

PREAMBLE

Multi-component submission PC subdr242parts1-7 and Summing-up (Part8)

This material, including all appendices have been researched and prepared as a public document to inform policy-makers, regulators and the general public and hopefully to stimulate debate and discussion about reforms in a climate where regulatory burden and consumer protection issues are being re-examined. It can only be hoped that over-reliance on generic provisions that appear in many respects to be flawed and inaccessible for a wide range of reasons discussed by others on the Productivity Commission's website in connection with the current Consumer Policy Review.

The material has been prepared in honesty and in good faith with disclaimers about any inadvertent factual inaccuracies. Case study material has been deidentified but represents actual case material. As to perceptions and opinions expressed by a private citizen, and those referred to from public domain documents, these too are expressed in honesty, good faith and without malice, but reflect genuine concerns about policy and regulatory provision and complaints and redress mechanisms.

I request that my contact details be retained on file indefinitely as an interested stakeholder willing to participate in future consultative processes and public hearings also. I would like to be notified of each and every development in this area either with research initiatives, legislative reform recommendations or public consultation opportunities.

There is dearth of consumer voices. I would like every possible opportunity to provide direct consumer perspectives whenever consumer issues are at issue.

Madeleine Kingston

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Concerned Victorian consumer

SUMMING UP: OVERVIEW OF SEVERAL COMPONENTS OF SUBMISSION: PRODUCTIVITY COMMISSION SUBDR242PARTS1-7

Each component of this submission¹ is intended to represent relatively stand-alone sections addressing more extended discussion on the over-riding objectives, though there is cross-referencing between chapters and there is significant inter-relation. This Chapter, as Part 5 follows on several previous components which are summarized below for convenience. It precedes Parts 6 and 7 which are also summarized here for convenience.

I summarize below other components of this submission in order to provide some linkages in the train of thought driving this multi-part submission subdr242.

Executive Summary (subdr242art1)

This section deals briefly with the Productivity Commission's various recommendations and introduced some new issues where gaps were believed to exist. It also briefly addressed issues of agency governance, leadership and the principles of promoting effective markets that are safe fair and sustainable for all. The concluding pages address issues of federalism and anti-federalism and any possible impacts on the formulation of a truly effective consumer policy framework.

Part 2 (subdr242art2)

This section focuses on further discussion of the overarching objectives, and relationship of National Competition Policy, and the public interest test. It is my considered view the fundamental principles of NCP have become blurred, inaccessible and distorted.

A primary focus of Part 2 is on impacts of cohesion, service provision and regulation and principles of accountability and transparency in government service provision as they impact on proper consumer protection and best practice government operation and regulation

Part 2 introduces the concept of calling a rose by its name and suggests that industry-specific complaints schemes, run, funded and managed by industry participants, though created under legislative enactments should be more transparently named External Industry-Specific Complaints Schemes or E-IS-CS not ADR providers or "Ombudsmen". The more accurate term E-IS-CS is the one used by the Federal Governments Benchmarks created in 1997²

Part 2 section discusses perceived inadequacies of industry-specific complaints schemes, misnamed ADR schemes or "ombudsman

¹ Submission subdr242 in several parts (1-7) found at http://www.pc.gov.au/inquiry/consumer/submissions?8995_result_page=3

² Federal Government (1997) Benchmarks for Industry-Specific Complaints Schemes, which encompasses six benchmarks for adoption by such schemes. For some schemes such as EWOV, adoption of these benchmarks is mandatory, for example under s36 of the *Gas Industry Act 2001*, which also includes reference to public perceptions of bias. These issues are discussed in great detail in part2 subdr242part2

It discusses some components of the Victorian Law Reform Discussion Paper (2007) “ADR and access to justice” identifying key factors

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

Part 2 analyses the complexity of ADR provision and explodes some myths in the use of this term which is most often applied to complaint schemes.

This section also begins discussion, continued in more detail in this component on regulatory burdens and harmful regulation issues. The issues of associated complaints scheme considerations are mostly limited to Part 4 (subdr242part4).

Beyond that I have endeavoured to demonstrate in Part 4 my view that the level of effectiveness, efficiency, fairness, impartiality and proper handling of complaints through the energy complaints scheme EWOV, consistent with mandated benchmarks under the *Gas Industry Act 2001* (Victoria) appear not being consistently met and that perceptions of public bias on the basis of “*legal posturing*” and “*legal stancing*” and other conduct detailed as a case study appear to be compromising proper access to justice in complaints handling and redress.

Finally, the issue of accountability for complaints schemes and proper compliance enforcement are addressed, as well as further comment on advocacy issues.

The two major recommendations made in Part 2 were as follows:

1. Separation from regulator control, more independence, better accountability, re-examination of jurisdiction, improved staff professional development
2. Extended powers of statutory ombudsman to facilitate investigation and enquiry poor management by so-called “ombudsman” as industry-funded run and managed by industry participants

These recommendations are in addition to the formation of an independent properly resourced national consumer body along the UK Model lines proposed by numerous consumer organizations, including PIAC in its direct submission to the Treasurer dated 18 January 2008 and in the recommendations by CHOICE (ACA), such that continuity of research and expertise are obtained.

The Western Australian Council for Social Services (WACOSS)³ under recommendation 23 or this response to the Productivity Commission’s Draft Report has asked the Commission to recognize the limitations of non-regulatory consumer protection in the essential services area in these works:

RECOMMENDATION 23

That the Commission acknowledge the limited utility of non-regulatory types of consumer protection in regards to essential service markets – especially in relation to people experiencing financial and other types of vulnerability.

Part 3 (subdr242part3)

This section focuses on aspects of regulatory reform and reservations about a policy that is committed to excessive reduction of regulation without due care to ensure that consumer protections do not become further diluted and inaccessible.

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 *“bloody awful agencies which ought to be defunded”* (discussed in more detail in Part2).

Further discussion of Peter Kell’s speech at the 2006 National Consumer Congress questioning the rationale for questions the rationale for heavier reliance on *“half-baked self-regulation.”*

Mentions the views of Peter Kell⁴, in discussing the importance of effective regulators – properly resourced and independent regulators without political pressure essential

Mentions the views of PILCH (2005) relating to poor understanding of *“corporations of the relationship between corporate social responsibility and business.”*

Discusses the views of Gavin Dufty and Andrew Nance re competition policy and impacts on consumers

Views of Peter Kell and Nigel Waters at World Consumer International Conference (2007)⁵

³ Western Australian Council of Social Service (WACOSS) (2007) to the Productivity Commissions Review of Australia’s Consumer Policy Framework (republished 2008 as DR243 http://www.pc.gov.au/__data/assets/pdf_file/0004/78079/subdr243.pdf

⁴ Kell, Peter (2006) *“Consumers, Risk and Regulation.”* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006

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

Discusses 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 requirements to an effective consumer policy framework are echoed by David Tennant as Director of Care Financial and Chair of CFA

Discussion of selected corruption and sustainability issues (ref *Jameson et al (2005)* and literature review

Concludes with the hope that 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.

Part 4 (subdr242art4)

This section expands on earlier chapters, primarily addressing the principle of harmful regulation as being not only unnecessary but unjust; it takes a detailed look at redress and enforcement issues with the focus on government accountability, and the complexities of ADR service delivery. It demonstrates that several bodies believed to be delivering these services are not in fact offering mediation at all, or impartial face-to-face facilitation of pre-court options between parties

Nor do these bodies advocate, arbitrate or have equivalent training to professional ADR providers or those with levels of professional development and training best suited to such provision. They are therefore unsuitably labeled ADR services, and misleading called both ADR services and “ombudsmen” A more honest description such as industry-specific complaints scheme with the acronym of IS-CS is what the public expects.

Beyond that this component endeavours to demonstrate my personal opinion, without malice and without prejudice that the level of effectiveness, efficiency, fairness, impartiality and proper handling of complaints through the energy complaints scheme EWOV, consistent with mandated benchmarks under the *Gas Industry Act 2001* (Victoria) are not being consistently met and that perceptions of public bias on the basis of “*legal posturing*” and “*legal stancing*” and other conduct and case management issues detailed as a case study appear to be compromising proper access to justice in complaints handling and redress.

Finally, in Part 4 (subdr242part4) the issue of accountability for complaints schemes and proper compliance enforcement are addressed, as well as further comment on advocacy issues.

“overlap or conflict between regulatory schemes (either existing or proposed) affecting regulated industries” (Objects MOU 2(b))

Part 5

The Productivity Commission was provided with substantially similar material prepared and dispatched to the Energy Reform Implementation Group (ERIG)⁶. The same material went to other parties including other MCE Teams and also the NMI. This material has now been marginally amended.

The current bulk hot water pricing and charging arrangements not only contravene trade measurement practice, but attempt to re-write contract law and strip end-users of bulk energy of their existing enshrined rights under multiple written and unwritten provisions. The methods used are the equivalent of measuring a bag of apples with an oil funnel

A specific example harmful regulation discussed in Part 5 includes policy provisions already in place such as the bulk hot water pricing and charging arrangements impacting on residential tenants in three states – Victoria, Queensland and South Australia discussed in considerable technical detail within this submission.

Other examples and more general discussion of the impacts of energy-specific recommendations made the Productivity Commission notably under 5.3 and 5.4, and by the Australian Energy Market Commission (AEMC) in their Review of the Effectiveness of Competition in the Gas and Electricity Retail Markets

Within this submission I address in more detail some technicalities and legalities more narrowly focused on a particular unjust regulation for pricing and charging of bulk hot water either supplied through distributor networks or embedded networks.

Not only do these provisions seem to be continuing to actively drive unacceptable market conduct, but they have the effect of making inaccessible to bulk energy users supplied with hot water services in multi-tenanted dwellings of their existing enshrined rights under multiple provisions, and despite the specific provisions with the revised MOU between the CAV and ESC dated 18 October 2007 providing for avoidance of clear options for escalation of any disputes between the parties and how these are best resolved.

⁶ Emailed copy to Productivity Commission (28 march 2008) of formal open submission to Energy Reform Implementation Group (215 pages) dealing with selected Considerations: The Plight of End-Consumers of Bulk Energy, notably those receiving bulk energy for hot water services living in multi-tenanted dwellings with no separate metering and those known as embedded network or inset customers

Similar material was also sent to the Ministerial Council on Market Reform Team directly by email (mcemarketreform@industry.gov.au); and through that Team to the retail Policy Working Group. In addition, the National Trade Measurement Institute (NMI) received a direct formal open submission in connection with their Trade Measurement Discussions Paper, and also to directly call attention to current anomalies and distortions of the intent and spirit of trade measurement provisions and of enshrined consumer rights under multiple written and unwritten provisions, including common law contractual provisions.

Though these provisions are probably contained in documents less transparently available to the public either at the ESC or the DPI, the MOUs should nevertheless be structured in such a way as to leave no doubt in anyone's mind about these parameters, and to leave both policy-makers, regulators and the public clear about appeal options on any matter. Such processes are consistent with best practice accountability and transparency.

It is not my opinion that consumer protection is adequate or that existing provisions for complaints handling and redress notably, in Victoria at least, through the energy-specific complaints scheme EWOV, calling itself, rather misleadingly an “*ombudsman*” or alternative dispute resolution entity. These issues were extensively discussed in Part 4 online (subdr424part4).

However, the primary issues addressed here are predominantly of a more technical nature, being focused on discrepant interpretations of existing energy regulations and terminology, contractual status, policy regulatory failure on a number of counts.

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

The aim is to seek reconsideration by responsible bodies of a particular harmful and inappropriate energy policy provisions using Trade measurement practices that are contrary to the intent and spirit of national trade measurement provisions (the default provision in Victoria and the proposed national body for trade measurement

These bodies and Ministers include the following

1. National Trade Measurement Institute (NMI) in its role in assuming policy and regulatory responsibility for trade measurement at a national level (already sent)
2. Ministerial Council on Energy (MCE) Energy Reform Implementation Group (ERIG) (already sent)
3. Ministerial Council on Energy Market Reform Team (MCE MRT) (already sent)
4. Ministerial Council on Energy Retail Policy Working Group (MCE RPWG) (through the MCE Market Reform Team) for their direct attention in view of current proposals to implement non-economic reforms associated with the National Framework for Energy Distribution (already sent)
5. Productivity Commission (current and supplementary submissions (subdr242parts1-7))
6. Australian Energy Regulator (AER)

7. Selected State agencies including the Department of Primary Industries (Victoria); Essential Services Commission and Consumer Affairs Victoria⁷ (part-material sent, ongoing dialogue with energy agencies)
8. Selected State Ministers including Victorian Minister for Energy and Resources and Victorian Minister for Consumer Affairs (part-material sent)
9. Selected Commonwealth Minister, including Federal Minister for Competition Policy and Consumer Affairs (The Hon Senator Chris Bowen) (pending)
10. Selected Ministers
11. Selected community organizations

⁷ Refer to the revised *Memorandum of Understanding 18 October 2007 between Essential Services Commission Victoria (ESC) and Consumer Affairs Victoria (CAV)*
Refer also to the revised Memorandum of Understanding between the Essential Services Commission and the Energy and Water Ombudsman Victoria (EWOV), (for all its perceived flaws including failure to mention how differences between the parties will ultimately be resolved. Refer also to s36 of the *Gas Industry Act 2001*, the *Electricity Industry Act 2000* and the *Essential Services Commission Act 2001* relating to perceptions of bias and failure to meet the mandatory prescribed benchmarks of industry-specific complaints schemes (Federal Govt 1997)
Refer to EWOV Constitution found at
<http://www.ewov.com.au/pdfs/Organisation/Constitution%2030%20May%202006.pdf>
Refer to EWOV Charter found at
<http://www.ewov.com.au/pdfs/Organisation/Charter%2030%20May%202006.pdf>
Refer to Department of Industry Science and Tourism (1997) *"Benchmarks for Industry-based Customer Dispute Resolution Schemes"*
Refer to Sharam, Andrea (2004), *"Power Markets and Exclusions"* (c/f EAG-ESC Report 2004)
Refer to Energy Action Group (EAG) (2004) *"Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code."*
Refer to CUAC Quarterly (2004) *"Embedded Networks: Disconnecting Consumers."* Article by in Brook, p 11 and 12. CUAC website
Dufty, Gavin (2004) *"Who makes social policy – the rising influence of the economic regulator and the decline of elected governments."* VCOSS Congress Paper (2004). Gavin Dufty is currently Manager Policy and Research, St Vincent de Paul Society
Rebuttal of the philosophical position of the Essential Services Commission in Dr. John Tamblyn's Powerpoint presentation at the World Forum on Energy Regulation, Rome Sept 2003
Refer to Energy Action Group (EAG) (2004) *"Report on the Essential Services Commission Energy and Water Ombudsman Victoria Response to Retailer Non-Compliance with Capacity to Pay Requirements of the Retail Code."*
Found a
<http://www.chronicillness.org.au/utilitease/downloads/Energy%20Action%20Group%20report%20re%20retailer%20non-compliance%20and%20the%20ESC.doc>
Prepared following FOI access to Records from the Essential Services Commission
Refer to EWOV (2006) Submission to Review of Essential Services Act 2001, p4
[http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/\\$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/ENERGYANDWATEROMBUDSMAN/$File/ENERGY%20AND%20WATER%20OMBUDSMAN.pdf)
Refer to [www. Complaintline.com.au](http://www.Complaintline.com.au)

Amongst the primary issues addressed here are those of a predominantly technical nature, being focused on discrepant interpretations of existing energy regulations and terminology, contractual status, policy regulatory failure on a number of counts.

In my opinion policy-makers and regulators should be open and receptive to unsolicited inputs such as this from the general community and other sources without the necessity for pressurized response to specific Discussion Papers or public consultative processes. Such a policy would promote enhanced trust and involvement between policy makers, regulators and the community at large and represent more meaningful dialogue, assuming that any of the issues raised in such a way will be considered beyond tokenism.

In any case I hope that energy government advisers, policy-makers, regulators, including the MCE Energy Reform Implementation Group (ERIG); the MCE Retail Policy Working Group; all national and state regulators, including the Essential Services Commission Victoria (ESC), and its equivalent bodies in other states; the Department of Primary Industries Victoria (DPI) and its equivalent policy-maker in other states; the Australian Energy Regulator; will study the material and take the concerns into account when looking at reform measures for energy.

In a climate of policy change all round, this may be a timely submission despite there being no specific MCE consultative forum to cover these concerns.

In a climate of policy change all round, this may be a timely submission despite there being no specific MCE consultative forum to cover these concerns.

Beyond that there are a number of more general considerations relating to compromised consumer protection. Therefore the material is available to other stakeholders wishing to examine in more detail an issue that has been festered for too many years entirely unaddressed

Other related material that has been submitted to various stakeholders, including the Productivity Commission in draft form or as privileged evidentiary material was more informal and/or prepared also for other audiences in connection with a real live case study example of consumer protection and redress gone horribly wrong.

The deidentified case study is contained in this submission and also in Part 4 (subdr242part4) within this submission as the best way to illustrate my points.

A privileged attachment shows the actual history of communications with the responsible statutory authorities and must remain privileged because of the personal data contained and possible legal privilege also.

The allegations are serious and multiple, remain unaddressed by all responsible bodies and complaints schemes for well over a year with a protracted football game of escaping accountability and transparency all round.

The current material was originally principally prepared for the National Trade Measurement Institute in connection with deliberations about trade measurement reforms, so the focus is there.

However, consumer issues are peppered throughout the document and particularly 3.1 (briefly only) 5.1; 5.3; 5.5; 7.1 (briefly only further discussion in subsequent submission); 8.2 (missing section on services unfit for purpose designed) 9.1; 11.1 (by implication further discussion in future submission); 11.2 (brief reference) reference is made to numerous components of the Productivity Commission's Draft Report on Australia's Consumer Policy Framework

I am a concerned Victorian consumer with direct experience of inadequate consumer protection, notably within the energy industry and with particular regard to trade measurement practices deemed to be unfair and unjust.

This submission is supported by citations and weblinks with icons that obey commands with a double-click (even if the icons are a bit sluggish to appear on screen right away).

The annotated contents pages will help interested parties to access those documents marked as (embedded) Appendices. Simply double-clicking on the empty space near the weblink or the visible icon should open up the embedded attachment directly from the Contents Page.

There are some by some relevant policy documents, these being energy guidelines and deliberative documents that appear to be contravening best practice, the intent and spirit of national trade measurement provisions, and worse still, the enshrined and sacred rights of consumers under multiple provisions in the written and unwritten law.

I cite a particular case study showing detrimental impacts as a direct and indirect consequence of existing energy provisions, which include questionable trade measurement practices that appear to violate the spirit and intent of existing national provisions, and which will become invalid and illegal when current utility exemptions are lifted, as is the intent.

Allegations in that real life case example include the following and are discussed in an appendix (p133-148).

Evidentiary material is available by way of 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.

Allegation 1 unconscionable conduct

Allegation 2 Threats, intimidation and coercion

Allegation 3 Unfair business practices (Fair Trading Act 1999)

Allegation 4 Unfair and inappropriate trade measurement

Allegation 5 Misleading and deceptive conduct

Allegation 6 Misleading details in bills issued to other tenants on same block

Allegation 7 Similar inappropriate and unacceptable business conduct

Allegation 8 Contravention of the intent of trade measurement and utility provisions

Allegation 9 Inappropriate supply charges

Allegation 10 Inaccuracy of deemed consumption of gas and charges applied

Allegation 11 Trade measurement practices that are against the intent and spirit of national and state trade and utility measurement provisions

Allegation 12 Compromised protections and adequate access to appropriate recourses

This last allegation (12) is leveled at the policy-makers and regulators and the inadequately resourced and informed industry-specific complaints scheme EWOV.

These issues will continue to compromise consumer protection, already at low ebbs.

There are specific concerns about the impacts on some 26,000+ Victorians using bulk gas energy centrally heated; and some 200+ of bulk energy used to heat single boiler tanks with a single bulk meter at the property of the Body Corporate.

Existing policy arrangements affect those in embedded networks, caravan parks, rooming houses, nursing homes.

Embedded networks are those where unlicensed distributors not covered by Energy Codes and legislation can purchase gas or electricity from the original network, transfer to another network and on-sell at inflated prices without recourses available to consumers other than through common law provisions.

Despite the intent of provisions under the *National Measurement Act 1960 18R*, delays with the lifting of certain utility exemptions have left loopholes in legislation that allow unacceptable market conduct. The default provisions are under this Act, since the mirrored provisions under the Victorian *Utilities (Metrological Controls) Act 2002* remains impotent without regulations to accompany it. This has been the case for some four years. Delays will now be perpetuated till around 2011 when National Trade Measurement provisions will be adopted for all states and territories.

If apportioning amongst owners is deemed appropriate, the current arrangements are not appropriate for rented apartments and those tenants in an “*embedded situation*” even if the term embedded network is not strictly applicable.

Interim material was also sent to various parties, including Ministerial Council on Energy Industry Groups, and offered also to the Victorian Parliamentary Law Reform Committee, for consideration of the detail of issues that have remained for far too long on a back-burner, swept under the carpet and alleged to have been adopted as pragmatic solutions “*in consumer interests to prevent them from price shocks.*”

That argument is not only weak but misplaced since the proper contractual parties in the provision of bulk energy that cannot be measured accurately or individually is the Owners' Corporation and the energy supplier. Though these considerations digress into issues of contract, common law provision, social justice and allegedly flawed energy regulatory policy, these matters cannot be isolated entirely from proper consideration of what is fair and just in determining future legal metrology policies and standardization.

Associated with metrology concerns are those relating to "*deemed or default contract provisions*" sanctioned by state energy polices that appear to be driving unacceptable market conduct, by authorizing the use of appalling trade measurement practices that are the equivalent of measuring a bag of apples with an oil funnel. Such practices fail to meet the most fundamental practice standards, spirit and intent of existing trade measurement provisions.

I fully understand that the NMI has no jurisdiction over contractual issues or the broader parameters of consumer protection and advocacy, but believe that the related issues of trade measurement practices in the utility area (notwithstanding certain current utility exemptions) deemed by the community to be unjust and unfair practices are important related issues that need to be urgently addressed in any trade measurement reform proposals.

Though focused on Victorian provisions under the policy control of the Department of Primary Industries (Victoria), and the regulatory control of the Essential Services Commission, it is my understanding that similar provisions sanctioning bizarre trade measurement practices apply also in other states.

The bulk of this submission discusses selected considerations concerning the plight of end-consumers of bulk energy, notably those receiving bulk energy for hot water services, living in multi-tenanted dwellings without separate metering for that bulk energy, and those in a similar position, known as embedded network of inset customers, receiving such energy suppliers from a network different to the original distribution network.

The Department of Primary Industries (Victoria) (DPI) has been known to exempt certain energy providers from holding any licence where they are operating within "embedded networks" and this has led to even further exploitation of consumer rights and proper trade measurement practices These issues are discussed in some detail in the body of the submission, with reference also to a case study that was heard before VCAT in the 2004 *Winters v Buttigieg* case, as published in the Spring 2005 Quarterly (September) of the Consumer Utilities Advocacy Centre (CUAC).⁸

⁸ CUAC September 2005 Quarterly Article by "*Embedded Networks: Disconnected Consumers.*" Article by Tim Brook, p11,12
Found at http://www.cuac.org.au/docs/quaterly_newsletter_issue1.pdf

The consequences of current sanctioned trade measurement practices has been widespread consumer detriment. In Victoria this impacts on some 26,000 end-users of bulk energy that cannot be appropriately measured with an instrument designed for the purpose, viz. either a gas or electricity meter that can filter control and regulate the flow of gas through such a meter.

Instead water meters are posing as gas or electricity meters, and apparently collusive arrangements between policy-makers, energy regulators, licenced and unlicenced suppliers of bulk energy (with or not through “embedded network” transmission); and Owners Corporation.

The introduction in Victoria of the *Owners Corporation Act 1997*; of clear-cut provisions under residential tenancies provisions and associated water industry provisions (s53-55, 69 of *RTA* (Victoria); the Victorian Unfair Contract provisions, Trade Practices and Fair Trading Provisions, as well as existing components of energy regulation designed for consumer protection (for example Product Disclosure Statement ESC 19(1) have done nothing to prevent unacceptable trade measurement practices or consumer detriment.

Given that the NMI will assume direct responsibility for trade measurement at a national level, following an agreement with COAG, and given the poor responsiveness of some State agencies in dealing with issues of serious concern impacting on trade measurement practices and other considerations, I hope that the Discussion Paper and deliberations will lead to more proactive addressing of existing policies and practices that are seen to be driving unacceptable market conduct, causing widespread consumer detriment, and contravening the intent and spirit of current national trade measurement provisions.

It is my contention that existing industry-specific complaints schemes, run, funded and managed by industry participants, are insufficiently equipped with the knowledge and expertise to deal with complex cases where legal interpretation and technicalities such as discussed in this document, to say nothing of extraordinary jurisdictional limitations.

Such schemes (for example Energy and Water Ombudsman), endeavour to resolve issues, sometimes by using tactics that are perceived as being “*high pressure conciliation*” methods.

EWOV, for example has been known to seek out independent legal advice to support the stance of industry scheme members, (given that their Constitution is exclusive to scheme members, though Committees do allow some consumer group representation), instead of recognizing their jurisdictional boundaries and knowledge gaps and making timely and comprehensive referrals to policy makers and relevant regulators and the State Ombudsman where statutory policy is seen to be driving unacceptable market conduct. Reporting of complex cases that remain unresolved for well in excess of twelve months is also an issue.

It is of public concern that EWOV's staff have been fit to adopt "legal posturing" stances by using oral and written legal stances and even threat of premature closure of files if a Complainant sought legal advice by way or seeking legitimate support or exploring legal or other options. This in itself represents a huge infringement of sacred legal rights and is contrary to the principles of the Attorney-General's Statement of Justice.

Until or unless the legislation clearly spells out what is acceptable trade measurement practice, consumer detriment and poor practice standards will continue to be unresolved issues of widespread concern. It is time for these issues, that have been festering for years on end unaddressed, to be appropriately addressed by State, Territories and Commonwealth bodies responsible not only for ensuring consumer protection, but best practice standards and appropriate outcomes.

The direct experiences the subject of case study and account illustrate the convoluted inter-body inter-relationships that remain cloudy and non-transparent both to the public and to the very bodies who are parties to such instruments.

I start with explaining for public interest selected available information on the accountabilities under certain instruments.

Alan Griffin observed at a 2004 National Consumer Congress as follows⁹:

"Looking to the future, there is a need to adjust government frameworks and resourcing to enhance both government and non- government information provision, advocacy and enforcement of consumer and business rights and responsibilities."

Amongst the issues that remain unaddressed in the energy arena are fair and just trade measurement practices; adequate enforcement and policy responsiveness to emerging needs and proper coordination of policy initiatives especially those relating to the provision of bulk energy used to communally heat boiler tanks serving residential tenants in multi-tenanted dwellings.

Currently satellite water meters are posing as gas and electricity meters with the endorsement of state energy regulators. Energy does not pass through water nor can such energy be justly or fairly calculated as legally traceable measurement. This is the least that consumers should be able to expect.

Existing provisions endorsed by state energy regulations are as good as relying on an oil funnel to measure the weight of a bag of apples.

⁹ Alan Griffin, MP, (then) Shadow Minister for Consumer Affairs "*Consumer Affairs – A Vision for the Future*" Keynote Address to National Consumer Congress 15 March 2004, p2

Consumer protection, especially for the “*inarticulate, vulnerable and disadvantaged*” has become entirely inaccessible, and needs to be restored as a matter of urgency. This term is not meant to merely denote financial hardship, but a range of conditions including psychiatric or intellectual disability; cognitive impairment; fear of authority or legal processes and complaints procedures; language barriers, often also accompanied by financial hardship ongoing or temporary.

As pointed out by Consumer Action Law Centre in their submission to the Essential Services Commission^{10/11/12}

Dispute resolution

*The most glaring disadvantage faced by customers of embedded networks is that they do not have access to dispute resolution through the Energy and Water Ombudsman Victoria (EWOV). In our view, EWOV provides a low cost, flexible, effective and efficient resolution of disputes involving energy and water providers and should be available to all consumers, whether or not they are customers of embedded networks. We understand that consumers of embedded networks in New South Wales have access to the ombudsman scheme in that state.*¹³

¹⁰ Consumer Action Law Centre (2006) Submission to Essential Services Commission on the Small Scale Licensing Framework Issues Paper, (11 August) Dispute Resolution, p2
Found at <http://www.consumeraction.org.au/downloads/DL82.pdf>

Note that there is a technical difference between those receiving from “*embedded networks*” and those receiving supplies direct from the original distribution source, but nevertheless not provided with separate energy meters through which individual consumption can be measured in multi-tenanted dwellings.

These residential tenants are being inappropriately charged individually for both consumption charges calculated in cents per litre, and for inflated supply charges for each tenant, theoretically for the reading of water meters (though site reading is not mandated, and was rejected for pragmatic reasons as being necessary) as instruments not designed for the purpose of measuring energy. These practices contravene the spirit and intent of trade measurement practice and will become illegal and invalid when current utility restrictions are lifted under national trade Measurement Provisions.

¹¹ See also Commentary on IEE Wiring Regulations 16th Edition BS 7671 : 2001 published 2002 found at

<http://www.google.com.au/search?q=Embedded+Networks+Disconnected+Consumers&hl=en&start=10&sa=N>

¹² See Consumers Federation of America (2000) “*Disconnected, Disadvantaged and Disenfranchised: Explorations in the Digital Divide*” (Mark Cooper) found at <http://www.consumersunion.org/pdf/disconnect.pdf>

¹³ My submission subdr242part4 has exploded the myth that EWOV is prepared to become involved, or indeed has the jurisdiction to become involved in such policy or tariff issues in any case. Again, this is a case where “regulators are mightily at fault” for flawed and harmful regulatory policies that remain unaddressed after years of unheard community concerns. See Peter Mair’s Submission

In each of my several submissions to different arenas, including the Productivity Commission, the Australian Energy Market Commission (AEMC), and the Ministerial Council on Energy (MCE) I have referred to concerns about current trade measurement practices as they are seen to detrimentally impact on consumers, and other considerations associated with contractual issues that are outside the parameters of the NMI's jurisdiction, but nevertheless pertinent.

Many of the issues that I wish to raise impact on perceptions of improper and unjust trade measurement practices that would be considered invalid and illegal if certain utility exemptions were lifted, as was the original intent.

This submission deals with the issue bulk energy provision and service standards, pricing charging and trade measurement practices in considerable technical detail, also endeavours to draw public attention to the some of the unaddressed gaps in consumer protection generally within the energy arena.

In particular it calls attention to gaps in providing for the needs of residential tenants who are consumers of energy and refers in detail to the submission made by the Tenants Union Victoria (TUV) to the MCE Retail Policy Working Group in 2007 (MCE RPWG)¹⁴. The design of a national energy Distribution and Regulation Framework needs to take account of current and proposed gaps in the public interest.

112 to the Productivity Commission's Draft Report, and Professor Luke Nottage's comments also, discussed by me in subdr242part4

See also Sharam, Andrea (2004), *Power Markets and Exclusions* (c/f EAG-ESC Report 2004), who has found that in the case of those conciliatory arrangements as are achievable between EWOV and energy suppliers in hardship cases, many consumers end up with spiralling debt through the arrangements made. Though ticked off as successful conciliation, this is an unsatisfactory outcome.

See Peter Mair's Submission to the Productivity Commission sub12

See Professor Luke Nottage's submission to the Productivity Commission sub114

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

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

Prepared following FOI access to Records from the Essential Services Commission

¹⁴ Tenants Union Victoria (TUV), (2007) Submission to MCE Retail Policy Working Group Composite Paper National Framework for Distribution and Regulation. July 2007 found at <http://www.mce.gov.au/assets/documents/mceinternet/TenantsUnionVictoria20070718145702%20Epdf>

The Tenants Union of Victoria was established in 1975 as an advocacy organisation and specialist community legal centre, providing information and advice to residential tenants, rooming house and caravan park residents across the state. We assist about 25,000 private and public renters in Victoria every year. Our commitment is to improving the status, rights and conditions of all tenants in Victoria. The TUV represents the interests of tenants in law and policy making by lobbying government and businesses to achieve better outcomes for tenants, and by promoting realistic and equitable alternatives to the present forms of rental housing and financial assistance provided to low-income households. (source preamble to TUV (2007) submission to Consultation Paper by MCE RPWG

As with other components, this component submission to subdr242part5 is made in a spirit of honesty and good faith, with disclaimers for any unintended factual inaccuracies. The issues have implications for a range of definitions and contractual considerations, deemed obligations, and proper apportioning of contractual status.

The opportunity exists for previous flaws to be addressed and corrected such that consumer protections are restored and upheld in the public interest.

Therefore though most about technicalities, this submission touches on a range of issues that should be considered in a holistic way when revising trade measurement best practice provisions and laws, accompanied by appropriate levels of education of all responsibilities parties, energy providers and the general public when the new provisions are in place.

It is more than interesting that some of this thinking is reflected in the conceptual model proposed by Arthur Allens Robinson in the Consultation Framework recommendations. Some are saying that it is like Christmas in particular industries. However, many clauses are being challenged in the US courts where they block the inherent right of individuals to seek seamless redress through the courts and are not theoretically expected to rely on advocacy and alternative dispute models alone.

In the New York Times Opinion article dated 16 September 2007¹⁵, still on the subject of uniform regulation and in the case of toys, for example, mandatory testing is believed to be a good idea in principle. However, it is observed that

“unless the rules are backed up with vigorous enforcement the government’s imprimatur could give parents a mistaken sense of security.”

One of the issues needs to be urgently addressed by the Productivity Commission to the Retail Policy Working Group RPWG is a first-principle of design considerations in this regard is whether an **embedded end consumer of energy, notably bulk-energy without separate metering** for each component of energy supplied, (as opposed to calculation of water volume consumed) can be deemed to be a *“small customer”* with reciprocal contractual obligations in the first place.

¹⁵ New York Times September 16 2007 *“The Need for Regulation.”* Editorial Opinion.

The laws of contract are first principle considerations above all else. Until or unless this first principle is addressed every other provision or projected consideration relating to “*small customer*” contractual obligations is secondary and irrelevant. It cannot be appropriate to consider an embedded end-consumer of energy contractually obligated in any way to any party within the chain of distribution unless the energy consumed can be directly measured in an appropriate best practice way, and consistent with the intended provisions of trade measurement provisions, utility provisions; the essence of contractual law considerations’ the essence of unfair trade practice considerations (leaving aside whether a contract can be shown to exist at all in all the circumstances).

Though energy suppliers appear not to recognize the range of contractual and trade measurement practices, issues of contract, proper definition of small customers and their rights and protections, including water temperature and maintenance issues appear to have been left unaddressed for far too long.

The existing provisions for embedded end-consumers, and especially those living in sub-standard rented accommodation with archaic communal hot water services that are not even providing water quality, including adequately heated water without meters that can measure energy consumption, provide good examples of inadequate consumer protection for those who the most vulnerable.

If it were not already bad enough that existing flawed guidelines have failed to allow for consumer protection or to embrace the fundamentals of contractual law provisions, trade measurement provisions, residential tenancy and body corporate provisions; the provisions of common law, water industry provisions and finally the rules of natural and social justice, newly creative and novel “*demand response solutions*” have been adopted by NEM Metrology provisions during the past two months that perpetuate and complicate matters by refusing to recognize that rules, regulations and even legislative provisions under one enactment cannot simply over-rule the provisions of other enactments that have already enshrined specified consumer protections. Yet that is precisely what is occurring.

What will be done specifically about this infringement of consumer rights, and how will these protections be swiftly restored?

Besides these issues, maintenance issues, health risks associated with hot water services, liability and contractual issues are also discussed in this submission, though time constraints preclude thorough examination of each of the issues raised.

Part 5 deals in some detail with pertinent definitions and contractual issues in table form as well as reference to current bulk hot water tariffs and the creative descriptions and interpretations used by energy retailers seeing themselves as supplying hot water services rather than energy.

Energy retailers are licenced only for the latter. Even if contractors or affiliates not carrying their names are licenced to supply hot water services, these third parties would be acting upon instruction after discussion with body corporate entities in the case of apartment blocks where there are embedded customers, and there are complex contractual and fair trading considerations that may not have been taken into account. In a climate of policy change this may be an appropriate time for these issues to be fully addressed. Perhaps the attention of the Retail Policy Working Group can be alerted to issues more pertinent to their working parameters. Nevertheless there may be some overlap.

Retrofitting of existing homes appears to have been included on the agenda, but there are considerations that will impact on residential apartments occupied by fixed low income tenants who cannot afford rent increases if landlords are not supported with capital grants and other incentives to attend to such matters

As previously mentioned in Victoria there are some gas bulk hot water systems and some 200+ electric bulk hot water systems that need urgent review, proper identification of contractual and maintenance liability, and requirement for carefully structured policies that take into account all legal liabilities and consumer right, states are also affected by similar arrangements.

Part 6

Part 6 addresses more general issues of harmful regulation impacts on consumers and some associated economic factors, whilst part 7 will be more focused on competition issues and challenge to the conclusion that competition has been effective in the gas and electricity markets in Victoria, as purported by the AEMC and endorsed by the Productivity Commission in its Draft Report.

The proposal under DR 5.4 by the Productivity Commission to remove effect deregulation of the remaining safety net default option, upholding the recommendation of the AEMC following flawed assessment of the effectiveness of competition on the gas and electricity retail markets as published in February 2008.¹⁶

In passing, though more thoroughly covered in Part 6, Part 5 deals with the proposal under DR 5.4. This proposal has met with sustained opposition from many parties including State Governments and community organizations. As expected, most of the larger gentailers support the recommendation.

The issues raised are not intended to be exhaustive. The intent is to give reason to pause and to encourage further exploration of recommendations that may hamper rather than enhance consumer protection as well as competition goals.

I provide another direct quote and citation from Part 6 as being particularly pertinent not only to the AEMC's various reviews and rule-making processes, but to other arenas where rushed and poorly considered decisions appear to be the norm:

¹⁶ See South Australian Government (2008) Submission to Productivity Commission's Draft Report (sub251) April
Found at http://www.pc.gov.au/__data/assets/pdf_file/0004/78682/subdr251.pdf

This is from Robin Eckermann Principal, Eckermann & Associates, Adjunct Professor (Network/Communication Technologies), University of Canberra¹⁷ regarding the smart meter rollout:

I appreciate the pressure to meet tight deadlines – and recognise the possibility that this submission will be set aside because it does not conform to the relatively specific guidelines within which feedback has been invited. However, in the words of Lord Chesterfield “Whoever is in a hurry shows that the thing he is about is too big for him.” There is no better time than right now to pause and check that nationally we are setting our sights on the right goals.

The health of the planet that we will leave to our children and to our grandchildren depends on seizing every opportunity – especially the big ones such as are on offer through the overhaul of ageing electricity supply networks.

The National Consumer Roundtable on Energy has in its response to the PC’s Draft Report¹⁸ welcomed the commission’s acknowledgement of the need for energy-specific consumer protections (p7). This group agrees that a

“.....welcome(s)) (a) national energy specific consumer protection framework can contribute to the efficient operation of a competitive energy market that is in the long term interests of consumers

The NCRE Group has noted that the PC’s primary reason for energy-specific consumer protection is provided exclusively in Appendix F of his Draft Report Volume 2 on the basis that gas and electricity are essential services. This Group have also pointed out the PC’s recognition that households

Require access to utility services even to achieve a basic living standard (p48 CP DR)

¹⁷ Eckermann, Robin (2007) Submission to MCE re Smart Meter Rollout Principal, Eckermann & Associates, and Adjunct Professor (Network/Communication Technologies), University of Canberra
Found at
<http://www.mce.gov.au/assets/documents/mceinternet/Eckermann%5Fand%5FAssociates20071119104053%2Epdf>

¹⁸ National Consumer Roundtable on Energy (2008) (NCRE) Response to PC’s Draft Report, p7
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I concur with the NCRE Group that¹⁹

In relation to essential services generalist consumer protections are inadequate to protect consumers” on these grounds

- *Generalist protections do not provide standard contract terms and conditions, for example in relation to billing and statements of account, payment and collection; and dispute-resolution*
- *Ensuring access to supply, protection against disconnection and retailer obligations in relation to dealing with utility debts and the financial hardship of energy consumers; and*
- *Matters particular to the marketing of essential services, including information provision and appropriate contractual consent protections*

The Roundtable group cited above has expressed legitimate concerns (p7 response to CP DR) that in the process of transfer to a national consumer protection framework, consumer protections are not diluted and that best practice principles are incorporated with regard to overall net public benefit. Competition is not an end in itself as has been repeated by many.

The Roundtable has analyzed TRUenergy’s clever dissection of the regulatory framework adopted by Victoria as

“The most onerous and costly regulatory framework in Australia”

That analysis by TRUenergy, cited by the National Consumer Roundtable Energy Group (p7 and 8) compared Victoria with Queensland, which was cited as adopting “*best practice.*” The Roundtable has suggested that TRUenergy’s opinion²⁰ may have been influenced by actual cost-benefits of regulation instead of a more balanced “*cost-benefit standpoint*”.

¹⁹ Ibid NCRE (2008), p7

²⁰ TRUenergy (2007) Response to PC Issues Paper, p5

Part 5 reproduces in full the two-page letter of concern, also submitted to the MCE retail Policy Working Group in July 2007. This can be found online at the citation shown below²¹

I concede that the regulatory framework for energy in Victoria is long over-due for streamlining, rationalizing and tidying up. The strict hardship regime in Victoria also has the lowest disconnection rates due to inability to pay²² (*NCRE, 2008, p8*).

If stricter hardship policies have indeed resulted in acceptably low disconnection rates, then, as observed by the NCRE, there are benefits for retailers in being able to recoup costs through robust hardship programs, and thus offset the additional cost per account of implementing such programs.

The arguments presented by the NCRE regarding rural and regional communities, often facing substantial difficulty in security improvements to their energy supply need to be heeded (*NCRE 2008, p8 and 9*)

Finally, on p9 of their submission to the PC, the NCRE has suggested that more confidence on the national regulators, AEMC and AER before they would feel comfortable about supporting the national framework would need to be justified.

Their concerns about confidence in the proposed rule-makers are shared by many.

I for one, having observed closely how the AEMC makes its market evaluations and assessments; what paltry data is relied upon; what little meaningful stakeholder input is genuinely sought; and what perceived errors are made in relying on accurate reliable data; coupled with poor comprehensive assessment of the internal energy market as a whole, cannot possibly provide full endorsement to transfer to a national framework till these issues are addressed – namely issues of governance, accountability; competent and comprehensive internal market assessment and willingness to learn from stakeholders in assessing whole of market needs.

This may seem like a tall order, but if the PC is about to recommend major changes to regulation and consumer protection without looking further into these reservations, expressed in different ways by many stakeholders, what could the nation be heading for in terms of consumer confidence and protection? Surely despite all the care that the PC has taken, we are not destined to head backwards, with further diluted confidence; with few protections; with diluted reliance on unfair contract provisions; with unacceptable expense and inaccessibility to generic protections alone.

I urge the Commission to study in detail other concerns, including the extensive consumer-related issues raised in the Joint Community Submission^{23/24}(subdr228) focused on consumer detriments arising from proposed energy reforms.

²¹ Total Environment Centre (TEC) (2007) Response to MCE Retail Policy Working Group Composite Paper National Framework for Distribution and Regulation. 18 July 2007 (2 pages) Found at

<http://www.mce.gov.au/assets/documents/mceinternet/TEC%281%2920070718150600%2Epdf>

²² Ibid NCRE Response to CP DR, p7

There have been many other concerns, including those expressed by the South Australian Government²⁵ about the rationale for finding that competition in the gas and electricity retail markets in Victoria have been successful, as determined by the AEMC and upheld by the PC.

These are discussed briefly here with selected highlights from opinions expressed in consultative forums and in more detail in Part 6. See also my detailed discussions in Parts and 2 in response to the AEMC's Second Draft Report²⁶

Part 6 also discusses briefly with direct citation in its entirety the arguments raised by Jim Wellmore, then Principal Policy Officer, in the PIAC submission to IPART in 2004²⁷ covering to some of the principles of the following:

1. Competition and consumer protection
2. Prices under competition
3. Competition and retailer costs and Cost Reflective Market Prices
4. Movements in CPI
5. Side constraints
6. Long Run Marginal Costs (LRMC) of generation
7. 'Green energy' costs
8. Retailer of Last Resort Provisions²⁸

²³ Joint Consumer Submission (2008) "*Model Consumer Submission in Response to Productivity Commission's Draft Report on Australia's Consumer Policy Framework* (March) subdr228 March Found at http://www.pc.gov.au/_data/assets/pdf_file/0005/77846/subdr228.pdf

²⁴ National Consumer Roundtable on Energy Joint Submission to Productivity Commissions Draft Report subdr119 found at http://www.pc.gov.au/_data/assets/pdf_file/0007/76885/subdr199.pdf

²⁵ South Australian Government (2007) Submission to AEMC's Second Draft Report 5 November 2007

²⁶ Madeleine Kingston (2007) Submission to Australian Energy Market Commission Review of the Effectiveness of Competition in the Gas and Electricity Markets in Victoria Second Draft Report, 9 November 2007.

Refer also to early draft material on disk provided to the Productivity Commission during February, originally prepared as a response to the AEMC's First Final Report. Many components are relevant to both reviews and all submissions to all arenas contain significant components pertinent to consumer protection issues, so there is much overlap

²⁷ PIAC (2004) Submission to Independent Pricing and Regulatory Tribunal (IPRT), NSW, Mid Term Review of Regulated Retail Tariffs (Jim Wellmore, then Principal Policy Officer, PIAC) Found at <http://www.ipart.nsw.gov.au/files/Public%20Interest%20Advocacy%20Centre%20-%20S4970.pdf>

Though some details of these arguments may have altered in the interim, the general arguments still remain sound in terms of consumer detriments and the issues surround energy pricing. Jim Wellmore has a way with outlining such concerns and has more local knowledge of NSW. For Victoria others have covered the ground in the Joint Community submission to the PC and so have others

Though recognizing that some of the details may have changed, the general arguments remain sound at deal with the NSW scenario at the time, though with overlaps and intra-state operations of energy retailers, the demarcations become less important in some areas. There remain many differences between the Victoria and South Australia, and Victoria and New South Wales, recently raised in submissions to the Productivity Commission.

Other matters

Other issues briefly addressed in this component (part 6 and 7) include:

9. The need for industry specific regulation for energy as upheld in numerous submissions to various arenas.²⁹
10. Further discussion of the role of the proper understanding and application of behavioural economics
11. The role and impact of retail price regulation (PC DR 5.4)
12. Cost-reflective market prices
13. Impacts on Tier 2 retailers and consequences for consumers
14. Embedded generation^{30/31}
15. Explicit informed consent
16. Marketing
17. Contract terms
18. Limited discussion of Generic vs specific regulation with emphasis on vicarious liability for third party servants/agents and contractors to energy suppliers³²

²⁸ Also raises concerns about RoLR implications repeatedly raised by other community organizations

²⁹ Note that energy retailers and their industry associations would love to see all or most energy-specific regulations gone altogether, and reliance placed on generic provisions alone, which have not been shown to be effective in addressing need for a host of reasons including procedural apathy; political pressure and lack of political will; flawed provisions within the TPA and FTA; cost; accessibility, complexity in obtaining access; football games of accountability between regulators, to mention but a few. See also submissions by Dr Michelle Sharpe (Victorian Bar and Melbourne University), Dr. Carol O'Donnell; Hank Spier; others

³⁰ See for example components of the submission from the Total Environment Group (TEG) (2007) to the MCE retail Policy Working Group Composite Paper National Framework for Distribution and Retail Regulation July

³¹ See also CUAC September 2005 Quarterly *“Embedded Generation – Disconnected Consumers*, Article by Tim Brook

Found at http://www.cuac.org.au/docs/quaterly_newsletter_issue1.pdf

Cites the case of *Winters v Buttigieg (2004)*, VCAT, and discussing how both licenced and unlicenced energy providers are escaping altogether accountability by exploiting flawed policy provisions (applicable in three States.) Retailers are openly charging approximately three times the supply charge cost for remote reading than for manual reading of water meters posing as gas meters, because policy provisions appear to sanction the application of bizarre algorithm formula in the calculation of individual consumption of gas that cannot be measured with an instrument designed for the purpose.

19. Cooling Off
20. Meter Data
21. Obligation to Supply
22. Hardship Policies
23. Regulation of Smart Meters
24. Broader Objectives of the NEL

Consistent with common law contractual provisions and any relevant components of the written or unwritten law, vicarious liability considerations demand that any contractual obligation between supplier and customer, however that customer is defined should be carried through to servants agents and contractors, and this should be clearly spelled out in the revised template energy framework when finalized.

Community organizations have more thoroughly covered some of these issues as they than time and opportunity permits me to do, so I urge the Productivity Commission to take all of those arguments into account.

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

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

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

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

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

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

³² See for example AER (2007) Response to the MCE Retail Policy Working Group Composite Paper, prepared by Allens Arthur Robinson 23 July, Clause 14-17 (23 July)
Found at <http://www.mce.gov.au/assets/documents/mceinternet/AER20070723144600%2Epdf>

I refer to the findings and recommendations consistently made by the AEMC repeated like a mantra from woe to go in each report, without due regard to the whole of the market, the feedback from smaller second-tier retailers³³

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

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

Victoria Electricity has specifically commented in its response to the AEMC Second Draft report that they are unable to support removal of price regulation effective 1 January 2009 until or unless significant problems in the wholesale gas market are remedied³⁴

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

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

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

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

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

³³ See for example Victoria Electricity (2007) Response to AEMC Second Draft Report, printing out deficiencies in the gas wholesale market, market power imbalances and the real threat to successful competition unless these issues are address. VE does not recommended price deregulation till those issues are fully addressed and notes there is no evidence that market rules and other factors will be addressed by 2009

³⁴ Victoria Electricity (Infratil) Response to AEMC’s Second Draft Report; February, p1

If errors of this magnitude have been made in the AEMC's investigation and evaluative processes, how many other glaring errors of fact and interpretation have occurred in forming the conclusions and recommendations that have been made? These included concerns expressed by Tier 2 Victoria Electricity³⁵ as summarized below:

1. *The events in gas marketing during the winter of 2007, raising concerns about the ability of the new market structures to support competitive gas retailing;*
2. *The impacts of dual fuel offers on some retailers (a concern shared by the South Australian Government in its submission to the AEMC's First Draft Report)*
3. *Concerns that the removal of price caps for customers on default contracts with host retailers would only work if unambiguous confidence can be held in competition upon the elimination of new and unacceptably high wholesale gas market risks imposed on non-incumbent retailers by new market rules and procedures.*
4. *Victoria Electricity's response to the First Draft Report³⁶ has pointed out that the physical assets and contracts in Victoria tend to be owned by vertically integrated retail incumbents and are tightly controlled and only available infrequently if at all.*
5. *The physical dimensions of the market leading to restrictions to growth ambitions association with Longford contracts*
6. *Recent rule changes involving injection dependency have created problems for new entrants, without the benefit of protection, review or authorization by the ACCC or any competition body*
7. *The South Australian Government³⁷ has expressed the view that it was important in assessing effectively competitive energy markets occurring around Australia that the evidence be unambiguous that such markets exist, rather than providing further evidence that markets are continuing to develop.*

³⁵ Victoria Electricity is a subsidiary of international utilities investor Infratil Ltd with net assets exceeding one billion. *Source: <http://www.victoriaelectricity.com.au/?Join/Business>*

³⁶ Victoria Electricity (Infratil) (Tier 2 retailer) Response to AEMC First Draft Report 9 November 2007 (second-tier retailer) See also Response to second Draft R indicating that existing regulatory rules not only support domination and risk of collapse of new entrant competition, but have led to active steps already that will have the effect of reducing the ability of Tier 2 retailer(s) to compete for Victorian energy customers.

³⁷ Govt of South Australia (2007) through The Hon Patrick Conlon, Submission to AEMC's First Draft Report; 5 November 2007

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

I commend the Treasury for taking a tough stance on cartel behaviour. There are nuances not covered under the formal definition of cartel behaviour that nevertheless may represent market power abuse.

The AEMC appeared to have little interest in the issues raised prior to publication of the Final Report of their Review of the Effectiveness of Competition on the Gas and Electricity Retail Markets in Victoria, and this new Energy Rule Maker has moved on to draw similar conclusions about South Australia just as soon as the motions of inviting stakeholder input is achieved.

However, particular attention is once again called to the serious reservations expressed by Victoria Electricity (Infratil Ltd parent company) in relation to impediments within the gas market so serious as to curtail further competitive activity amongst certain Tier 2 retailers. Refer to the submission by Victoria Electricity to the AEMC Issues Paper and to the AEMC Second Draft Report. Some of their concerns are summarized my previous submissions, within the Executive Summary subdr242part1; and addressed again in Parts 6 and 7.

Part 7 (subdr242part7)

The Productivity Commission already has since February had on disk an earlier draft version .pdf part 7 as subdr242part7with the final being tidied up. This is also intended for publication and I apologize for lateness.

A major focus of Part 7 (subdr242part6) is examination of the internal energy market in some detail illustrating enormous gaps in the robustness of the assessment made by the Australian Energy Market Commission (AEMC) that retail competition in the gas and electricity markets in Victoria has been successful.

That flawed finding has been upheld by the Productivity Commission, and has led to a number of recommendations including Draft Recommendation 5.4 (PC), that will have detrimental outcomes not only on consumers generally, but also on the economy and “*competition*” goals. As observed by Louise Sylvan Deputy Chair, ACCC, consumers not only benefit from competition but actually drive it.

The rationale used to drive energy reform appears not been undertaken with proper attention to the multitude of inter-related issues that should form part of a decision to effect major energy reforms. This is not the first time that energy issues have arisen and have required external and independent enquiry. Very little seems to have been learnt from past experiences.

As a consequence of the AEMC’s decision to find retail competition effective in the gas and electricity retail markers, one of the decisions made was to recommend removal of the last remaining price regulatory control of the safety net default option, a decision also upheld by the Productivity Commission.

There are many other implications of the AEMC decision that flow on to consumer issues, and these have been raised repeatedly apparently without being heard.

Part 6 discusses some of these, dating back several years³⁸ since the same concerns are being echoed again. These include the issues competition and consumer protection; prices under competition, competition and retailer costs, movements in CPI, side constraints, LRMC of generation; green energy costs; retailer of last resort (ROLR) costs; and host of other issues as raised by numerous stakeholders participating in the Productivity Commission's current Review on the brink of finalization; as well as stakeholders participating in the AEMC Victorian review now completed, with other states likely to be the next targets of premature and ill-considered decisions.

The poor confidence in the Rule Maker (AEMC) has had the effect of instilling caution and even frank opposition to any imminent plans to effect nationalization of the consumer policy framework and introduction of a new national generic law, though there are many other impediments, including concerns about whether the new proposals will dilute rather than enhance consumer protection. These were amongst my original reservations also in previous components of this submission.

Part 6 deals in more detail with competition issues and links these to the Productivity Commission's Draft Recommendation 5.4 indicating support for the AEMC's recommendation that retail competition in Victoria's gas and electricity markets has been successful, and secondly that there is justification and merit in removal of the last remaining price regulatory control of the safety net default option prices.

Removal of that regulatory control is not synonymous with price cap removal, the more commonly used term. This is not a price cap but a negotiated price that is regulated. Its role extends far beyond an "*inefficient and blunt tool*" for addressing hardship. Its implications have been discussed and aired by many community organizations and individuals.

The role and impact of retail price regulation (PC DR 5.4)

Selected political and policy issues – the broader context

In Part 2 of my Submission to the AEMC's First Draft Report, I had raised some broader policy considerations components of which are included in this chapter to keep the topics intact. Most of these refer to *Jamison et al's (2005)* literature review of utility reform.

I now cite again the findings and conclusions by experts in the area of utility reform and impacts of privatization; renegotiated contracts.

³⁸ PIAC (2004) Submission to Independent Pricing and Regulatory Tribunal (IPRT), NSW, Mid Term Review of Regulated Retail Tariffs (Jim Wellsmore, then Principal Policy Officer, PIAC) Found at <http://www.ipart.nsw.gov.au/files/Public%20Interest%20Advocacy%20Centre%20-%20S4970.pdf>

The Summary of the Second Draft Report discusses under 2.3 the rationale for removal of retail price regulation as follows:

2.3 Rationale for removal of retail price regulation

Where competition is found to be effective, it should ensure that market prices reflect efficient costs and there is no need to maintain price regulation. Indeed, regulated prices will almost always provide an imperfect substitute for those prices determined in a competitive market and are likely to impose costs and distortions not present in a competitive market.²¹

This issue is also raised briefly in Part 5 as are earlier references as discussed in 2004 in a PIAC submission to IPART³⁹ to the principles of Competition and consumer protection; Prices under competition; Competition and retailer costs; Movements in CPI; Side constraints; LRMC of generation; ‘Green energy’ costs; Retailer-of-Last-Resort (ROLR) costs.

Cost-reflective market prices

The AEMC’s preoccupation is with ensuring cost-reflective market prices, is either unable or unwilling to factor in the broader principles of national competition policy that embraces shared responsibility for social obligations; and regrettably but perhaps predictably has upheld philosophical stances that were expressed as far back as 2004 at the World Energy Regulator’s Forum – by the then Chairperson of the ESC, now Chairperson of AEMC. These issues are discussed elsewhere in this submission and were also raised in my lengthy response to the AEMC’s First Draft Report.

Part 7 deals in great detail with refutation of whether competition has been successful in Victoria’s gas and electricity markets and in some parts is fairly technical.

It challenges the extent to which the AEMC may have omitted to undertake a robust analysis of the market; the paltry data relied upon based on poor records and available of data (see CRA’s multiple disclaimers about paucity of data; the discomfort expressed by the Energy and Water Ombudsman (Victoria) Ltd, the energy-specific complaints scheme about the use made by the AEMC of complaints data

³⁹ PIAC (2004) Submission to Independent Pricing and Regulatory Tribunal (IPRT), NSW, Mid Term Review of Regulated Retail Tariffs(Jim Wellsmore, then Principal Policy Officer) Found at <http://www.ipart.nsw.gov.au/files/Public%20Interest%20Advocacy%20Centre%20-%20S4970.pdf>

Though some details of these arguments may have altered in the interim, the general arguments still remain sound in terms of consumer detriments and the issues surround energy pricing. Jim Wellsmore has a way with outlining such concerns and has more local knowledge of NSW. For Victoria others have covered the ground in the Joint Community submission to the PC and so have others

For example, I note the discomfort expressed by EWOV over the use made by the AEMC of complaints data published by them, starting with the conclusion to the discussion on the use made of data, quoted verbatim in subdr242part4 published on the PC site⁴⁰:

It discusses serious flaws in the application of consumer behaviour assessment without due regard to the sophistications of best practice behavioural economics theories or proper understanding of their application in terms of how consumers actually behave.⁴¹

In good faith, perhaps an interpretation can be placed that these reservations and disclaimers are so significant as to possibly have the effect of appreciably diluting any weight placed on the report as showing how successful competition has been in a financial sense from retailer perspective.

These reservations summarize real concerns:

- CRA was forced to rely on publicly available information and historical data in order to assess the revenue and cost components that determine retailer margins;
- CRA was unable to obtain actual data from retailers;
- CRA was forced to rely on broad range estimates only because of unavailability of robust data in particular actual data;
- CRA was forced to rely on historical energy retail margins, and information in the public domain to assess the revenue and cost components that determine retailer margins; in particular revisiting of the previously analysis that was undertaken to calculate a regulated price path in 2003, with substitute for CRA's best estimates only of cost outturns for the years 2004-2007.
- CRA was forced to place reliance on average consumption levels of those on standing offers in order to assess retailers' revenues from customers on standing offer contracts. The material was partly sourced in August 2007 from retailers' websites with 'some input' from retailers describing their market offers that were available at the time. Typical discounts were assumed.
- CRA conceded the likelihood that actual results are more likely to be nearer to the midpoint or at the lower end of the ranges quoted in CRA's "*best estimates*" CRA have specified how their estimates were formulated for the different cost item as follows:

⁴⁰ EWOV (2008) Refer to discussion on the issue of complaints statistics and interpretation of EWOV data p1-4 Response to AEMC Review of the Effectiveness of Competition on the Electricity and Gas Retail Markets in Victoria First Final Report. Refer also to EWOV Response to AEMC Second Draft report, p2

⁴¹ Refer for example to the latest submission subdr253 of 11 April 2008 by Louise Sylvan, Deputy Chair, ACCC discussing in detail the emerging role of behavioural economics in consumer policy Louise Sylvan is Deputy Chair ACC as well as Chair of the Economics for Consumer Policy Working Group at the OECD.
Found at http://www.pc.gov.au/__data/assets/pdf_file/0008/78686/subdr253.pdf
Refer to other submissions, including from Deborah Cope, Principal PIRAC Economics Consulting (Sub106); Joint Community Submission DR228

- CRA's analysis begin with using retail cost estimates that had been used in providing advice to the ESC in 2003 relating to current price paths for electricity and gas, commencing in 2004.⁴²

The CRA estimates were based on 60% of customers being on market contracts and this being maintained.

As pointed out by Mr. Dufty in his submission another way of putting this is that 30% of domestic and 40% of commercial customers that took up market offers indicated that these contracts did not meet their expectation.

CRA acknowledged the likelihood that actual results are more likely to be nearer to the midpoint or at the lower end of the ranges estimated as "*best estimates.*"

This presumption based on the quality of the data, and the fact that retailers that adopted a less than conservative hedging strategy than assumed in the study may have experienced high wholesale electricity purchase costs. Those presumptions were consistent with the EBITDA's reported by Origin Energy and AGL in their annual reports of the past several years.

The broad estimates provided, given the frequently acknowledged data limitations in the CRA Report must count for reasonable grounds to take a pause and make an honest assessment of whether results such as these in the absence of accurate and reliable actual data are sufficient grounds for removing standing offers and lightening regulatory burden to the extent of possibly compromising the broader goals of competition that are not by any means restricted to monetary gains and profit margins

The Second Draft Report analysis by the AEMC had apparently been updated on the basis of that earlier data and estimates. The AEM had originally admitted in its Second Draft Report that that given the paucity of the data available, now would take account of the precision of the estimates of margins when deciding how much weight to place on this source of evidence.

Nevertheless, one report after the other until publication of the final report on 27 February 2008, the AEMC upheld its pre-determined decision to continue with removal of the regulated safety default option and conclude that competition in Victoria had been successful in the gas and electricity retail markets, without due regard to all relevant factors, a robust analysis of the internal market, and in particular an in-depth look at the wholesale end where the price drivers emanate. The AEMC has used these precise words under Section 8.1.1.

⁴² CRA (2007) *Impact of Price and Profit Margins on Energy Retail Competition in Victoria* C11383-00, p7008 8 October 2007. Report commissioned for AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report*, October 2007 Sydney.

This was based on the fact that the standing offer price levels were based on the assumptions, estimates and projects of cost that were made at the time, plus net margins that the Victorian Government considered to be reasonable

“As any estimate of a benchmark wholesale energy purchase cost is based upon an assumed risk management strategy and an estimate of the value of the residual risk exposure of the retailer the potential for material error in the estimate of the wholesale purchase cost exists. Similarly regulators or governments have needed to make assumptions about efficient retail operating costs when setting the existing price controls over retail prices.”

“The paucity of data available means that little robust analysis has been undertaken into this cost item again leaving open the potential for material error. The Commission will take account of the precision of the estimates of margins when deciding how much weight to place upon this source of evidence.”⁴³

In addition the Commission has also made the following statements and disclaimers, emphasizing that the observations (in the First Draft Report) are only preliminary at this stage, noting the need for caution. That admission is given below verbatim.

“The Commission is mindful, however, that a reasonable margin for the average customer does not imply that all customers are profitable under the existing standing offer tariff, given that the cost of serving a customer can vary as a result of location, tariff type or levels of consumption. Accordingly, the Commission considers there remains some risk that the structure and level of the standing offer tariff is inhibiting the further development of competition.”

“The Commission emphasizes that these observations are only preliminary at this stage. It also notes the need for caution when interpreting estimates of margins and drawing inferences from them about the effectiveness of competition given the inherent imprecision in the exercise.”

⁴³ AEMC, First Draft Report, 2007 p246-247

CRA admitted to paucity of more current data so it is difficult to know whether the new estimates had any real basis given the changes in the market since that time; the fact that many investors have existed the scene, and the number of market changes generally. This is a climate of wholesale price volatility.

Louise Sylvan as Deputy Chair of the Australian Competition and Consumer Commission (ACCC) as well as Chair of the OECD Economics for Consumer Policy Working Group has emphasized the role of behavioural economics in consumer policy. Ms Sylvan points out on page 2 of her recent submission to the Productivity Commission⁴⁴, that the OECD Working Group chaired by her see behavioural economics as complementary to conventional and information economics.

Ms Sylvan goes on to say that a thorough understanding of how consumers will behave is essential for reaching policy decisions that will work effectively in many markets.

In referring to the OECD Toolkit attached to her submission, Ms Sylvan has pointed out the following:

“...Both the detriments and the decision- making segments of the Toolkit, however, presuppose that research is occurring and that some agency or agencies have responsibility for ‘watching’ the demand side, and carrying out pro- active investigative and rigorous analysis of consumer outcomes.

Ms Sylvan has expressed concern about

“.....quite appropriate hesitancy about intervening in markets – because of regulatory risk and uncertainty – has become translated into a lack of activity in rigorously examining consumer problems in markets (a) confusion between the task of final evaluation and decision- making and the process of investigation and analysis.”⁴⁵

⁴⁴ Sylvan, Louise (2008) Submission to Productivity Commission’s Draft Report, p1, subdr252
Found at http://www.pc.gov.au/__data/assets/pdf_file/0008/78686/subdr253.pdf
Louise Sylvan is Deputy Chair at the Australian Competition and Consumer Commission and Chair of the Economics for Consumer Policy Working Group at the OECD

⁴⁵ Global Competition Forum found at http://www.oecd.org/document/25/0,3342,es_2649_37463_39410210_1_1_1_37463,00.html c/f Sylvan, Louise (2008) Submission to Productivity Commission’s Review of Australia’s Consumer Policy framework, subdr253, p3-4
Found at http://www.pc.gov.au/__data/assets/pdf_file/0008/78686/subdr253.pdf

On page 4 of her submission DR253 made these concluding comments:

“Conclusion

To conclude, an evidence-based approach to consumer policy, which takes as its focus an analysis of consumer outcomes, and which bases any intervention on real consumer behaviours, can help ensure that ineffective interventions are not pursued or are remedied, and that sound alternatives are considered within a sophisticated cost-benefit analysis, including whether a market will respond successfully to consumer problems by itself within a reasonable time.

Equally important, examining whether markets are working from the consumer perspective complements the type of market analysis which is undertaken on the competition (or supply side) and in some jurisdictions is an integrated task⁴⁶. The current draft decision tree in the OECD Toolkit for Consumer Protection and Empowerment recognizes this integration and is attached for your information⁴⁷

In her submission to the Productivity Commission sub106 Deborah Cope of PIRAC Economic Consulting⁴⁸ had referred to the findings of the OECD Roundtable on Demand-side Economics for Consumer Behaviour (2006) provided an extensive list of examples of behavioural biases.

In itself, this diversity in behaviour creates a challenge for applying behavioural theory to public policy questions. It makes it difficult to analyze and provide guidance on how to identify the economic and social concerns that can arise from various types of behaviours, and the government policies and interventions that would be most effective in dealing with those categories of behaviours.

I have already referred in subdr242part2 to the published frank views such as those of Peter Kell as CEO of Australian Consumer Association (ACA, the publisher of CHOICE)

⁴⁶ See for example, http://www.oft.gov.uk/advice_and_resources/resource_base/market-studies/ c/f Sylvan, Louise (2008) Submission DDR253 to Productivity Commission’s Draft report, p4, citation 7

⁴⁷ See attachment to Louise Sylvan’s Submission to the PC’s Draft report, p5 “Draft decision Tree – from Chapter 5, Customer protection and Empowerment.: Building a Toolkit for Policy Makers, adapted from Australian Productivity Commission

⁴⁸ PIRAC Economic Consulting sub108 to Productivity Commission’s Issues Paper, p5 consumer behaviour Found at http://www.pc.gov.au/__data/assets/pdf_file/0007/67255/sub106.pdf

in two recent National Consumer Congresses⁴⁹ regarding accountability and regulatory philosophy.

As discussed in more detail in subdr242part2, paged 13-16, Edmond Chattoe from the Department of Sociology University of Surrey, Guildford, UK, has questioned whether sociologists and economists can communicate. I provide below an abstract and the introduction to from his 1995 paper and some pertinent arguments from the body of the paper.⁵⁰

Chattoe sociologist explains that the economic theory of consumer choice

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

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

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

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

⁴⁹ Kell, Peter (2005) "*Keeping the Bastards Honest – Forty Years on Maintaining a Strong Australian Consumer Movement is needed More than Ever.*" NCC Speech March
See also Kell, Peter (2006), "*Consumers, Risk and Regulation*" (2006) Published speech delivered by Peter Kell, CEO Australian Consumers Association (publisher of CHOICE) at the National Consumer Congress (17 March
Found at <http://www.choice.com.au/files/f124236.pdf>

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

Finally Chattoe sums up as follows:

“This paper addresses three linked difficulties in using economic and sociological theories of consumer decision-making as the basis for a computational model. The first difficulty is the non-operational nature of many of the theories. Their explanatory power cannot be assessed using data that can actually be obtained. The second difficulty is that of grounding, of what a given theory rests upon by way of lower level constructs and explanations. This gives rise to the final difficulty, that of reconciling both the aims and methods of economic and sociological theory. In each case, the computational perspective provides a measure of clarification and potential for development. “

Amongst other submissions addressing the role of behavioural economics and a through understanding of current and predicted consumer behaviour I highlight the submissions from PIRAC Economic Consulting Sub106⁵¹; Joint Consumer Submission subdr228⁵²; St Vincent de Paul Society’s submission to the AEMC’s Draft Report, CHOICE’s submission sub108, and the submission by Kildonian Uniting Care (2008) Submission to PC Draft Report subdr206 Feb, p4⁵³

Part 6 analysis in considerable detail with an ample selection of citations, including from the Australian Energy Regulator’s publication State of the Energy Market 2007.

⁵¹ PIRAC Economic Consulting (2007) *“Bridging the Gap Between Government Theory and Policy.”* Submission 106 to Productivity Commission’s Issues Paper (August)

Found at http://www.pc.gov.au/__data/assets/pdf_file/0007/67255/sub106.pdf

⁵² Joint Consumer Submission (2008) subdr228 to Productivity Commission’s Draft Report (March)

Found at http://www.pc.gov.au/__data/assets/pdf_file/0005/77846/subdr228.pdf

⁵³ Kildonian Uniting Care (2008) Submission to PC Draft Report subdr206 Feb, p4

Found at http://www.pc.gov.au/__data/assets/pdf_file/0011/76898/subdr206.pdf

The AER publication State of the Energy Market 2007⁵⁴ cautions the manner in which switching or churn rates should be put when assessing customer participation.

“While switching (or churn) rates can also indicate competitive activity they should be interpreted with care. Switching rates are sometimes high at a relatively early state of market development when customers are first able to exercise choice and can stabilize even as a market acquires more depth. Similarly it is possible to have low switching rates in a very competitive market if retailers are delivering good quality services that vies customers no reason to switch.”

NEMMCO published churn data measuring the number of customer switches from one retailer to another, and such data has been published for NSW and Victoria since FRC was introduced in 2002 and for South Australia since 1 October 2006. The data covers gross and net switching

Gross switching: *Measures the total number of customer switches in a period, including switches from a host retailer to a new entrant, switches from new entrants back to a host retailer, plus switches from one new entrant to another. If a customer switches to a number of retailers in succession, each mover counts as a separate switch. Over time, cumulative switching rates may therefore exceed 100 per cent.*

Net switching: *Measures the total number of customers at a specified time who are no longer with the host retailer and have switched to a new entrant. This indicator counts each customer once only.*

Both indicators exclude customers who have switched from a default arrangement to a market contract with their existing retailer.

A churn rate measures switches as a percentage of the underlying customer base. The local energy regulator in each state publishes retail customer numbers on an irregular basis.

⁵⁴

Australian Energy Regulator (2007) State of the Energy Market, 2007 AER 6.2.2, p 183

Note the AER recognizes that this publication is out of date. It does not take into account the events of the winter of 2007, and the reservations expressed by Victoria Electricity (the child company of Infratil Ltd) a Tier 2 Energy Retailer in its submission to the AEMC Second Draft report (2008), or its previous submission to the Issues Paper (2007).

Nor does it take into account the multiple internal market considerations that appear to have been either altogether neglected or incompletely assessed by the AEMC in their assessment of competitiveness in the gas and retail markets in Victoria. These issues are summarised briefly with citations in the Executive Summary, repeated with sub5 as an Appendix (Summary), and discussed in much greater detail in subdr242part6 as a component of this submission to the Productivity Commission

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The AER publication summarizes churn rates since the introduction of full retail contestability as follows

Customer switching behaviour

Conclusions: ⁵⁵

“The establishment of the national electricity market was an ambitious vision in the early 1990s. On balance, the benefits forecast have been delivered, but not without much perseverance and hard work.

The market still faces challenges. Timely investment in new generation will be needed. The interaction between government-owned and private businesses is a continuing source of tension. The appropriate framework for ensuring optimal national transmission investment, when planning is conducted primarily at state level, has continue to receive review and attention. The new regulatory regime will require bedding down – and no doubt many other issues will arise.”

“However, it is less than 10 years since the first trial of an interstate market and eight years since the start of the NEM. A lot has been achieved, but there is still much to do.”

The AEMC as the new Rule Marker for Energy Markets, and primary adviser to MCE forums, has not only failed to take these factors into account, but has apparently also failed to appropriately examine the numerous internal market factors that impact on proper assessment of the readiness of the retail energy market to be deemed to be successful in Victoria.

The same assessments are being rushed through with the South Australian assessment as a matter of upholding a policy decision, regardless of how that decision is actually sustainable by what is happening in the market. A decision to examine the retail end of the market without a robust examination of the wholesale factors, availability of gas market contracts, impacts of vertical and horizontal integration and numerous other internal market factors has resulted in a skewed analysis o the market and premature decision to effect full deregulation.

Since that decision has influenced the Productivity Commission both to support the AEMC’s flawed findings, and to also recommend removal of the retail price cap, Part 6 of this submission albeit still in draft form addresses these issues as part of the plea for a more robust examination of the impacts of such decisions on consumer policy.

⁵⁵ State of the Energy Market 2007. Australian Energy Regulator. Exec Summary Conclusions, p35 AER 2007

I have covered much of this in summary form in the executive summary subdr243part1, but isolate the relevant pages as a discrete attachment with this submission and will do the same for Part 6 when finalized and ready to go to the web site, with apologies for the delay in completing this challenging section, dealing in considerable detail with the alleged flaws in the assessment of the state of the energy market. The AER publication State of the Energy Market published in July 2007 is well out of date now and many factors have impeded the effectiveness of retail competition generally.⁵⁶

I provide another direct quote and citation from Part 6 as being particularly pertinent not only to the AEMC's various reviews and rule-making processes, but to other arenas where rushed and poorly considered decisions appear to be the norm:

This is from Robin Eckermann Principal, Eckermann & Associates, Adjunct Professor (Network/Communication Technologies), University of Canberra⁵⁷ regarding the smart meter rollout:

I appreciate the pressure to meet tight deadlines – and recognise the possibility that this submission will be set aside because it does not conform to the relatively specific guidelines within which feedback has been invited. However, in the words of Lord Chesterfield “Whoever is in a hurry shows that the thing he is about is too big for him.” There is no better time than right now to pause and check that nationally we are setting our sights on the right goals.

The health of the planet that we will leave to our children and to our grandchildren depends on seizing every opportunity – especially the big ones such as are on offer through the overhaul of ageing electricity supply networks.

I concur with the National Consumer Roundtable Energy Group (NCREG) that⁵⁸

In relation to essential services generalist consumer protections are inadequate to protect consumers” on these grounds

- *Generalist protections do not provide standard contract terms and*

⁵⁶ See for example the serious concerns expressed by Victoria Electricity, the child company of Infratil, in their submissions to the AEMC's Issues Paper and Draft Reports respectively in connection with the completed AEMC's Review of the Effectiveness of Competition in the Gas and Electricity markets in Victoria, the final report for which was published on 28 February 2008

⁵⁷ Eckermann, Robin (2007) Principal, Eckermann & Associates, and Adjunct Professor (Network/Communication Technologies), University of Canberra
Found at
<http://www.mce.gov.au/assets/documents/mceinternet/Eckermann%5Fand%5FAssociates20071119104053%2Epdf>

⁵⁸ Ibid National Consumer Roundtable Energy Group (NCREG) (2008), p7

conditions, for example in relation to billing and statements of account, payment and collection; and dispute-resolution

- *Ensuring access to supply, protection against disconnection and retailer obligations in relation to dealing with utility debts and the financial hardship of energy consumers; and*
- *Matters particular to the marketing of essential services, including information provision and appropriate contractual consent protections*

The Roundtable Group cited above has expressed legitimate concerns (p7 response to the Productivity Commission’s Draft report DR) that in the process of transfer to a national consumer protection framework, consumer protections are not diluted and that best practice principles are incorporated with regard to overall net public benefit. Competition is not an end in itself as has been repeated by many.

The Roundtable has analyzed TRUenergy’s clever dissection of the regulatory framework adopted by Victoria as

“The most onerous and costly regulatory framework in Australia”

That analysis by TRUenergy, cited by the National Consumer Roundtable Energy Group (p7 and 8) compared Victoria with Queensland, which was cited as adopting “*best practice.*” The Roundtable has suggested that TRUenergy’s opinion⁵⁹ may have been influenced by actual cost-benefits of regulation instead of a more balanced “cost-benefit standpoint).

I concede that the regulatory framework for energy in Victoria is long over-due for streamlining, rationalizing and tidying up. The strict hardship regime in Victoria also has the lowest disconnection rates due to inability to pay⁶⁰ (*NCRE, 2008, p8*).

If stricter hardship policies have indeed resulted in acceptably low disconnection rates, then, as observed by the NCRE, there are benefits for retailers in being able to recoup costs through robust hardship programs, and thus offset the additional cost per account of implementing such programs.

The arguments presented by the NCRE regarding rural and regional communities, often facing substantial difficulty in security improvements to their energy supply need to be heeded (*NCRE 2008, p8 and 9*)

⁵⁹ TRUenergy (2007) Response to PC Issues Paper, p5

⁶⁰ Ibid NCREG Response to CP DR, p7

Finally, on p9 of their submission to the PC, the NCRE has suggested that more confidence on the national regulators, AEMC and AER before they would feel comfortable about supporting the national framework would need to be justified.

Their concerns about confidence in the proposed rule-makers are shared by many.

I for one, having observed closely how the AEMC makes its market evaluations and assessments; what paltry data is relied upon; what little meaningful stakeholder input is genuinely sought; and what perceived errors are made in relying on accurate reliable data; coupled with poor comprehensive assessment of the internal energy market as a whole, cannot possibly provide full endorsement to transfer to a national framework till these issues are addressed – namely issues of governance, accountability; competent and comprehensive internal market assessment and willingness to learn from stakeholders in assessing whole of market needs.

This may seem like a tall order, but if the PC is about to recommend major changes to regulation and consumer protection without looking further into these reservations, expressed in different ways by many stakeholders, what could the nation be heading for in terms of consumer confidence and protection?

Surely despite all the care that the PC has taken, we are not destined to head backwards, with further diluted confidence; with few protections; with diluted reliance on unfair contract provisions; with unacceptable expense and inaccessibility to generic protections alone.

There appears to be a general vote of no confidence in the AEMC's evaluative processes and decisions. This does not portend well for a confident market, given that the AEMC is also the new National Energy Rule Maker and that nationalization of energy regulation is imminent, consistent with the recommendations made both by the AEMC and the Productivity Commission.

The apparent poor confidence in the AEMC's capacity to make adequate evaluation preceding policy decisions is something that needs to be considered in terms of possible impacts on consumer confidence at large and on other stakeholders. Questions have been asked about commitment to undertake meaningful dialogue; governance, accountability and skills issues. These concerns have not been lightly expressed, and are reflected also in the tone and content of numerous stakeholder submissions both the Productivity Commission and the AEMC's consultative processes.

One Tier 2 retailer has openly expressed serious concern about the misinformation upon which the AEMC appears to have relied in relation to the gas market and its impacts on impeding market competitiveness. The ability to offer both gas and electricity are crucial to a successful energy market from a retailer perspective.

Sustainable competitiveness needs to be demonstrated. Numerous stakeholders believe that the AEMC has made premature and misguided decisions that have led to recommendations that have the potential to trigger ongoing market power imbalances; threats to competition and thus to consumer welfare; and even recession. The state of the economy is bad enough now.

There are serious consequences in making a premature decision to deem the retail energy market sufficiently competitive to justify removal of the only remaining energy price regulation, being the safety-net default option, commencing 2009.

The date for this to occur has been settled long before the new national consumer policy framework is in place, and may precede proper consumer protection arrangements if the original date is upheld.

In addition, some Tier 2 retailers have contested whether the market is indeed at a place where dependable contestability can be deemed.

In supporting its conclusion that gas retailing is effectively competitive but less so than for electricity, the AEMC has held that

“Gas retailing is effectively competitive as retailers are pursuing opportunities to secure gas customers in conjunction with marketing electricity the number of gas products available is continuing to grow and access to wholesale gas products is improving.”

The two submissions from Victoria Electricity in response to the First and Second Draft Reports raised a range of concerns about the gas market, including the only one that the Commission has acknowledged and that is the recent amendments to the rules governing the operation of the gas wholesale market, which could have unintended consequences for the future of competitiveness of gas retailing in Victoria.

Victoria Electricity has corrected the AEMC’s misinformation that steps are being taken to address this issue.

These matters do not encourage robust endorsement of the Commission’s conclusion about effectiveness of competition on gas retailing.

The fact is that dual fuel offers are dictating competitive advantage and there is only limited availability of gas only offers.

The South Australian Government in its response to the First Draft Report has expressed the view that

“this raises the general question as to what degree a market is sufficiently effectively competitive to enable consideration of the removal of price controls.”⁶¹

⁶¹ Govt of South Australian (2007) Response to AEMC First Draft Report; 5 November 2007

Beyond that the South Australian Government has questioned

“the extent that a call can be made at a point in time on the degree of competitive effectiveness which relies in part on an expectation of future developments.”

The SA Government submission suggests for example that the AEMC’s view on the degree of gas retail market competitive effectiveness appears to rely in part on the expectation that access to wholesale gas products will continue to improve. Such an expectation does not appear to be supported with any evidence

There is a shortage of gas supply. How far has this been examined in the AEMC’s⁶² deliberations if at all? Where is the evidence to justify the claim made by the AEMC expressed below?

Preliminary Findings AEMC First Draft Report, p15⁶³

“that the gas market is continuing to grow and access to wholesale gas products is improving.”

“as retailers are pursuing opportunities to secure gas customers in conjunction with marketing electricity the number of gas products available”

I cite from Andrew Nance’s 2004 submission to the MCE Standing Committee of Officials below⁶⁴:

⁶² The Council of Australian Governments through its Ministerial Council on Energy, established the Australian Energy Market Commission (AEMC) in July 2005 to be the Rule maker for national energy markets. The AEMC is currently responsible for Rules and policy advice covering the National Electricity Market. It is a statutory authority. (Their) key responsibilities are to consider Rule change proposals, conduct energy market reviews and provide policy advice to the Ministerial Council as requested, or on AEMC initiative”

⁶³ Source: AEMC First Draft Report (2007) full citation below (October), p2
Australian Energy Market Commission (AEMC) (2007) AEMC, Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report, October 2007, Sydney, Preliminary Findings, p15
Found at
<http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/aemcdocs/000First%20Draft%20Report%20-%20Main%20Body.pdf>

⁶⁴ Nance, Andrew (2004), BEng (Elec Hons), B.AppSc (Energy) (2004) Submission to MCE Standing Committee of Officials National Framework for Gas Distribution and Retail Regulation

“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 services⁶⁵

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 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”

Part 7 includes discussion of the impacts of vertical retailer-gentailer integration may not fit the formal definition of cartel conduct, but the consequences of such integration has been shown to shut out smaller energy competitors in New Zealand and similar issues have become evident also in Australia, notably in the Victorian and South Australian markets. To ignore these signs of market failure is to bury one’s head in the sand. Who will act swiftly to counter-act this, when and how?

It provides extracts from the speech given by Senator Chris Bowen at the 2008 National Consumer Congress on cartel conduct⁶⁶. There are subtle nuances wherein certain conduct may not fall under the strict definition of that definition of cartel conduct but nevertheless constitutes anti-competitive behaviour.

Issues Paper. Andrew Nance was then at the South Australian Council of Social Sciences (SACOSS), but made the submission as a private citizen.

⁶⁵ Not an economic commodity – see South Australian Council of Social Services (SACOSS) (2007) Submission to MCE Retail Policy Working Group Composite Paper National Framework for Distribution and Retail Regulation
<http://www.mce.gov.au/assets/documents/mceinternet/SACOSS%281%2920070724152903%2Epdf>

⁶⁶ Bowen, Senator Chris (2008) Verbatim extract from Senator Chris Bowen’s Speech at the 2008 National Consumer Congress 6 March 2008. Senator Chris Bowen is Assistant Treasurer and Minister for Competition and Consumer Affairs

This includes making access to contracts almost impossible for second-tier retailers to obtain, and the culprits extend to regulatory authorities in the design of their rules as observed by Victoria Electricity in its submission to the AEMC's Issues Paper (2007) and Second Draft Report (2008).

The design of a national energy Distribution and Regulation Framework needs to take account of current and proposed gaps in the public interest.

As with other components, this component submission to subdr242part5 is made in a spirit of honesty and good faith, with disclaimers for any unintended factual inaccuracies. The issues have implications for a range of definitions and contractual considerations, deemed obligations, and proper apportioning of contractual status.

The opportunity exists for previous flaws to be addressed and corrected such that consumer protections are restored and upheld in the public interest.

Therefore though most about technicalities, this submission touches on a range of issues that should be considered in a holistic way when revising trade measurement best practice provisions and laws, accompanied by appropriate levels of education of all responsibilities parties, energy providers and the general public when the new provisions are in place.

It is more than interesting that some of this thinking is reflected in the conceptual model proposed by Arthur Allens Robinson in the Consultation Framework recommendations. Some are saying that it is like Christmas in particular industries. However, many clauses are being challenged in the US courts where they block the inherent right of individuals to seek seamless redress through the courts and are not theoretically expected to rely on advocacy and alternative dispute models alone.

In the New York Times Opinion article dated 16 September 2007⁶⁷, still on the subject of uniform regulation and in the case of toys, for example, mandatory testing is believed to be a good idea in principle.

However, it is observed that

“unless the rules are backed up with vigorous enforcement the government’s imprimatur could give parents a mistaken sense of security.

For any set of government standards to work in this case safety, but applicable to other matters, the Consumer Product or in the case of Australia, Goods and Services, must be able to enforce companies’ compliance with spot checking of compliance and policing.

⁶⁷ New York Times September 16 2007 Editorial Opinion. The Need for Regulation

For such policing to occur in the energy industry in Australia resources are required. Will the state or the federal government have those resources to ensure enforcement, and in the case of those who find a way to shift the goal posts and escape or ignore enforcement strategies, even when generic provisions are relied upon, that may provide a challenge.

Without meaning to be unnecessary skeptical, but influenced by the US experience that has recently received press coverage, perhaps all responsible parties will see to carefully examine each proposal to lighten the regulatory burden that comes from industry and seek

“to understand the full consequences of regulations on all citizens.”

Should Australians be taking heed of the cautions expressed by Edmund Mierzwinski, consumer program director at the US Public Interest Research Group in Washington. In his words

“I am worried about industry lobbyists bearing gifts. I don’t trust them. Their ultimate goal is regulation that protects them not the public.”

As reported in the New York Times⁶⁸

“It’s a little unique when both consumer groups and industry associations are out there saying that we need new regulations and the government doesn’t agree

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

Robert Shull, deputy director for auto safety and regulatory policy at Public Citizen a consumer advocacy group based in Washington, said his organization and other consumer watchdogs would be keeping close tabs to see if these different proposals amounted to more than simply “opportunistic attempts to avoid real regulation.”

Should Australians be asking the same questions and be wary of industry motives?

⁶⁸ Ibid, p 2 NYT 16 Sept07 *In Turnaround Industry seeks US legislation*

At present, within the energy industry benchmarks of best practice consumer-focused service deliveries and protections may have become a blurred and inaccessible partly because of under-funding and resourcing, but also perhaps because of policies that are weighted from the outset in favour of industry⁶⁹.

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

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

In conclusion, responsible energy and trade measurement reform is welcomed in Australia.

Consumer policy reform is welcomed if it genuinely addresses community needs and expectations and the detail yet to be determined does not bring consumer protections down to the lowest common denominator.

Some energy policy reforms are overdue by well over a decade. Certain current provisions are causing widespread consumer detriment besides falling far short of community expectations, needs, consumer protections, and best practice trade measurement. Some of the current policies and practices will become invalid and illegal when the current utility exemptions are lifted.

Whether diluted political will, procedural apathy, regulatory complexity, overlapping and confusing policy and regulatory responsibility, or other factors are diluting proper access to even the generic laws is a matter for strenuous public debate and discussion.

This limited component is intended to stimulate discussion on certain aspects of compromised consumer protection and is presented in good faith in all honesty and without malice or intent to vexatiously target any one individual agency or entity.

⁶⁹ Dufty, G, *Who makes social policy? – The rising influence of economic regulators and the decline of elected Governments*. Policy and Research Unit, St Vincent de Paul VCOSS Congress Paper 2004; and John Tamblyn's Paper presented to the World Forum on Energy Regulation, Rome, Italy 5 – 9 October 2003, Concurrent Overview Session 5 "*Are Universal Service Obligations Compatible with Effective Energy Retail Market*". Victoria's Experience to Date.

I close with an extract the submission from Consumer Utilities Advocacy Group (CUAC)⁷⁰ to the MCE retail Policy Working Group's Composite Paper in July 2007 did not mince words in seeking appropriate dialogue, due care and feedback on submissions to date.

RPWG Process

We have concerns about the RPWG process, similar to those of other stakeholders. We strongly support an extension of the timelines for this process – it is more important that this work be done correctly than quickly.

Given that the AAR Paper does not have the imprimatur of the RPWG (let alone the Standing Committee of Officials or the Ministerial Council on Energy), we would request that governments provide some formal feedback on the submissions that have been made so far as a matter of some urgency.

We would also recommend that the development of the Rules be an inclusive process, in consultation with stakeholders, through the Stakeholder Reference Group.

I repeat from earlier components of this multi-part submission, in this is a climate of policy reform, it may be expedient to heed the voices of those from the real world of consumers and apply the grounding theories espoused by such authors as David Tennant⁷¹ and Edmund Chattoe⁷² who has questioned whether sociologists and economists can dialogue at all.⁷³

⁷⁰ Consumer Utilities Advocacy Centre (CUAC) (2008) Submission to MCE Retail Policy Working Group Composite Paper National Framework on Distribution and Retail Regulation, 31 July. Covering letter, page 6 (of 94 pages) Found at <http://www.mce.gov.au/assets/documents/mceinternet/Consumer%5FUtilities%5FAdvocacy%5FPaper20070806125707%2Epdf>

⁷¹ Tennant, David (2006) “*The dangers of taking the consumer out of consumer advocacy.*” A speech delivered by David Tennant, Director Care Financial Counselling Service at 3rd National Consumer Congress, hosted by Consumer Affairs Victoria Melbourne 16 March 2006 found at <http://www.afccra.org/documents/TheDangersofTakingTheConsumerOutofConsumerAdvocacy.doc>

⁷² Edmond Chattoe, Sociologist, University of Guildford, UK,

⁷³ 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>

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

Meanwhile, I am placing this document and all other components of my submissions on the Productivity Commission's website amongst the other component submissions related to subdr242 (parts 1-7) so that there is a permanent public record of these particular community concerns on the issue of inappropriate trade measurement practice.

Madeleine Kingston

Madeleine Kingston Concerned citizen

FACTORS INCOMPLETELY CONSIDERED IN ASSESSMENT OF PERCEIVED EFFECTIVENESS OF COMPETITION IN THE GAS AND ELECTRICITY MARKETS IN VICTORIA⁷⁴

5.4 Removal of remaining safety-net default option energy further discussion, including competition issues and gaps in proper assessment of effectiveness of competition in the retail gas and electricity markets as concluded by the AEMC and supported by the Productivity Commission

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

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

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

The prospective casualty list is certainly not restricted to small end-consumers or businesses. The impacts on smaller Tier 2 retailers and new entrants cannot be ignored either. Some are protesting and seeking delay of the decision to effect total price deregulation till specified internal market considerations impacted by statutory rules (VENCorp) and market power imbalances are addressed.⁷⁵

⁷⁴ Principles may be extrapolated to other States.
See <http://www.aemc.gov.au/electricity.php?r=20070315.165531>
South Australia is the current target – refer to Submission by South Australian Government to AEMC’s Second Draft Report
<http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/submissions/014Minister%20for%20Energy,%20the%20Hon%20Patrick%20Conlon%20MP.pdf>
See also Victoria Electricity (VE) to AEMC Issues Paper (2007), AEMC First Draft (2007) and AEMC Second Draft Report (2008) respectively
See two-part submission Madeleine Kingston
<http://www.aemc.gov.au/pdfs/reviews/Review%20of%20the%20effectiveness%20of%20competition%20in%20the%20gas%20and%20electricity%20retail%20markets/final%20draft/submissions/013Madeleine%20Kingston%202nd%20Submission%20Part%202.pdf>

⁷⁵ See for example Victoria Electricity (2007 and (2008) Responses to AEMC’s Victorian Review Competitiveness Retail Energy Markets

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

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

I refer to the findings and recommendations consistently made by the AEMC repeated like a mantra from woe to go in each report, without due regard to the whole of the market, the feedback from smaller second-tier retailers,⁷⁶ and from other concerned stakeholders.

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

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

Victoria Electricity has specifically commented in its response to the AEMC Second Draft Report that they are unable to support removal of price regulation effective 1 January 2009 until or unless significant problems in the wholesale gas market are remedied.⁷⁷

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

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

⁷⁶ See for example Victoria Electricity Response to AEMC Second Draft Report, printing out deficiencies in the gas wholesale market, market power imbalances and the real threat to successful competition unless these issues are address. VE does not recommended price deregulation till those issues are fully addressed and notes there is no evidence that market rules and other factors will be addressed by 2009

⁷⁷ Victoria Electricity (Infratil) Response to AEMC’s Second Draft Report; February, p1

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

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

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

If errors of this magnitude have been made in the AEMC's investigation and evaluative processes, how many other glaring errors of fact and interpretation have occurred in forming the conclusions and recommendations that have been made? In fact, it can be demonstrated that a huge range of relevant internal market factors have either not been examined at all or insufficiently examined and considered before drawing the conclusion about alleged effectiveness of competition (in Victoria), repeated like a mantra from one report to another, regardless of stakeholder challenge or objection and in the face of blatant evidence that the conclusions would benefit from reconsideration

The VE submission to the AEMC First Final Report goes on in more detail on page 6 to discuss the review of VoLL Gas – a report that had been finalized by MMA for consideration, and a general "Top End Review" – always on the CRA agenda for commissioning, but not considered by Victoria Electricity to be sufficient to deal with longer term exercise with uncertain outcomes and in any case not likely to be completed before Winter 2008.

"As a result, new entrants and second tier retailers face extensive risks going into this year.

"The most important item remains unaddressed – an interim solution that will allow smaller retailers to compete for customers over 2008 and the following 2-3 years."

“There is disagreement between market participants – it is hardly surprising that dominant retailers that have benefited from a market rule change would disagree with smaller competitors who are severely disadvantaged by it. If VENCopr is waiting for consensus, it will never be in a position to act....”

“VenCorp management has decided to take a position that favours those dominant retailers.”⁷⁸

Some of the concerns expressed by Tier 2 Retailer Victoria Electricity⁷⁹ are summarized below:

- 1. The events in gas marketing during the winter of 2007, raising **concerns about the ability of the new market structures to support competitive gas retailing**;*
- 2. The **impacts of dual fuel offers on some retailers** (a concern shared by the South Australian Government in its submission to the AEMC’s First Draft Report)*
- 3. Concerns that the removal of price caps for customers on default contracts with host retailers would only work if unambiguous confidence can be held in competition upon the elimination of new and unacceptably high wholesale gas market risks imposed on non-incumbent retailers by new market rules and procedures.*
- 4. Victoria Electricity’s response to the First Draft Report⁸⁰ has pointed out that the physical assets and contracts in Victoria tend to be owned by vertically integrated retail incumbents and are tightly controlled and only available infrequently if at all.*

⁷⁸ This is a general concern in the community – that the tail has for some time been wagging the dog and that the Tier 1 retailers have government advisers, the government; and the direction of regulatory control, in their power – this enhancing further market dominance factors. This cannot be good for the overall economy, for the implications for anti-competitive outcomes and for consumers generally, who according to Louise Sylvan, Deputy Chair, ACCC in her recent submission (DR253) to the Productivity Commission believes that consumers not only benefit from competition but actually drive it. The detrimental impacts on consumers are innumerable and will not be resolved by cursory tweaking of existing provisions or over-reliance on compromised complaints redress

⁷⁹ Victoria Electricity is a subsidiary of international utilities investor Infratil Ltd with next assets exceeding one billion. *Source: <http://www.victoriaelectricity.com.au/?Join/Business>*

⁸⁰ Victoria Electricity (Infratil) (Tier 2 retailer) Response to AEMC First Draft Report 9 November 2007 (Tier 2 Retailer) See also Response to second Draft R indicating that existing regulatory rules not only support domination and risk of collapse of new entrant competition, but have led to active steps already that will have the effect of reducing the ability of Tier 2 retailer(s) to compete for Victorian energy customers.

5. *The physical dimensions of the market leading to restrictions to growth ambitions association with Longford contracts*
6. *Recent rule changes involving injection dependency have created problems for new entrants, without the benefit of protection, review or authorization by the ACCC or any competition body*
7. *The South Australian Government⁸¹ has expressed the view that it was important in assessing effectively competitive energy markets occurring around Australia that the evidence be unambiguous that such markets exist, rather than providing further evidence that markets are continuing to develop.*

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

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

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

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

Internal energy market and competition issues impacts

1. Examination of the whole market in context

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

⁸¹ Govt of South Australia (2007) through The Hon Patrick Conlon, Submission to AEMC’s First Draft Report; 5 November 2007

Starting with the distribution end, and the price drivers that start not in the middle of the supply but at the very beginning. Apparently the AEMC studied wholesale reports as “*background reading*” and not as central to the whole pricing issue and impacts of deregulation, given that retailers do not set the price, but rather manage risks through hedging contracts, assuming they can obtain them, and secondly assuming they can afford them. Some gaps that have been suggested include the following.⁸²

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

2. **Tumultuous energy market conditions**⁸³
3. **Very high electricity and gas prices (wholesale)**⁸⁴
4. **Impact of future events on wholesale markets causing resulting in retail price increase**
5. **Flaws in the assessment of effective retail competition in the gas market**
6. **Vertical and Horizontal Integration Factors and advantages to incumbents**^{85/86}

⁸² Council of European Energy Regulators (CEER) found at http://www.ceer.eu/portal/page/portal/CEER_HOME/CEER_PUBLICATIONS/PRESS_RELEASES/CEER_PRESS_2003-10-06.PDF

⁸³ Infratil 2007/8 Notable Events Developments found at http://www.infratil.com/downloads/pdf/ift_results_presentation191107.pdf
Note Infratil is the parent company for Victoria Electricity who has responded to AEMC’s Review (First and Second Draft Reports, notably p2 of latter response) with vociferous protests about the conclusions drawn that retail competition is effective in the current tumultuous climate with references to procurement of physical gas for injection at Longford as a major barrier to entry and growth and steps already taken to reduce competition efforts in the Victorian Market. Refers to similar happenings in SA. Not related to retail end of prices. Retailers manage risk and do not set prices

⁸⁴ Ibid Infratil 2007/8 Notable Events (parent company for Victoria Electricity)

⁸⁵ Ibid CUAC (2007) Response to Issues Report

7. **Examination of load growth and management factors – ⁸⁷**
8. **Cost smearing** and its negative impact for the user/causer pay principle underpinning the market
9. **Hampered modeling through lack of long-term real time customer load and behavioural data**
10. **Hampered modeling through lack of long-term real time customer load and behavioural data**
11. **Advanced Metering Infrastructure (AMRO)**
12. **Inherent distortions in the market in the market caused by the nature of the services, as exemplified by the Retailer of Last Resort Provisions ⁸⁸**
13. **The likelihood that the level of retail competition in Victoria will decrease with price rises in other states ⁸⁹**

Selected financial issues – supply side barriers

14. **Consideration of Return on Investment (ROI) impacts at distribution level and impacts on retail competition ⁹⁰**
15. **Consideration of available capital investment to the forecast load growth over the regulatory period ⁹¹**
16. **Consideration of refurbishment of aging asset base ⁹²**
17. **Impact on retail competition by such external factors return as on investment impacts on at distribution level (where the price-setting occurs) and at the same time ensuring that there is capital investment to the forecast load growth over the regulatory period as well as ensuring the refurbishment of an aging asset base ⁹³**

⁸⁶ The perception of the negative impacts on smaller retailers of vertical integration (generation-retailer) are shared also by some of the smaller retailers themselves – see opinions of Victoria Electricity; documented outcomes in the New Zealand energy market as a direct consequence of vertical integration and as outlined in online material published by Victoria Electricity parent company Infratil cautions expressed in the publication State of the Energy Market, 2007, AER;

⁸⁷ EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

⁸⁸ CUAC (2007) Response to AEMC’s Issues Report; 10 July 2007.

⁸⁹ CUAC (2007) Response to AEMC’s Issues Report; 10 July 2007.

⁹⁰ Ibid EAG (2007) Submission to ACCC October direct quote

⁹¹ Ibid EAG (2007) Sub to ACCC direct quote

⁹² Ibid EAG (2007) Sub to ACCC direct quote

⁹³ Ibid EAG October 2007 direct quote

Selected financial issues – demand side barriers

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

Political and regulatory factors

21. Possible impacts of political interference⁹⁴
22. Consideration of possible reduction of commercial capacity to network users through special regimes for construction, operation and use of merchant lines
23. Examination of Political Sustainability defined as:
24. Correlation of complex far reaching interrelated decisions⁹⁵
25. Consideration of random or otherwise unpredictable factors impacting on measured performances
26. Other external threats
27. “Political, legislative or regulatory decisions concerning energy investment and trading frameworks in one State having an impact on all States (and Territories)”⁹⁶.
28. “Full examination of the existing and proposed Regulatory Framework –
29. How the institutional design of the regulatory entity, the design of the government’s overall regulatory system (includes courts, checks and balances within the government etc), and the country’s relationships with other countries and multilateral institutions relate to opportunism.”⁹⁷ (Jamison et al 2005)
30. “Proper examination of Corruption”
Broadly defined as the relationship between corruption and risk, and methods for mitigating risk resulting from corruption⁹⁸
31. Examination of Renegotiation and Bailout factors defined as⁹⁹
32. Proper coordination of transmission network planning

⁹⁴ Ibid CEER (2003) direct quote

⁹⁵ Ibid EAG (2007) Submission to ACCC October

⁹⁶ Jamison, MA, Holt, L, Ber, SV, (2005) *Mechanisms to Mitigate Regulatory Risk in Private Infrastructure Investment: A Survey of the Literature for the World Bank*. The Electricity Journal Vol 18(6) July 2005 pp 36-35

⁹⁷ Ibid Jamison, MA, Holt, L, Ber, SV, (2005)

⁹⁸ Ibid Jamison et al (2005)

⁹⁹ Ibid Jamison et al (2005)

33. **Consideration of impact of inter-related decisions re structure of national transmission system**
34. **Consideration of transmission asset issues**
35. **Consideration of risk of badly flawed ACCC Regulatory Test consultation process if review processes are unduly compressed**¹⁰⁰

Selected Climate Change, Emissions Trading and Energy Efficiency issues

36. **Interaction of competition between climate change, emissions-trading, energy efficiency**^{101/102/103/104/105}
37. **Renewable energy and energy-efficiency targets**^{106/107//108109}
38. **Consideration of other unpredictable external factors**¹¹⁰
39. **Absence of robust evidence of retailer rivalry** to support conclusions that rivalry between retailers was sufficiently strong¹¹¹, along the following lines, as suggested by the South Australian Government in its response to the First Draft Report
40. **Assessment of possible impacts of regulatory uncertainty for the transmission businesses** so that they can continue investing in new and replacement infrastructure with minimal dislocation to their work programs (EAG had recommended minimization of such uncertainty)¹¹²
41. **“Detailed examination of existing and proposed Financial Instruments.”**¹¹³
42. **Absence of single market objective and effective representation, review and appeal mechanisms allowing all end-users fair and equitable participation**

¹⁰⁰ Ibid EAG (2007 Sub to ACCC direct quote
¹⁰¹ Ibid PIAC (2007) Submission AEMC First Draft Report Terms of Reference p 1 and 2
¹⁰² Ibid Alan Pears (2007) Submission to National Frameworks for Distribution Networks Network Planning and Connection Arrangements.
¹⁰³ Business Council for Sustainable Energy Submission to Victorian Energy Efficiency Target Scheme, via DPI 18 May 2007, cover letter, p1
¹⁰⁴ TEC online Environmental and Social Objectives for the NEM available at <http://www.tec.org.au/index>.
¹⁰⁵ CUAC (July 2007) Response to AEMC’s Issues Paper 10 July 2007
¹⁰⁶ Ibid, PIAC (2007) Submission to AEMC’s First Draft Report; November 2007 p1 and 2
¹⁰⁷ Ibid Alan Pears (2007) Submission to NGDNNP&CA. Oct
¹⁰⁸ Ibid as for citations 80,82, 83, 84, 85 and 86
¹⁰⁹ National Framework for Energy Efficiency Guidelines (NFEE) found at <http://www.energyefficiencyopportunities.gov.au/assets/documents/energyefficiencyopps/industry%5Fguidelines%5Ffinal%5Fweb%5Fversion20071008110144%2Epdf>
¹¹⁰ CALV Submission to AEMC’s First Draft Report, November 2007
¹¹¹ Govt of South Australia (2007) Response to the AEMC First Draft Report, November 2007
¹¹² EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote
¹¹³ Ibid Jamison, MA, Holt, L, Ber, SV, (2005)

43. **Detailed analysis of demand side interaction with the market** providing sufficient evidence that competition in both electricity and gas retail markets is effective. CALV has referred to the OECD Consumer Policy Committee’s comprehensive checklist and toolkit for assessing regulatory change; recognition of market failure from consumer perspective¹¹⁴ (CALV)

Selected Retailer impacts

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

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

Selected Demand side issues:

46. **Recognition of the essential nature of energy**¹¹⁵ (CALV)
47. Recognition of market failure from consumer perspective as evidenced in part by complaints lodged, notwithstanding the poor level of awareness of the existence at all of the energy-specific complaints body. Some twenty-six percent make no complaints at all.¹¹⁶ (CALV)
48. **Contemplation of a competition framework that enables an effective and equitable spread of the inevitable cost burden over time and across different sectors of society**¹¹⁷
49. **Assessment of the quality of regulated services provided to customers by examining company prices and profits and trends in company’s total productivity (TFP)**¹¹⁸

¹¹⁴ CALV (2007) Submission to AEMC’s First Draft Report, November note especially p10 -11

¹¹⁵ Ibid CALV (2007)Submission p10 and 11

¹¹⁶ Ibid CALV (2007) Submission p10 and 11

¹¹⁷ PIAC (2007) Submission to AEMC’s First Draft Report 9 November 2007 Terms of Reference p 2

¹¹⁸ Ibid Pacific Economics Group (2007) *“Performance Indicators and price monitoring: assessing market power”* in Network Issue 24 May 2007 ISN 1445-6044. Pacific Economics Group. A Utility Regulator’s Forum.

50. Examination of Political Sustainability

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

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

I give some examples below:

1. Refer to the concerns expressed by stakeholders about disturbing reliance by the AEMC on information directly impacting on assessment of effective sustainable retail energy competition as influenced by statutory market rules; difficulties with the physical procurement of gas; the influence of vertical and horizontal integration; alleged market power issues. What other misinformation of like calibre has been relied upon in the assessment of effective competition in the gas and electricity markets? Refer to submissions to AEMC's current retail review by Victoria Electricity in November 2007 and February 2008 respectively.
2. Refer to JackGreen's Annual Report as a Tier 2 Retailer (2007) ¹¹⁹

“The ACCC the master of the new National Regulator confirmed that they would review the performance of individual companies in the market with a view to determine if any “gaming” of wholesale prices had occurred. It’s clear to Blind Freddy that it had occurred; the question was who caused it and who benefited from it? Again the market activity is fairly transparent and somewhere north of the Murray and south of the Brisbane River will find those most active.”

3. Refer to EAG's view about compressed decision-making processes ¹²⁰:
4. Refer to numerous submissions to many arenas including ERIG by Energy Action Group
5. Refer to submissions by Australian Conservation Foundation; by numerous community agencies, including PIAC; by Alan Pearce regarding environmental and sustainability issues

¹¹⁹ JackGreen (Tier 2 Retailer) (2007) Annual Report 2007

¹²⁰ EAG Submission (2007) to ACCC SP/PowerNet Revenue Cap Association October

6. I quote from EAG's Report¹²¹ to the ACCC SP/PowerNet Revenue Cap Association

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

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

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

“Far-reaching impact of complex interrelated decisions around the future structure of the national transmission system”¹²²

“The ACCC Electricity Group is currently faced with a complex number of interrelated decisions around the future structure of the National transmission system. The failure to consider each decision in relation to the others will cause problems well into the future for the transmission asset owners and the market” (EAG Oct 2007)

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

¹²¹ Energy Action Group (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association October

¹²² EAG submission to the ACCC SP/PowerNet Revenue Cap Association October 2007)

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

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

“One of the implicit objectives of this revenue/pricing review and possible Rule reset should be the minimization of regulatory uncertainty for the transmission businesses so that they can continue investing in new and replacement infrastructure with minimal dislocation to their work programs.”

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

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

Complex far reaching interrelated decisions. ¹²³

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

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

¹²³ Ibid EAG Submission to ACCC

Conclusion

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

SPI PowerNet owns but does not control the asset base.

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

- ensure that minimum changes occur to the WACC equation and the methodology for determining WACC is consistent across the Commonwealth*
- ensure that newly discovered assets are not rolled into the asset base and that easements are excluded from the asset base.*
- reject any attempt by the proponent to adjust the initial RAB*
- minimize market complexity and possible ‘gaming’ opportunities that will be created by the move to introduce hybrid interconnectors and other exotic transmission arrangements into the NEM. A single asset owner in each region simplifies the management of transmission assets.*
- assess the costs and benefits of integration the system planning function back into the transmission businesses.*
- address the problems evident in both Victoria and South Australia jurisdictions where the only viable solutions to transmission augmentation*
- Load Management, Demand Management and embedded generation are discounted as the market based solution. Currently in both Victoria and South Australia there are minimal mechanisms that can facilitate either Demand Management or ensure that embedded generation can compete with transmission augmentation as an option for system development Load Management, Demand Management and embedded generation need to be treated in an equal manner to transmission augmentation in meeting load growth requirements make provision for SPI PowerNet to develop and sustain an employee and industry skills base.*
- A mechanism needs to be developed to ensure that all 4 options can compete equally. Currently the only viable option is transmission augmentation.*

- *One of the implicit objectives of this revenue/pricing review and possible Rule reset should be the minimization of regulatory uncertainty for the transmission businesses so that they can continue investing in new and replacement infrastructure with minimal dislocation to their work programs.”*

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

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

The current trend to add complexity to the NEM greatly increases arbitrage and gaming opportunities for participants.”

Madeline Kingston

Prepared by Madeleine Kingston

**BULK HOT WATER PRICING AND CHARGING ARRANGEMENTS BY
CONVERSION ALGORITHM – CONFUSOPOLY IN ACTION**

Note water meters are posing as gas meters, theoretically to calculate gas consumption in cents per litre through gas and electricity do not pass through water meters Site specific readings were rejected. Massive supply charges are being applied, some provided using embedded networks are being exempted from licences and there are highly compromised complaints redressed. End-users not legally obliged to accept contractual status are being imposed with such status under pain of threat of disconnection. Such market conduct is seen to be driven by existing energy policies in Victoria and other states.

Regulators, policy-makers and complaints schemes run funded and managed by industry participants apparently believe these arrangements to be fair and reasonable and in accordance with best practice. Those who are not controlled by licence conditions have a bigger and better ball with the rules. End-consumers are the casualties.

Applicable Term: CONVERSION FACTORS

Definition`

Cost of Supply (Charge) ‘theoretical’ revenue = (B) = (L * X) + (M * Y) + (N * Z)

Where L = mega joules recorded at master meters (supplied by retailers)

X = Tariff 10 commodity charge (as per government gazette)

M = number of gas bulk hot water sites (as provided by retailers)

Y = Tariff 10 per site supply charge (as per government gazette)

N = number of gas bulk hot water customers (as provided by retailers)

Z = per customer hot water meter charge (as charged in South Australia to recover additional infrastructure support costs, including meter installation, maintenance and readings)

When $A < B$, a retailer has recovered less revenue than the theoretical revenue

When $A > B$, a retailer has recovered more revenue than the theoretical revenue

1. The *BHWCG 2005 Appendix 1* apparently permits:
2. *“Retailer provided gas bulk to water per customer supply charge (cents) = the supply charge under the tariff applicable to the relevant gas bulk hot water unit divided by the number of customers supplied by the relevant gas bulk hot water unit. Retailers may decide not to charge the supply charge or may decide to roll-in the supply charge into the commodity charge of the applicable tariff.”*
3. Further the definition of customer gas bulk hot water charge (cents) is shown as below in the Guideline:

*“customer gas bulk hot water charge (cents) = “the customer’s metered consumption of hot water (litres) (**not energy measured in cu metres or megajoules**), at a gas bulk hot water price (cents per litre) + customer’s supply charge (cents)*

4. The conversion factor in the said guideline is shown as:

CF = the gas bulk hot water conversion factor = 0.49724 MJ per litre, with the gas bulk hot water tariff shown as “the market tariff applicable to the bulk hot water unit”

5. “Option 2 Fixed conversion factor (ADOPTED) (See Final Report Review of Bulk Hot Water Arrangements (September 2004) (ESCV) and Bulk Hot Water Guideline (2)(1).

6. *Fix the conversion factor at the historic level of 0.49724 MJ per litre in the GTO (or current equivalent). The billing arrangements for gas BHW then would require the retailers to include the conversion factor and cents per litre hot water rate in the annual gazette of scheduled gas tariffs (along with the appropriate gas BHW tariff, that is, Tariff 10/11). Another way of expressing this adopted FCF option could possibly be as follows, taken directly from explanations provided during 2001 Gas trading Arrangements Working Group (GTAWG) for the Victorian Retail Rules Committee assessed issues associated with gas bulk hot water billing*

7. *“Flat rate: All hot water consumption is billed at a flat rate per litre (rate derived from natural gas tariff and multiplied by the conversion factor).*

8. *However, confusion reigns, at least in the minds of end-consumers of bulk energy endeavouring to interpret bills when presented with these other alternatives.*

9. *“Billing in mega joules (1): this formulae involves reading from a master Cold Water and Master Gas Meter to derive litres per mega joules*

10. *Billing in mega joules (2): This formula is used where no cold water meter is required by the sum of all hot water consumed is divided into the gas consumed from the Mast Gas Meter to give a litres per mega joule rate. The gas tariff is then applied to this individual consumption by reading individual (hot water) meters.*

Sources:
<p>ESC Energy Industry Guideline 2005 20(1) Bulk Hot Water Charging Guideline (1) (December) found at http://www.esc.vic.gov.au/NR/ronlyres/C0E6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf</p>
<p>ESC Final Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (December) (23 pages) found at http://www.esc.vic.gov.au/NR/ronlyres/4554EA66-6F9E-49C8-934E-1E8232D989AC/0/FDP_EnergyRetailCodeAmendmentsFinalDec05.pdf</p>
<p>ESC Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August) found at http://www.esc.vic.gov.au/NR/ronlyres/37078658-5212-4FA7-8A8E-AC42AB12BDDC/0/DDP_EnergyRetailCodeTechAmend20050810_CommissionPap_C_05_8007.pdf</p>
<p>ESC 2005 Final Report Review of Bulk Hot Water Billing Arrangements (September) found at http://www.esc.vic.gov.au/NR/ronlyres/20C3454F-0A47-428B-845B-1D7D85FBE572/0/FinalReviewBulkHotWaterBillingSept04.pdf</p>
<p>ESC 2004 Draft Report Review of Bulk Hot Water Billing Arrangements (July) found at http://www.esc.vic.gov.au/NR/ronlyres/D687B56E-71DD-4A46-B881-4D7E835503FA/0/GasBulkHotWater_DraftReportJuly04.pdf</p>

Correspondence between February and August 2004 between Department of Primary Industries {DPI} (Victoria) and VESC February – August 2004, notably dated 13 May; 16 July; 11 August 2004 respectively from Robert Bolt, then Executive Director Energy and Security DPI expressing concerns about BHW billing arrangements Other DPI correspondence and replies from VESC same sources not available online as submissions and concerns from DPI on this matter

Response to VESC re Draft Report Review BHW Billing dated 29 July 2004 from TRUenergy supporting non-site visit billing and supporting option 2, **fixed conversion factor** without site visits for meter reading CF historic level; 0.49724 MJ per litre in GTO would require retailers to annually gazette CF and cents per litre hot water rate plus appropriate BWH tariff, i.e. Tariff 10/11 all based on conceptual model of billing.. Site specific rejected as too expensive to measure and collect data from meters as input Bulk HW meter; hot water consumed (satellite meters); and total hot water consumed by all the residences (thus turning the billing process into a water meter exercise contrary to the spirit and intent of trade measurement provisions) Found at

http://www.esc.vic.gov.au/NR/rdonlyres/CD7E8430-868E-4C42-A937-08E7082F57CA/0/Sub_TXU_BulkHotWaterJuly04.pdf

Response to VESC Draft Report Review BHW Billing dated 6 August 2004 from AGL ES&M re transparency of cents per litre rate; site number inconsistencies and off-peak rate for electric BHW (customers paying full general rate. Mentions site-specific billing too hard in projected FRC environment – a decision taken as read. Response dated 19 September 2005 from EWOV on Draft Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August).

Response to VESC from St Vincent de Paul (SVDP dated 27 July 2004. Confirms lack of transparency in arrangements especially re conversion factor; compliance enforcement forthwith of repayment of overcharging as specified in Retail Code and as previously applied to TXU (now TRUenergy); confirms desirability for site specific reading to counter-act price-shocks to individuals especially for those with poorly maintained residential premises including Office of Housing, DHS; suggests new and replacement installations be site specific. Found at

http://www.esc.vic.gov.au/NR/rdonlyres/6BE152A1-1F27-47C2-B47A-0C32825670F3/0/Sub_StVincentDePaul_BulkHotWaterJul04.pdf

1. Option 1: adjustable conversion factor: rejected
2. Option 2 Fixed conversion factor (adopted) based on a conversion factor at a cents per litre hot water rate as gazetted
3. Option 3 – Site specific Option – REJECTED a portion gas measured at the site-specific master meter to each individual customer based on their hot water use –

Despite site-specific reading being rejected, individual tenants are each being charged WATER meter reading fees with the fee for remote reading far greater than manual reading. This is despite the fact that an instrument not designed for measuring energy is theoretically being used, contrary to the spirit and intent of trade measurement legislation

CALCULATION OF CONSUMPTION – TRADE MEASUREMENT AND UTILITY CONSIDERATIONS

I quote below directly from the NMI website¹²⁴:

Responsibility for Australia's trade measurement system is currently shared between the Commonwealth, States and Territories.

The National Measurement Act 1960 prescribes the Australian legal units of measurement and describes how to demonstrate that a measurement has been made in terms of those units if this is required for legal purposes. The Act also provides for pattern approval of measuring instruments to ensure that the design of these instruments is suitable for accurate measurement under the normal environmental conditions encountered during use.

Uniform Trade Measurement Legislation, developed by the Commonwealth, States and Territories, has been enacted by the States and Territories. Together with individual administration acts and regulations, this legislation provides the States and Territories with the means to regulate the accuracy of measuring instruments used for trade.

The State and Territory governments require that all goods sold by measurement by weight, length, volume, area or count are accurately measured, labelled and the correct price calculated. This includes petrol pumps, shop scales, weighbridges, pre-packed articles, machines for measuring length etc. NMI is responsible for the pattern approval testing of models of measuring instruments. The following fair trading departments are the first point of contact for enquiries about weights and measures used in trade:

¹²⁴

National Trade Measurement Institute (NMI) *A national trade measurement system*

Found at

<http://www.measurement.gov.au/index.cfm?event=object.showContent&objectID=C3EB158B-BCD6-81AC-1DC5A41E29837C8C>

Last reviewed 11 March 2008

Future Commonwealth administration

Under the current system, changes to legislation have been introduced at different times in different jurisdictions leading to inconsistencies and different interpretations. Consequently, in February 2006 the Council of Australian Governments (COAG) identified trade measurement as one of six regulatory 'hot spots' and asked the Ministerial Council on Consumer Affairs (MCCA) to develop a recommendation and timeline for the introduction of a national trade measurement system. MCCA subsequently recommended that a trade measurement system administered by the Commonwealth was the best option to remove existing structural problems, to rationalise the different regulatory regimes of the States and Territories, and to address the challenges presented by new measurement technologies.

COAG accepted the MCCA recommendation and, on 13 April 2007, formally agreed that the Commonwealth should assume responsibility for trade measurement. It was subsequently announced that NMI would take responsibility for administering the national system. The transition period for the transfer of responsibility from the States and Territories to the Commonwealth will be three years, with the new system commencing on 1 July 2010.

Trade measurement and utility provisions allow for better trade measurement practices. The current arrangements are in contravention of the spirit of this, despite the existence of remaining utility exemptions that will render current methods of calculation of energy consumption to be both invalid and illegal. Meanwhile, best practice standards for trade and utility measurement are non-existent for the calculation of levels of consumption of bulk energy for hot water services that are part of the common property infrastructure of body corporate (Owner's Corporation).

The National Measurement Institute (NMI) has openly acknowledged that ¹²⁵

In a modern society, many activities need reliable, legally traceable measurement, so that we can be confident of their integrity. These include:

- *trade measurements, such as in the supply of electricity, gas and water;*
- *agricultural and mineral exports;*
- *detection of drunk or speeding motorists;*
- *monitoring of workplace noise or environmental contamination;*
- *assessment of food quality; and*
- *consumer transactions, such as buying food or petrol.*

In trade, the buyer expects to receive fair measure. Usually it is not feasible for an individual consumer to check this, so governments establish legal metrology systems to protect consumers' interests. Although systems for regulating weights and measures have existed in many societies for thousands of years, the range of consumer transactions has increased with time and with technological advances.

The National Measurement Act 1960 Act No 64 of 1960 (with amendments to Act No 27 of 2004) provides as follows:

18R Transactions by utility meters to be in prescribed units of measurement

A person is guilty of an offence if:

- (a) the person sells a quantity of gas, electricity or water for a price; and*
- (b) the price is not a price determined by reference to a measurement of a quantity in the unit of measurement required by the regulations.*

Penalty: 50 penalty units.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

¹²⁵ Fact Sheet Legal Metrology – legal traceability of measurements, NMI found at <http://www.measurement.gov.au/assets/documents/nmiinternet/NMI3220060104093102%2Epdf>

Regulations associated with that Act, viz, *National Measurement Regulations Statutory Rules 1999 110*¹²⁶ currently exempt utility meters providing gas and electricity, but not cold water meters (with qualifying clauses) in all circumstances but there are future goals to remove such exemptions when the infrastructure is in place to accommodate such changes. State legislation in Victoria has not caught up with national standards and provisions¹²⁷, despite the existence of the *Utilities Act 2002* (Victoria) (effective 2003) but without current regulations to match, so rather impotent for the last four years, thus compromising consumer protection).

With reference to the *National Measurement Regulations 1999 Statutory Rules 110*¹²⁸ it could be argued that unjust measurements are being applied and unjust pricing formulae (*notwithstanding apparent endorsement by the current Victorian energy regulator*) and that the principle that a penalty should apply to:

*“a person whose act or omission causes or is likely to cause a measuring instrument in use for trade to give a measurement or other information that is incorrect is guilty of an offence if the person acted or omitted to act with the intention of causing that result of with reckless indifference to whether that result would be caused.”*¹²⁹

Determinations of Recognised-value Standards of Measurement

National Measurement Institute:

- density of water (dated 21 March 1985)
- density of standard mean ocean water (dated 21 March 1985)
- dynamic viscosity of water at a temperature of 20°C (dated 21 March 1985)
- dynamic viscosity of water at a temperature in the range 19.98°C to 20.02°C (dated 21 March 1985)

¹²⁶ *National Measurement Regulations 1999 Statutory Rules 1999 110 as amended made under the National Measurement Act 1960. Compiled to 1 July 2004 taking into account amendments up to SR 2004 No 132*

¹²⁷ See further discussion in separate documentation relating to existing utilities provisions, State and Federal, and refer in particular to the National Measurement Institute’s role and parameters

¹²⁸ Ibid *National Measurement Regulations 1999 Statutory Rules 1999 110*.

¹²⁹ Refer to *National Measurement Regulations 1999 Statutory Rules 1999 110 a amended made under the National Measurement Act 1960 s8(1) amended by No 17/2000 s7(1)*

Recognised value Standard of the Density of Water

In pursuance of paragraphs 8A(1)(a) and (b) of the National Measurement Act 1960, it was determined that the magnitude of the density of water ρ_t at a temperature t and a mean pressure p shall be a recognized value standard of measurement, provided t lies within the range 0°C to 40°C and p lies within the range $2 \times 10^4 \text{ Pa}$ to 10^6 Pa . For the purposes of this Determination:

When p is $101\,325 \text{ Pa}$ and t is one of the temperatures listed in Table 2 the magnitude of the density in $\text{kg}\cdot\text{m}^{-3}$ is as stated in the table, which is derived from the following formula:

$$\rho_t = 999.972 - (t - 3.984\,9)^2 / 506.603\,12 \times (t + 286.460\,1) / (t + 67.760\,1)$$

where ρ_t is the density in $\text{kg}\cdot\text{m}^{-3}$

ρ_t and t is the temperature in $^\circ\text{C}$.

(b) When p is $101\,325 \text{ Pa}$ and t is between two adjacent values of temperature listed in the attached table then the magnitude of the density in $\text{kg}\cdot\text{m}^{-3}$

ρ_t shall be determined from the table by linear interpolation.

(c) When p differs from $101\,325 \text{ Pa}$ the magnitude of the density in $\text{kg}\cdot\text{m}^{-3}$

ρ_t as stated in the attached table or derived therefrom in accordance with the above linear interpolation shall be algebraically increased by an amount equal to $(5.061\,9 - 0.030\,9\,t + 0.000\,361\,4\,t^2) \times 10$

$$7(p - 101\,325).$$

(d) If the value of t used in the attached table and the above equations does not differ from the true mean temperature of the water by more than 0.1°C , if the value of p used in the equation does not differ from the true mean pressure within the water by more than $1\,000 \text{ Pa}$, and if impurities in the water do not exceed 1 part in 105 by mass, the chance is not more than one in one hundred that the density so ascertained differs from the true density by more than 0.05 $\text{kg}\cdot\text{m}^{-3}$

Section 87 Part 10 of the NMA refers to exemption of utility meters (Act s3) as follows

Part 10 Miscellaneous

87 exempt utility meters (Act s3)

For the definition of utility meter in subsection 3(1) of the Act the following classes of meters are exempted from the operation of Part VA of the Act

- (a) gas meters*
- (b) electricity meters*
- (c) water meters installed before 1 July 2004*
- (d) water meters installed on or after 1 July 2004, other than cold water meters with
 - (i) a maximum continuous flow rate capacity of not more than 4,000 litres per hour, and*
 - (ii) maximum permissible errors mentioned in clause 13 of Division 3 of Part 1 of Schedule 12**

Note: Meters with a maximum continuous flow rate capacity of not more than 4,000 litres per hour are normally, but not exclusively, used for metering water supply to domestic premises

Under Section 89 of the NMA, limits of error for utility meters are described as follows

89 Utility meters – limits of error (Act, s 18V)

The maximum permissible error for a utility meter is set out in Schedule 12 and in the certificate for the utility meter