

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

Open submission Part 3

**Detailed discussion of
Reducing Regulatory Burden
Industry-specific regulation
Aspects of 5,1; 6.1, 7.1, 8.1**

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 3 ASPECTS OF REGULATORY REFORM

This Chapter follows on from the both the Executive Summary and Chapter 2, dedicated discussion of Overarching Principles and relationship of National Competition Policy already logged with the Productivity Commission as discrete but related submissions

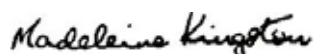
Executive Summary already published but is intended to represent a stand-alone section addressing more extended discussion on the over-riding objectives.

The intent is to allow this chapter to stand on its own merits without the necessity to refer back to the Executive Summary, so any repetition is intentional. The arguments presented here are specific to regulatory reform measures.

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.



Madeleine Kingston

ANNOTATED CONTENTS –

Further discussion of regulatory reform philosophies

Cover sheet	
Preamble	2
Annotated Contents	3-5
Further discussion of aspects of regulatory reform	6-59
Brief reiteration of the findings of the Senate Select Committee 2000 on the application of National Competition Policies. These were the findings of that Committee, and are as valid today as they were at the time. Including that effective addressing of hardship policies were not addressed by shifting of financial responsibility to <i>“bloody awful agencies which ought to be defunded”</i> See more detailed discussion in Part 2 Chapter 2 Submission to PC Draft Report	6-9
Mentions the views of PILCH (2005) relating to poor understanding of <i>“corporations of the relationship between corporate social responsibility and business.”</i> ¹ .	9
Discusses of the provocative speeches by Peter Kell, CEO of Australian Consumer Association (CHOICE) at the 2005 National Consumer Congress March ² , referring to “less sensible arguments used to justify less regulation. Explores key arguments underpinning the “red tape debates believed to be misconceived, and at the 2006 National Consumer Congress March 2006 ³ Explores red tape misconceptions. <i>“Will the right consumer protection tools be made available regulators?”</i>	10-12
Brief mention the views of <i>Jamison et al (2005)</i> views on regulators	12

¹ PILCH (2005) Submission to the Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility (July), Executive Summary Overview (cited in my Part 2 submission to the PC DR)

Found at

http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/submissions/sub04.pdf

² Kell, Peter (2005). *“Keeping the Bastards Honest – Forty Years on, Maintaining a strong Australian Consumer Movement is needed more than ever. A Consumer Perspective”* Published speech delivered at the National Consumer Congress 2005 March 2005

³ Kell, Peter (2006) *“Consumers, Risk and Regulation.”* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006, p 2. Peter Kell is CEO of the ACA, publisher of CHOICE magazine and peak consumer advocacy body.

being scapegoated for unpopular policies	
Competition and fiscal ideologies inadequate to appease consumer anxieties. Compromised consumer confidence is compromised consumer protection	12
Reducing Regulatory Burdens – discussion of Victorian philosophies described by the then Victorian Treasurer (2006) John Brumby and now Victorian Premier (since July 2007)	12-14
Passing mention of impacts of vertical and horizontal integration in the marketplace	14
Views of <i>Cowan and Tynan (1999)</i> ⁴ as cited by <i>Jamison et al (2005)</i> concerning impacts of privatization agreements on the community, especially the “poor”	15-18
Further discussion of Peter Kell’s speech at the 2006 national Consumer Congress questioning the rationale for “questions the rationale for heavier reliance on “ <i>half-baked self-regulation.</i> ”	18-22
Selection of competition policy issues. Cites Gavin Dufty, and Andrew Nance. Includes Nance’s view in 2004 a year after full retail competition was introduced that “ <i>There has been no convincing argument that this latest attempt to rearrange the deckchairs will actually provide any tangible benefit to consumers</i> ” <i>Cites views of Peter Mair (to PC)</i> <i>“Black letter regulation to protect particular dealings often becomes a game of contrived frustration: prospectively, exposing breaches of golden rule principles might change the game”</i>	22-35
Cites 2007 VCOSS Response to the Final Report of the <i>Review of the Essential Services Commission Act 2001</i> addressed to the Victorian Minister of Finance, the VCOSS raising some important issues regarding both information-gathering and enforcement.	36
Cites the views of Edmund Chattoe UK Sociologists – Can Economists and Sociologists communicate?	37
Views of Peter Kell and Nigel Waters at World Consumer International Conference (2007) ⁵ Better accountability of government agencies – a significant gap in the current framework. Referring to the need to ensure that markets are fair, efficient sustainable and equitable. These central	37

⁴ Cowen B, Tynan P & N . 1999. “*Reaching the Urban Poor with Private Infrastructure, Finance, Private Sector, and Infrastructure Network*”, Note No. 188, Washington, D.C.: The World Bank.

requirements to an effective consumer policy framework are echoed by David Tennant as Director of Care Financial and Chair of CFA	
Discussion of selected views of the PC about existing shortcomings in consumer protection	38-39
Extract from a technical example within the energy industry of the consequences of light-handed regulation I quote directly from an EAG Powerpoint Presentation at the International Metering Conference in October 2007 ⁶ illustrating deficiencies and side-effects of “light-handed” regulation including “poor information” and understanding of a range of complex inter-related factors	40
Discussion of selected regulatory design principles taken mostly from <i>Jamison’s</i> World Bank literature review	42-42
Regulatory Corruption (broadly defined) c/f Jamison et al’s 2005 literature review	42 See also 45
Discussion in brief of an example of regulatory failure leading to unacceptable market conduct The role of specific unfair contract provisions as in the Victorian model	42-47
Discusses revised Memorandum of Understanding (MOU) dated 18 October 2007 between Consumer Affairs Victoria and Essential Services Commission. Discusses selected inadequate compliance and enforcement issues, despite policies. The theory and practice gap is significant and needs to be bridged at all levels of government	44-47
Information asymmetry and distortions – brief comment	47
Discussion of selected corruption and sustainability issues (ref <i>Jameson et al (2005)</i> and literature review	47-51
Concluding remarks - ?hope for the future	51-52

⁵ Consumers International Conference (2007) Holding Corporations to Account Luna Park, Sydney Australia 29-31 October

⁶ Energy Action Group (John Dick President) *Allocating Risks in a Gross Pool Market* Presentation at Metering International Conference 24 October 2007

Further discussion of regulatory reform philosophies

As mentioned in Submission (Chapter 2 to the PC, the Senate Select Committee had made these important findings in 2000, which advisers, politicians, policy-makers, and regulators would do well to heed and re-consider in the light of current regulatory reform programs:

<i>Lack of understanding of NCP policies;</i>
<i>A predominance of narrow economic interpretation of the policy rather than wider consideration of the externalities</i>
<i>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;</i>
<i>Lack of transparency of reviews; and</i>
<i>Lack of appeal mechanisms</i>

“The Senate Select Committee had found that social services were not shown to improve during NCP.⁷ The SSC took seriously the suggestions in many submissions that some aspects of NCP and its administration would appear to be in conflict with the principles of good health community and social welfare service provision. That Committee’s findings in terms of competition policy and its impacts are further discussed elsewhere.

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

⁷ SCC 2000 “*Riding the Waves of Change*” A Report of the Senate Select Committee Ch 5 the Socio-economic consequences of national competition policy. 2000 found at http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc

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

The opening line of Chapter 5 of the SSC Report on the Socio-Economic Consequences of Competition Policy.⁸

“Market forces are global but the social fallout that policy makers have to manage are local”⁹

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

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

- a) *for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or*
 - b) *for the merits or appropriateness of a particular policy or course of action to be determined; or*
 - c) *for an assessment of the most effective means of achieving a policy objective;*
- the following matters shall, where relevant, be taken into account:*
- d) *government legislation and policies relating to ecologically sustainable development;*
 - e) *social welfare and equity considerations, including community service obligations;*

⁸ Ibid SCC (2000) “*Riding the Waves of Change*”

⁹ 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

- | | |
|----|--|
| f) | <i>government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;</i> |
| g) | <i>economic and regional development, including employment and investment growth;</i> |
| h) | <i>the interests of consumers generally or of a class of consumers;</i> |
| i) | <i>the competitiveness of Australian businesses; and</i> |
| j) | <i>the efficient allocation of resources.</i> |

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

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

The Senate Select Committee’s 2000 enquiry did not find that shifting of financial responsibility to

“bloody awful agencies which ought to be defunded”

worked in terms of dealing effectively with hardship policies implemented by the government or contracted out.

The detail of provision is yet to be formulated, but why should the public have any confidence that the arrangements will be any more effective now in a climate of uncertainty, rising prices and cutbacks. Social security agencies are already taking up the option of bundling relief provisions but expecting vulnerable consumers to make a choice

as to which service they wish to use subsidies for. Just how service guarantees will be made for essential services is yet to be outlined.

In terms of risk-shifting, those corporations who enter the energy industry enter with full theoretical knowledge of the risks to be borne. Retailers in fact occupy the principle role of managing risks through appropriate hedging instruments. They have far less control over actual prices than do wholesalers. A study of the retail market in isolation without realizing the impacts that wholesale and distribution prices have on the market is to fail to undertake a robust study.

In Section 5 of his 2006 provocative paper about regulatory policy and reform¹⁰, Peter Kell discusses the importance of effective regulators in a:

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

As pointed out by PILCH

Less than 10 per cent of corporations demonstrate a developed understanding of the relationship between corporate social responsibility and business.¹¹

¹⁰ Kell, Peter (2006) “*Consumers, Risk and Regulation.*” Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006

¹¹ PILCH (2005) Submission to the Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility (July), Executive Summary Overview (cited in my Part 2 submission to the PC DR)

Found at
http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/submissions/sub04.pdf

In his concluding paragraphs of his published 2006 speech, Peter Kell provokes debate in the following words:

Conclusions

The debate we need to have on consumer protection regulation in Australia is yet to come. A proper evaluation of the aims and structure of consumer protection is needed, so that regulation better serves consumers today and into the future. But this won't occur if we start from positions that suggest that consumers are already over-protected, and that regulatory developments in recent years are unreasonable attempts to further reduce the risks they face.

We also won't see key consumer protection regulators given the right tools and objectives.

As part of my review of consumer protection there is certainly scope to have a debate about the appropriate level of risk that consumers should carry in different circumstances. Indeed this should be one of the key questions that anyone with an interest in consumer policy needs to address. But this needs to be informed by a realistic assessment of the types of risks that consumers face today in an increasingly globalized financial system, as well as an assessment of the impacts of these risks – both positive and negative. It also needs to be informed by a more sober assessment of the way in which a range of major regulator developments in recent times actually shift risks to consumers away from government and firms. We've yet to see this work take place in the current round of regulatory review.

In the previous year Peter Kell provided another provocative speech, also at the NCC¹²

Mr. Kell stressed that the successes of aspects of current consumer protection need to be acknowledged. For example Peter Kell, CEO ACA has referred to less sensible arguments used to justify less regulation. He discussed in his published speech to the 2006 National Consumer Congress the key arguments underpinning the 'red tape' debates are misconceived. He believes that there is a

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

¹² Kell, Peter (2005). “*Keeping the Bastards Honest – Forty Years on, Maintaining a strong Australian Consumer Movement is needed more than ever. A Consumer Perspective*” Published speech delivered at the National Consumer Congress 2005 March 2005

framework that we need for the future.”

One concern about the current proposals may be that in a desire to reduce regulatory burden along the lines and for the reasons presented by Peter Kell referred to here, is that consumer protection could be diluted through reliance on the “lowest possible denominator approach.”

It is difficult to tell without the detail how the protection framework will actually work and how accessible redress and enforcement will be in the real world.

I quote from Peter Kell’s 2006 Speech at the NCC¹³

“From ACA’s perspective reducing regulatory burdens whilst still ensuring good market outcomes is an important objective. Consumers don’t benefit from poorly directed regulation or complicated rules that aren’t enforced. Reducing regulation that unnecessarily restricts market competition will also generate better outcomes for consumers.”

Jamison (2005) claims that

“regulators are sometimes scapegoats for unpopular policies and unavoidably become involved in shaping the policies that they are supposed to implement. As a result of such frictions regulators are sometimes removed from office or marginalized in some way.”

He recommends strategies by which adaptive leadership can be used to help constitutes to adapt to new policies and changing situations, whilst still staying in the game. The foremost leadership skill recommended is the ability to

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

¹³ Kell, Peter (2006) “*Consumers, Risk and Regulation.*” Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006, p 2. Peter Kell is CEO of the ACA, publisher of CHOICE magazine and peak consumer advocacy body. Prior to joining ACA, Peter was Executive Director of Consumer Protection, and NSW Regional Commissioner, at the Australian Securities and Investments Commission (ASIC).

How do political party, personal, and informal relationships affect the effectiveness of formal policies on regulatory systems, regulatory agencies, and corruption?

These considerations should be paramount in the minds of those formulating reforms and consumer policy frameworks, more especially in the essential services arena.

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

With that in mind, I highlight sections of the publication authored by the then Victorian Treasurer John Brumby, now Premier of Victoria.

Reducing the Regulatory Burden¹⁴

Foreward

Reducing the Regulatory Burden

The Reducing the Regulatory Burden Initiative (the initiative) was announced by the Victorian Treasurer in May 2006. The initiative is focused on reducing the administrative and compliance burden of state regulation on business and the not for profit sector by;

- *ensuring the administrative burden of any new regulation is met by an ‘offsetting simplification’ in the same or related area; and*
- *reducing the overall compliance burden through funding of a programme of reviews.*

Under the initiative the Government has committed to:

- *reducing the administrative burden of State regulation as at 1 July 2006 by 15 per cent over three years and 25 per cent over five years.*

¹⁴ Brumby, John (2006) “*Reducing the Regulatory Burden: The Victorian Government’s Plan to Reduce Red Tape.*” John Brumby was the then Victorian Treasurer, but now Premier of Victoria. About DPI Reducing the Regulatory Burden <http://www.dpi.vic.gov.au/DPI/dpincor.nsf/childdocs/-7F1041F3C997FDDCCA256DB00021E202-085E15DDD84DD27ACA2573590017BC4B?open>

<ul style="list-style-type: none"> • <i>reviewing key areas of compliance burden</i>
<ul style="list-style-type: none"> • <i>offsetting simplifications to any new or additional administrative or compliance burdens imposed by regulations made after 1 July 2006.</i>
<p><i>The Department of Primary Industry is committed to the efficient development of regulation. The Department has prepared a detailed Three Year Administrative Burden Reduction Plan to address the administrative burden imposed on business by its stock of regulation. The Department is also undertaking a programme of reviews to identify the necessary actions to reduce compliance burdens.</i></p> <p><i>The reviews and the initiatives outlined in the Three Year Administrative Burden Reduction Plan are focused on the identification of areas of regulation which impose significant cost to business as well as those that are scheduled for review through the normal operation of legislative process. Some of the reviews to date are:</i></p>

I show below the Context of the Victorian Reduction of Regulatory Burden statement of in terms of Reducing the Regulatory Burden¹⁵, with reference to National Competition Policy¹⁶

<p><i>Context p2</i></p> <p><i>“The Victorian Government recognises that good regulation will protect the community and the environment, while underpinning efficient and well functioning market economies.</i></p> <p><i>Conversely, ineffective regulation can both hinder economic activity and defeat the intended objectives of the regulation.</i></p> <p><i>The Victorian Government also recognises that the cumulative impact of regulation may affect business investment decisions.</i></p> <p><i>The Government is aware that the burden of much regulation falls disproportionately on small organisations. Reforms that reduce burdens, without compromising policy objectives, are good for all Victorians.</i></p>

¹⁵ Brumby, The Hon John “Reducing the Regulatory Burden, The Victorian Government’s Plan to Reduce Red Tape” ISBN 920920921B26 State of Victoria
Found at
[http://www.dpi.vic.gov.au/DPI/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3e8ccc079f7b914dca2573d2001fbf82/\\$FILE/reducing_reg_burden%20brochure.pdf](http://www.dpi.vic.gov.au/DPI/dpincor.nsf/9e58661e880ba9e44a256c640023eb2e/3e8ccc079f7b914dca2573d2001fbf82/$FILE/reducing_reg_burden%20brochure.pdf)

¹⁶ The principles of National Competition Policy have been incompletely understood by many politicians, bureaucrats, policy-makers and regulators. In 2000 the Senate Select Committee

Our aim is to find the simplest and most effective means of achieving the Government's intended policy outcomes. This approach is not about changing Victoria's regulatory objectives - rather it is about ensuring that regulation is achieving its outcome in the most efficient manner."

"Through the Reducing the Regulatory Burden initiative the Victorian Government will continue, as a priority, to review the regulatory environment over which it has control and will continue to set a standard for other jurisdictions.

Only by continuing this commitment to the reform agenda will Victoria and Australia, as a nation, be prepared for the significant social and economic challenges ahead."

Statement of Commitment, p 3

Reducing the Regulatory Burden affirms the Victorian Government's on-going commitment to regulatory reform and builds on our national leadership in implementing the National Competition Policy reform initiatives.

The Victorian Government recognises that regulation is an important tool for achieving policy objectives. However, this initiative seeks to minimise any unnecessary burden on businesses, not-for-profit organisations and the community at large.

Reducing the Regulatory Burden commits Victoria to a specific and ambitious target for reducing the administrative burden of State regulation, and to a program of reviews aimed at identifying where there is scope for simplifying and streamlining regulation.

In August 2005, the Victorian Government further strengthened its position as a national leader on regulatory reform with the release of its proposal to COAG, A Third Wave of National Reform.

The proposal received significant support from the business community which had for some time been calling for regulation reform to encourage a more productive and competitive business environment.

The February 2006 meeting of COAG recognised that regulatory reform was a key issue and, although it did not adopt Victoria's proposals in their entirety, it agreed to a priority list of regulation reviews.

Although Victoria remains committed to a co-operative and concerted national approach, it cannot allow the lack of national agreement to delay a reform agenda which is essential if the social and economic challenges facing Australia are to be addressed.

In developing the Reducing the Regulatory Burden, Victoria has drawn on international best practice in regulatory reform.

This initiative positions Victoria as a leader in tackling the reforms which will be the foundation for our future economic growth and prosperity.

John Brumby MP Treasurer¹⁷

The Context of the Victorian Government's Plan for reduction of regulatory burden was described in the same publication authored by the then Victorian Treasurer, John Brumby, now Premier of Victoria since July 2007

The Victorian Premier in the same publication discusses how review and reform of existing areas of undue burden may be achieved under the Victorian Plan for Reduction of Regulatory Burden

P8

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 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.

P9

The Government is committed to identifying priority areas for review and establishing timelines for completion of these reviews.

The reviews will be undertaken and specific reforms developed to reduce the burden of regulation.

As with the National Competition Policy, some reviews will be done in-house while others may be undertaken through a public process.

¹⁷ The Honourable John Mansfield Brumby since 30 July 2007 has been Premier of Victoria, Minister for Multicultural Affairs and Minister for Veterans' Affairs
Ministerial Appointments: Minister for Finance and Assistant Treasurer October 1999-May 2000. Minister for State and Regional Development October 1999-December 2006. Treasurer 22 May 2000-August 2007. Minister for Innovation February 2002-August 2007. Minister for Regional and Rural Development December 2006-August 2007. Premier since 30 July 2007. Minister for Veterans' Affairs, Minister for Multicultural Affairs since July 2007.

This program of reviews will be combined with incentive payments to reward outcomes which reduce the regulatory burden.

In some cases, such as particularly complex areas or those which involve multiple departments, it may be more appropriate for the Victorian Competition and Efficiency Commission (VCEC) to undertake the review.

To what extent have past infrastructure reforms in developing countries improved access of the poor to utility services?

The concepts are still applicable to countries like Australia that are not termed “developing”

*Jamison et al (2005)*¹⁸ cite a selection of authors who have written in the relationship between the urban poor to private infrastructure.

These include *Cowan and Tynan (1999)* whose conceptual paper recommends that:

“policymakers consider the market structure and potential for entry before entering into privatization contracts.”

Though not the focus of this submission, there are many concerns about the current marketplace, in a climate of vertical and horizontal integration with market dominance perceived on many grounds by a select few whose power and vertical structures may make it exceedingly difficult for new entrants to survive in an open fully deregulated market. I have alluded to these concerns in my companion submission addressing 5.4 but the smogaarsboard of market intelligence available cannot be properly addressed in the context of a submission predominantly focused on consumer policy.

¹⁸ Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank*. The Electricity Journal Vol 18(6) July 2005 pp 355-35

Cowan and Tynan (1999)¹⁹ as cited by Jamison et al (2005) that contracts need to achieve the following:

- | |
|---|
| 1) <i>“Ensure that the privatization agreement does not cut off service options for the poor or reduce choices.”</i> |
| 2) <i>“Contractual provisions should focus more on output standards (quality of service) and less on input standards, such as standards based on an international company’s technology.”</i> |
| 3) <i>“Other items to consider include: alternative interconnection arrangements for the poor, subsidies that are targeted and not tied to one supplier, and changes in the regulatory process to improve service for the poor and gauge willingness to pay.”</i> |
| 4) <i>“Policy decisions made during the transition to a concession will likely need to be made sequentially.”</i> |
| 5) <i>“Once a contract is finalized, it is difficult to change entry and competition rules, provide for alternative supplies, and stipulate lower technical standards.”</i> |

Another paper cited by Jamison et al (2005) The paper examines and explains the macroeconomic and microeconomic linkages between infrastructure reform and the poor, with focus on priority setting. These issues are discussed by the authors:

- | |
|---|
| 1. <i>Macroeconomic and microeconomic linkages between infrastructure reform and the poor and discusses setting priorities</i> |
| 2. <i>Describes reforms’ impacts on access and affordability for the poor;</i> |
| 3. <i>Discusses approaches for improving access for the poor, including operator obligations, connection targets, low cost technologies, subsidies and cross-subsidies, and open entry;</i> |
| 4. <i>Describes approaches for improving affordability, including lifeline subsidies, means-tested subsidies, vouchers, balancing connection and</i> |

¹⁹ Cowen B, Tynan P & N . 1999. *“Reaching the Urban Poor with Private Infrastructure, Finance, Private Sector, and Infrastructure Network”*, Note No. 188, Washington, D.C.: The World Bank.

usage charges, billing options, and prepaid service.

If these issues can be sensible targeted through such reviews we will all be better off. But in the current climate it is all too common to see less sensible arguments used to justify less regulation. Instead of a constructive evaluation of different regulatory options and their potential outcomes, we get undifferentiated attacks on regulation and regulators, often driven by barely concealed self-interest.

We also see the inevitable return of the simplistic ‘quantity theory of regulation.’ Where the desirability of regulation is simply related to the question of ‘how much’ rather than whether it is effective.

This is disappointing. We need a rigorous debate around consumer protection in Australia. We need to look at whether our regulations and regulators are meeting their objectives in today’s market environment. But we won’t get there if we start from the wrong premise.

However, the weaknesses are significant and caution needs to be exercised in deeming current provisions adequate, mostly meeting need, with gaps fixable by greater use of existing mechanisms and co-regulatory practices²⁰ Kell goes further, suggesting that

“.....in most cases, self-regulation is no more flexible than the black letter law and, in many cases, considerably less flexible.”

If this area was looked at, I would like to see an honest, empirical assessment of some of the key propositions used to support self-regulation such as its alleged flexibility, market friendliness in the face of changing market conditions, and ability to be more attuned to the way that industry is changing.

My observation is that in most cases, self-regulation is no more flexible than the black letter law and, in many cases, considerably less flexible.

²⁰ Ibid Kell (2005) “*Keeping the Bastards Honest – Forty Years on....*” NCC

The starting point of the Productivity Commission's recommendation is a sensible one. It is an assessment of the effectiveness of current mechanisms. To understand effectiveness because we are always looking for improvements because we are always analysing current problems to overlook some of the successes.

I refer again to the speech delivered by Peter Kell²¹ as CEO of the Australian Consumer's Association at the National Consumer Congress in Melbourne in 2005²²

In that speech, Peter Kell discusses the Productivity Commission's Draft Report on the Review of National Competition Policy. The report had called for review of consumer protection law and policy in Australia. Peter Kell questions the rationale for heavier reliance on "half-baked self-regulation."

He quotes directly from that PC Draft Report a component of which is reproduced below and cited from Peter Kell's speech and referring to the recommendation to the Australian Government, in consultation with States and Territory to establish the review that is the current subject of consultation and on the brink of being finalized.

The Australian Government, in consultation with the States and Territories, should establish a national review into consumer protection policy and administration in Australia. The review should particularly focus on: the effectiveness of existing measures in protecting consumers in the more competitive market environment; mechanisms for coordinating policy development and application across jurisdiction, and for avoiding regulatory duplication; the scope for self-regulatory and co-regulatory approaches; and ways to resolve any tensions between the administrative and advocacy roles of consumer affair bodies.

²¹ Peter Kell is the Chief Executive Officer of Choice (Australian Consumers' Association), having joined on 11 March 2004. ACA is Australia's leading consumer organisation, and the publisher of CHOICE magazine. Prior to joining ACA, Peter was Executive Director of Consumer Protection, and NSW Regional Commissioner, at the Australian Securities and Investments Commission (ASIC). Peter joined ASIC in 1998 when it was given significantly expanded consumer protection jurisdiction, and was responsible for ASIC's approach to consumer protection regulation in the financial services sector. Peter's area developed and implemented successful regulatory campaigns in areas such as mortgage broking and financial planning, built ASIC's widely recognised consumer education and financial literacy programs, and developed policy and approval standards for consumer dispute resolution schemes. Peter was also responsible for establishing ASIC's Consumer Advisory Panel.

²² Ibid Kell Peter (2005). "Keeping the Bastards Honest" Speech delivered by Peter Kell, CEO ACA at the National Consumer Congress 2005

In his 2005 speech Peter Kell examines the (then) proposed review and asks whether a review of consumer protection along the lines proposed was warranted²³ Peter Kell's words were²⁴:

Now, at the outset, let me say that ACA supports a review of consumer protection policy and we support it, I hasten to add, despite the fact that we see some significant risks associated with such an exercise. Some of those risks are already apparent in the way that the Productivity Commission talks about this issue and I am sure some of you have seen their report.

For example, there seems to be a notion that there is a wealth of self-regulatory initiatives that are not currently being given sufficient attention in this area. I am not so sure about that and I would like to put in a plea that we all be spared from more half-baked self-regulation. There are, of course, other players who would see such a review as a golden opportunity to wind back consumer protection. At times, this seems to be based on the idea that if we somehow develop more competitive markets, then consumer protection should be stripped back.

That sort of notion, which is partly there in the Productivity Commission discussion, is problematic for several reasons. I will mention three. One is that there seems to be at times, in discussions around the outcomes of competition policy, a premature celebration of competition in some markets before it has actually really arrived or had an impact.

The second reason why I think that that is an inappropriate approach comes from some of the work that Louise Sylvan has been doing. We should not be thinking of competition and consumer protection as somehow at odds with each other but, rather, we ought to be looking at the opportunity for integrating them and seeing them as complementary objectives in much of the regulatory arena.

Finally, I think the notion that more competition means we can, in some simplistic sense, wind back consumer protection, is based on a one dimensional and unproductive understanding of consumer behaviour. That is what I will return to a little later in my talk.

²³ Do we need a review of consumer protection regulation along these lines?, p2 Peter Kell's speech at the 2nd National Consumer Congress Melbourne March 2005

²⁴ Ibid Kell, Peter (2005) *Keeping the Bastards Honest – Forty years on....*” Speech at 2005 National Consumer Congress March, p2

Having pointed out some risks, I think it would be unfortunate if we let those risks stop us from seeking to improve consumer protection through such a review. I believe we can achieve a better and more coherent approach to regulation in this area, and we have reached a stage in consumer protection regulation in Australia when a big picture examination could and should provide some important opportunities to rethink some of our current structures and approaches. There are a range of challenges we face, and market developments that have arisen that warrant some fresh thinking.

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

I now refer to the topical published speech by Peter Kell²⁵ at the National Consumer Congress in March 2006²⁶, referring to a number of important publications concerning regulation, including the 2005 published public lecture presented Gary Banks at the ANU on the topic of regulation-making in Australia.²⁷

He refers to PC's Regulation and Review 2004-05 as part of its Annual Report series.²⁸

That 2006 NCC talk by Peter Kell presents some provocative concerns about the philosophy of consumer protection and the extent to which it may be inappropriate for

²⁵ Peter Kell is the Chief Executive Officer of Choice (Australian Consumers' Association), having joined on 11 March 2004. ACA is Australia's leading consumer organisation, and the publisher of CHOICE magazine. Prior to joining ACA, Peter Kell was Executive Director of Consumer Protection, and NSW Regional Commissioner, at the Australian Securities and Investments Commission (ASIC). Peter joined ASIC in 1998 when it was given significantly expanded consumer protection jurisdiction, and was responsible for ASIC's approach to consumer protection regulation in the financial services sector. Peter's area developed and implemented successful regulatory campaigns in areas such as mortgage broking and financial planning, built ASIC's widely recognised consumer education and financial literacy programs, and developed policy and approval standards for consumer dispute resolution schemes. Peter was also responsible for establishing ASIC's Consumer Advisory Panel

²⁶ Kell, Peter, (2006) Australian Consumers Association. "*Consumers, Risk and Regulation.*" Speech delivered at National Consumer Congress 17 March 2006

²⁷ Banks, Gary, (2005) *Regulation-making in Australia: Is it broke? How do we fix it?* Presented by Chairman of Productivity Commission at a public lecture. This lecture was given as part of a Public lecture Series of the Australian Centre of Regulatory Economics (ACORE) at the Faculty of Economics and Commerce, ANU, Canberra, 7 July 2005

²⁸ Found at http://www.pc.gov.au/data/assets/pdf_file/0020/7661/cs20050707.pdf
Productivity Commission (2005) Regulation and its Review 2004-05 Annual Report Series. Online <http://www.pc.gov.au/research/annrpt/reglnrev0405/reglnrev0405.pdf> c/f Published speech delivered by Peter Kell at the National Consumer Congress 2006, p 12 References.

such philosophies to shift regulatory risk from government and/or corporations to individuals.

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

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

Within the energy sector such a shift of risk is seen which is expected to borne by consumers. When such a shift relates to essential services, without which daily living requirements cannot be met in a modern society and when the burden is forced upon those who are vulnerable and disadvantaged not only because of financial hardship, but for a host of other reasons that may preclude active choice and participation in the market, questions need to be asked about how the acceptability of such shifts.

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

A similar viewpoint is expressed by Gavin Dufty, currently Manager Social Policy and research at St Vincent de Paul Society. Mr. Dufty is also given to sharp and eloquent critical analysis also of the regulatory landscape.

With his permission, I reproduce will shortly reproduce Gavin Dufty's VCOSS Congress Paper presented in 2004 as a critical examination of the paper presented the previous year by John Tamblyn, currently Chairperson of the Australian Energy Market Commission, but at the time Chairperson of the Essential Services Commission.

For the moment I will turn attention to discussion of the philosophies that have been published in relation to the Victorian initiatives to reduce administrative and compliance burdens on businesses and not for profit sector.

Whilst supporting the need to review regulation that is truly unnecessary, is duplicated, confusing or inappropriate I am most concerned that often misguided interpretations of the original intent of National Competition Policy goals do not become again lost in the eagerness to reduce burdens, with the possible unintended consequence of increasing market power imbalances and compromising consumer protections.

In Section 2 of my Part 2 Submission to the PC's Draft Report I discussed in some detail overarching objectives and their relationship competition policies and the various interpretations applied to them.

The findings of Senate Select Committee²⁹ in relation to NCP impacts on social services were not shown to improve during NCP. Ethical and sustainability, and socially responsible and financial considerations. Expressly, proper regard for local, social, community and environmental interests and financial considerations.

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

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

Andrew Nance's views and findings³⁰ (at the time with South Australia Council of Social Services (SACOSS) are also extensively cited and relied upon in the body of the text.

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

Extract (pages 1 and 2):

“While reforms continue to ignore the existence of a group of consumers and target the average consumer these vulnerable households will continue to be failed by the market and many families will continue to suffer unnecessarily. As the Issues Paper acknowledges and then seems to forget, electricity and gas are essential services

We have such little information on what is happening to residential customers and vulnerable consumers in particular, it is impossible to offer any support outside the state to what appears to be an unelected unaccountable bureaucracy. It is

²⁹ SCC 2000 “*Riding the Waves of Change*” A Report of the Senate Select Committee Ch 5 the Socio-economic consequences of national competition policy. 2000 found at http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc

³⁰ Nance, Andrew (2004) Personal Submission to MCE SCO National Framework for Electricity and Gas Distribution and Retail Regulation – Issues Paper October 2004 Found at <http://www.mce.gov.au/assets/documents/mceinternet/AndrewNance20041124123357.pdf>

recommended that the SCO enquiry into residential disconnection rates in SA since the introduction of full retail contestability on 1 January 2003. Further it is suggested that the SCO enquire into why, over 18 months later, no meaningful data has been released into the public domain.

Further it is suggested that the SCO enquire into how many fatal housefires have occurred in SA homes disconnected from electricity for inability to pay since FRC and then maybe enquire why there have been no inquiries or actions in response”There has been no convincing argument that this latest attempt to rearrange the deckchairs will actually provide any tangible benefit to consumers”

Gavin Dufty analyses the philosophies of the ESC apparently startlingly similar to those of the AEMC) in relation to Universal Service Obligations (USOs)³¹ Dufty also deals with the hairy issue of shifting responsibility from corporations and government to consumers; or from corporations to government, a process that he refers to as “gaming” though that term is also used in the context of this submission in referring to misuse of market power³² Rather than explain this here, I urge interested readers to read the whole paper presented by Gavin Dufty to gain an understanding of philosophical dichotomies that may have given rise to much debate within the context of this Consumer Policy Review. Though Dufty’s paper is focused on energy regulation, many of the principles can be applied to other arenas.

In his 2004 analysis of the Essential Services Commission’s philosophies and approaches, Gavin Dufty, now Manager Social Policy and Research St Vincent de Paul Society said³³

³¹ Dufty, Gavin “*Who Makes Social Policy – The rising influence of economic regulators and the decline of elected Governments.*” VCOSS Congress Paper 2004 Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn’s Powerpoint presentation at the World Forum on Energy Regulation, Rome Sept 2003. Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004 in a presentation entitled “*The Right to Service in an Evolving Utility Market.*” (seemingly a revamp of “Are Universal Obligations compatible with effective energy retail market competition? Tamblyn World Forum of Economic Regulators Rome 2003)

³² See for example the views and concerns expressed in the 2007 Annual report of Jackgreen, a Tier 2 Retailer. “*It is clear to Blind Freddy that gaming has occurred; the question is who caused it and who is benefitting from it?*”

³³ Dufty, G (2004). *Who Makes Social Policy? – The rising influence of economic regulators and the decline of elected Governments.* VCOSS Congress Paper 2004

³³ Tamblyn, John (2003) Powerpoint presentation World Forum on Energy Regulation, Rome September “*Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition?*” John Tamblyn (then) Chairperson Essential Services Commission Victoria.

In all of these models the ESC³⁴ is proposing to withdraw from the traditional basic protections delivered via universal service. In lieu of a universal safety net offered via universal service obligations the ESC proposes to protect customers where the market is failing through the establishment of “residual markets”³⁵.

This residual market would be subsidized by the Government supposedly using monies currently allocated to fund energy concessions designed to increase affordability of energy services for low income households.

As observed by Mr. Dufty, The model proposed

“.....creates the opportunity for private companies to ‘game’³⁶ the subsidies created to address market failure. This could occur through company’s retreating from providing services to all but the most profitable customers.

The proposals made

“.....not only shifts the target groups for the concessions, but also serves to reduce minimum protections to all Victorians. “.....seeks to erode the current framework of regulated price caps and defined minimum service standards.

The 2004 VCOSS Congress Paper authored by Gavin Dufty of the Social and Research Unit, Society of St. Vincent de Paul Society Victoria³⁷ highlights inequality issues, questions how the needs of the vulnerable and disadvantaged can be addressed within energy policy and suggests that there may be a role of universal service obligations for essential services.

Those issues have become topical once again in the light of proposals by the Government to allow price deregulation in the entire Australian energy market, barring Western

³⁴ Essential Services Commission, *Review of the effectiveness of retail competition and the consumer safety net for electricity and gas*, Issues paper, December 2003,p18

³⁵ Residual markets occur when various customers who are directly excluded from mainstream market offers are provided a residual service; this is usually a minimalist type service.

³⁶ Gaming refers to the ability of companies to increase profit by shifting additional costs or low profitability/high risk customers onto third parties, such as government.

³⁷ Ibid Dufty, G, *Who makes social policy?* VCOSS Congress Paper

Australia, as part of the current Review of the Impact of Competition in the Gas and Electricity Retail Markets.

In raising significant social policy issues that have arisen during the review of effectiveness of retail competition in the Victorian energy market and review of the Victorian gas and electricity code, that paper explores:

“The potential and real impact economic regulators have on shaping and redirecting elected governments’ social policy objectives.”

Mr. Dufty notes that:

“There is lack of awareness of and respect for the role and mandate of the State Government in setting and delivering social and other objectives within the democratic process.”

His VCOSS paper analyses the hidden agenda in policies adopted by the Essential Services Commission, resulting in withdrawal from the traditional basic protections delivered via universal service obligations.

The scheme adopted was to fall back on *“residual markets”* through retailer of last resort arrangements {RoLR} whereby a retailer opts to inherit vulnerable consumers where no one else would, or in the event of market failure. The RoLR would be financially compensated in such circumstances but the universal safety net protections would become obsolete and inaccessible.

Mr. Dufty eloquently attacks a conceptualized approach by the Essential Services Commission that is used merely to address market failure instead of maintaining overall consumer protections for Victorian consumers. The risks to consumers of such a strategy are enormous and encourage retailers to abandon all but the *“most profitable customers.”*

Explains Mr. Dufty:

“In effect the ESC is proposing to increase costs for many who are already disadvantaged purely to stimulate competition with little to no regard for the social impacts.”

The idea was for the regulator to increase default prices (the safety net) to stimulate competition and address the needs of the vulnerable and disadvantaged especially those with financial hardship by shifting responsibility to charity organisations or government agencies, leaving the retailers to make high profit margins in the interests of competition.

Such an imbalance cannot be in the interests of achieving equity or to meet minimal social justice goals.

This approach was supported by John Tamblyn, then Chairperson of the ESC, and now chairing the Australian Energy Market Commission's Review of the Impact of Competition on Retail Gas and Electricity Markets.

Gavin Dufty's VCOSS paper in 2004, exposes the rationale behind Mr. Tambyln's Powerpoint presentation at the World Forum on Energy Regulation in Rome in 2003 as referenced above.

I quote more fully from that paper with the author's consent – as an important public document that deserves to be read – and re-read in the public interest, more especially at a time of major energy regulatory reform and other major consumer protection reforms in the context of the Productivity Commission's current enquiry.

In Gavin Dufty's 2004 VCOSS Congress Paper, through case study of the Victorian energy market he powerfully illustrates significant social policy issues that have arisen during the review of the effectiveness of retail competition in the Victorian energy market and the review of the Victorian gas and electricity retail code.

Since the issues impact on the role of safety net arrangements; eligibility for government assistance and the potential for universal service obligations for essential services, these issues are as pertinent today in the light of imminent price deregulation in the energy industry, substantial lightening of the regulatory burden to the extent that may occasion detriment to the low-income groups and others with a range of vulnerable and disadvantaged conditions.

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

The views of Gavin Dufty, Social Scientist and Manager Social Policy and Research at the St Vincent de Paul Society raise concerns about:³⁸

³⁸ Dufty, Gavin *"Who Makes Social Policy – The rising influence of economic regulators and the decline of elected Governments."* VCOSS Congress Paper 2004 Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn's Powerpoint presentation at the World Forum on Energy Regulation, Rome Sept 2003. Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004 in a presentation entitled *"The*
27 of 54

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

As noted by Mr. Dufty, it is of substantial community concern that regulators can

“propose and implement programs that are contrary to elected governments’ policy statements and the ability of regulators to involve third parties such as the not for profit sector in being responsible for assessing utility customers’ entitlements for waivers of penalties or eligibility for assistance.

As far back as 2004 Mr. Dufty summed up the beliefs of the ESC as follows:

“Competition will not only deliver the best outcomes for domestic energy consumer but it will also serve to protect them from abuse by companies operating within this market

There is a need to strip away Universal Service Obligations (the safety net) as they undermine the benefits of competition.”

That is now exactly what is about to happen. Quoting directly from segments Mr. Dufty’s 2004 VCOSS Congress Paper which dissects the paper delivered by John Tamblyn, (then Chairperson of the Essential Services Commission Victoria) now Chairperson Australian Energy Market Commission (AEMC):

The Commission’s objectives also include a requirement to

Promote a more certain and stable regulatory framework that is conducive to

Right to Service in an Evolving Utility Market. (Are Universal Obligations compatible with effective energy retail market competition Rome 2003 – a similar talk with a changed title

28 of 54

longer-term infrastructure investment and to maintain the financial viability of regulated utility industries.

In seeking to achieve its primary objective, the Commission must have regard to the following:

- (a) to facilitate efficiency in regulated industries and the incentive for efficient long-term investment;*
- (b) to facilitate the financial viability of regulated industries;*
- (c) to ensure that the misuse of monopoly or nontransitory market power is prevented;*
- (d) to facilitate effective competition and promote competitive market conduct;*
- (e) to ensure that regulatory decision making has regard to the relevant health, safety, environmental and social legislation applying to the regulated industry;*
- (f) to ensure that users and consumers (including low-income or vulnerable customers) benefit from the gains from competition and efficiency; and*
- (g) to promote consistency in regulation between States and on a national basis*

In this paper Dr. Tamblyn proposed three options for reconciling the perceived dichotomy of universal service obligations and competition.

Firstly, “raise default price level/restrict price rebalancing/target CSOs to vulnerable users. Increase default margins above supply costs

In this option the Regulator proposes to increase default prices (the safety net) to stimulate competition, give people more information about the market and target government funded CSO, (concessions) to unprofitable customers to compensate for market failure.

Secondly “Market prices for majority of users/target default prices/CSOs to vulnerable users.

In this option the Regulator proposes that customers, who accept a market offer, should not be eligible for the full safety net protections. Market offers will have basic protections (e.g. under existing contract protections such as those offered by the Trade Practices Act), more information provision would be provided and retargeted CSO’s (concessions) to act as a subsidy provided to those that the market is failing (in lieu of market contracts.)

Thirdly:”Improve Retailer of Last Resort (RoLR) arrangements.

Concerns about credit risk/retailer failure can undermine retail competition & consumer benefits

In this option the ESC is proposing the establishments of clear guidelines for a retailer of last resort (i.e. a retailer that will provide energy retail functions where no other will). This retailer would then be responsible for unprofitable customers. They would be financially compensated for the cost of these customers.

The ESC goes as far as suggesting that

*“In considering the causes of vulnerability that contribute to the difficulty that some customers have in participating in the competitive retail market, consideration will also have to be given to whether the most appropriate way for addressing them will involve changes to the energy policy and regulation framework and/or the broader welfare, health and regional policy frameworks.”*³⁹

*In all of these models the ESC is proposing to withdraw from the traditional basic protections delivered via universal service. In lieu of a universal safety net offered via universal service obligations, the ESC proposes to protect customers where the market is failing through the establishment of “residual markets.”*⁴⁰

This residual market would be subsidized by the Government, supposedly using monies currently allocated to fund energy concessions designed to increase affordability of energy services for low income households.

³⁹ ESC, (2003) *Review of the effectiveness of retail competition and the consumer safety net for electricity and gas*, Issues Paper, December 2003, p18

⁴⁰ Residual markets occur when various customers who are directly excluded from mainstream market offers are provided a residual service; this is usually a minimalist type service.

2.0 Regulation and social policy

During the past twelve months the ESC has undertaken two reviews that have resulted in their entry into the arena of social policy making; in both cases the proposals by the ESC have the potential to detrimentally impact upon low income and disadvantaged Victorians and directly contradict the policy direction and programs of the elected State Government.

2.1 Review of the effectiveness of retail competition and the consumer safety net for electricity and gas.

The ESC from time to time undertakes reviews into various matters. In late 2003 it undertook a review into the effectiveness of retail competition. In this review the commission identified that there were some areas where competition was not effective and was failing particular households.

In particular the ESC concluded that low volume energy consumption households (with bills of under approximately \$980 per annum) and households that take electricity on an off peak tariff were effectively being excluded from market offers by energy retailers⁴¹.

In response to this, the ESC proposed that the state concession framework be reconceptualised to address these issues of market failure⁴². John Tamblyn, Chairperson of the Essential Services Commission, proposed the question in a world energy forum on regulation: Are universal service obligations compatible with effective energy retail market competition?

In this paper Dr. Tamblyn proposed three options for reconciling the perceived dichotomy of universal service obligations and competition.

The Commission also has objectives under the Electricity Industry Act 2000, which are:

- to the extent that it is efficient and practicable to do so, to promote a consistent regulatory approach between the electricity industry and the gas industry; and*
- to promote the development of full retail competition.⁴³ There are also numerous regulatory instruments that the ESC has at its disposal; these include licenses, codes, guidelines and determinations. It is via these*

⁴¹ Energy retailers are private companies that sell energy to households.

⁴² Ibid Tamblyn J, (2003).

See also Tamblyn J (2004) "*The Right to Service in an Evolving Utility Market. (Are Universal Obligations compatible with effective energy retail market competition Rome 2003 –Dr. Tamblyn expressed similar views at the National Consumer Congress in Melbourne during March 2004*

⁴³ ESC, regulatory framework, www.reggen.vic.gov.au/electricity136.html

regulatory instruments that the ESC can determine how the providers of these essential energy services operate within Victoria. This includes not only pricing and service quality but also practices and procedures that are to be adopted by the companies when dealing with customers.

It is important to note when reading through the objectives of the ESC that the major focus is the promotion of a competitive energy market. The ESC position on such matters can be summed up as follows “as in any industry competition is designed to bring consumers long-term benefits as a result of retailers competing to provide the best combination of products, service and price.”⁴⁴ The ESC also believes that competition will serve to protect small energy users from detrimental activities undertaken by companies: “Effective energy retail competition can protect the interests of most consumers”⁴⁵.

The ESC even goes as far as believing that “Market-wide USOs (Universal Service Obligations⁴⁶) can inhibit development of competition & limit public & consumer benefits.”⁴⁷

The implications of the AEMC’s imminent decision to recommend price deregulation to follow on from the introduction of full retail competition FRC are far-reaching.

The AEMC’s appears to have an entrenched philosophical belief about the dichotomy between perceived “competition” and “non-competition” instead of seeing these issues as two sides of the same coin.

Notwithstanding that the Australian Energy Market Commission (AEMC) does not appear to uphold the concerns expressed in submissions to and findings of the Senate Select Committee’s Report (2000) on the socio-economic impacts of competition discussed elsewhere, there are long-standing concerns that

“Victoria’s energy sector provides another example of how investors in the (now privatized) distribution and retail sectors benefited from policies which, at the same time, deliberately perpetuated a trading position which contravenes the

⁴⁴ ESC, (2001) *Power of choice, All about your new power a step-by-step guide*, Leaflet page 4

⁴⁵ Tamblyn J (2003) “Are Universal service obligation compatible with Effective energy retail market competition? Victorian experience to date” PowerPoint presentation World Forum on Energy Regulation, Rome Italy October 5-9 2003 (John Tamblyn is now Chairperson AEMC, previously Chairperson ESC) See also his published presentation to the 2004 National Consumer Congress along similar lines

⁴⁶ Universal service obligations are defined minimum service standards (including price) that are available to all customers, regardless of whether or not they are on a contract

⁴⁷ Ibid Tamblyn J, (2003) and Tamblyn J (2006)

competitive neutrality principle.”

I refer to and endorse wholeheartedly the arguments presented to the Review of the ESC Act by the VCOSS as shown below:

"Primary emphasis on consumers

"We do not agree with the suggestion that the primary emphasis on consumer interests in itself increases the risk of over-emphasising short term consumer benefits at the expense of long-term security. [1] Clearly consumer interests are served by an appropriate balance of both considerations.

The Commission's current objectives promote the pursuit and achievement of this balance by asserting as its primary objective the long term interests of consumers, and addressing in its facilitating objectives both a range of key elements of this objective (efficiency, incentives for investment, financial viability and so on), and some key imperatives to guide consideration of allocative efficiencies where appropriate (giving regard to relevant health, safety, environmental and social legislation, ensuring consumers benefit from competition, and so on)." On the other hand, the proposed new objective, with its primary emphasis on "efficient investment in, and efficient operation and use of, resources," [2] has a number of key shortcomings: it confuses the means with the end; it emphasises some elements of addressing the long term interests of consumers and omits others; and it considers but does not protect those interests. It also explicitly excludes matters of allocative efficiency that sometimes must be considered. Managing this delicate balance is complex but necessary, and VCOSS believes that the Commission's good performance reflects, among other things, the efficacy of its multifaceted objective in facilitating this task.

Conflicting or complementary objectives?

"We do not agree with the characterisation of the facilitating objectives and price determination considerations as "conflicting." ³ Rather they are complementary and appropriately recognise that the regulation of essential services is complex and requires addressing a number of imperatives that all impact each other. As noted above, the Commission's good performance is, in our view, largely attributable to its successfully balancing the demands of these complementary objectives, thus securing the long-term viability of regulated industries without neglecting consumers' needs for equitable affordable access to essential services."

On Page 8 of its Second Draft Report, the AEMC states that:

"The competitive retail energy sector in Victoria is supported by a sound consumer protection framework that is made up of energy specific regulation covering a wide variety of issues including obligations on retailers to disclose detailed energy offer information to customers as well as general consumer protection laws that prohibit amongst other things misleading deceptive and unconscionable conduct. There are also detailed codes and laws regulating the direct marketing techniques favoured by energy retailers."

The current consumer protection framework is not believed to be sound by many, including silent stakeholders either not aware of, or for whatever reason unable to participate in consultative processes such as the Productivity Commission's (PC) Review of Australia's Consumer Policy Framework or any other arena in which to make their concerns known.

There is significant dissatisfaction with current protections, and in particular compliance enforcement. The mere existence of regulatory protections is insufficient. Market failure through inappropriate conduct is unquestionable, to the detriment of the entire community and those who are inarticulate and disadvantaged in particular.

The PC has found that in two areas of current State and Territory responsibility including aspects of energy services – the case for a national approach is well established, hence the transfer of responsibility to the national level should occur without further review. If the effect of that transfer merely introduces new tools within generic laws without proper compliance enforcement, consumer protection will be diluted not enhanced.

I refer to and support Peter Mair's response to the PC's Draft Report in which he refers to a consumer-policy framework that would *"make market players accountable"* and *"set a new benchmark for consumer protection."*

He summarizes this concept as providing a framework in which

"competing suppliers would cooperate to ensure consumers are well informed before individually offering in good faith products that are fit for purpose but if necessary allowing complaints to be resolved independently."

Peter Mair goes on to speak of conscious decisions to perpetuate wrong-doing in these words:

"As is, breaches of the golden rule are usually conscious decisions taken by suppliers (and sometimes customers) people knowingly doing the 'wrong thing', because they can and know they won't be stopped. Black letter regulation to protect particular dealings often becomes a game of contrived frustration: prospectively, exposing breaches of golden rule principles might change the game. It will be interesting to see what support there is for a golden rule approach in the business sector including industry associations and other peak industry bodies."

Regulators also can be mightily at fault. Whatever golden rule arrangements might be agreed, success will often depend on front line regulatory agencies applying them with a suitable commitment to their own accountability. Some major national regulatory agencies apparently have scant regard for their charges observing anything akin to the golden rule, misbehaviour in markets is often condoned with alacrity and some regulators simply choose not to pursue with proper purpose what otherwise would seem to be their clear legislative responsibilities. Regulatory agencies that are seen to be compromised or underpowered would ideally be made subject to an extended freedom of information obligation to explain apparent shortcomings.

I suspect that proposal, for regulators with consumer protection roles to be made more openly accountable, is the main point I would want to add to the framework proposed by the Commission. The commission knows well from its previous inclination to allow independent reviews of regulators, that there is resistance to external review from regulatory agencies and their political patrons, even so, it may be worth putting that proposal on the table again—adopted, it would be a powerful force for good.

Peter Mair’s perceptions have hit the nail on the head. Currently regulators with consumer protection roles appear not to be upholding their responsibilities.

This observation was also sustained in other submissions to the Productivity Commission’s current Review. See for example The Victorian Council of Social Services has recommended in its response to the Retail Policy Working Group Composition Paper that

“The regulation of marketing must ensure both that consumers are protected from inappropriate aggressive and misleading conduct; and that the benefits promised by competition – choice and value – are accessible to all consumers and facilitated by comprehensible and complete information that facilitates choices based on comparison.”

In its July 2007 Response to the Final Report of the *Review of the Essential Services Commission Act 2001* addressed to the Victorian Minister of Finance, the VCOSS raised some important issues regarding both information-gathering and enforcement. I deal first with enforcement issues, and quote below directly from the Gavin Dufty's VCOSS submission

<p><i>“We also support recommendations 25 and 26 regarding bringing consistency to the Commission’s enforcement powers and enabling the Commission to attach proportionate penalties to breaches of licence conditions codes and determinations.</i></p>
<p><i>We have long been of the opinion that the primary weakness in the energy consumer protection framework has been the impact of non-compliance and while the Commission has been quite successful in working with businesses to encourage compliance it has limited means to address and discourage breaches through the application of appropriate penalties. Revocation of a licence is a serious matter with grave consequences and the Commission should have at its disposal a range of penalties that are more appropriate for the types of breaches that generally occur.”</i></p>
<p><i>4 P Grey & P Lewis World Energy Retail Market Rankings: second edition June 2006 First Data Utilities & Vaasa EMG Utility Customer Switching Research Project 2006</i></p>
<p><i>5 Langmore M & Dufty G Domestic electricity demand elasticities: issues for the Victorian energy market 2004</i></p>

Consumer protection has never been as compromised as at this crucial time of policy and regulatory change within the energy industry. It may be timely for these considerations to be aggressively addressed before another decade of poor protection is heralded. Compromised consumer confidence of compromised consumer protection.

Fundamental to any critique of consumer policy is the philosophical dichotomy between regulators, policy-makers and advisory bodies (such as the Productivity Commission) and those who are associated with the consumer movement.

Edmund Chattoe⁴⁸ has asked whether sociologists and economics can in fact communicate at all, not only because of language differences and interpretations, but on the basis of fundamental and perhaps irreconcilable philosophical differences.

At the CI World Congress in October 2007⁴⁹, Peter Kell referred to the need to ensure that markets are fair, efficient sustainable and equitable. These central requirements to an effective consumer policy framework are echoed by David Tennant as Director of Care Financial and Chair of the Consumers' Federation of Australia.

Peter Kell has referred to the need to put pressure on industry sectors to clean up their act, treat consumers fairly across borders, and raise minimum standards. And we will work with governments, putting strong pressure on when necessary, if markets do not deliver fair results. At times regulation will be needed to protect consumers or to ensure competition works for consumers.

That is not all that is required. Nigel Waters, Privacy International and Peter Kell have referred to the need to ensure that government agencies are also held more directly accountable through measures that will ensure compliance monitoring. There is little point in having legislation and regulation and advocacy in place unless provisions are upheld.

In Victoria and perhaps in other states also it has been demonstrated very clearly that upholding of existing provisions by agencies responsible is less than optimal. Accountability by government agencies and their affiliated bodies (such as industry-specific complaints schemes, notwithstanding their "separate legal identity" as companies with limited guarantee without share portfolio) is a huge gap in current consumer protection and is not adequately covered in the PC's Draft recommendations

The Commission has identified and discussed some examples of the shortcomings in the current arrangements (Box 2, Summary, p 9) further discussion in the main body of the Draft Report (Volume 2)

⁴⁸ 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>

⁴⁹ Found at <http://www.kent.ac.uk/esrc/chatecsoc.html>
Consumers International Conference (2007) Holding Corporations to Account Luna Park, Sydney Australia 29-31 October

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

The Commission has recognized that there is scope to do much better and has predicted that addressing the identified impediments

“could deliver sizeable benefits for consumers and the community.”

and also that

“...the changing nature of consumer markets and the growing expectations of consumers themselves mean that in the absence of remedial action the costs of the deficiencies in the current policy framework will almost certainly grow.

On that basis the Commission has concluded that aspects of the framework are in need of an overhaul

The Commission has also recognized that:

“a more nationally coherent consumer policy framework and changes to some specific components of that framework would help to promote productivity growth and innovation”

The Commission has made a number of worthy recommendations for which full credit is deserved. These are discussed under Strengths of the Draft Report recommendations. In particular the Commission has made a strong case for standardization, removal of duplication and inconsistency and updating of regulation more responsive to emerging needs and expectations. Recognition that deficiencies in the current policy framework will grow unless addressed is a great starting point.

Presumably because of lack of appropriate funding, unfortunately the Commission's work has been restricted to quantitative work in seeking to assess current impediments and made recommendations

Turning to a single technical example within the energy industry of the consequences of light-handed regulation I quote directly from an EAG Powerpoint Presentation at the International Metering Conference in October 2007⁵⁰

One important side effect of "light handed regulation" is poor information

How can you model AIMRO without the appropriate data, analysis and information! There are a number of important deficiencies in the current MCE papers out for consultation as a result.

- *What reliable data is available on heating and cooling one of the largest component of small business and residential consumption patterns!*
- *How many a/c's and what size and star rating?*

EAG aware of a/c units of sizes up to 50 KW are being installed in Qld., while 30 KW units are becoming common in NSW.

Some further Regulatory Design Principles

From cursory glance at the status of consultation papers being reviewed by the MCE Retail Policy Working Group it would seem that a model that includes proposed approaches in relation to specific legislation rather than under the umbrella of an overall national consumer policy independently administered, the latter being recommended by CHOICE (ACA) and other community agencies as the preferred model for consumer protection.

In my opinion, these principles should be embraced in overall regulatory design across the board. No attempt should be made to bargain away the right of any aggrieved

⁵⁰ Energy Action Group (John Dick President) *Allocating Risks in a Gross Pool Market* Presentation at Metering International Conference 24 October 2007

individual or other stakeholder to be stripped of the right of appeal at the highest level. However, in the case of private individuals their access to resources is extremely limited.

The current generic process are deficient for a host of reasons discussed elsewhere specifically under Consumer Protection deficiencies.

The public at large is also looking for improved transparency, such as publishing of all external reports relied upon, whether or not specifically commission for this current Retail Review, but as long as they give a more complete picture of the market and its performance. Other examples are poor accessible to deliberative documents and all of the thinking, evidence and material that guides government decisions.

This would indicate that if benchmarking principles are not included transparently and robustly in the design stage market failure may result with band aid solutions developing in much the same haphazard manner in which regulation has developed to date.

As noted in the theory model section above, *Burns and Riechman's (2004)* conceptual study examines key drivers of investment behavior of regulated infrastructure companies under performance-based regulation. It uses a case study of Railtrack in the U.K. to illustrate a situation where in the early stages of privatization, the incentives to improve quality were extremely weak and the incentives to cut costs and distribute profits to shareholders were stronger.

Getting the conceptual framework right takes time and effort. It cannot be rushed if best outcomes are to be achieved. The Australian public at large believes that decisions and processes have been consistently too rushed for these outcomes to be optimal. Scanty data has been relied upon. Decisions need to be balanced and take into account all stakeholder input, with appropriate time-lines allowed, and opportunities for regular review and rule change that fair, equitable, transparent and accessible.

Burns and Riechman's (2004) as analyzed by *Jamison et al (2005)* acknowledge that the cost:benefit ratio for establishing quality indicators can be difficult to determine for both current and expected future output performance. Negotiations should not be left to the end of a price review period.

Jamison et al (2005) recommend this paper as one that offers a number of practical suggestions regarding benchmarking under performance-based regulatory principles. These are discussed in detail in the theory model section.

Regulatory System

In discussing regulatory systems *Jamison et al (2005)* direct attention to *Baldwin and Cave's (1999)*⁵¹ overview of legislative bodies, courts, central government departments and local authorities.

Another pertinent choice by Jamison is *Henisz Witold and Zelner's (2004)* paper⁵² of political economy of private electricity proviso in Southeast area.

Comment

Though focused on ASEAN countries, the value of this paper in the current regulatory review may be examination on how difference in policy credibility affected government opportunism and investor's choices of strategic safeguards.

Of equal importance may be the examination of how strong political ties between government agencies weaken formal checks and balances. Another *Jamison* choice is that of the same authors⁵³ in 2005 regarding political risk in infrastructure investment.

Corruption (broadly defined)

Comment:

Jamison et al (2005) discuss corruption in their literature review as broadly defined. Whilst this can seem a loaded term, it is used in this discussion more broadly to include misleading conduct or unethical, policy or terminology, intentional or otherwise that can lead to consumer detriment, and not intended to offend any individual or agency.

Corruption is a matter of degree and whilst in the context of developing countries may imply a certain meaning in terms of illegal corruption (bribery), it is used here in a broader sense where

“legal corruption as a result of legal political financing or undue influence of political firms on policymakers.”

⁵¹ Baldwin, R., and M. Cave. 1999. *“Understanding Regulation: Theory, Strategy, and Practice,”* Oxford: Oxford University Press, Chapter 5 c/f Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.* The Electricity Journal Vol 18(6) July 2005 pp 36-45

⁵² Henisz, Witold, and Bennet Zelner. 2004. *“The Political Economy of Private Electricity: Provision in Southeast Asia,”* Reginald H. Jones Center for Management Policy, Strategy and Organization, University of Pennsylvania.

⁵³ Henisz, Witold, and Bennet, Zelner. 2005. *“Managing Political Risk in Infrastructure Investment,”* Reginald H. Jones Center for Management Policy, Strategy and Organization, University of Pennsylvania. c/f Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.* The Electricity Journal Vol 18(6) July 2005 pp 355-356

It may be contended that are levels of conduct, often driven by existing policy that fall into a grey area where social justice issues have been compromised and re-balancing has become overdue. If it were not the case, the current Inquiry would be redundant.

Misleading conduct is also a matter of degree and policies in place can either deliberately or inadvertently condone such conduct by allowing loopholes and interpretations to creep into regulatory instruments, including codes and guidelines that overtly, almost unashamedly, appear to exploit consumer rights, entitlements and interests.

Refer, for example, the Victorian Essential Services Commission (ESC)⁵⁴ *Bulk Hot Water Guideline 20(1) 2005*⁵⁵ that allows for magical algorithm formulae through which water meters posing as either gas or electricity meters are used to calculate water volume and then by conversion factor converted into deemed gas or electricity usage, and charges expressed in cents per litre.

This is despite the fact that energy suppliers are licenced to sell gas or energy not value-added commodities such as “*hot water products*” and that gas is measured in either cubic meters or megajoules, and electricity measured in KW/h. these arrangements are discussed in considerably further detail elsewhere in a dedicated submission but is cursorily mentioned here in the context of reduction of regulatory burden or inappropriate regulation.

In a real-life case example included in that separate energy-focused submission, I discuss how the current bulk hot water arrangements represent an excellent example of inappropriate regulation that needs to be amended to bring provisions in line not only with proper trade measurement practice, but consistent with existing enshrined protections under multiple provisions that cannot simply be re-written by energy policy makers and regulators, without due regard to conflict provisions elsewhere.

⁵⁴ Victorian Essential Services Commission, the current regulator
⁵⁵ ESC Guideline 20(1) (2005) Bulk Hot Water Charging Guideline
http://www.esc.vic.gov.au/NR/rdonlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf
See also all associated deliberative documents on ESC Website consultations/submissions, the apparently collusive efforts of policy-makers, regulators, energy-providers and owners Corporations as well as complaints schemes to support the unsupportable with policy provisions that strip end-consumers of their enshrined contractual rights; rights to information that is clear and devoid of misleading terminology and implications; and consistent with their rights under multiple arenas of the written and unwritten law
Final decision (2005) FDD-Energy retail Code – technical Amendments – Bulk Hot Water and Bills based on Interval Meter data (August) found at
Found at http://www.esc.vic.gov.au/NR/rdonlyres/37078658-5212-4FA7-8A8E-AC42AB12BDDC/0/DDP_EnergyRetailCodeTechAmend20050810_CommissionPap_C_05_800_7.pdf
Draft Report Review of Bulk Hot Water Billing Arrangements (2004) found at
http://www.esc.vic.gov.au/NR/rdonlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf
Response from TXU (nw TRUenergy) http://www.esc.vic.gov.au/NR/rdonlyres/CD7E8430-868E-4C42-A937-08E7082F57CA/0/Sub_TXU_BulkHotWaterJuly04.pdf
Final Review of Bulk Hot Water Billing Arrangements (September)
<http://www.esc.vic.gov.au/NR/rdonlyres/20C3454F-0A47-428B-845B-1D7D85FBE572/0/FinalReviewBulkHotWaterBillingSept04.pdf>

The claims made in that case study, which have been supported with privileged evidentiary material supplied to the Productivity Commission, including actual letters of threat of disconnection used as a lever to coerce contractual relationships, albeit that instruments designed for the purpose of measuring energy consumption are not in use, but rather substitute meters posing as gas or electricity meters, whereby energy is measured and charged in cents per litre through sanctioned policies put in place by energy policy-makers and regulators.

The allegations included alleged unconscionable conduct by an energy supplier of bulk energy (where the proper contract lies with the owners Corporation) against a particularly vulnerable and disadvantaged end-consumer with a psychiatric and suicide history threatened with unjustified unconscionable conduct; threats, intimidation and coercion; unfair business practices (Fair trading provisions) unfair and inappropriate trade measurement practices contravening the spirit and intent of national trade measurement provisions but sanctioned by regulators); misleading and deceptive conduct; misleading details on bills issued to other tenants on the same block; inappropriate application of supply charges properly belonging to the Owners Corporation; similar inappropriate and unacceptable business conduct to other residential tenants not contractually liable; inaccuracy of deemed consumption of gas and charges applied;

The last allegation of inadequate and compromised protections and adequate access to appropriate recourses is leveled at policy-makers and regulators and the inadequately resourced and informed industry-specific complaints scheme

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

In that matter, the range of alleged serious conduct issues on the part of the energy supplier have been driven by unacceptable regulatory provisions the bulk hot water charging for the “heated water” or the heating component of centrally heated water. The heating component cannot be separately measured with a prescribed instrument under the *Gas Industry Act 2001*, being a meter through which gas passes to filter, control and regulate the flow of gas.

Neither the industry-specific complaints scheme Energy and Water Ombudsman (EWOV) nor the policy-makers and regulators have yet been able to resolve this issue and accept in a timely and appropriate manner that the existing provisions are seriously flawed and in contravention of consumer rights and protections within and outside energy provisions, despite advice from the peak Victorian consumer protection body, Consumer

45 of 54

Affairs Victoria that the end-consumer of bulk energy is not the relevant customer, but rather the Owners Corporation.

Before briefly discussing the political and philosophical issues that may impeding the proper application of compliance enforcement in the context of the Victorian attitude to reduction of the regulatory burden with regard to administrative and compliance burden, I raise the issue whether the existing provisions for bulk hot water pricing and charging of “*water products*” but misleading implying that proper accountable trade measurement practices are in place (using for example such phrases “your hot water consumption is being monitored, but without explaining how this is done and whether existing enshrined consumer protections may be eroded by such arrangements.

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

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

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

Under revised provisions under a Memorandum of Understanding (MOU) between Consumer Affairs Victoria and the Essential Services Commission.⁵⁶ The objects of that MOU are:

2 Objectives and purpose of this memorandum

This memorandum seeks to:

- (a) ensure that the regulatory and decision making processes of the parties in relation to regulated industries are closely integrated and better informed*
- (b) avoid overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries*

⁵⁶ Memorandum of Understanding dated 18 October 2007 between Consumer Affairs Victoria and Essential Services Commission Victoria (ESC). Signatories David Cousins, Director of Consumer Affairs Victoria and Greg Wilson Chairperson Essential Services Commission Victoria. This replaces the previous MOU of 2004 and was in part triggered by concerns about the application of current policies associated with bulk hot water provisions
Memorandum of Understanding dated 18 October 2007 between ESC and CAV Found at http://www.esc.vic.gov.au/NR/rdonlyres/5CF8C62C-0314-4FD3-B792-FA8E6520769F/0/MOU_CAV_Oct07.pdf

(c) provide for sharing information between the parties in the context of their respective roles in relation to regulated industries; and

(d) promote the adoption of a best practice approach to regulation

I particularly refer to object (b) referred to above in relation to avoiding overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries.

Such a conflict has occurred in relation to the Bulk Hot Water Charging Guideline ESC Guideline 20(1) for reasons discussed elsewhere. This example is given to illustrate that it is not only important to identify what will appropriately reduce regulatory burden without compromising consumer protection, but also what is actively contributing to consumer protection compromise in an active way as inappropriate regulation.

In terms of the apparently bizarre arrangements in place for “energy only contracts” assuming that this is referring to calculations of energy consumption for the heating of centrally heated bulk hot water systems in rented apartments and other settings, without the benefit of site reading, without the benefit of reading of separate meters; and using water meters as substitute gas meters, with charges for energy being effected in cents per litre; it would seem that the whole concept is not only misleading to the public; fails the transparency and informed consent tests; but also seems to have the effect of re-writing contract law altogether, thus seemingly stripping end-users of their fundamental contractual and other rights. This matter is discussed elsewhere in more detail.

Suffice it to say here that billing practices and operations, seemingly driven by existing policy can be interpreted as misleading, against the public interest

Gas Industry Act 2001⁵⁷

This Act regulates the Victorian gas industry. It requires persons who distribute or sell gas to obtain a licence from the Essential Services Commission of Victoria, or a licence exemption. It also provides for VENCORP (the Victorian Energy Networks Corporation), the independent system operator for the Victorian gas wholesale market. Key provisions

⁵⁷ Nowhere in the *Gas Industry Act 2001* is there any provision for water meters to pose as gas meters. Both in this instrument and in the Gas Distribution Code gas meters are described as instruments through which gas passes to filter control and regulate the flow of gas passing through those meters (or the metering installation).

Yet creative application of provisions for energy suppliers, licenced and unlicenced (the latter category stripping consumers of proper protection and redress) under “policy” guidelines allow for unjust imposition through creative attempts to re-write contract law and trade measurement practice of charges for water products and value added products though energy retailers are licenced to sell gas and electricity, not value added or water products

Any provisions that changes these provisions to allow loopholes through which consumer protection can be further eroded will be made without due regard to the obligation to ensure that existing provisions to not contradict protections under other provisions

include a consumer safety net for domestic and small business customers in the transition to effective retail competition.

I now turn to enforcement policies and guiding principles for which the DPI claims direct responsibility online.⁵⁸

(The DPI's)

“enforcement policy provides the guiding principles necessary for a fair safe and equitable application of the law in the day to day dealings of authorised persons with the general public and others. The policy is also a clear indication of what the public will receive from law enforcers by way of information choice and safety.”

Definitions

The following definitions apply to terms used in the policy:

- **Compliance** means the state of conformity with the law. DPI will secure compliance with the Acts for which it is responsible through three types of activity: (a) extension (includes communication of information, promotion and capacity building), (b) compliance monitoring and auditing, and (c) enforcement.
- **Enforcement** activities are designed to compel compliance and include: (a) formal inspection to verify compliance; (b) investigation of suspected breaches of the law; (c) measures to compel compliance without resorting to formal court action, for example, directions, notices, on the spot fines, prohibition orders and warning letters; (d) measures to compel compliance through court actions such as injunctions, prosecutions, court orders, undertaking entry works and cost recovery through civil action.

The bulk hot water provisions represent a good example of misguided and inappropriate unfair and unjust implied contract provisions that are squarely the primary responsibility of policy-makers and regulators. It is incumbent of those parties to ensure that regulations do not contravene conflicting legislation and other provisions in the written and unwritten law.

Whilst Unfair Contract Provisions, and the provisions under Fair Trading and trade practices legislation does not cover policy-makers and regulators, they must surely take their share of vicariously liability for unacceptable market conduct that can be shown to be either directly or indirectly driven by statutory policies endorsed by such parties.

Beyond that, the provisions of the existing Victorian Unfair Contracts legislation offer enhanced and valued protection (in theory but weakened by poor compliance

⁵⁸ DPI Enforcement found at <http://www.dpi.vic.gov.au/DPI/dpincor.nsf/childdocs/-7F1041F3C997FDDCCA256DB00021E202-5E308C7F594A2EA7CA25728E00010E85?open>

enforcement mechanisms). These provisions should be echoed in the provisions adopted by other States, but diluted by over-reliance on weak and often inaccessible provisions under existing generic law. Much has been said about the extraordinary weaknesses of those generic laws and I had my voice to the concerns already expressed by many parties without repeating them here.

The purpose of raising unfair contract provisions is to again support existing Victorian provisions and dispute the wisdom of removing such provisions simply because they are adopted in only “one or two States.” Such a decision would be detrimental to the philosophy of enhancing proper consumer protection – which is diluted enough as it is.

There appears to be a general perception amongst policy-makers and regulators that in seeking to secure competitive market contracts it may be permissible to omit to mention any front-end or back-end penalty to consumer detriment that switching choices may herald. This was one issue discussed at the recent Public Meeting auspices by the AEMC Retail Competition Review on 4 September 2007 chaired by John Tamblyn.

I repeat that at both the Melbourne Public Meeting on 4 September and the parallel meeting in Bendigo the following day, John Tamblyn mentioned that full retail competition would not necessarily mean lower prices but could mean that:

*“competition is sufficient to keep the marketplace in balance.”*⁵⁹

At the Bendigo meeting on 5 September Mr. Tamblyn said:

*“competition is sufficient to keep the marketplace in balance, even if every customer is not necessarily well informed.”*⁶⁰

B. Corruption.

As mentioned above *Jamison et al (2005)* consider corruption to be of particular concern on the basis that it

1. Decreases service output by increasing, costs,
2. Diverts capital from productive uses

⁵⁹ CUAC Quarterly Newsletter AEMC review of effectiveness of FRC,” p. 4.

⁶⁰ CUAC September Quarterly “AEMC Review of Effectiveness of FRC

3. Takes wealth from its legitimate owners

The authors⁶¹ cite ongoing corruption is a concern listed by respondents in World Bank investment climate surveys, who also expressed concerns about the effects of corruption on investment.⁶²

As noted by *Jamison et al (2005)* where transparent processes are lacking, corruption is often an indicator in governance indices.

Private participation contracts that lack transparency are particularly vulnerable to various manifestations of corruption or unethical behaviour, with the potential for such behaviour to occur at different stages in a contractual infrastructure project cycle:

1. Project identification
2. Contract Award
3. Negotiation
4. Project Finance
5. Implementation

Jamison et al (2005) examine

1. The various conditions in which such conduct is likely to occur in infrastructure sectors;
2. The extent to which competition of service providers, the transparency of the regulatory process, budget oversight, performance audit capability and other governance oversight;
3. Whether corruption can be adequately addressed if strategies are applied only in the public sector, aim to identify the strategies that could be used to reduce the incidence of corruption (used broadly)

The authors attempt to answer those questions by referring to the literature review the subject of their comprehensive paper

Comment

⁶¹ Ibid Jamison, MA, Holt, L, Ber, SV, (2005) "*Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.*" The Electricity Journal Vol 18(6) July 2005 pp 36-45

⁶² Mary Hallward Driemeier and David Stewart, 2004, "*How Do Investment Climate Conditions Vary Across Countries, Regions, and Types of Firms?*" Background paper prepared for the *World Development Report 2005: A Better Investment Climate for Everyone.* c/f Jamison et al (2005) ibid 50 of 54

The issues raised should form part of the overall framework not only in considering consumer protection, but also in term of how these gaps can affect competition and productivity overall.

In referring to bribes paid to electricity and telecommunications utilities, authors *Clarke, George and Xu (2004)*⁶³, as referred to by *Jamison et al (2005)* concede that de novo private firms are more likely to be the bribe payers where this occurs and utilities are less likely to receive bribes in countries with greater capacity in terms of better-developed telecommunications systems, more competition in the telecommunications sector and utility privatization.

Of more interest to the current Australian reforms is the empirical data analysis by *Daniel Kaufmann, 2004*⁶⁴ from the 2004 Executive Opinion Survey of the World Economic Forum cited by *Jamison et al (2004)*.

The paper shows evidence of improved governance resulting in high incomes per capita and suggests that of the fifteen obstacles to global competitiveness.

“the eradication of corruption would have the greatest benefit for a country’s ability to compete globally (as measured by its ranking on the World Economic Forum’s Growth Competitiveness Index.)”

Further the study claims that though

“...poorer countries have higher levels of illegal corruption (bribery) than their richer counterparts. However there is great variability among richer countries in the OECD and elsewhere in the level of corruption that could be described as “legal” (legal political financing or undue influence of political firms on policymakers).”

These considerations are crucial to any overall framework parameters:

⁶³ Clarke, George R.G., and Lixin Colin Xu. 2004. *“Privatization, Competition, and Corruption: How Characteristics of Bribe Takers and Payers Affect Bribes to Utilities.”* Journal of Public Economics 88: 2067-2097
Jamison, MA, Holt, L, Ber, SV, (2005) *“Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.”* The Electricity Journal Vol 18(6) July 2005 pp 36-45

⁶⁴ Kaufmann, Daniel. 2004. *“Corruption, Governance and Security: Challenges for the Rich Countries and the World.”* In Corruption, Governance and Security.

It is of real concern that questions are being asked about the level of perceived “gaming” activities

In the Australian context the questions that are being openly posed are:

1. Who is causing the perceived ‘gaming’
2. Who is benefiting from it (gaming)?
3. Who is going to put a stop to it, when and how?
4. What specific and wider impacts will this sort of conduct have on the Australian community?
5. Is a radical change to the consumer policy framework overdue
6. What about inherent protections for the smaller retailers? – newcomers to the scene encouraged by rosy interpretations of the energy market climate to take further risks – ones that could significantly damage their stability and viability
7. Is it responsible to proffer such encouragement without a thorough analysis of the market?

Sustainability

Jamison et al (2005), after a thorough literature review, and given their standing within a world-class Public Utility Research Centre in Florida comment on the political, popular and legal support for selected features of sustainability of government institutional structure and anticorruption (broadly defined) as they affect investment risk by improving the predictability of outcomes.

There is a risk where governance of these issues is limited to regulators and policymakers too close connected with the consumer policy framework.

Many weaknesses have been identified in current regulatory instruments, compliance enforcement, affiliations, efficacy of complaints schemes and compromised consumer protection. There is general consensus on these issues across the board. The suggestions may therefore be helpful despite the context in which they are made.

In Australia the possible conflicts of interests associated with such issues and also with industry-specific complaints schemes, as discussed in more detail under discussion of the consumer policy framework and the existing industry specific complaints scheme provisions. There are also many reservations about the viability and efficacy of the generic provisions.

These are discussed by various authors on the Productivity Commission’s site, notably those of Dr. Michelle Sharpe, Dr. Carroll O’Donnell and Hank Speir.

Jamison et al (2005) discuss the concept of sustainability in their preamble to examination of this category of literature on the topic.

They refer in particular to the sustainability of government institutional structure and anticorruption policies as affecting investment risk by improving the predictability of outcomes.

Jamison (2005) offers the following viewpoint⁶⁵:

*“A regulatory agency’s ability to function is determined not just by its own technical capacity to perform its duties but by legal rules that define its formal authority the willingness of the courts and other governmental entities to recognize and follow these legal rules and the belief and acceptance of operators customers foreign governments and multilateral organizations (such as The World Bank) that the regulatory agency is legitimate and capable.”*⁶⁶

Jamison (2005) says that as countries become more democratic, infrastructure projects that fail to deliver affordable services to the poor can result in political pressure on governments to renegotiate or terminate private contracts. For example, subsidies are often part of pro-poor strategies.

If they are not effectively targeted or services are under-priced, revenue streams needed to meet contractual performance outcomes may be jeopardized. Therefore, risk mitigation policies need to consider pro-poor strategies.

CONCLUDING REMARKS

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

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

⁶⁵ Jamison, Mark A, Holt, L, Ber, SV, (2005) *“Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank.”* The Electricity Journal Vol 18(6) July 2005 pp 36-45

⁶⁶ Jamison, Mark A (2005,) *“Leadership and the Independent Regulator,”* Public Utility Research Center, University of Florida, Gainesville, Florida.

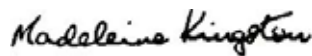
Or is Edmond Chattoe⁶⁷ right in suggesting that socialists and economists simply cannot dialogue for all the reasons he cites in the paper discussed above.

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

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

Lightening the regulatory load in a responsible way is one thing, but diluting consumer protection is another. Therefore due care must always be taken to ensure that consumer protection is not sacrificed in the interests of “competition efficiency” or that the fundamental principles of the National Competition Policy are forgotten. Sadly, too often the corporate and government social responsibility goals of national competition policy are readily misunderstood or ignored.

We hope that the new Consumer Policy Framework will serve to redress many of the real gaps by providing real solutions and real enforcement commitment. Tools are fairly useless if left in the cupboards to rust.



Madeleine Kingston

⁶⁷ 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>