ As suggested by CHOICE in their response to the PC’s Draft Report

¹² As suggested by the Victorian Bar in its Response to the Victorian Parliamentary Law Reform Committee’s Civil Justice Review

that is:

(i) to minimise cost and delay;

(ii) to conduct litigation in a proportionate manner.

I deal first with the Overarching objective suggested by the PC has on page 11 of the Report refers to its primary benchmark

The role of behavioural economics beyond recognition of its existence and academic examination of its application is a crucial part of developing an overall consumer policy framework, designing overarching objectives and determining what is really meant by

“the well being of the community as a whole”

There I highlight or draw direct attention to some of the submissions that the Productivity Commission has no doubt considered already, including that of Kildonian UnitingCare; the Queensland Government; the views of Peter Kell; the views of Deborah Cope of PIRAC Economic Consulting to name a few.

Kildonian Uniting Care has quite outspoken about apparently dismissal of evidence by behavioural economics as inconclusive or of little practical value. I cite below shortly from their submission to the PC’s Draft Report (206DR). The submission counteracts criticisms made of behavioural economics and suggests that more traditional theories offer no more complete or cogent explanations for consumer behaviour.

In suggesting proper application of behavioural economics, Kildonian UnitingCare has made the following specific recommendations which I would like to endorse as inclusions into the operational objective

¹³***Recommendations***

Kildonan would like to see an additional operational objective:

- *Provide consumers access to goods and services especially essential goods and services.*
- *Research and consultation into market imbalances especially in the area of financial products and services.*

¹³ Kildonian Uniting Care (2008) Submission to PC Draft Report SUBDR206 Feb, p4

- *Research and consultation in the area of behavioural economics and how this area of study can inform and strengthen consumer protections beyond mere information disclosure.*

These recommendations follow on from detailed discussion in the submission from Kildonian Uniting Care. Kildonian UnitingCare has commented on their disappointment that behavioural economics appears to have been dismissed as follows:

“.....very discouraging to see the evidence by behavioural economists mainly dismissed by the Productivity Commission as inconclusive or of little practical value.

If this information is not relevant, why are aspects of behavioural economics (for example prospect theory) standard text book requirements in assessing and understanding consumer risk behaviour in marketing? By understanding a consumers’ internal risk analysis, marketing can proactively focus on turning the risks into benefits in the message, and thus overcoming significant perceived consumer resistance. Kildonan strongly suggests that findings from behavioural economics are reconsidered and incorporated into the consumer protection framework in order to address the large imbalance between individual consumers and suppliers.

Kildonian UnitingCare has gone on to discuss in detail to discuss the implications of failing to appropriately consider the role of behavioural economics in influencing consumer protection policy.

The submission further suggests that

If consumer choice does not result in consumer benefit it may not be that the consumer is unsophisticated but that a stronger safety net is required to balance market failures. A failure to acknowledge that at times consumers may not act in a completely rational manner and protect their self interests may overlook vital consumer protections.

One could argue that the sub-prime market failure is almost a text book case of behavioural economics in action. People discount the future are influenced by framing and do not always act in their best interests. Low cost loans were offered by suppliers and accepted by consumers with little consideration of ability to

repay once the interest rate reflected the market rate after a set future time. The requirements to sell and meet targets, based on the attraction of commissions by suppliers and the dream of buying their own home by the consumer framed this transaction outside the pending future reality. The sub-prime market failure has shown that both consumers and suppliers may not act in their own best interests.

Consumers are locked into loans they can barely afford often living a hand to mouth existence. In America, once the property is sold in a market that has plummeted consumers risk losing their only asset at a discount price as well as being left with the balance of the debt the house sale could not clear. Similarly, some large financial institutions have experienced significant losses while most financial institutions have experienced a world-wide credit crunch that has escalated the price and limited the availability of credit across the industry. It may appear that some significant suppliers did not exhibit the sophistication necessary to protect their own self interest. Every major area of study has its critics, this should not deter from the overall merit of the behavioural economists findings. The Productivity Commission needs to consider and investigate behavioural economics in an unbiased manner as there may be applications for consumer protections that are currently not considered. Current markets depend on consumer choice as an expression of acting in consumers' best interests. If consumer choice does not result in consumer benefit it may not be that the consumer is unsophisticated but that a stronger safety net is required to balance market failures. A failure to acknowledge that at times consumers may not act in a completely rational manner and protect their self interests may overlook vital consumer protections.

Next I highlight components of the observations made by the Queensland Government. In citing the findings of the Australian Treasury¹⁴, in relation to important determinants of wellbeing and how consumer behavioural economics (CBA) can be used constructively in formulating a robust consumer policy framework

“CBA can be difficult to apply to some benefits of proposed action such as assessing the monetary value of life health and well-being. These harder to quantify benefits are important to balancing the cost benefit equation but can be neglected in the national CBA process.

In examining the assessment of costs and benefits in policy the Commonwealth Treasury's wellbeing framework recognizes that analyses of economic development which only take in income and which neglect other important determinants of wellbeing.

The behavioural economics approach treats key aspects of consumer decision making as endogenous originating from within the individual. While the classical economics approach treats key aspects of consumer behaviour as exogenous that is influenced by their external environment.

¹⁴ Australian Treasury (2004), Policy Advice and Treasury's Wellbeing Framework, *Economic Roundup*, Winter.

This means the behavioural approach can offer more insights into consumer decision making where neo-classical economics alone is unable to explain critical issues for consumer protection.^{15[39]}

In suggesting proper application of behavioural economics, Kildonian UnitingCare has made the following specific recommendations which I would like to endorse as inclusions into the operational objective

On the issue of behavioural economics Peter Kell argues that¹⁶

“....one of the key sources of the current frustrations about consumer protection policy is that much of it in this country is still based on a very limited and increasingly old fashioned view of consumers derived from a narrow economic model. We are still approaching consumer and competition policy based on a model, in fact, that I would argue at time is actively misleading about how consumers make decisions and how we consume. This has to change. This is our challenge, and our policies and messages for consumers will be better if this happens.

Behavioural economics, I do not think, has all the answers. But it is a very good place to start and it is about time that Australia caught up with the 10 or 20 years of thinking that has been going on in relation to this issue in other countries, notably the US.

There is an old joke about economists. An economist is someone who looks at something in practice and wonders whether it would work in theory. The traditional approach does not require empirical investigation and unfortunately that is how much of our approach to consumer behaviour in competition and consumer protection regulation has worked in Australia.

Though I am pleased to see that consideration has been given by the PC to behavioural economic theories, at least in principle, there appears to be so much focus on process that

¹⁵ Smith, R and King, S (2006) “*Insights into Consumer Risk: Building Blocks for Consumer Protection Policy*” Roundtable on Demand-Side Economics for Consumer Policy: Summary Report, OECD, Paris c/f Submission to Inquiry into Australia’s Consumer Policy Framework by Queensland Government

¹⁶ Kell, Peter (2005) “*Keeping the Bastards Honest – Forty Years On.....*” Speech delivered at the 2005 National Consumer Congress Melbourne March, p6

it is hard to see how these theories are likely to be incorporated into the practical application of the proposed policy framework. Others have commented on the process concerns perhaps at the sacrifice of outcomes.

The heuristics of decision-making; discrepancies in the interpretation of consumer conduct, notably switching conduct; and the significant segment of the community who are unable to make decisions in their best interests, despite provision of information and regardless of quality, makes this field a challenge when determining whether the effectiveness of competition is real or imagined, since all components of the market need to be working well for this to be the case.

I refer the PC to the submission by PIRAC Economic Consulting (Sub106); and to the submissions and work of others. Peter Kell CEO of ACA has also written and spoken in various arenas about the issue of behavioural economics, including at National Consumer Congress forums.

I refer to published frank views such as those of Peter Kell as CEO of Australian Consumer Association (ACA, the publisher of CHOICE) in two recent National Consumer Congresses regarding regulatory philosophy and echo Edmund Chattoe's^{17/18} challenging question as to whether economists and sociologists can indeed have meaningful dialogue.

I also refer to the work of Edmond Chattoe from the Department of Sociology University of Surrey, Guildford, UK, who has questioned whether sociologists and economists can communicate. I provide below an abstract and the introduction to from his 1995 paper and some pertinent arguments from the body of the paper.¹⁹

“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

¹⁷ Edmond Chattoe, Sociologist, University of Guildford, UK,

¹⁸ 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.

¹⁹ 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>

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. “

“Introduction

This paper arose as a result of a literature survey on the economic and sociological theories of consumer decision-making, in the early stages of a project to construct a computer simulation of the budgetary decision process. The original plan was to choose a suitable theory, implement it as a computer simulation model and use interviews and diary research to provide a rich source of data and suggestions for theory development. In fact, both the prevailing economic theory, and a large amount of sociological material proved unsuitable for this purpose. The process of understanding why much of this theory was unsuitable suggested an important role for computational simulation and cast some interesting highlights on the methodological differences between economics and sociology. As an economist recently arrived in a sociology department, I realised that my attempts to explain myself and understand others were themselves a suitable object of social research. This paper is both a result of that process and a contribution to it.

The paper is divided into three parts. In the first, the economic possibilities for consumer theory are considered, and the deep difficulties of operationalisation and grounding are addressed. In the second part, the contributions of sociology are considered. It is argued that these are currently non-theoretical, at least by economic criteria, but nonetheless extremely important. (Economics has understressed their importance because they cannot readily be fitted into its theoretical framework, but this reflects neither their true importance, nor an accurate assessment of the defensibility of the resulting economic theory.) Finally, the possibility for a reconciliation of both views is suggested within the (non partisan) computational framework.

Methodological prescriptions are often unsatisfactory because they simply descend into rhetoric. It is almost impossible to decide on the correct way to do science that has yet to be done. Instead, I shall consider science that has already been done using the traditional methodology and explain how it has led to the paradoxes that now exist. In suggesting an alternative and illustrating the way in which it avoids these paradoxes, I shall argue that it is therefore a better way to

proceed.”

Chattoe explains that the economic theory of consumer choice

Posits a preference ordering over a specified set of goods a set of ‘axioms of rationality: and a budget constraint

He refers to textbook arguments that are used to suggest the choice of axioms based on ‘common sense’ or plausibility rather than the demands of theory

In discussing the economic view Chattoe speaks of levels of risk in applying popularly held economic consumer theory. Limitations are least damaging; removal of limitations involves straightforward generalization of the theory and constitutes a large part of the normal science practiced by consumer theorists

However, by contrast, Chattoe refers to genuine concerns about the risks of relying on obscurities and paradoxes, referring to not simply the state of development of the theory, but its suitability as a description of real phenomena.

Says Chattoe:

Paradoxes are the most damaging type of difficulty since they suggest that the theory may actually be incoherent rather than simply incomplete or unclear.

These grounding theories can be extrapolated to discussion of such issues as advocacy that is not grounded in consumers. David Tennant believes that such models of advocacy can be ineffective as well as potentially dangerous.²⁰

These further extracts from Chattoe’s paper may be pertinent to the current and similar enquiries:

²⁰ Tennant, David (2006) “Taking the consumer out of advocacy” Published speech delivered at 3rd National Consumer Congress Melbourne March. Rebuttal of Dr. Chris Field’s paper “Consumer Advocacy in Victoria delivered at the same congress.

In fact some models, though not typically in consumer theory, permit agents to estimate the coefficients in a common and correct model of the world, but this is an extremely restricted sense of learning, which is at least as much the process of establishing a model by which the world is to be understood.

Economists often answer questions that bear a striking resemblance to those we might really want answered.

It seems unlikely that sociologists will be particularly keen to fit their theorising to the structure of a model which was unable to tackle the problem it obliges them to solve.

In fact, there is ample evidence that it will not, at least at the level of psychology (ref 14).

Historically, sociologists have never paid a great deal of attention to consumption. ... When attention was devoted to actual consumption behavior, it was most often a branch of social pathology, concerned with social problems of insufficient nutritious food, excess alcohol, inadequate health care, too many cigarettes. Only rarely did the sociological classics examine consumption for its own sake." (ref 21, page 1).

Furthermore, it is notorious that interview data is considered, without adequate argument, to be inferior to that obtained from other sources. Hall and Hitch (ref 10) found that "cost-plus" pricing was extremely widespread among firms, yet marginal pricing is still almost universal in theory building.

Simulation is often criticised for producing models that are "too complex" or that are able to "show anything". This is not a valid criticism of simulation, rather of the fact that simulation has an embarrassing habit of revealing questions we can't answer. Mathematical models don't solve this problem, they simply allow us to ignore it."

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

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

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

Each recommendation for the proposed framework is discussed below:

“ensure that consumers are sufficiently well-informed to benefit from, and stimulate effective competition”

This is an important goal and one that has received much attention in dialogue between stakeholders and various public inquiry initiatives, including the PC the AEMC and certain state enquiries such as the VPLR Committee’s ADR Discussion Paper and then VPLR Commission’s Civil Justice Review.

In discussing neo-classical economics Vijaya Nagarajan²¹ acknowledges that:

“market failures can result where the consumer is not equipped with sufficient information to participate effectively in the market or where the consumer may be misled or deceived. Accordingly consumer laws have been focused on disclosure or on consumer protection.”

Yet the Chairperson of the AEMC commented at both the Melbourne and the Bendigo public meeting forums on 4 and 5 September 2007 respectively, that that effective competition could mean that:

“competition is sufficient to keep the marketplace in balance, even if every customer is not necessarily well informed.”²²

One of the submissions to the PC’s current Review was from Vijaya Nagarajan.²³ In her submission Ms Nagarajan explores the concept of a:

²¹ Nagarajan, Vijaya (2007) Response to PC’s Issues Paper

²² CUAC September Quarterly “AEMC Review of Effectiveness of FRC

²³ Vijaya Nagarajan, BEc LLB (Macq), LLM (Monash) is a Senior Lecturer at Macquarie University. She teaches Trade Practices Law and Business Organizations. Her research interest include Regulation; Competition Law, Commercial Law and Legal Education Her submission to the PC’s Issues Paper explores some important social, consumer protection and regulatory principles and asks some challenging questions about perceived consumer sovereignty, competition policy and neo-classical economic theory.

“A consumer fully armed with relevant information, who is articulate and rational (as) a necessary assumption of the neo- classical model and its importance. (This) has been long acknowledged.”

Perhaps simple acknowledgement insufficient to make a difference or is consumer empowerment no more than a concept in competition policy?

Could it be the assumption that competition will be beneficial to the consumer making competition law more palatable globally as Ms Nagarajan suggests, or is that assumption merely artificial and more about theoretical neoclassical economics?

As proposed by Ms Nagarajan, hand in hand with privatisation of previously public monopolies, comes a:

Competition law and policy is now accepted as an essential tenet of a market oriented economy with many developing and transitional countries specifically adopting competition laws that mirror those in developed countries. The assumption that competition will be beneficial to the consumer makes competition law all the more palatable globally across all sectors of production.

Privatisation of public monopolies such as telecommunications electricity water and other essential services is being actively pursued across the world aimed at increasing competition in all sectors. However hand in hand with these changes has been a clear acknowledgement that market failure is common and competition does not guarantee that the consumer's interests are met thereby requiring rigorous and often specifically targeted consumer protection laws.”

To what extent is the consumer actually an active participant using the price mechanism effectively to obtain goods or services?

Ms Nagarajan refers to:

“The regulatory space is now occupied by a myriad of parties including public and private bodies using a variety of strategies such including the traditional litigation route as well as resorting to individual blogs all of which have the power of regulating the conduct of business”

It is valid to question how real that theoretical consumer power may be within the regulatory space. Do consumers really have any say at all apart from cursory involvement in consumer consultative processes? Is the voice of the people being heard, and if so is responsiveness up to community expectations?

Please see my discussion under PC Draft Recommendation 11.1 “*Empowering Consumers*” and reference to the compelling arguments presented by VLAS for formal regulation in a timely way as argued by VLAS in their original submission to the PC Issues Paper (sub79) and to other arenas, including the VPLR Committee’s ADR Discussion Paper.

Ms Nagarajan discusses manufactured confusion in speaking of bundled offers and other confusions that develop despite the provision of information.²⁴ This is further discussed elsewhere.

Meaningful consumer engagement

Consistent with the theory models of best practice leadership embraced by *Jamison (2005)*²⁵ will the politicians and bureaucrats of Australia recognize that the foremost leadership skill recommended is the ability to:

“get on the balcony and see what is really going with operations politicians consumers and others a meaningful engagement with all stakeholders.”

Current strategies in heralding reform measures are thought by many to be lacking in the department of meaningful dialogue. Not that the dialogue is not occurring, but there are queries about how meaningful that dialogue is; how well the consumer voice and other voices are being heard; the extent to which airing and meaningful reciprocal dialogue is occurring with stakeholders in time to make a difference before new regulations are put in place.

One way to encourage proper community consultation and input is to make informal “stitch-in-time” submissions more welcome within and outside consultative forums so that early signs of market failure can be detected and addressed before a public enquiry becomes mandatory.

²⁴ Nagarajan, Vijaya, (2007) Response to PC’s Issues Paper

²⁵ 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

Many consumers and other stakeholders wish to be more involved in policy inputs. The pace at which inter-related initiatives expect input within unreasonable competing deadlines means that neither consumers nor community organizations, nor other stakeholders have a reasonable opportunity to participate.

There is insufficient online access to public policy documents and difficulty in seeking clarification from prescribed agencies about jurisdictional boundaries and accountabilities. This should be addressed to promote a more open and transparent government.

In a climate of rushed policy change in many arena, such as is envisaged within the energy industry with price deregulation around the corner, despite overall market readiness in both gas and electricity markets, and in the light of the tensions and apprehensions apparent on both sides of the fence, all stakeholders are begging for more certainty and stability; improved meaningful dialogue and longer timelines to give effect to the theory of stakeholder consultation.

The current energy market in Victoria at least, and now to some extent also in South Australia, it does not seem so. Wholesale prices are excessive. Market structure and market rules are rendering it impossible for smaller retailers to either obtain suitable contracts or to physically obtain gas, for example.

The impacts of generator-retailer vertical and horizontal integration are under-recognized and causing havoc in the competitive market.

Bureaucrats appear to be supporting the notion of competitive (energy) markets based on flawed conceptual thinking. The public are not fooled – and the entire nation stands to pay an unacceptably high, irreversible price down the track.

Is there a case for enhancement of evaluative skills governance and accountability amongst those who make far-reaching decisions such as energy price deregulation in a volatile and unstable market fraught with market power dominance; restrictive rules and other factors impeding proper competition in both gas and electricity markets, given the impact of being able to offer dual fuel products.²⁶

ERIG has already recognized gaps in AEMC governance and staffing issues. Will eroded faith in the AEMC's ability to make considered and well-informed decisions ultimately contribute to collapse of community confidence such that there are no veins left to revive? Clearly the decisions are made, but the community is not ready to accept the validity of the assumptions made, the conclusions drawn and have rejected the paucity of the data relied upon, save for market participants who stand to enhance market dominance.

²⁶ See for instance the submissions by Victoria Electricity to AEMCs First and Second Draft Reports raising these issues – which were not so much as acknowledged by cursory response; and the submission by the ACCC to the AEMC's Second Draft report cautioning against making assumptions about the reasons for barriers to competitive growth

What can the community at large expect of future accountabilities from top down and bottom up? When will the gaps be addressed with accountability and how? These are pertinent questions from the community that require investigation and answers – in the public interest.

The risk is being passed on to consumers along with the price. How long can this go on without a recession developing?²⁷

Though the PC has now made some recommendations for improved access to information, this alone will not solve the issue of inability to effectively participate in the market for those, for example with literacy issues, cognitive impairment; intellectual or psychiatric disability, isolation from information sources; or other barriers.

*Ensure that goods and services are safe and fit for the purposes for which they were sold*²⁸

This is a very worthy goal. It is really very difficult to know how to comment till the policy tools are identified.

*Prevent practices that are unfair or contrary to good faith*²⁹

²⁷ See Kilian, Lutz (2007) “*The Economic Effects of Energy Price Shocks*” abstract found at <http://www-personal.umich.edu/~lkilian/jel052407.pdf> (with acknowledgements to Paul Edelstein and others) Poses such questions as *Why do energy price increases seem to cause recessions, but energy price decreases do not?*

²⁸ I note gaps in specific recommendations to ensure that services, especially fungible services such as energy, are delivering as expected (for example heated water, which in any case energy providers are not licenced to sell, but rather simply the energy that heats, chargeable to Owners Corporation if the individual consumption of such energy cannot be measured with an instrument (meter) designed for the purpose,. Note water meters are not suitable instruments through which energy can be measured. Such practices will become explicitly illegal and invalid when existing utility exemptions are lifted. This matter is discussed under Ch 8

²⁹ On the issue of good faith, please see further comments about discrepant interpretations of such phrase by the Courts and others, and refer also to the views of stakeholders on the use of this phrase. Perhaps, consistent with the recommendations of the Victorian Bar to the VPLRC’s ADR Discussion Paper, a definition of “a duty to act honestly” (e.g. to minimise cost and delay) and secondly “a duty to assist the Court in achieving the overriding purpose” (e.g. “to conduct litigation in an appropriate manner” may be a more appropriate way of phrasing the overall guideline of preventing practices that are “unfair or contrary to good faith”

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 definition³⁰ that the

"duty to act in good faith"

may be problematic as a concept

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

Perhaps the PC as well as VPLR Committee; the VPLR Commission would take note of the proposal by the VB that the overriding obligation, if imposed on all participants, and not just the parties and their lawyers, the "*over-riding obligation*" should be:

- *A duty to act honestly and*
- *A duty to assist the Court in achieving the overriding purpose –*
that is
 - *to minimize cost and delay*
 - *and to conduct litigation in a proportionate manner*

The VB has raised some valid objections to aspects of the Civil Justice Review's Exposure Draft. These include issues relating to

³⁰ 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].

a. first the introduction of a statutory overriding purpose;

b. secondly the introduction of statutory overriding obligations imposed on all participants in the civil justice system.

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

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

Comment

If such a proposal is adopted, I would be particularly concerned that if the proposed statutory overriding obligation is to be extended to this category of persons, this would

*"in effect remove the immunity that such persons currently enjoy."*³¹

In addition, the VB has suggested that the ADR process can occur before or during proceedings, and participants contemplating court action and active engagement in the ADR process need to be clear of the obligations and expectations of them before embarking on the process. I support that view.

³¹ See *Cabassi v Villa (1940)* 64 CLR 130 at 141. c/f Victorian Bar's Submission to Victorian Parliamentary Law Reform Commission's Civil Justice Review Exposure Draft, p 3 2.6 and 2.7

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

Accordingly the VB³² has suggested a simpler requirement to act honestly and reasonably. Factors such as cost, delay, complexity and formality are some of the impediments to accessing justice that the Victorian Parliamentary Law Reform Committee Discussion Paper has already identified.

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

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

As mentioned previously, I would prefer to see the term “*good faith*” phrased differently as recommended by the VB and discuss this shortly.

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

*Meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage*³³

I would like to see included the phrase

³² Victorian Bar. (2007) Response to Victorian Parliamentary Law Reform Committee’s ADR Discussion Paper. See also Victorian Bar submissions to Victorian Parliamentary Law Reform Commission’s Civil Justice Review.

³³

“inarticulate vulnerable disadvantaged and culturally or linguistically diverse.”

Both vulnerability and disadvantage tend to mostly conjure up financial hardship and when arguments are raised to implement policies such as deregulation, this appears to be the focus of attention, diverting attention away from other forms of disadvantage and vulnerability. Whilst community protection through financial hardship policies and enhanced community service obligations should be robust this is not the only area of need.

Including the term *“inarticulate”* more overtly includes those with language, or cognitive barriers, psychiatric or intellectual disability, or for some other reason finds it too challenging to actively seek consumer protection.

In any case the terms vulnerable and disadvantaged though discussed as concepts in the PC’s Draft Report are not incorporated into the objectives or sufficiently defined to leave no room for discrepant interpretations.

At a recent 2008 Public Hearing of the VPLR Committee’s Inquiry into ADR, several community groups³⁴³⁵ 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 Review was focused on provisions for culturally and linguistically diverse groups, including indigenous Australians.

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

The VLAS submission convincingly argues that there is need to create space for

³⁴ 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

³⁵ 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

- *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.*

VLAS³⁶ has pointed out their experience that:

The needs of remote Indigenous Australians are often emphasised or prioritised in terms of funding at the expense of the needs of urban/regional Indigenous Australians.

Government intervention should acknowledge that both remote and urban/regional Indigenous Australians have needs that should be met.

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

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.³⁷

Another specialist group accessing ADR processes was youth groups requiring youth services or youth justice facilities.³⁸

³⁶ VLAS (2007) Submission to VPLR Committee's ADR Discussion Paper

³⁷ Crime Victims Support Association (2008) Presentation by Mr. Noel McNaramara, CEO, in support of written submission to VPLRC's Inquiry into Alternative Dispute Resolution

³⁸ 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

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

The exemplary practical experience of VLAS is working effectively with marginalized groups is not all that qualifies this body to make recommendations for reform.

Their experience in attempting to advocate for more inclusive and realistic policies has frequently been thwarted by cost considerations or mainstream political objectives. These factors have the potential effects of excluding significant improvements.³⁹

The VLAS submission eloquently discusses merits of formal equality as superior to substantive equality. Equality and fairness principles and also discussed with suggestions that challenge the current system of disproportionate penalties for the poor and the role of a combined application of formal and substantive equality.^{40/41,}

Systemic racism is also discussed in the context of over-representation of Aboriginal people in the criminal justice system.

VLAS recommends that systemic discrimination has to be strategically addressed and makes specific recommendations in terms of Koorie ideas and values which should be considered as a policy or program is developed.

A crucial component of the various VLAS submissions made is recognition that:

“some western assumptions about communication and culture may handicap an understanding of the importance of other cultural approaches.”

The same arguments may be applicable to other marginalized groups, such as those suffering from psychiatric disorders, with or without substance dependence; intellectual disability; cognitive impairment for a variety of reasons, including psychiatric or intellectual disability.

Though 60-80% of those with psychiatric disability⁴² (also have a dual diagnosis label (viz. substance dependence).⁴³

³⁹ Paraphrased from Victorian Aboriginal Legal Service (VALS) written submission to VPLR Committee’s ADR Enquiry, p4

⁴⁰ Ibid VALS submission, p4

⁴¹ Ibid VLAS submission p4

⁴² Whether or not formally diagnosed, bearing in mind for example that it can take over a decade to diagnose bipolar disorder an incurable serious mental illness).

A further marginalized group that deserve specialist attention are international students whether fee-paying, or Commonwealth of Australia stipends,⁴⁴ other student stipends awarded to those from developing countries. See further discussion under access to justice, legal aid and legal advice.

I support and directly cite from CUAC's July 2007 submission to the AEMC Issues Paper⁴⁵

4.6 Impact of competition on vulnerable customers

Which customers are likely to be considered vulnerable customers? What factors contribute to customer vulnerability?

There has been significant work done in recent years to identify vulnerable consumers. A good working definition has been formulated by Consumer Affairs Victoria and is 'a person who is capable of readily or quickly suffering detriment in the process of consumption.'⁴⁶

It is important to remember however that vulnerability is not just about the consumer, but also about the market's perception of the consumer:

The 'market dimension' of consumption incorporates the motivations of buyers and sellers, consumers' information requirements for successful purchases and the capacity of markets to 'fail' in ways that are detrimental to consumers.

⁴³ Substance dependence (addiction), abuse and use are not synonymous terms. In 1991 T. D. Boscarelli identified a gene for addiction. Addiction is a serious mental illness also in its own right and frequently seen in combination with other psychiatric disorders. This condition, whether or not comorbid with other psychiatric illness can lead to criminal activity and the need for targeted specialist and sensitive inputs, including proper access to non-court interventions

⁴⁴ 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.

⁴⁵ CUAC Response to AEMC Issues Paper.

⁴⁶ Consumer Affairs Victoria (CAV) (2004) Discussion Paper *What do we mean by 'vulnerable' and disadvantaged' consumers?*, , p1, available at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/\\$file/vulnerabledisadvantaged.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/vulnerabledisadvantaged.pdf) c/f CUAC's Response to Issues Paper citation 9, page 11

The 'personal dimension' of consumption incorporates those attributes and circumstances of individuals that affect how purchase decisions are made (particularly access to and use of information) and how a consumer is positioned in transactions relative to sellers.

Variables in each of the market and personal dimensions affect consumer vulnerability, but it is not necessary for there to be problems in both dimensions for concerns about vulnerability to arise. Consumers with normal capacities and in 'ordinary' personal circumstances may still be susceptible to detriment, due to the characteristics of a particular market, product or transaction.⁴⁷

A key group of vulnerable consumers is those who are prone to financial hardship. The Commission should also be aware of the demographics in Victoria that indicate a very high proportion of the population is on a fixed or low income:

UNSW Centre for Social Policy Research, under the auspices of the Committee for Melbourne Utility Debt Spiral Project, found a strong correlation between serious financial deprivation and utility stress. Households experiencing utility stress account for:

- *31 per cent of Victorians aged 15 or over hold a concession card;*
- *By household, approximately 37 per cent of Victorian households have at least one person in the household who is a concession cardholder;*
- *43 per cent of concession cardholders are aged 65 and over; and*
- *In some areas of the state, notably East Gippsland and parts of Central Victoria, the number of concession card holders can be over 40 per cent of the local population.⁴⁸*
 - *70 per cent of all households suffering financial hardship;*
 - *25 per cent of all households in income poverty; and*
 - *83 per cent of all households suffering both financial hardship and income⁴⁹*

⁴⁷ CUAC (2007) Response to Issues Paper citing CAV Discussion Paper *What do we mean by 'vulnerable' and disadvantaged' consumers?*, 2004, p1 *ibid* CUAC, in Response to AEMC Issues Paper, AEMC; June; cit 10, p1 found at [http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/\\$file/vulnerabledisadvantaged.pdf](http://www.consumer.vic.gov.au/CA256902000FE154/Lookup/CAV_Publications_Reports_and_Guidelines/$file/vulnerabledisadvantaged.pdf)

⁴⁸ *Ibid* CUAC Response to AEMC Issues Paper

Temporary Hardship

I reiterate the issues raised by CUAC concerning temporary financial hardship issues in their original response to the AEMC Issues Paper

In relation to temporary financial hardship CUAC has stated that it is not possible to develop a complete check-list of reasons for why consumers fall into temporary financial hardship.

CUAC cites research that:

“Certain characteristics have a more pronounced correlation to utility stress than others.”⁵⁰

However in relation to temporary financial hardship, CUAC has pointed to research showing that:

“Consumers can experience hardship for various but equally critical reasons (interest rate rises that lead to higher mortgage repayments loss of a job family break up or a sudden unexpected bill for car repairs to name but a few possible scenarios).”⁵¹

First timers can be “inexperienced in dealing with customer assistance schemes. These customers are very dependent upon the response they receive from energy retailers as their situation often means that they are not linked to the state concession system

Centrelink or other welfare/customer assistance schemes.⁵² 14

Research has demonstrated that retailers’ inflexibility when negotiating payment plans can be a cause of severe utility stress and imminent disconnection. For customers with

⁴⁹ Dept of Human Services (2007), *State concessions and hardship program 2005-06*, March, p8
ibid c/f CUAC Response to AEMC Issues Paper p11, cit 11

⁵⁰ Ibid CUAC (2007) Response to Issues Paper, p12

⁵¹ Ibid CUAC Response to Issues Paper, p12 AEMC Retail Competition Review p 12

⁵² Rich, N and M Mauseth, M, *Access to Energy and Water in Victoria – A research report*, CALV p64-65 citation 4, AEMC Issues Paper Review of Effectiveness of Retail Competition in the Gas and Electricity Markets c/f CUAC Response to Issues Paper, p12 AEMC Retail Competition Review

temporary payment problems an affordable plan can be all that is needed to solve the problem.⁵³

Chronic Hardship

In their response to the Issues Paper CUAC had identified the customer group that included customers with low income levels experiencing a long-term struggle to meet basic household expenses (housing, food, transport and utilities).

CUAC pointed out that this group may not always find it impossible to pay their energy bills:

“...but they may often forego other essentials goods or services to pay for energy, as well as under- consuming as a way of making the service more affordable.

A key issue for this customer group is that only measures that address the affordability of energy are going to alleviate the problem. There are, however, many ways of addressing affordability, including reducing the cost of energy for this customer group, reducing consumption levels through improved energy efficiency and improving direct financial assistance or income levels.⁵⁴

St Vincent de Paul Society Victoria told the Victorian Committee of Inquiry into energy hardship that between 2001-02 and 2003-04 there was a 230% increase in utility assistance provided to consumers¹⁵. The Commission should take care that any changes to the safety net arrangements do not simply shift responsibility from the retailer to the community sector.⁵⁵

The primary - and a very valuable - benefit to consumers is the protection the standing offer provides consumers against price volatility. That has not been a major concern in the past, given the stability of wholesale market prices, but it is certainly an issue for the future.

Exposing residential consumers, who are least well prepared to manage that risk, would certainly imperil access to affordable energy.

⁵³ N Rich and M Mauseth, (2004) *Access to Energy and Water in Victoria – A research report*, CALV and CUAC 2004, p 64-65.

⁵⁴ Ibid CUAC (2007) Response to AEMC Issues Paper, p12 p 12

⁵⁵ StVdePSoc (2005) Submission to Committee of Inquiry into Financial Hardship of Energy Consumers June; p15, available at [http://www.doi.vic.gov.au/doi/doielect.nsf/2a6bd98dee287482ca256915001cff0c/3bf666a8e99340ecca257030001632f7/\\$FILE/St%20Vincent%20De%20Paul%20Society.pdf](http://www.doi.vic.gov.au/doi/doielect.nsf/2a6bd98dee287482ca256915001cff0c/3bf666a8e99340ecca257030001632f7/$FILE/St%20Vincent%20De%20Paul%20Society.pdf) c/f CUAC Response to Issues Paper July 2007 AEMC Retail Competition Review

Another important and often overlooked has been the facilitating role the standing offer provides to set the ROLR price. Industry has complained about the costs incurred in determining the price of a standing offer, but neglects to mention that having a ROLR safety net requires a similar process regardless.

The ESC's decision in identifying the standing offer terms and conditions points out both its value in protecting vulnerable consumers, as well as endorsing the rigour with which it has been set. The ESC's reasoning is worth citing in full:

"... but they may often forego other essentials goods or services to pay for energy as well as under-consuming as a way of making the service more affordable.

SECTION 2 Part 2

OVERARCHING OBJECTIVES IN RELATION TO OF CORPORATE SOCIAL RESPONSIBILITY AND THE PUBLIC INTEREST TEST

Comment:

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"⁵⁶

Such gaps appear to be include the upholding the National Consumer Policy (NCP) in relation to those less fortunate requiring social welfare service provision or living in regional areas, and secondly the broader principles of good health and community provision (*refer to SCC Findings 2000*).

"The Senate Select Committee found that social services were not shown to improve during NCP.⁵⁷ 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.

⁵⁶ 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>

⁵⁷ 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

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

In its submission to the Senate Select Committee, PILCH made the following statements in its Executive Summary Overview outlining the rationale for enhanced corporate social responsibility⁵⁸. These considerations need to be taken into account when considering the parameters of a consumer policy framework for Australia.

Executive Summary

1.1 Overview *This Paper examines the nature, extent, scope and incidence of corporate social responsibility in Australia. It also considers the legislative and policy frameworks that variously encourage or discourage corporations with respect to conducting their business and affairs in a socially and environmentally responsible and sustainable way.*

1.2 *The Paper concludes that current frameworks do not promote, and in some instances, constitute obstacles to, corporate social responsibility. Given the capacity of corporations and corporate conduct to either promote or derogate human rights and social, environmental and community interests, the Paper proposes a range of legislative and policy initiatives – including in relation to directors’ duties, reporting and disclosure requirements, and government procurement – to ensure that corporations consider the interests, values and rights of stakeholders and the broader community.*

⁵⁸ PILCH (2005) Submission to the Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility (July)
Found at
http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/submissions/sub04.pdf

Findings

In this Paper, the term ‘corporate social responsibility’ is used to refer to corporate decision-making, management, practice, performance and reporting which is:

- *Ethical*
- *Sustainable and*
- *Has regard to local, social, community and environmental interests as well as financial considerations*

The impact and influence of corporate activity is significant, widespread and increasing. Corporations have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to impact harmfully on the human rights and lives of individuals and communities.

Recognising these impacts and spheres of activity and influence, particularly as they pertain to the realisation of fundamental human rights, there is a strong public interest in the conduct of business and corporate affairs to impact positively not only on relevant financial interests, but also on relevant social and environmental interests.

While the extent of corporate social responsibility in Australia has increased significantly over the last decade, it still remains low. Less than 10 per cent of corporations demonstrate a developed understanding of the relationship between corporate social responsibility and business.

There is a manifest need for policy and incentives to promote corporate social responsibility and encourage companies to contribute to the realisation of human rights within their spheres of activity and influence.

Section 181 of the Corporations Act, which requires directors to act in good faith in the best interests of the company and for a proper purpose, only permits corporations to have regard to, and act in the interests of, social, environmental and broader community interests in so far as those interests are related to, or likely to bear on, the financial interests of shareholders.

As previously mentioned, one of the submissions to the PC's current Review of Australia's Consumer Policy Framework was from Vijaya Nagarajan.⁵⁹ In her submission Ms. Nagarajan explores the concept of a:

"A consumer fully armed with relevant information, who is articulate and rational (as) a necessary assumption of the neo-classical model and its importance. (This) has been long acknowledged."

Is acknowledgement alone that consumer empowerment is crucial enough to make a difference or is consumer empowerment no more than a concept in competition policy?

Is the assumption that competition will be beneficial to the consumer making competition law more palatable globally as Ms Nagarajan suggests, or is that assumption merely artificial and more about theoretical neoclassical economics?

As proposed by Ms Nagarajan, hand in hand with privatisation of previously public monopolies, comes a:

Competition law and policy is now accepted as an essential tenet of a market oriented economy with many developing and transitional countries specifically adopting competition laws that mirror those in developed countries. The assumption that competition will be beneficial to the consumer makes competition law all the more palatable globally across all sectors of production. Privatisation of public monopolies such as telecommunications electricity water and other essential services is being actively pursued across the world aimed at increasing competition in all sectors.

However, hand in hand with these changes has been a clear acknowledgement that market failure is common and competition does not guarantee that consumer's interests are met thereby requiring rigorous and often specifically targeted consumer protection laws

⁵⁹ Vijaya Nagarajan BEc LLB (Macq), LLM (Monash) is a Senior Lecturer at Macquarie University. She teaches Trade Practices Law and Business Organizations. Her research interest include Regulation; Competition Law, Commercial law and legal education Her submission to the Productivity Commission's Issues Paper explores some important social, consumer protection and regulatory principles and asks some challenging questions about perceived consumer sovereignty, competition policy and neo-classical economic theory.

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

VLAS argues for a strong effective suite of regulatory measures as being necessary in relation to consumer policy⁶⁰

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

I reproduce the astute observations made by VLAS in their submission to the PC Issues Paper to reinforce the view that competition policy has never adequately protected marginalized and vulnerable groups.⁶¹

“Competition policy is premised on the primacy of competition and market forces to produce efficiency and quality outcomes. The extent of the economic benefit of these policies to the economy are contested with economists such as John Quiggins arguing the benefit is only 0.2 % of GNP. Competition policy has never adequately included protection for vulnerable groups, such as socially, economically and culturally marginalised groups.

Even proponents of competition policy have acknowledged that the supposed aggregate benefits may not be enjoyed equally. Within this policy frame any form of Government regulation may be construed as a cost to business.”

In principle, the Victorian Department of Justice⁶² recognizes the need to ensure that civil procedures better support the focus of modernizing justice, protecting rights and addressing disadvantage. In addition, effective processes need to be available to support prompt and fair resolution of commercial dispute.

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

⁶⁰ VLAS (2007) Response to PC’s Issues Paper (May);

⁶¹ Ibid VLAS (2007) p1

⁶² Department of Justice, (DOJ) (2004)Victoria New Directions for the Victorian Justice System 2004-2014: Attorney-General’s Justice Statement (2004) 9

enhance or have the potential to hamper access to justice, or any regulatory measure that may, in the interests of lightening the burden on the courts for example, impose obligatory conciliatory demands on the public, and particular those most affected by the power imbalances that exist – the “*inarticulate, vulnerable and disadvantaged.*”

“Market forces are global but the social fallout that policy makers have to manage are local”⁶³

That was the opening line of Chapter 5 of the SSC Report on the Socio-Economic Consequences of Competition Policy.⁶⁴

At 9.30 AM on 1 November 1999 a group of most distinguished participants met to discuss a range of issues associated with competition impacts on the community at large, and on social and welfare parameters in particular applying the public interest test. That committee was the SSC on the Socio-Economic Consequences of the NCP.

Though the issues concerning the ADR regulatory proposals under consideration by the VPLR Committee are not concerned with competition policy, some of the conclusions drawn by that SSC apply to all areas where public policy and regulatory reform are under contemplation. The issues raised should certainly be of interest to the PC. As this submission is targeted at both Inquiries, I hope inclusion of material outside the direct parameters of each will be accepted in the spirit intended – to inform and highlight further debate about the specific tools that will be required to improve the consumer protection framework, and to reinforce what has already been said so eloquently by others.

The Chairman opened the proceedings with an outline of the enormous number of issues that needed to be discussed in examining the operation and administration of the NCP on the community and environment and to receive feedback on the issues raised in the committees interim report and in the reports from other inquires, and to look for possible solutions.

The Committee was given the impossible task of not only discussing the issues on the table, but also of presenting its report within the last sitting day in December 1999, which at a guess would have been within a five week period. That was eight years ago almost to

⁶³ 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

⁶⁴ 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 day. The witnesses were asked to give evidence and were offered indemnity under parliamentary privilege to encourage frank discussion.

It is now 2008. Twenty-first century community expectations are not what they were a decade or two ago. This is a consumer-driven society. Government policy at all levels needs to recognize that.

“Competition goals” and fiscal economic ideologies will not in themselves serve to appease community anxieties. What is more, measures to meet fiscal goals and economic reforms based on reducing regulatory burdens at all costs will quite simply not serve to engage community support for policies that may be transparently ignoring community need, expectation and proper access to justice.

In discussing cost implications of effective consumer protection reform, VLAS⁶⁵ has effectively argued that:

The ‘playing field’ is far from level hence strong effective consumer policy is a necessity. Consequently, it is with some concern that we note that the Issues Paper appears to start from the premise that regulation may be too expensive.

The framing of this inquiry suggests that regulation is unaffordable and ineffective compared to empowerment. More generally the terms of reference imply scepticism about the need to protect consumers and a concern that it ‘costs too much’ to protect consumers by regulation.

Since the Commonwealth Government removed \$120 million in 1996 from the legal aid system, civil legal aid in Australia has been virtually non existent. The Commonwealth Government appears to have forgotten that not only is effective regulation necessary but effective enforcement must also be available. People on low incomes need access to the civil justice system including consumer protection if this is to be a reality.

The key rationales for Government intervention to empower and protect consumers are social justice and protection of disadvantaged members of the community.

VALS adds that Government intervention to empower and protect consumers is necessary. VALS supports formal regulation of the market through legislation etc as opposed to market self regulation.

This is because the theory of market self-regulation is flawed in practice when it comes to minorities, such as Indigenous Australians, and poor people. In reality,

⁶⁵ VLAS (2007) Response to PC’s Issues Paper, May

Indigenous Australians do not have enough leverage to effect market self-regulation because they are a minority, which undermines any notion that they have choice or have influence to effect changes that protect their rights.

It is important that formal regulation occurs so that standards are established and redress is available before it is too late.

VLAS⁶⁶ seeks to answer questions about what the balance should be to ensure that consumer's decisions properly reflect their preferences (empowerment) and procribing particular outcomes (protection) as follows:

<i>Rationales for Government intervention</i>
<i>The key rationales for Government intervention to empower and protect consumers are social justice and protection of disadvantaged members of the community. It is VALS' experience that the needs of remote Indigenous Australians are often emphasised or, prioritised in terms of funding, at the expense of the needs of urban/regional Indigenous Australians. Government intervention should acknowledge that both remote and urban/regional Indigenous Australians have needs that should be met.</i>
<i>VALS adds that Government intervention to empower and protect consumers is necessary. VALS supports formal regulation of the market through legislation etc as opposed to market self regulation. This is because the theory of market self-regulation is flawed in practice when it comes to minorities, such as Indigenous Australians, and poor people. In reality, Indigenous Australians do not have enough leverage to effect market self-regulation because they are a minority, which undermines any notion that they have choice or have influence to effect changes that protect their rights. It is important that formal regulation occurs so that standards are established and redress is available before it is too late.</i>
<i>Regulation can lead to complexity and VALS argues that regulation that is not complex but simplified will benefit both consumers and those in the consumer industry. Please see further discussion of the issue of simplification of the system below.</i>
<i>Discussion about a consumer policy framework occurs within a Government policy frame which includes National Competition policy. Such policies are demonstrably unfair to disadvantaged people as they presume the presence of a</i>

⁶⁶ Ibid VLAS (2008) Response to CP' Issues Paper, p1

level playing field.

The 'playing field' is far from level hence strong effective consumer policy is a necessity. Consequently, it is with some concern that we note that the Issues Paper appears to start from the premise that regulation may be too expensive.

The framing of this inquiry suggests that regulation is unaffordable and ineffective compared to empowerment. More generally the terms of reference imply scepticism about the need to protect consumers and a concern that it 'costs too much' to protect consumers by regulation.

Since the Commonwealth Government removed \$120 million in 1996 from the legal aid system, civil legal aid in Australia has been virtually non existent. The Commonwealth Government appears to have forgotten that not only is effective regulation necessary but effective enforcement must also be available. People on low incomes need access to the civil justice system including consumer protection if this is to be a reality.

The dichotomy between empowerment and protection posed by the Issues Paper is a limiting one. Both effective empowerment and regulation are essential if consumers in aggregate and disadvantaged consumers in particular are to be better protected and better prepared.

Consumers who are culturally and/or economically disadvantaged already face a range of disincentives from accessing empowerment or regulatory regimes.

However, the complexity of products, services and standards make it a challenge for most consumers not simply disadvantaged ones.

Even if it can be proven that there is no cost benefit to the Government, or to business, of having regulation which protects consumers there would still be a justice benefit. Where that justice benefit was shared at least proportionally by vulnerable groups it could be described as a fairer system.

VALS argues that if the empowerment and regulation strategies simply try to incrementally tinker with the existing system then regulation will become more expensive and empowerment will become more difficult and also more expensive.

If regulation and empowerment are to be effective at creating a fairer system there needs to be a commitment to reducing the complexity of regulation as well as improving consumer's access to regulatory enforcement processes. Reduced complexity makes it easier for business and the community to know what is expected. The idea of simplifying regulation is a win-win strategy as it makes it clearer for all parties what standards apply.

There is a risk that simplified regulation would increase the scope for

unscrupulous businesses to utilise loopholes to get around simpler legislation.

“This means review of how the system works and the opportunity for disadvantaged consumers to seek remedies at Courts and Tribunals would have to be re-established through a civil legal aid system. Without effective access to regulatory enforcement most disadvantaged consumers will be continue to miss out on assistance. Even in cases where the monetary value of the matter is relatively small the relative significance to a person of low income may be great and systems need to reflect these issues.

VALS’ submission advocates that consumer policies should be framed around achieving a fairer system where aggregate improvements as well as specific improvements to disadvantaged groups of consumers are prioritised.

VALS supports formal regulation of the market through legislation etc as opposed to market self regulation. This is because the theory of market self-regulation is flawed in practice when it comes to minorities, such as Indigenous Australians and poor people in general. In reality, Indigenous Australians do not have enough leverage to effect market self-regulation because they are a minority, which undermines any notion that they have choice or have influence to effect changes that protect their rights. It is important that formal regulation occurs so that standards are established and redress is available before it is too late. Regulation can lead to complexity and VALS argues that regulation that is not complex but simplified will benefit both consumers and those in the consumer industry. Please see further discussion of the issue of simplification of the system below.

The pace at which regulatory reform is taking place is dizzying. It is not that reform should not have been considered carefully with proper evaluative processes in place earlier, but rather how quickly decisions are now being made, especially for example with energy reform, with steadfast refusal to note the impediments to deeming competition in both gas and electricity markets successful.

This rhetoric and background may well be annoying to those who just want to know what the ADR landscape looks like and possibly whether the State Government can race through the Victorian parliamentary processes those recommendations for civil justice reforms that may need more careful consideration.

Alternatively, inquiries such as those of the Productivity Commission's current Review of Australia's Consumer Policy Framework⁶⁷ (or for that matter any other initiative to reduce regulatory burden at all possible costs) may not see any sense in these global arguments aimed at promoting consumer interests, and proper access to justice.

As Dr Chris Field has noted:

"...competition is never an end in itself; it is simply a means to an end, that end being to achieve an efficient allocation of resources and the maximization of the long term interests of consumers."⁶⁸

So here we have it competition is apparently about "efficient allocation of resources"⁶⁹ rather than:

"...broad principles of the public interest and take account of the difficult to measure social factors rather than relying on narrow more easily measurable economic factors."⁷⁰

Which of these views does the Victorian Parliamentary Law Reform Committee and/or the Victorian Parliamentary Law Reform Commission embrace? Or the Productivity Commission? We already know what the Australian Energy Market Commission and the Victorian ESC believes. Does the Victorian Department of Communities (VDC) have a view on this contentious issue?

⁶⁷ Field, Chris Discussion Paper, "Consumer Advocacy in Victoria", launched at the National Consumer Congress, also on 16 March 2006. Pages 21 and 22 of the draft Discussion Paper c/f David Tennant's rebuttal at the same conference "The dangers of taking the consumer out of consumer advocacy."

⁶⁸ Tennant, David (2006) "The dangers of taking the consumer out of consumer advocacy" A speech delivered by David Tennant Director, Care Inc Financial Counselling Service At the 3rd National Consumer Congress, hosted by Consumer Affairs Victoria Melbourne 16 March 2006. Rebuttal of Dr. Chris Field's Paper "Consumer Advocacy in Victoria" March 2006 as above

⁶⁹ As espoused by Dr. Chris Field

⁷⁰ A Report of the Senate Select Committee on the Socio-economic consequences of national competition policy, Ch 5 found at http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc
Recommendations Found at http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc
Recommendations.

What can either the State or the Federal Government do to appease community organizations and concerned private citizens that all is well; that consumer protections are of paramount concern; and that regardless what is done to address “*competition goals?*”

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

At present, within the energy industry benchmarks of best practice consumer-focused service deliveries and protections may have become a blurred and inaccessible partly because of under-funding and resourcing, but also perhaps because of policies that are weighted from the outset in favour of industry^{71/72}

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

In 2000 the SSC in 2000⁷³ received many submissions and other evidence on these issues in particular, the inadequacy of the NCP legislation and agreements:

- *The inadequacy of State legislative review processes;*
- *Pricing subsidy or regulatory distortions having adverse environmental impacts*
- *Fundamental issues of private versus public ownership of natural resources*
- *Adverse social impacts of water pricing reforms; and*
- *The inadequacy of the application of the public interest test*

⁷¹ Dufty, G, (2004) “Who makes social policy? – The rising influence of economic regulators and the decline of elected Governments.” Policy and Research Unit, St Vincent de Paul VCROSS Congress Paper 2004; rebuttal of 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.”

⁷² See also Tamblyn HJ (2004) Tamblyn J (2004) “The Right to Service in an Evolving Utility Market National Consumer Congress” 15-16 March 2004 Park Hyatt, Melbourne Expresses similar philosophies to that expressed the previous year in Rome as above. Refer to analysis by Gavin Dufty, (2004) *ibid*

⁷³ SCC (2000) “*Riding the Wave of Change,*” A Report of the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy Committee 2000, Ch 5

In Chapter 4⁷⁴ of its 2000 SSC Report reference was made to a recurring theme identified in the interim report. These related to difficulties in the way in which National Competition Policy had been implemented.

Prominent amongst those difficulties were problems with interpreting and understanding the Public Interest/Public Benefit Test, including these factors:

- *a lack of understanding of the policy;*
- *a predominance of narrow economic interpretation of the policy rather than wider consideration of the externalities;*
- *a lack of certainty between States and Territories as differing interpretations of the policy and public interest test, result in different applications of the same conduct;*
- *lack of transparency of reviews; and*
- *lack of appeal mechanisms*

The Committee's reservations were confirmed by the responses received to the Interim Report. The SSC formed the view that failure to properly explain the NCP had contributed to these serious problems. Policy and rule-makers need to make sure that the policies proposed are not only well understood by stakeholders but by themselves, with a thorough understanding guaranteed for those directly affected, or the broader public.

This cannot be achieved without effective communication, timely provision of all protocols and documentation relied upon, and meaningful and timely stakeholder dialogue. That dialogue should be ongoing, and open. It should not be restricted to chance availability to respond to numerous consultation initiatives with overlapping deadlines.

The mechanism should exist for informal dialogue and proactively sought inputs from all stakeholders. This should apply to every avenue of public policy with the principles of transparency and accountability being paramount.

The first observation made by the SSC in this chapter was the impact of specific infrastructure investment (e.g. the Snowy Mountains Scheme) on urban concentration and the impacts on rural and regional Australia in response to wider economic and social currents.

⁷⁴ Ibid SCC (2000) Ch 4, The Public Interest Test and its Role in the Competition Process

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

The PC's findings had produced estimates that were subject to variation. What the Committee had been concerned to ensure, was that the impacts of the policy are monitored in a rigorous fashion and the results of such monitoring are reported to policy-making authorities.

Social commentators had found that:

“Structural change (had) also left a growing group of so called ‘battlers’ in comparatively low paid jobs, poorly organized and reliant on a relatively stagnant minimum award wage structure. As these people slip behind the rest of the population (including fellow workers able to benefit from enterprise bargaining), they feel insecure and as bitter and resentful of people on welfare as they are of the ‘tall poppies’”

Social services were not shown to improve during NCP.

The SSC took seriously the suggestions in many submissions that some aspects of NCP and its administration would appear to be in conflict with the principles of good health, community and social welfare service provision.

Whilst not negative changes were found to be

“.....as a result of NCP or indeed micro- economic reform generally,” the Committee found that there was “potential there for the NCP to worsen the impact of rural downturn, industrial changes, globalization etc...”

The Committee acknowledged the right of the Australian community to:

“be informed of the costs of the policy particularly through clear identification of

social change hardship and environmental costs.”

The PC had

“.....identified job losses by infrastructure providers in its latest report and justified these losses in terms of improvements in efficiency. The adverse impacts of these employment losses can be compared to the impacts of the early tariff reductions on the manufacturing industries.”

A significant finding of the SCC Report was that:

“To improve efficiency State governments have sought to address overstaffing in their electricity utilities. This saw total employment in the electricity supply industry decline from slightly more than 80000 in 1985 to around 37000 in 1997....much of this decline occurred prior to implementation of the NCP in 1995. However reductions in employment have continued since then...”⁷⁵

“The Committee doubt(ed) that the benefits of NCP will ever be able to be satisfactorily measured. The Commission’s attempts are praiseworthy but they are estimates subject to variation. What the Committee is concerned to ensure, is that the impacts of the policy are monitored in a rigorous fashion and the results of such monitoring are reported to policy making authorities.”

The impact of NCP on social welfare was discussed extensively in the Senate Committee’s Report. In particular the Committee examined:

I. Whether or not the supply provision of social welfare services health and related services had been adversely affected by the introduction of NCP; and

⁷⁵ Productivity Commission, Impact of Competition Policy Reforms on Rural and Regional Australia, Inquiry Report, No 8, September 1999, p 108.

2. Secondly whether there was a need for structural adjustment assistance or transitional assistance for those adversely affected by NCP

The Committee noted how many social, welfare and medication organizations had supported the view that:

“some aspects of NCP and its administration would appear to be in conflict with the principles of good health community and social welfare service provision”

It has been suggested that some aspects of NCP and its administration would appear to be in conflict with the principles of good health, community and social welfare service provision.

In commenting on the impact of the provision of social welfare services, health and related services the Report continued:

“.....the local area seems to be where the problems surface first and in the old structure we were able to try and jump on that very quickly.

“I am not saying that is the answer to everything-there are a lot of bloody awful services out there that should have been defunded-but I do feel that the move to competition as the answer to that is actually causing much more fragmentation. Also from the ground it is the most incredible waste of money I have ever seen in my life.”

“Many people feel that this marketplace stuff has got out of hand. To some extent in my mind national competition policy is seen as this marketplace ideology writ large. We want to see a benefit that has more social value for people in their lives.”

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

The SSC predicted

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

There were problems recognized with project commencement requirements; funding issues; systems parameters; best practice recruitment parameters; continuity of funding.

There were recommendations that data collection should be qualitative and not merely quantitative.

The SSC recognized the need for robust assessment of impacts of various policies adopted.

It is not enough to rush enthusiastically into reform of the magnitude envisaged and imminent for energy infrastructure regulatory and economic change.

I now refer to the Discussion Paper on Corporate Social Responsibility (CSO) the Public Interest Law Clearing House (PILCH)⁷⁶

“Levels of CSR

The term ‘corporate social responsibility’ is used broadly to describe a view of corporate governance which advocates the pursuit by companies of a broader range of objectives than simple profit-making. However, it is helpful to distinguish levels of corporate conduct that may be consistent with CSR.⁷⁷

Compliance

Companies, like individuals, are subject to a wide range of legal obligations and regulation, some of them specific to business and industry sectors (for example, accounting regulations or product labeling requirements) and some of general application (for example, a duty to avoid injury to members of the public).

⁷⁶ PILCH (2005) Discussion Paper Corporate Social Responsibility and the Corporations Act 2005 Found at <http://www.pilch.org.au/files/Y885BU8MKC/PILCH%20CSR%20Discussion%20Paper.doc>

⁷⁷ Wilson Therese, (2005) “The ‘best interests of the company’ and corporate social responsibility”, paper presented at the Corporate Law Teachers Association conference, 7 February 2005, 4. c/f Ibid PILCH (2005) Discussion Paper Corporate Social Responsibility

On a conventional economic view, legal compliance might be seen as one of a number of costs to a business.

On this view, it is in a company's best interests to adopt a narrow, minimalist view of its legal obligations, so as to limit costs whilst continuing to operate lawfully.

Although compliance with all applicable legal and regulatory obligations is fundamental to the practice of CSR, CSR goes beyond compliance in that it involves companies engaging in conduct not required by law which serves broader interests than the pursuit of immediate profit for shareholders.

Sustainability

Companies are increasingly recognizing that their long-term profitability depends upon their business operations being sustainable. By most definitions, 'sustainability' means that a company must not only take care of operating factors that contribute to its short-term profitability, but do so in a way that preserves its ability to meet future needs, by taking into account social and environmental factors.⁷⁸

In order to sustain its operations over the long term a company is not only required to manage risk and consider its direct operational needs in the future, but also to consider the well-being of the society and environment in which it operates.

By taking account of its impact upon and relationship with society and the environment, a company can help preserve and enhance the 'external' conditions that are fundamental to its profitability, such as the natural resources, infrastructure, rule of law and intellectual capital from which it benefits.

Responsibility to stakeholders

The pursuit of sustainability will require a company to consider a variety of interests, including the interests of 'stakeholders' that are important to its long-term profitability. However, CSR might be said to go further than sustainability in that, by its terms, it suggests a company has a 'responsibility' to take into account the interests of stakeholders, as well as its shareholders.

In this vein, Don Argus, Chairman of BHP Billiton Limited, has stated that a company's 'licence to operate' is conferred upon it by the communities in which it operates.⁷⁹

⁷⁸ Sustainable Measures, *Definitions of Sustainability and Sustainable Development* found at <www.sustainablemeasures.com/Sustainability/DefinitionsDevelopment.html>.

⁷⁹ Don Argus, address to Edmund Rice Business Ethics Initiative, 19 May 2002,

Who are the stakeholders to whom a company owes responsibilities? Stakeholders might be limited to groups connected to the company by conventional legal relationships such as employees, suppliers, clients, and consumers or persons to whom a company owes a duty of care.

Alternatively a company might view itself as having responsibilities to a broader group, whose interests are somehow affected by the company's operations, for example as a result of their involvement in secondary or service industries, as a result of effects on a shared environment or as beneficiaries of a social service provided by a private sector operator.

Social activism

At its highest level, CSR might include the pursuit, by a company, of objects beneficial to society that are altogether unconnected to its commercial operations. Examples might include acts such as the making of donations to charitable organizations, allocation of staff or other resources to not-for-profit projects or companies taking a stance on a human rights issues.⁸⁰

Frequently, advocates of CSR refer to the 'business case' for companies engaging in social activism. Nevertheless, there is no reason why CSR theory should not accommodate the possibility of acts of corporate philanthropy or idealism with purely altruistic motives.”

In that joint submission to the ERIG Discussion Paper 2006 a number of consumer advocacy organizations⁸¹

An efficiency and public interest focus

ERIG states that its Discussion Papers “concentrate on economic efficiency”.⁸² Moreover, quoting the Hilmer Report⁸³, ERIG posits that competition is the

⁸⁰ Found at <www.erc.org.au/busethics/articles/1036114283.shtml>.
An example (albeit short-lived) was Microsoft Corporation's support for a bill banning discrimination against same-sex attracted people (see David A Vise, 'Microsoft Draws Fire for Shift on Gay Rights Bill' The Washington Post, 26 April 2005, Found at <www.washingtonpost.com/wp-dyn/content/article/2005/04/25/AR2005042501266.html>

⁸¹ Joint Submission (2006) from Various Community Advocates to Energy Reform Implementation Group Discussion Papers Nov 2006
found at
<http://www.erig.gov.au/assets/documents/erig/Consumer%20groups%20ERIG%20joint%20submission20061216114324%2Edoc>

fundamental driver to achieve economic efficiency.

While we agree that efficiency and competition are important principles informing future energy market reform options, we are of the view that the public interest must underscore the implementation of these principles.

⁸² ERIG, (2006) *Discussion papers*, Nov 2006, p 24.

⁸³ Hilmer Committee, *Independent Committee of Inquiry into National Competition Policy*, August 1993

The energy market objective is to maximise efficiency in the long term interests of consumers. In our view, the long term interests of consumers are advanced by ensuring continuous access to the affordable, reliable and safe supply of energy, in recognition that energy is an essential service to the community. We are concerned that ERIG has ignored the public interest in favour of a narrowly defined notion of efficiency and that while pure economic efficiency may contribute to the long term interests of consumers, it does not always do so. For this reason we continue to hold the view that competition and efficiency goals need to be balanced by other social policy goals.

In its review of National Competition Policy, the Productivity Commission outlined a number of key benefits of Australia's micro-economic reform program for consumers.

These include improved productivity, sustained economic growth and increased consumer choice. The Commission noted, however, that "experience with NCP reinforces the importance of ensuring that the potential adjustment and distributional implications are considered at the outset".⁸⁴ The review noted the "mixed impacts" of reforms on regional communities and adverse impacts on the environment (such as increased greenhouse gas emission from the reform-related stimulus to demand for electricity). In our view, economic growth exists to serve not just the majority of Australians, but all of them. Public policy programs must not place such an emphasis on wealth creation that we pay insufficient attention to how we distribute wealth. Further economic reforms must sit alongside of social justice policies that ensure a fair, decent and inclusive Australia. In its final report, ERIG must more clearly address distributional and environmental implications of its recommendations and proposals for reform. The pursuit of economic efficiency, by governments, is pointless unless it contributes to social ends.

⁸⁴ Productivity Commission, (2005) *Review of National Competition Policy Reforms (Report No 33)*, Apr 2005, p 150.

In February 2006, Consumer Law Centre Victoria and Monash University's Centre for the Study of Privatisation and Accountability released a comprehensive report analysing the impact of electricity reform in Victoria. The report, Electricity Reform in Victoria: Outcomes for Consumers, found that while electricity reforms have produced some significant benefits, these benefits have not accrued equally among consumers.⁸⁵ Benefits have accrued to industry, commercial users and metropolitan consumers while low-income and disadvantaged consumers (including rural and regional consumers) have seen mixed impacts from reforms. ERIG has failed to consider the ways in which unequal distribution of benefits from reform may seriously impinge upon overall consumer benefit. We are concerned that ERIG's proposals, including those related to retail price regulation (see further below), will have significant negative impacts on the most vulnerable sections of the community.

ERIG proposes that the best way to deliver assistance to members of the community disadvantaged by reform is through Community Service Obligations (CSOs). As stated by PIAC in its supplementary submission to the ERIG Issues Paper, we agree that CSOs can have an important and effective role in mitigating negative social outcomes from competition reform. However, we do not see participation in CSO programs as the limit upon service providers' community responsibility. ERIG does not acknowledge or attempt to deal with the complexity involved in targeting and implementing CSOs to ensure they are effective. A number of reports previously provided to ERIG demonstrate the difficulty in this task.⁸⁶⁸⁷

Difficulties include targeting customer groups who do not generally benefit from CSOs, including the "working poor" who, despite being on limited incomes, may not hold concession entitlements. Hiving off social responsibilities to the vague notion of CSOs is an inadequate response to addressing the disadvantage faced by some vulnerable consumers. ERIG's final recommendations must ensure that service providers responsibilities to disadvantaged and vulnerable consumers are explicit and clear. Victorian reforms relating to hardship and wrongful disconnections are examples of ways in which these responsibilities should be reflected."

⁸⁵ CALV and the Centre for the Study of Privatisation and Accountability (2006), *Electricity Reform in Victoria: Outcomes for Consumer*, Feb 2006.

⁸⁶ Uris Keys Young, (2005) (PIAC NSW) "Cut off: the impact of utility disconnections", a research project of the Utility Consumers' Advocacy Program, (February 2005) Public Interest Advocacy Centre, Sydney

⁸⁷ Rich N. Mauseth M, (2004) (CLCV & CUAC) "Access to Energy and Water in Victoria" A Research Report CLCV and CUAC. Nov

In its submission to the Energy Hardship Enquiry in 2005, the KCFS⁸⁸ raised a number of pertinent issues regarding access to financial hardship relief for those struggling to meet bills. Amongst the salient points of disadvantage was that relief through the Utility Relief Grants Scheme (URGS) is only a temporary and does not give recipients a debt-free start. Those who are on Centrelink payments but earning low enough income to be of equivalent income are normally excluded. The paper refers to *Rich and Maseuth (2004)* paper⁸⁹

Utility Relief Grants Scheme (URGS)– mains and non mains

URGS commenced out of the HEAS program by a social work student placement in 1983-84 as a pilot program. The original concept was to provide low income and disadvantaged consumers a fresh start and worked in conjunction with HEAS who provided energy efficiency information and assistance to replace energy inefficient appliances. This has now changed to less substantial financial assistance without the support of energy efficient information. URGS considered low income consumers not necessarily only those with a health care card.

Eligibility criteria

- *Health card holder (there is some flexibility with this but still very restrictive)*
- *Your energy or water use has increased substantially, resulting in high energy or water bills;*
- *You have had high unexpected expenses on essential items, for example, funeral expenses;*
- *Your household income has decreased substantially, for example, due to unemployment.*

⁸⁸ Kildonian Child and Family Services (2005) Submission to The Energy Hardship Inquiry Energy and Security Division, Issues Paper

⁸⁹ Ibid Rich N. Mauseuth M, (2004) (CLCV & CUAC) “Access to Energy and Water in Victoria”

Advantages

- *Provides usually once off limited financial assistance to highly targeted consumers experiencing temporary hardship.*
- *Suspension of the utility account and no disconnection until URGS is processed is an enormous advantage to consumers experiencing hardship.*
- *This program is vital for low income consumers experiencing temporary hardship to prevent disconnection.*
- *Improvements with the form are currently underway.*

Disadvantages

Only a temporary measure for people experiencing hardship. Limited amount of grant money often does not give consumers a debt free new start. Access to Energy and Water in Victoria summarises this problem, "if a grant is meant to relieve a household's temporary financial crisis, the grant's usefulness will be undermined if, after the application of the grant, the household is still left in financial crisis." (Rich & Mauseth, 2004 p71)'

Limited criteria means people experiencing genuine hardship may not qualify. For example, people without health care cards but on a low income that is not low enough to be Centrelink equivalent.

People experiencing genuine chronic poverty or fuel poverty, without change in circumstances may not meet even one of the three criteria. This program is aimed at people facing temporary hardship only.

The current application form is hard to access by Culturally and Linguistically Diverse (CALD) people, people with mental health issues as well as people with poor literacy levels because of the amount of information requested by the form. The greatest demand to access a financial counselor by consumers is to receive assistance in filling in the URGS form. This assistance could be very time intensive. Business receive a payment from DHS to process the form but financial counsellors do not.

Recommendation

That the URGS is maintained and strengthened by dropping the health care card criteria for people on low incomes (working poor) and increase the amount of money granted to consumers to give them a debt free start.

That the URGS form be revised after the consultation process earlier this year to make it more accessible.

Who will pay for community service obligations?

This is a good time to ask the question who will pay for the community service obligations. The electricity market is becoming national and the other utilities will one day follow. The Victorian government needs to work hard on the ministerial council for energy to maintain the hard earned gains for consumers in Victoria for electricity once electricity is Federal. Part of the battle is to secure funds. Since utilities are essential services in order to ensure access and eradicate fuel poverty and establish federal energy programs for disadvantaged consumers while maintaining state programs for gas and water the government needs to advocate for community service obligations to be paid from utility GST revenue. The GST revenue is the only fair way to ensure access for low income consumers to essential services, and ensure they benefit from Victoria's abundant brown coal reserves. With GST revenue we could pay for leading world class consumer protection programs across Australia."

In 1999 during the dialogue about the socio-economic impacts of competition policy Graeme Samuels referred to above began his musings with observations of the more sinister aspects of the public interest – what he had previously described as attempts by those who:

"having a vested interest to claim the retention of their vested interest."

He suggested that:

"one of the objectives of competition policy is to subject those claims to a rigorous, independent, transparent test to see whether in fact vested interests are being protected or whether public interests are genuinely being served by the

restrictions on competition that are the subject of reviews under the Competition Principles Agreement.

He then went on to discuss the level of guidance should be provided to agencies involved and various tiers of government at national state and local level, so that they could gain a “*better understanding of the way that the public interest issue should be considered.*” He was not satisfied that this had been achieved with the best success levels.

The first measure is then is for governments to determine guidelines as to the application of the public interest test to offer the best level of assistance to those that are applying the test in its application.

He identified three areas of public interest that needed as a first-line to be taken into account – that any reviews of legislation is undertaken independently, rigorously and transparently, in order to ensure that enough material was received from stakeholders:

“that presents the genuine public interest as distinct from material being received from vested interests that are purporting to represent the public interest.”

His recommendations went beyond recognition of public interest parameters, the rigorous application of the public interest test and the principles of transparency and accountability. He felt that:

“the public interest should have been applied right throughout the process of competition policy.”

Mr. Samuel saw a place for reexamining why and whether state legislation and regulation should have been exempted from s51 of the Trade Practices Act. This had been achieved by lobbying governments, not by being subjected to rigorous public interest test.

The cynics have suggested that the reason they secured exemption by transparent public interest assessment.

Following Alan Fells’ explanation of the examples in the wine growers and medical fields, Senator Murray sought some clarification as to how switching gas water electricity and so on to more competitive practices were differentiated in the public interest analysis and the perceived consequences, baring in mind the social issues and the essential nature of these services.

He referred to the Industrial Relations Commission philosophies regarding safety net considerations, and compared this philosophical approach to that of the ACCC and ASIC.

“The process of those reviews is, as we have said on many occasions, to be conducted independently, transparently, objectively and rigorously. Those reviews have the capacity to examine all the options and to examine all the issues of public benefit that have been established in case law, in practice and in commission decisions through authorization processes over the past 25 years.

You have got all the capacity to do that and you should, in fact, do it. They involve considerations, not only of economic issues, but also of social issues.

Indeed, the Competition Principles Agreement in clause 1(3) lists only one economic issue, that of economic efficiency, amongst the seven, eight or nine—I forget the exact number—issues that need to be considered where relevant and where appropriate in the area of public benefit assessment.”

The others, as you will know, relate to employment issues, ecological issues, environmental sustainability, occupational health and safety, social welfare, equity considerations, regional employment and regional development. There are a whole lot of issues there that are listed and they are not exclusive.

They are inclusive. Social issues and social relevance is very much a part of competition policy and ought to be applied with all the wealth of experience that has been developed over the past 25 years in the administration of the authorization of public benefit and public interest tests.”

The Committee’s reservations were confirmed by the responses received to the Interim Report. The SSC formed the view that failure to properly explain the NCP had contributed to these serious problems. Policy and rule-makers need to make sure that the policies proposed are not only well understood by stakeholders but by themselves, with a thorough understanding guaranteed for those directly affected, or the broader public.

I refer to the recommendations of the (SSC) in 2000⁹⁰ when discussing NCP intentions and goals, which includes effective and timely stakeholder consultation and parameters that extent beyond commercial gain.

With those reservations in mind it is important to re-emphasize that sufficient lead time is allowed to plan for the price and social impacts that will leave possibly half the

⁹⁰ Ibid SSC (2000) *“Riding the Wave of Change”*, A Report of the Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy Committee 2000 Ch 5

population at risk of shell-shock and disadvantage when price deregulation becomes a reality. That may be a growing proportion as the population ages.

Recommendations

14. *That all reviews of legislation and changes to competitive arrangements in the social welfare sector adhere to the broad principles of the public interest and take account of the difficult to measure social factors rather than relying on narrow, more easily measurable, economic factors.*
15. *That all contracting out arrangements and competitive tendering processes and documentation in the social welfare sector be public and transparent. There should be a presumption that all documents will be public and any claims of commercial confidentiality should be kept to a minimum and where essential.*
16. *That Governments critically examine competitive tendering processes for social welfare services with a view to ensuring that a sophisticated and flexible approach is taken to the provision of service. The process should consider as part of the public interest test: quality, consistency and continuity of service; the value of local co-operative arrangements and the personal nature of such service.*
16. *That, where appropriate, the Commonwealth Departments of Health and Aged Care and Community Services, examine competitive tendering programs and determine which services are properly and efficiently competitively tendered and which may be contracted out on a benchmark of service basis. Particular attention should be paid to rural and remote communities where locally provided co-operative services may be integral to the success of service delivery.”*

Another important recommendation of the SSC was in relation to impacts on urban, rural and regional communities expressed as follows:

“For rural development policies to be successful there needs to be a greater focus on people. Perhaps the best way to achieve this is by emphasizing the value of social obligations rather than the 'rights' of self-interested individualism. Conventional wisdom stresses the importance of competition rather than community. While the current approach to rural development, at the very least, recognizes the importance of rural Australia, successful achievement of its objectives requires a more critical consideration of the dominant neo-liberal approach to policy-making.”

However, only under very special circumstances will the process of adjustment generated by unfettered market forces be socially optimal. Processes of economic contraction are likely to proceed excessively rapidly as the loss of one area of economic activity imposes external costs on others.

Finally, I quote from the same chapter of the SSC Report on the impacts of micro reform:

“... (the) “impact of micro reform is becoming more and more severe in terms of its effects. And it is becoming harder for fiscal and other reasons to smooth the social effects.”

It was recognized that:

“In the small rural centres of Australia the circumstances benefitting perfect competition are most unlikely

Deregulation of professions and centralization of policies of government departments were considered amongst other factors to have a detrimental social impact on rural populations.

As far back as 1999 in discussions about NCP generally it was recognized that anger in the many rural populations had metamorphosed into fatalism and the feeling that the government had left the negotiating table.

It can only be hoped that the energy reforms will not lead to outcomes like that for the vulnerable groups and populations, and that the remainder of the Australian population does not become even more disillusioned than they are about the general and specific impacts of the proposals envisaged in terms of the social and welfare prices that will undoubtedly be paid.

Besides that there is the question of the smaller energy companies, the second-tier energy retailers simply trying to retain liquidity and a small share of the market.

They too must be given every support since in some ways they will potentially share the same position of facing power imbalance detriments, fear of uncertainty and worse than that fear of being swallowed up by the giants. Powerdirect has already seen that happen as the inaugural second-tier retailer.

Dr. Steven. Dovers of the ANU⁹¹ is quoted by the SSC as saying:

Anyone who has played junior football can impart the invaluable lesson that a level playing field, set rules and fixed goal posts the stuff of healthy competition matter little when someone twice your size charges at you. Just as big firms can (and do) run over and flatten small firms in a "fair and competitive" market, so it is that weakly institutionalised policy considerations can be easily outweighed by strongly institutionalised ones. Thus it is for ESD, and the lack of institutionalisation is evidenced in comparison to other public policy fields.

⁹¹ Professor Steven R Dovers. BSc (Canberra) BLet. PhD (ANU) has degrees ecology and geography and a PD in environmental policy. His research centres on approaches to sustainability policy and environmental management that integrate the nature of substantive problems and natural systems, with a public policy and institutional perspectives including policy and institutional analysis; decision-making in the face of uncertainty; emergencies, climate change impacts; science; policy interactions; adaptive policy and management; natural resource management; interdisciplinary research theory and practice and environmental history. Professor Dovers, of ANU, focuses on interactions between human and natural systems and related policy and management questions, rather than on single disciplines or sectors – complex problems in environment and sustainability require an interdisciplinary and cross-sectoral approach. His research combines rigorous scholarship and development of practical policy capacities. Professor Dovers has cop-authored, edited and co-edited over two hundred articles, books, chapters, conference papers and reports, including over eighty refereed works and significant conference papers and highly regarded books. He has been chief investigator or co-investigator in externally-funded research projects worth A1.6 million and is regularly invited to speak at policy-oriented conferences. Post-graduate research training is at the core of his research program, and he teaches the course Policy and Institutional Analysis (SRES 3028-6018). Professor Dovers' profile cited above can be found at <http://fennerschool.anu.edu.au/people/academics/dovers.php>

Even official sustainability policy states that environmental, social and economic policy should be balanced and integrated, and this means that there should be some degree of parity in policy processes. Yet the underpinnings of much social and especially economic policy are vastly more substantial than environmental concerns. Where are the ecological equivalents of the Australian Bureau of Statistics, National Accounts, Census, input out put tables, monthly population surveys, or Productivity Commission? Where is the implementation that would make ESD a weak statement of ecological rationality comparable to its counterpart from economic rationality, the pervasive National Competition Policy (NCP)? NCP makes for an interesting comparison.

Chapter 6 of the SSC Report of 2000 referred to the essence of the Interim Report in which the Committee had canvassed the difference between the public interest test of the NCP and the public benefit test of the ACCC as follows:

“The need for public debate and understanding has not diminished.

Public benefit has been and is given wide ambit by the Tribunal as, in the language of QCMA (at 17,242), ‘anything of value to the community generally, any contribution to the aims of society including as one, of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress’. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society’s resources.

We bear in mind that (in the language of economics today) efficiency is a concept that is taken to encompass ‘progress’ and that commonly efficiency is said to encompass allocate efficiency, production efficiency and dynamic efficiency.”⁹²

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.

⁹² Victorian Newsagency Decision, ATPR 41-357 at 42,677.

Without limiting the matters that may be taken into account, where this Agreement calls:

- a) *for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or*
- b) *for the merits or appropriateness of a particular policy or course of action to be determined; or*
- c) *for an assessment of the most effective means of achieving a policy objective;*

the following matters shall, where relevant, be taken into account:

- d) *government legislation and policies relating to ecologically sustainable development;*
- e) *social welfare and equity considerations, including community service obligations;*
- f) *government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
- g) *economic and regional development, including employment and investment growth;*
- h) *the interests of consumers generally or of a class of consumers;*
- i) *the competitiveness of Australian businesses; and*
- j) *the efficient allocation of resources.*

The Committee continues to be concerned about the application of ‘public interest’ given the confusion that exists over what the term means or allows under NCP. The confusion, when:

“...combined with the administrative ease of simply seeking to measure outcomes in terms of price changes, encourages the application of a narrow, restrictive, definition. The Committee considers that it is important to devise a method of assessment of the policy which attributes a numerical weighting to environmental and social factors to avoid the over-emphasis on dollars merely because they are easy to measure. Mr. Waller advised the Committee that:

“In summary, it is a difficult area. There are problems of methodology, there are problems about the practical application of the policy. Underlying all this, I would say that I think that, in net benefit terms, the national competition policy arrangements are of major value to Australia in meeting the problems it faces globally.”⁹³

“The Committee recognizes the argument that the NCP has contributed to Australia’s success in meeting the problems it faces globally, particularly, the economic shocks that came out of the “Asian melt down”. However, even if it is accepted that that is the case, the country’s overall ability to cope internationally is not always fully appreciated in the face of lost jobs, reduced pay and conditions, failing or lost social infrastructure, or the other adverse consequences of structural change that are perceived to be attributed to NCP.”

One of the most significant statements made in this chapter is of direct relevance to the proposed infrastructure reforms.

I quote directly from the statements made by Mr. Ritchie National Farmers Federation in his dialogue with Senator McGauran:

“Mr RITCHIE—My assumption is that obviously we support some of the initial gains that have been made under national competition policy, but in areas such as infrastructure, NFF is starting to have some real, serious concerns. The picture that Rod Nettle painted about what is going to happen to rural and regional

⁹³ Mr M Waller, Committee Hansard, 1 November 1999, p 841

Australia is not a difficult picture for us to extrapolate to, either.”

“If you apply a strict principle of user pays to the provision of infrastructure, then you are not going to have a rural and regional Australia to worry about in 25 to 50 years because nobody out there can afford to pay.

This is the whole principle of externalities under which economic theory had been working for 100 years until we decided to throw it out in 1994. Let us go back and see if that was a sensible decision to throw out the principle of externalities and external benefits.”

Looking as if he were “*champing at the bit.*” Graeme Samuel, President National Competition Council, was invited to make opening comments. He chose to focus on the definition of the term public interest – which he said defies all attempts at further definition, because

“the public interest is as broad as it is long but it endeavours to encompass what the two words suggest—that is the public and the interests of the public.”

The best I can manage is to direct readers to the reservations that have been expressed by multiple community organizations and consumer policy advocates many times over, and especially in the lead-up to full retail competition in 2003.

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

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

He then went on to discuss the level of guidance should be provided to agencies involved and various tiers of government at national state and local level, so that they could gain a:

“...better understanding of the way that the public interest issue should be considered. “He was not satisfied that this had been achieved with the best success levels.”

The first measure is then is for governments to determine guidelines as to the application of the public interest test to offer the best level of assistance to those that are applying the test in its application.’

He identified three areas of public interest that needed as a first-line to be taken into account – that any reviews of legislation is undertaken independently, rigorously and transparently, in order to ensure that enough material was received from stakeholders:

“that presents the genuine public interest as distinct from material being received from vested interests that are purporting to represent the public interest.”

His recommendations went beyond recognition of public interest parameters, the rigorous application of the public interest test and the principles of transparency and accountability. He felt that:

“the public interest should have been applied right throughout the process of competition policy.”

Mr. Samuel saw a place for re-examining why and whether state legislation and regulation should have been exempted from s51 of the Trade Practices Act. This had been achieved by lobbying governments, not by being subjected to rigorous public interest test.

The cynics have suggested that the reason they secured exemption by transparent public interest assessment. Following Alan Fells’ explanation of the examples in the wine growers and medical fields.

Senator Murray sought some clarification as to how switching gas water electricity and so on to more competitive practices were differentiated in the public interest analysis and the perceived consequences, baring in mind the social issues and the essential nature of these services.

He referred to the industrial relations Commission philosophies regarding safety net considerations, and compared this philosophical approach to that of the ACCC and ASIC.

“The process of those reviews is, as we have said on many occasions, to be conducted independently, transparently, objectively and rigorously. Those reviews have the capacity to examine all the options and to examine all the issues of public benefit that have been established in case law, in practice and in commission decisions through authorization processes over the past 25 years.

You have got all the capacity to do that and you should, in fact, do it. They involve considerations, not only of economic issues, but also of social issues. Indeed, the Competition Principles Agreement in clause 1(3) lists only one economic issue, that of economic efficiency, amongst the seven, eight or nine— I forget the exact number — issues that need to be considered where relevant and where appropriate in the area of public benefit assessment.”

The others, as you will know, relate to employment issues, ecological issues, environmental sustainability, occupational health and safety, social welfare, equity considerations, regional employment and regional development.

There are a whole lot of issues there that are listed and they are not exclusive. They are inclusive. Social issues and social relevance is very much a part of competition policy and ought to be applied with all the wealth of experience that has been developed over the past 25 years in the administration of the authorization of public benefit and public interest tests.”

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

Current strategies in heralding reform measures are thought by many to be lacking in the department of meaningful dialogue. Not that the dialogue is not occurring, but there are queries about how meaningful that dialogue is; how well the consumer voice and other voices are being heard; the extent to which airing and meaningful reciprocal dialogue is occurring with stakeholders in time to make a difference before new regulations are put in place.

In a climate of rushed policy change such as is envisaged, and in the light of the tensions and apprehensions apparent on both sides of the fence, all stakeholders are begging for more certainty and stability that they perceive to be offered, improved meaningful dialogue and longer timelines to give effect to the theory of stakeholder consultation.

The public at large is also looking for improved transparency, such as publishing of all external reports relied upon (one example may be the AEMC contracted survey to Wallis Consulting – perhaps the public can have full access to the entire report with conclusions rather than a raw data summary as presented at two recent Victorian public forums during September.

The community continues to express concerns over the speed at which the whole regulatory process in the energy industry is being revamped.

Turning now to a more detailed examination of infrastructure policy reform with energy at the top of the list, this limited submission refers to recent findings in the literature that may be worth considering.

The community at large has expressed ongoing concerns about the speed with which proposed change is occurring.

A study published in the CUAC quarterly July 2007 examined models of consumer consultation. Through a public grant the paper Consumer Consultation: International Best Practice Models was produced by the Monish Centre for regulatory studies and funded through a CUAC public grant.

CUAC the study identified that effective consumer consultation needed to draw from different models. Key concepts identified were:

- 1. A clear, genuine commitment to consult, beyond either manipulation or tokenism*
- 2. Use of a wide range of consultation mechanisms rather than a single method*
- 3. Commitment of appropriate resources*
- 4. A mix of formal and less formal arrangements; and*
- 5. Public accountability and transparency.*

These principles are upheld in numerous quarters.

With regard to energy regulatory reform, a literature review⁹⁴ recently undertaken by Jamison, Holt and Berg (2005) of the Public Utility Research Centre, University of Florida discussed.

“Well-conceived regulatory frameworks, including independent regulators, sound price-setting regimes and transparent regulatory processes that invite stakeholder participation, can improve the investment climate by increasing predictability and reducing political risk”

These authors have taken the care to identify gaps in the literature on risk mitigation in infrastructure. Notable gaps are:

“...an understanding tradeoffs between instruments that have conflicting effects the dynamic process of policy development sustainability of infrastructure policies leadership and the effects of multilateral institutions. We also find a lack of synergy in some areas of research and recommend approaches for increasing awareness and collaboration.”

Whilst this chapter is not about regulatory reform, the topic of a separate chapter in this series I include with concern a snippet from the Victorian Government’s Philosophies as contained in the Victorian Premier’s booklet “Reducing Regulatory Burden”⁹⁵ referring to “National leadership in implementing the National Competition Policy reform initiatives”

In addition to targeting reductions in the administrative burden of regulation, the Government will reduce the compliance burden imposed by State regulation.

Compliance burden is the additional cost incurred by organisations in order to adhere to legal requirements. For example this could include the purchase of additional equipment to comply with food safety regulation or to meet

⁹⁴ 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.” Found at sourced from <http://bear.cba.ufl.edu/centers/purc/primary/documents/RiskMitigationLiteratureReview.pdf>

⁹⁵ Brumby, John (2006) Reducing the regulatory Burden” The Victorian Government’s Plan to Reduce Red Tape”

environmental standards for the disposal of industrial waste.

The Government believes there is scope to simplify and streamline regulation while at the same time ensuring that its policy objectives continue to be achieved.

p8 Reducing the regulatory Burden” The Victorian Government’s Plan to Reduce Red Tape”

Whilst efforts are made by community organizations to support the socioeconomic rationale for customer protections in energy markets⁹⁶, and whilst there are widespread concerns about the tokenism of community consultation in the major regulatory and consumer policy changes that are being envisaged, the public appear to be at ongoing of detriment on account of alleged exploitation of policy provisions in place that either inadvertently or deliberately facilitate questionable conduct that leave the public at risk.

Madeleine Kingston

Madeleine Kingston

⁹⁶ Refer to funded project CUAC Partnership Grant produced by PeopleFirst

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:⁹⁷</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.⁹⁸”</i></p>

⁹⁷ Refer to VLRC (2007) ADR Discussion Paper, 2.1 “the definitions of ADR in civil disputes and criminal matters and VLRC Comm Civil Justice Review (2006)

⁹⁸ 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
------------	-------------------

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>⁹⁹</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>

⁹⁹ 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

¹⁰⁰ Astor and Chinkin, above n 8, 82.

	<p>“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 bring the parties together and attempt to negotiate an agreed outcome.¹⁰⁰</p> <p>However, McCrimmon observes that ‘it is argued that there is no true ‘dispute’ which can be resolved – the dispute occurred in the past and entirely on the offender’s terms.’¹⁰¹</p>
Review of ESC Act 2001	<p><i>Review of the Essential Services Commission Act 2001, Final Report, 2006,</i></p> <p><i>See VCOSS Response to Review of ESC Act 10 July 2007, p2</i></p>
Therapeutic justice	<p>A principle focused on maximising therapeutic outcomes for people involved in the criminal justice system. A therapeutic justice model seeks to address the causative factors underlying offending behaviour. Therapeutic jurisprudence has informed the development and operation of problem-solving courts in Victoria such as the Drug Court and the Koori Court.</p>
OCA	<p><i>Owners’ Corporation Act 1997 (Victoria)</i></p> <p>(previously Body Corporate and Subdivision Act)</p>
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

¹⁰¹ 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