17 September 2008

Miss Wendy Heath
Review of Regulatory Instruments
Essential Services Commission
Level 2, 35 Spring Street
Melbourne 3000

ESC Review of Regulatory Instruments – Draft Decision – August 2008

Dear Ms Heath

Thank you for the opportunity of responding to the Essential Services Commission Regulatory Review of Instruments.

I present the material in various components, originally prepared as part of a larger multi-part submission for other arenas. I have retained the numbering that applied originally (Part 2), and have subdivided the material further.

Part 2 deals with a more general range of issues and places the regulatory exercise in some context.

Aside from looking at some of the general governance models adopted both by the ESC in this Review and by the Ministerial Council on Energy Standing Committee of Officials' National Energy Consumer Framework's Table of Recommendations and some concerns about consultative processes generally this component is of a more philosophical nature. It looks at the extent to which competition in Victoria may have been incompletely assessed, providing a collation of opinion.

I have presented strong views about the existing bulk hot water provisions which predominates my analysis of the contractual governance model adopted by the National Energy Consumer Framework (NECF) and the Draft Decision of the Commission to transfer from deliberative documents and the BHW Charging Guideline into the *Energy Retail Code*, whilst retaining the contractual rationale that was in place at the time of their adoption on 1 March 2006 after deliberations during 2004 and 2005.

I understand that the DPI has taken over policy provision for most components of these arrangements, whilst the ESC will retain control over what is shown on bills.

The presumption seems to have been made that by transferring from guidelines and deliberative documents to the *Energy Retail Code* (Victoria) regulator instructions to energy providers, including retailers under licence provisions, to impose contractual status on the wrong parties, using trade measurement practices that cannot show legally traceable consumption or contractual status, the provisions will become valid and legally and technically sustainable.

Imminent nationalization has presented an opportunity to target both jurisdictional and national arenas during a time of regulatory uncertainty and change and focus most energies on contractual matters that have had adverse outcomes for consumers who are imposed with deemed contractual status for BWH arrangements that properly belong to landlords.

I have extensively discussed this by responding to a vast number of components from the National Energy Framework Table of Contents, but all of those comments are pertinent to the decision made jointly by the DPI and ESC to endeavour to consolidate on the arrangements by transferring large components to the Code.

Since the adoption of this Guideline 1 March 2006, after various deliberative processes during 2004 and 2005, it has been possible with regulatory sanction for energy retailers to undertake the following:

- Creatively interpret the provisions of the *Gas Industry Act 2001* and the *Electricity Industry Act 2000* by imposing on the wrong parties contractual status, where the proper contractual responsibility for any consumption and supply charges or any other associated charges lie with the Landlord/Owner or representative
- Use water meters to effectively pose as gas meters using practices that could be construed as misleading
- Use trade measurement practices that defy best practice as well as the spirit and intent of existing trade measurement laws and regulations, and which will become formally invalid and illegal as soon as remaining utility exemptions are lifted from national trade measurement provisions
- Effectively make inaccessible the enshrined contractual rights under conflicting schemes and other provisions in the written and unwritten laws end-users of heated water that is centrally heated and supplied to Landlords or their representatives, including tenancy provisions and common law rights under contractual law; as well as the specific provisions of unfair contract provisions and the provisions of other generic laws

These matters are also impacted by existing provisions and proposed changes to the *Energy Retail Code*. Therefore selected matters from the proposals to amend the VERC are also discussed. These include:

1. **Detailed discussion of the application of deemed status** on those receiving heated water supplies as a composite product (rather than energy) as an integral component of their rental lease arrangements with their private landlords under mandated residential tenancy provisions. This is most effectively discussed in the context of the proposed national provisions, regardless of what arrangements may be retained and perpetuated in the interim.

For this reason though a response to the VESC's proposal to repeal the BHW Charging Guideline VESC 20(10) and transfer most components to the Energy Retail Code, the bulk of the discussion about contractual arrangements and interpretations takes place in the form of a detailed response to many components of the National Consumer Energy Framework Table of Recommendations currently under consideration.

Because of imminent changes it is impossible to separate the issues adequately, so this component of the submission is targeted at more than one arena

2. **Minimum requirements on bills and implications for transfer of billing provisions** from the BHW Guideline to the ERC;
3. **The unfair requirement of residential tenants to provide safe unhindered and convenient access to meters** under Clause 13.3 of the VERC (also reflected in the NECF template.
4. **The unreasonable demand to obtain acceptable identification and contact details**, by way of forcing under pain of disconnection of heated water products (not energy), an explicit contract with a retailer from end-users of a composite water product from which the heating component cannot be separated or measured in a legally traceable way; and where the end-user residential tenant is already paying for heated water under mandated residential tenancy terms.
5. **The requirement for the existing and proposed Laws, Rules and all other provisions to avoid regulatory overlap and conflict with other schemes**, as is already required under s15 of the *Essential Services Commission Act 2001* and the Memorandum of Understanding dated 18 October 2007 between CAV and ESCV.
6. **The implications of existing trade measurement and calculation practices**, particularly in the light of national provisions and philosophical commitment at national level to uphold the principles of legally traceable provision and consumption of goods and services.

   The trade measurement considerations and calculation methodologies also have significant impact on contractual matters.

   Therefore, whilst matters are not quite settled within the national framework, and during an unsettling time for all with major regulatory change and uncertainty, it may be a good time to more thoroughly air and resolve issues that have been on the backburner for a good number of years as a *"too-hard-basket"* topic – bulk hot water arrangements, and proper allocation of the correct contractual parties

   The question of regulatory overlap with other schemes, combined with technical definitions and trade measurement practices used to calculate deemed consumption of energy and apportion both consumption and supply costs on residential tenants in these circumstances instead of Landlords or owners Corporations is discussed in detail as the central theme

   The proposed NECF template requires provision of acceptable identification at the outset. I support the Victorian proposal that connection occurs first and identification issues pursued later.

However, in the circumstances where regulatory overlap exists and a residential tenant has no requirement under other laws to honour an additional contractual relationship to the one with the Landlord under mandated lease provisions, the requirement to provide any identification in order to formalize a contract with the energy provider is unreasonable to begin with. The contractual party should be the Landlord or Owner. These practices in turn have enormous implications for the following:

- Assessment of who the contractual party should be and how customer or relevant customer is properly interpreted
- How soon consumer protections can be restored such that they can once again readily access their fundamental contractual, tenancy and other rights without threat or fear of disconnection of hot water services and without having to accept unjust unilaterally imposed contractual status without having to accept formal contractual liability for costs and meter access arrangements
- Whether the entire energy regulation framework and trade measurement framework can be seen to be compatible with the bulk hot water pricing charging and trade measurement provisions

In Victoria the Department of Primary Industries (DPI) is responsible for policies for bulk hot water provisions, a term that has distorted the whole concept of energization and the obligations and rights of energy suppliers, using legally and technical unsustainable policy provisions that defy all reasonable principles of best practice, proper trade measurement, contractual law.

Currently the contractual rationale deems end-users of heated water contractually responsible for the delivery of energy to centrally heated water in blocks of rented apartments and flats, reside in deliberative documents of no legal weight.

Following direct challenge legal and technical to these flawed policies, taken up initially with the industry-specific complaints scheme Energy and Water Ombudsman (Victoria) Ltd, the Essential Services Commission as current Victorian jurisdictional regulator, and ultimately the Department of Primary Industries (DPI), it has been proposed that the existing bulk hot water pricing and charging provisions, be formally incorporated into the Energy Retail Code.

Conclusions

The Bulk Hot Water Pricing and Charging arrangements, appear to fall far short of acceptable business and trade practices, and of the fundamental principles embraced by the NMI on the requirement to show legally traceable trade measurement in the manner in which *"energization"* is being interpreted within existing policies and consequently by energy retailers and other providers, by referring to a composite water product – using water meters posing as gas meters, where the water is centrally heated from a single energization point on common property infrastructure on the property of Landlords and Owners' Corporations.

With regard to billing matters, for which apparently VESC still has control, I comment in some detail later on the implications of the proposed changes within the VESC Draft Decision.

It is my contention that despite efforts to enhance transparency and achieve consistency and harmonization, the proposed provisions contain many drawbacks that deserve further scrutiny, leaving aside the debate about contractual and trade measurement arrangements now under DPI control. Central to the concerns are the inability of the arrangements to show legally traceable measurements that can be used to allocate responsibility to end-users of heated water products.

The proposed inclusion on billing includes under 4.2 of the ERC a requirement to indicate on a bill whether the bill is based on a meter reading or is a wholly an estimated bill. In the case of BHW the original deliberative documents that led to their adoption, it had been claimed that site specific reading of meters was too expensive and inconvenient for retailers to adopt despite providing more transparency, and notwithstanding in the first place that water meters are not supply points or ancillary energy point (which in any case are taken as one within the legislation and elsewhere) or suitable devices through which individual energy consumption can be measured.

The proposed provisions may not meet the general requirement for a minimum number of meter reads under bill smoothing arrangements (5.3 VESC RR DD) and Meter Reading (NECF TOR).

This is claimed on the basis that meter readings may not be undertaken at all, of either water volume or gas volume, and that if these occur they do not occur regularly, yet bills for the allegedly monitored and calculated heating component of *"hot water consumption"* by individual tenants imply that at least water volume is precisely calculated if not gas; the proposed provisions for billing do not meet the requirement for a minimum number of meter reads of either satellite hot water meters on common property infrastructure of Landlords or OCs (which measure water volume only not gas or heat) or of the single bulk energization point on common property of Landlords or OCs (which supply point measures gas volume only not heat, meaning energy, and not hot water consumption).

These matters also have implications for transparency; informed consent about practices adopted, even if a *"deemed status"* imposition is adopted or explicit contracts obtained with or without coercive threat of disconnection of heated water.

In addition, if bill smoothing in proposed jurisdictional provisions relies on a 9-month period; and 12-months within the proposed NECF TOR, this means that those on low fixed incomes will be disadvantaged by having to find funds for which they have had no chance to budget.

If estimates of water consumption (upon which gas or electricity consumption is based through conversion factor formulae) is based on estimated or actual consumption of previous tenants in the same apartment, this cannot be a fair way of calculate costs. Residential tenants are a transient population. In any given period a single apartment can house anything from one to several parties using variable quantities of water. Under the current imprecise and infrequent calculation proposals, leaving aside contractual debate and calculation methods, this produces inequity and legal traceability issues based solely on the billing cycle and bill smoothing arrangements proposed.

Though information relating to how often water meters and gas meters will be read, and information on brief calculation details is implied within the ERC very few end-users residing in sub-standing buildings still using communal bulk hot water systems will ever know of or be directed to the ERC to check how things are done. In addition, if the explanations for calculation methods and formulae are to be concealed, it is less likely that transparency of any description will be achievable. This is unacceptable.

Recommendations

The VESC and DPI are urged to reconsider the implications of retaining the vast majority of the existing provisions within the Bulk Hot Water Charging Guideline VESC 20(1) 2005 (effective 1 March 2006) by repeal the Guideline and transferring these to the *Energy Retail Code* (VERC).

The bills, if they are to be submitted to end-users as tenants receiving heated water at all, should clearly show how often the meters will be read, and also that the reading is based on calculation of water volume consumption through which conversion factor calculations are used to guestimate deemed gas usage.

VERC 3.3 Denied Access to Meters (see also NECF TOR)

The expectations that residential tenants provide safe convenient and unhindered access to any meters behind locked doors are unreasonable and unjust. This has been raised by community organizations, including the tenants Union Victoria in various submissions including to the MCE RPWG Working Papers.

Most landlords do not allow residential tenants access to such meters. This mainly applies to water meters being used to all intents and purposes as substitute energy supply points. These are the meters that generally reside with the boiler tank behind a locked door. If the current methods are to be perpetuated regardless of regulatory overlap, contractual and technical matters, it is far more sensible for energy providers to have energy key access through the Landlord or Owners' Corporation. The contact details of the latter are usually transparently available on the outside of buildings housing multiple residential tenants using bulk hot water provisions, and those for which energy meters are for some reason also behind locked doors.

VESC 3.4 Refusal to provide acceptable ID or refundable advance

Under the Victorian provisions disconnection is allowable after 10 business days notice is provided of intent to disconnect energy, and if the customer continues to refuse identification.

The Victorian recommendation (as opposed to the NECF TOR) is supported that connection take place then disconnection if no acceptable identification is provided, except in the case of those receiving heated water that is communally heated with a single energization point serving a communal water tank on the common property infrastructure of Landlords. The tenants receive a composite water product not energy. The water is reticulated in water pipes to their apartments. They are covered for the cost of supply of the heating component of the water, from which the former cannot be separated or measured in a legally traceable way.

Under mandated tenancy lease provisions, tenants take up tenancy in the secure knowledge that they are protected under tenancy laws and that it is Landlord is responsible for payment of all utility costs other than bottled gas that cannot be measured in such a way with an instrument designed for the purpose. Hot water flow meters are not energization points. They measure water volume not heat and cannot possibly calculate individual consumption of the heating component of a composite product. Not even the gas meters can measure heat. They measure gas volume only not energy (heat). Bills are expressed in energy. If they are read at all, the two groups of meters hot water flow meters, and gas meters, are read, at least two months apart, though site specific reading was not mandated. Despite this high water meter fees are imposed and supply charges to individuals. No water dial reading is available, so no checking is possible.

The contractual arguments presented are not only impacted by regulatory overlap considerations, but also the trade measurement and calculation methods used, and the range of technical definitions within the current laws. The new law uses the term energization which has a particular meaning. The same applies to disconnection. Neither refers to water products or measurement of water.

This is on the basis of all of the arguments presented to show that the end user of heated water is not the relevant customer, despite interpretations of provisions and incorporation of the BHW provisions into the VERC. This provision in the first place represents gross regulatory overlap with other schemes and interferes with the enshrined contractual rights of residential tenants under the mandated terms of their tenancy leases.

Retailers and distributors need to feel secure that the instructions that they are given are not producing the intended or unintended outcome of expecting them to choose which laws they are expected to uphold; to undertake practices that fall short of best practice, including trade measurement practices; and will not in the future, because of breach of trade measurement provisions, leave them open to criminal charges and/or civil penalties; and that the disconnection processes that they undertake will not also leave them vulnerable to private litigation and/or criminal charges

In the light of the goals of the MCE SCO to achieve proper consultation and move to nationalization in a considered staggered way to take into account jurisdictional differences whilst balancing the need to achieve harmonization, consistency and optimal governance levels, it is prudent for consultative initiatives at all levels to be undertaken in a considered way with adequate time being provided at each consultative stage.

Since, Victoria is aiming to *"lead to way"* to other States at different stage of competitive progression, it is crucial that robust consultation is effected and that all deliberative documents and consultative inputs are transparently reported online.

It is also important that good examples are set and that practices soon to become formally illegal, that are causing detriment to consumers and confusion and uncertainty to providers of energy are not retained and consolidated but rather reviewed with the aim of re-assessing contractual matters. The BHW guidelines do not stand up well to scrutiny on a number of grounds thoroughly discussed in the accompanying documentation, notably under Parts 2A and 2B.

Yours sincerely


Madeleine Kingston

Ministerial Council on Energy Standing Committee of Officials
Table of Recommendations and Policy Paper
MCE National Energy Consumer Framework 2008
and
MCE Network Policy Working Group
and
Victorian Essential Services Commission Regulatory Review 2008
and
Australian Energy Regulator
and
National Measurement Institute
and
Productivity Commission

Open submission Part 2

MADELEINE KINGSTON

SEPTEMBER 2008

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

Madeleine Kingston

(03) 9017-3127

Or email mkin2711@bigpond.net.au

PREAMBLE

As a private citizen, I welcome the opportunity to comment on the Essential Service Commission's Review of Regulatory Burden 2008, and at the same time respond to components of the NECF Table of Recommendations and Policy Paper and more detail, though considerable material has already been provided already to the latter and to other MCE arenas.

In addition, I have created the opportunity to re-target certain agencies and entities that have previous material from me in my campaign to raise awareness on certain regulatory consumer protection and competition issues generally.

This overview component (Part 2)[1] of my submission deals with some philosophical beliefs and views about regulation selectively and in general terms to answer some of the issues raised by other stakeholders.

This material aims to reinforce the view that energy-specific regulation is essential, and that many of the protections in place are desirable and necessary, if not requiring further strengthening and clarification.

The companion submissions 2A and 2B deal with specific matters, including certain existing arrangements that would benefit from review.

As late supplementary submissions these contain the detail that is required to validate the initial points made. Whilst apologizing for late submission of these additional components, I also believe that publication would represent token acceptance of the value of wider stakeholder inputs that are allowable under policies that restrict inputs to nominated consumer consultative committee members, more especially if the deliberations of such committees are not made openly available for wider comment by consistent and timely online publication of outcomes.

I have already expressed by view about robust consultative processes and adequate opportunity for stakeholder consultation. I do not share the views of the VESC that this regulatory review has been the subject of robust consultation, save mostly behind locked doors. The issues paper and the Working Papers that led to Draft Decisions about to be ratified are yet to be made accessible

This submission deals with reinforcement of the view that energy-specific regulation is essential, and that many of the protections in place are desirable and necessary, if not requiring further strengthening and clarification.

In some cases, I believe that review of the instruments is highly desirable because of perceptions of compromised protection and overlap with other regulatory schemes, making certain enshrined rights of consumers inaccessible.

In addition I deal in considerable detail with a few selected issues of concern with the view to encouraging reconsideration of existing regulations that are seen to be detrimental to consumers and their enshrined rights.

---

[1] The numbering has been retained from a sequence of documents intended for the MCE arenas, sine Part 1 is an overview of all documents prepared for the MCE SCO Table of recommendations and other parties.

It is important that a forum like this gives stakeholders an opportunity to express what may not be working within regulations, and I hope that the information and comments provided will be seen in the spirit intended and be published openly and transparently, despite criticism of certain regulatory provisions.

On the basis that I believe that aspects of the current Victorian Regulatory Review may have been instrumental in highlighting certain principles in policy, regulatory and legislative reform that deserve to be scrutinized and benchmarked to meet the highest standards of governmental, regulatory and business practice, I have not allowed mere deadlines to prevent me from making my personal contribution towards highlighting areas of community expectation that are being inadequately met.

My observations and conclusions are not intended to be personal or exclusive to any one agency or entity, but I have taken an opportunistic approach to addressing shortfalls as I see them in the hope that the principles will be addressed not only with regard to current energy reform processes, but also be extrapolated to other arenas where reform and benchmarking can be targeted to achieve the best possible outcomes.

Therefore I am seeking publication of these views – for the record, without necessarily believing that these attempts will represent anything more than a journey travelled, and regardless of final outcomes.

As a late-comer to the arena of public consultative processes, it may be premature for me to adopt the stance of a committed cynic. However, I would be less than honest if I pretended to be anything less than jaded at this stage of involvement.

The leeway offered by the MCE SCO is much appreciated with late submission, bearing in mind also that the MCE SCO will also be interested in the material to be included within the Rules and how consistency between jurisdictions may be effectively achievable.

In any case various MCE arenas including the Retail Policy Working Group (RPWG); the Energy Reform Implementation Group (ERIG) and the Department of Resources Energy and Trade (MCE-RET) have already been alerted to some of the issues in previous submissions.

The bottom line is this – I believe that without urgent and serious consideration of certain matters, there is a risk of inadvertently incorporating into new policies, regulations and legislation some of the existing flaws within certain provisions that are long overdue for reconsiderations

The Law needs to be more specific and to clarify issues that have given rise to angst, expensive complaints handling; expensive government administrative burden; and the potential for private litigation.

Market participants need to receive clear unambiguous instructions that do not leave them at potential risk; that do not require them to choose which laws and provisions that must uphold; or that may confuse them as to best business practice parameters.

An unsettled market is one that has no potential to bring the best rewards for the business community or the community at large.

This is a time of major policy regulatory and legislative reform. The climate may be ripe to learn some lessons from the past – and to remember the position the nation was in when the Senate Select Committee on National Competition Policy of 2000 found significant gaps in policy provision and adequate grasp or interpretation of the fundamentals of National Competition Policy.[2]

Reducing regulatory burden is important where those burdens are duplicated unnecessary or harmful. Finding the right balance and choosing the right instruments to either shed or enhance is a highly skilled exercise. More care needs to be taken as to how and when this should be done.

[2] Refer to brief notes on this topic in Component Submission 2A to multiple arenas, including the VESC Regulatory Review and NECF Table of recommendations and Policy Paper and to previous submissions to the Productivity Commission's Review of Australia's Consumer Policy framework

Disclaimers

This material, including all appendices have been researched and collated 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.

Its central aim is to provide a selection of collated views of stakeholders.

The material has been prepared in honesty and in good faith, expressing frank opinion and perceptions without malice about perceived systemic regulatory deficiencies and shortfalls, market conduct and poor stakeholder consultative processes, with disclaimers about any inadvertent factual or other inaccuracies. Perhaps I should go a step further and take a leaf from the CRA Report disclaimers and add that

> *"I shall have and accept no liability for any statements opinions information or matters (expressed or implied) arising out of contained in or derived from this document and its companion submissions and appendices) or any omissions from this document or any other written or oral communication transmitted or made available to any other party in relation to the subject matter of this document."*

Case study material has been deidentified but represents actual case examples of consumer detriments, some seen to be driven by existing policies at risk of being carried into the National Energy Law and Rules.

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 or vexatious intent, 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. It has been observed by others that the NEM resounds with a single handed clap that excludes consumers. Access to consumer voice and protections for consumers of gas seem even less accessible.

I would like every possible opportunity to provide direct consumer perspectives whenever consumer issues are at issue. This is one of several components but each intended to stand alone as a dedicated submission on selected topics.

Madeleine Kingston

Madeleine Kingston Concerned Victorian consumer

ANNOTATED CONTENTS

Part 2 deals with a more general range of issues and places the regulatory exercise in some context. Aside from looking at some of the general governance models adopted both by the ESC in this Review and by the Ministerial Council on Energy Standing Committee of Officials' National Energy Consumer Framework's Table of Recommendations and some concerns about consultative processes generally this component is of a more philosophical nature. I have retained the numbering that applied originally (Part 2), and have subdivided the material further.

It looks at the extent to which competition in Victoria may have been incompletely assessed, providing a collation of opinion, examines selected consumer protection issues and sets the context for current energy reviews. Other issues relate to general regulatory philosophies and national competition policy. Brief mention of advanced metering and pre-payment meters is made.

Because of the number of issues raised within the VESC Regulatory Review and the MCE SCO Table of Recommendations selected components have been isolated here for dedicated treatment in direct response to the wording and/or proposals suggested.

This has required sub-dividing Part 2 so that the topic of predominant focus is separated to some extent from other issues not focused on the targeted issue of Bulk Hot Water Arrangements and similar considerations for embedded consumers.

Part 2 contains certain sections that have been reproduced in Part 2A for completeness These include general comments on policy parameters CESC and MCE SCO Table of Recommendations and Policy Paper (pg 29 Pt 2); General Comment of the VESC Consultation Processes (p20-32) pt2); Brief comment on SCC MCE Governance Model (pp33-34 Pt 2)' Further selected general discussion of regulatory reform philosophies (pp33-34 Pt 2); Selected Reflections on Impact of Prices and Profit Margins on Energy Retail Competition in Victoria[3] (p 64-79 Pt 2); Checklist of incompletely or altogether unaddressed issues in assessment of effectiveness of competition in the gas and electricity markets in Victoria[4] (pp60-00 Pt 2)

[3] Impact of Price and Profit Margins on Energy Retail Competition in Victoria. Project report Ref D 11383-00. Commissioned Consultant's Report to AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report*, October 2007, Sydney.

[4] 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 to AEMC First Draft Report Madeleine Kingston (November 2007). Found at
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

[5] Impact of Price and Profit Margins on Energy Retail Competition in Victoria. Project report Ref D 11383-00. Commissioned Consultant's Report to AEMC, *Review of the Effectiveness of Competition in Gas and E50-69lectricity Retail Markets in Victoria: First Draft Report*, October 2007, Sydney.

[6] 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 to AEMC First Draft Report Madeleine Kingston (November 2007). Found at
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

ANNOTATED CONTENTS AND STRUCTURE OF SUBMISSION PART 2A

Summary of clauses to be retained and transferred to clauses 3.3 or 4.2 of the Victorian Energy Retail Code **66-67**

These include:

Clauses 2.1.1;[7] 2.1.3[8], 2.3;[9] selected components of 3.1 of Guideline 20(1) are to be retained and transferred to the Victorian Energy Retail Code.

A discussion is undertaken under MK Comment of each of these clauses of the Guideline to be retained and transferred to the VERC. The discussion presumes VERC intent is to attempt to validate moves to regard the BHW arrangements as quite separate to the remainder of the regulatory framework, regardless of overlap and conflict with other schemes.

(1) 2.1.1 Calculation in accordance with regulated formula under DPI control

---

7 Relates to calculation of gas bulk hot water charges in accordance with a regulated formula. The rule is to be retained and transferred to Clause 3.3 of the *Energy Retail Code* under the current regulatory review.

8 Requires publication of the gas BHW rate. This means the gas price in cents per litre that is used to charge customers for energy in delivering gas bulk hot water. The term relevant customer is not used as in s46 of the *Gas Industry Act 2001*. This is defined broadly within the legislation and not confined to natural persons. It simply relates to consumption threshold of no more than 10,000 GJ per annum and can apply to entities. In fact this threshold applies to 1.6 million Victorians, with only 100 larger customers using more than 10,000.

9 Information to be included on bills. Requires retailers to detail on the customer's bill certain information regarding the calculation of the customer's bulk hot water charges. Considered by VESC to be important for customers who consumer bulk hot water to understand their bill. Note this mentions hot water consumption not heat or energy or gas volume. Retailers are licenced to sell gas and energy not composite water products. They sell the energy to landlords based on gas volume calculation to a single energization point on common property infrastructure.

(2) 2.1.3 Publication of the gas bulk hot water rate by retailers

Note the use of the term water as applied to energy retailers licenced to sell gas or electricity only, not composite products, and impliedly to disconnect or decommission gas or electricity not hot water services

(3) 2.1 Details to be included on bills[10]

This single component of the provisions will be retained by the ESC. Formulae policies will revert to the DPI and continue to be regulated, presumably by negotiation rather than by set tariffs

It is unclear how peak and off peak charges will apply or where details of these arrangements will be published and the formulae rationale

Retailers in Victoria are required provide greenhouse gas information on customers' electricity bills are set out in *Electricity Industry Guideline No. 13 - Greenhouse Gas Disclosure on Electricity Customers' bills*.

The purpose of the guideline is to specify, to retailers, the minimum level of information on greenhouse gas emissions associated with generation of electricity that must be included in each bill issued. These include the amount of emissions associated with the amount of electricity to which the bill relates; the amount of emissions associated with the amount of electricity to which each previous bill related within the past 12 months (if information is available), a graphical representation of this data with explanation and the website address www.greenhousegases.gov.au.

The objective is to increase customer awareness of the link between energy use and greenhouse gas emissions and to enable customers to monitor over time their energy consumption and the emissions associated with it

[10] There is a requirement under the *Electricity Industry Guideline 13* for retailers in Victoria to also provide greenhouse gas information on customers' electricity bills, with the objective of increasing customer awareness of the link between energy use and greenhouse gas emissions and to enable customers to monitor their energy consumption, and the emissions associated with it, over time
These include the amount of emissions associated with the amount of electricity to which the bill relates; the amount of emissions associated with the amount of electricity to which each previous bill related within the past 12 months (if information is available), a graphical representation of this data with explanation and the website address www.greenhousegases.gov.au.

[11] VESC Bulk Hot Water Charging Guideline. Formalized in December 2005. Implemented 1 March 2006. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/C0E6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf*

[12] This is a very telling request by the retailers. In providing reasons to view Clause 3.3 of the BHW charging arrangements as redundant, the retailers have referred to small business customers and deregulation of that class of customers. It implies that they actually do consider landlords to be the customer, not the tenants.

Under this heading, a discussion is undertaken of the original rationale behind adoption of this Guideline after various deliberative processes during 2004 and 2005.

The value of retaining these documents in archives is discussed as an important historical record of the rationale and detail relied upon in the adoption of this Guideline in the first place, much of which is to be retained but merely transferred elsewhere. It is not the Guideline itself therefore that is redundant but the numbers of pages that contain it. The repeal has facilitated simplifying but the reasoning behind the Guideline is crucial for a proper understanding of what is happening and how this conflicts with existing regulatory provisions in other schemes

Discussion of implied transfer from deliberative documents of 2004 and 2005 directly into the VERC **183-189**

This proposal is discussed below under Comment of specific proposals, including the lack of transparency at the time of deliberations and formalization of provisions now to be repealed and for the most part transferred elsewhere to Clauses 3.3 and 4.2 of the VERC

Discussion of Repeal of Clause 1 Introduction: Purpose Authority and Application and Implied Repeal or Archiving of the Deliberative Documents that led to their adoption **190-192**

This proposal is on the basis of transfer of BHW policies to the DPI from 1 January 2008, with the VESC retaining responsibility only for what is shown on bills

The implications of the current system of calculation and contractual arrangements are discussed in the context of conflict with other regulatory schemes, trade measurement considerations, including the provisions of the national measurement legislation which will make current calculations formally illegal when remaining utility exemptions are made. The crux of the arguments present is summarized below.

The purpose had been explained as the Commission's requirements for the charging by retailers of energy in *"delivering electric bulk hot water"* or *"gas bulk hot water"* to customers (without specifying **"relevant customers"** from gas or electrical distribution systems

Energy providers deliver gas or electricity not electric or gas hot water or composite water products. End-users receive composite water products reticulated in water pipes without any energization, connection, supply point or supply address associated with their apartments. These are synonymous terms. No transmission pipeline facilitating the flow of gas is reticulated to their apartments. They do not receive energy, but a water product.

The Landlord receives the energy on common property infrastructure. This energy is reticulated in a gas transmission pipe to a water storage tank. All equipment is on common property infrastructure. The water is purchased by the Landlord at the mains from the Water Authority. It is then reticulated to the water tank. All transfers occur on common property infrastructure. The last step is transfer in water pipes belonging to the landlord of heated water to each apartment.

The Landlord forms an implicit or explicit contract with the supplier from the moment of requesting installation of the infrastructure to supply energy to his boiler tank. He takes supply as soon as this is in place and a supply charge applies from that time. The taking of supply does not commence as each new residential tenant or occupier of individual flats turn on a water tap.

Ownership of the hot water flow meters is irrelevant. These are merely devices that calculate water volume usage. Though made to withstand heat they do not measure gas volume, heating value, ambience, temperature. They cannot measure individual consumption or approximate to gas usage

The derived formula is pointless since the Landlord receives energy at a single energization point on common property infrastructure. A single read of the bulk gas meter and a bill to the Landlord would simplify matters and be consistent with the Landlord's existing requirement under residential tenancy legislation to meet supply and consumption costs of heated water supplied to renting tenants where bulk hot water is supplied. These costs are factored to the rent.

For VENCorp Distributor-Retailer settlement purposes, only a single supply and billing point applies consistent with the legislation.

The current arrangements represent regulatory overlap with other schemes. This is disallowed under s15 of the *Essential Services Commission Act 2001*. The arrangements interfere with the enshrined existing rights of individuals under residential tenancy laws. In as far as these arrangements are intended to apply to renting tenants, this is a conflict and represent detriment to them. The arrangements turn suppliers into billing agents and interfere with private contractual arrangements between Landlords and Tenants that are enshrined within the Law under other schemes. No deemed contracts were ever intended to apply to those receiving heated water as a composite product. The flow of energy cannot be facilitated through a water pipe.

The original rationale for the adoption of this Guideline and its contents, most of which are intended to be retained is discussed at some length. This historical information is crucial to understanding and revisiting the validity, appropriateness; legal and technical sustainability of these provisions.

It is unreasonable to expect tenants to go to expense including filing fees that would offset costs to recover costs that should properly be the Landlord's responsibility in the first place. The existing arrangements with two lots of meter reads theoretically add to costs. Supply charges in any case belong to the landlord.

Changes by DPI to Appendix 1 (gas BHW charging) and Appendix 2 (electric bulk hot water charging formulae) using conversion factor algorithms that rely upon theoretical measurement of water volume and Appendix 2.

The implications of the current system of calculation and contractual arrangements are discussed in the context of conflict with other regulatory schemes, trade measurement considerations, including the provisions of the national measurement legislation which will make current calculations formally illegal when remaining utility exemptions are made.

[13] Such a formulae is technically and legally unsound and also represents regulatory overlap with other schemes. The calculation methodology violates and intent and spirit of national trade measurement laws and will become formally illegal with high penalties when remaining utility exemptions are lifted as is the intent. See Section 18R Part V *National Measurement Act 1960*.

OVERVIEW OF PART 2B (SEPARATE DOCUMENT)

Selected contractual and definitional issues impacting on jurisdictional bulk hot water arrangements within codes and guidelines

See more extensive discussion under Contractual Matters with focus of deemed contracts; Analysis of BHW and VERC proposed changes Analysis of aspects of NECF Glossary and TOR

See also Part 2 cover letter, index and general reflections regulatory matters

Part 2B is closely related to 2A

Part 2B is closely connected with Part 2A. The two components should be read in tandem.

Part 2A examines in more detail the jurisdictional provisions for bulk hot water contractual and pricing arrangements, which hold contractually liable end-users of utilities who receive not energy in service pipes transmission pipes or electrical lines, regardless of network arrangements, but rather a composite water product, whilst being directly charged for energy on the basis of using water meters to calculate the *"gas rate"* or *"electricity rate"* that should apply based on water volume usage alone.

Part 2B in direct response to many components of the MCE SCO Table of Recommendations since the issue of Intended to VESC Regulatory Review Draft Decision August; NECF Table of Recommendations; National Measurement Institute,[14],AER

This is a dedicated component to issues pertaining to:

- Best practice regulation and policy, narrowly focused mostly on Bulk Hot Water Provisions and similar impacts on embedded end-consumers
- Contractual and definitional matters
- Some of these considerations extend beyond BWH provisions as these arrangements impact on the entire governance model for contractual arrangements and technical definitions
- Trade measurement
- Regulatory overlap with other schemes

These matters are particularly pertinent:

- Certain procedural matters, including conditions precedent and subsequent;
- The absence of sufficient clarification within the Law regarding disconnection matters generally and with particular regard to how these may be impacted by the BHW arrangements with tacitly permit disconnection of heated water rather than energy.
- Jurisdictional provisions current and proposed and some implications.

[14] It is recognized that the parameters of the National Measurement Institute's role does not extend to issues of contract, specific energy regulation or wider parameters of consumer protection. Instead the NMI is focussed on best practice trade measurement practices, accountability, and the achievement of legally traceable means of delivering goods and services.

The jurisdictional considerations and current and proposed provisions are directly impacted by the contractual governance and definition is central to those relating to BHW issues and also those technically described as “embedded”

However in the one case water supplies are the commodity of supply and in the other energy through an alternative network services. The two issued are frequently confused and therefore insufficient attention is paid to the fundamental differences in perceptions of “supply” parameters.

There is a direct correlation between the VESC’s Draft Regulatory Decisions and some of these matters so the two components should be read in tandem.

All components of Part 1 principal recommendations 1.1- 1.48 and 1.78– 1.86 (pp.2- 46)

Many components of Part 3 Recommendations 3.01- 3.11 (pp. 67- 70)

Many components of Part 4 Recommendations 4.1- 4.11 (pp.71- 75)

Components of Part 5 Recommendations 5.1- 5.23 (pp. 76- 84)

Components of Part 6 Recommendations 1.49 -1.76 (pp. 85- 100)

I refer to some general considerations relating to definitions as contained in the SCO NECF Policy Paper, and discussing in general terms some implications and gaps.

The over-riding focus of this submission is contained in subsection 2A, which for the purposes of the Victorian Regulatory Review isolates a single instrument about to be repealed as a Guideline and substantial components transferred to the *Energy Retail Code*. Other crucial components will be either discarded or perhaps become less transparently available, including clarification of interpretation and the specifics of pricing and charging formulae for *“bulk hot water pricing and charging arrangements”*

The matters primarily addressed in Part 2A are in specific response to the proposals made for repeal, transfer or abolition of VESC Guideline 20(1) Bulk Hot Water Charging Arrangements as contained on pp65-67 of the current Stage 1 VESC Regulatory Review, in addition to general discussion about regulatory provisions and the possible interest of other agencies

It is no accident that these have been taken together or that several agencies have been targeted. The issues raised are so fundamental to the governance model adopted in the Policy Paper of the MCE SCO Table of Recommendations and to decisions as to what should be further included and clarified within the Law rather than within the Rules, that it would be remiss to treat the two consultative initiatives as unrelated exercises with a hit and miss approach in targeting appropriate bodies with current and proposed responsibilities for energy policy and regulation

Material that is specific to case study example has been deidentified but liberally referred to as a tip-of-the-iceberg example of regulations that need to be re-considered in the light of the move to nationalization; the need for consistency and harmonization, whilst adopting best practice; the need to avoid regulatory overlap with other schemes; and the need to adopt trade measurement and economic regulation principles that neither conflict with other laws and provisions; that may leave retailers and other energy providers at risk of litigation or even criminal charges in using certain approaches by way of endeavouring to force unwarranted contractual relationships with end-users of utilities.

It is to be remembered that energy providers are authorized to sell energy through energization points that can show legally traceable measurements and calculations as to consumption and cost.

Energy providers are permitted to restrict or disconnect energy as defined within the law and regulations, but this should be as a last resort. They are not authorized to disconnect hot water supplies, or composite products, especially where these are already included as part of a legitimate mandated rental package under the mandated residential lease terms that residential tenants have an intrinsic right to rely upon

The central contention in this component Part 2B is that there are gaps in the contractual governance model that need to be addressed more closely. It is also proposed that some matters currently under jurisdictional control should be spelled out more clearly in the Law.

The misinterpretation of s46 of the *Gas Industry Act 2001* (Victoria) has unjustly imposed contractual status for the sale and supply o energy, where this is in fact supplied to a single energization point considered for VenCorp Distributor-Retailer purposes to be a single supply point/supply address and single billing point. This upholds provisions within the current legislation also.

All energization/supply points for supply of energy to BWH storage systems are single supply/address points. The distribution systems used for transmission of energy and reticulation of water are entirely different.

There are significant trade measurement considerations also that will be further discussed. This indicates that the NECF lexicon and contractual governance model may have loopholes that will give rise to debate, expensive complaints handling; conflict and possibly private litigation.

The Victorian Energy Retail Code and Gas Distribution System Code (Gas Code) now consistently show the meaning o connection as follows:

> *Connection (b) for gas*
>
> *the joining of a **natural gas installation** to a distribution system **supply point** to allow the flow of gas" (VERC and Gas Code). Therefore supply has a parallel meaning in the context of s46 of the GIA.*

The NECF contractual governance model under 1.25 of the Table of Recommendations provides clear definitions of what constitutes a customer distribution service, thus establishing a contractual obligation to the retailer in the distributor-retailer-customer

The proposed additional definition for meter for BWH provisions is

> *"a device which measures and records the consumption of bulk hot water consumed at the customer's supply address"*

The NECF contractual governance model under 1.25 of the Table of Recommendations provides clear definitions of what constitutes a customer distribution service, thus establishing a contractual obligation to the retailer in the distributor-retailer-customer.

1.25 of the NECF TOR in defining customer distribution services includes these parameters

> - *the connection of the premises to the distribution network to allow the flow of energy between the network and the premises*
> - *where a physical connection already exists, activating or opening the connection in order to allow the flow of energy between the network and the premises (this is referred to throughout as 'energisation' of the connection);*
> - *maintaining the capability of the network to allow the flow of energy between the network and the premises through the connection; and services relating to the delivery of energy to the customer's premises.*
>
> *The nature, scope and content of initial customer connection services are being dealt with concurrently, as part of the distribution connection & planning requirements work stream of the Network Policy Working Group (NPWG).*

For those receiving heated water supplies that are communally heated by a single supply point on common property infrastructure, the contention put forward is that a new tenant or occupant in a multi-tenanted dwelling is not a “new customer” nor do the individual premises of those parties represent “new supply points” or even energization points

The supply point is connected once at the time that a Landlord seeks to have a gas or electric metering installation fitted for the purpose of heating a communal water storage tank. No further energization takes place. The supply is continuous and happens once as a connection, long before any occupants take up residence in individual flats and apartments. Their apartments have no supply points/supply addresses (meaning connection points) or any equipment associated with gas or electricity supply entering their apartments, regardless of network changeover or ownership. The provisions of existing legislation concerning supply points and that within existing Codes are unambiguous. I becomes a question of proper interpretation of those provisions, leaving aside for the moment the regulatory overlap considerations.

All of these considerations have impacts on conditions precedent, conditions subsequent; disconnection processes, and nature of disconnection (water supplies vs energy); and on proper recognition of Landlord/Owner responsibility. Unless better clarification within the Law is achieved the risk of continuing debate over discrepant will continue to cause angst, detriment, expensive complaints handling and possible litigation

Part 2B seeks the careful consideration of the NECF in further clarifying certain factual matters, with recommendations to regard separately the position of those who are currently regarded as contractually obligated to energy suppliers for the *"delivery of electric hot water"* and the *"delivery of gas bulk hot water"* These are not terms that make good technical sense or are consistent with existing and proposed legislation and other provisions.

This class of consumers, for the most part from the private rental market in sub-standard accommodation does not receive energy at all. The receive a composite water product which is transmitted in water pipes belonging to a Landlord or Owners' Corporation after the water has been heated in a communal water tank.

The Landlord receives direct supply of energy to heat such a tank, which he commences to take supply of from the moment the metering installation is in place. A supply charge kicks in at that point, not when a succession of residential tenants turn on a water tap using a water product that has no connection whatsoever with the energy distribution system; no energization point at a; no supply or supply address point or connection (synonymous).

The matters primarily addressed in Part 2A are in specific response to the proposals made for repeal, transfer or abolition of VESC Guideline 20(1) Bulk Hot Water Charging Arrangements as contained on pp65-67 of the current Stage 1 VESC Regulatory Review, in addition to general discussion about regulatory provisions and the possible interest of other agencies.

It is to be remembered that energy providers are authorized to sell energy through energization points that can show legally traceable measurements and calculations as to consumption and cost. Energy providers are permitted to restrict or disconnect energy as defined within the law and regulations, but this should be as a last resort. They are not authorized to disconnect hot water supplies, or composite products, especially where these are already included as part of a legitimate mandated rental package under the mandated residential lease terms that residential tenants have an intrinsic right to rely upon.

The customers allegedly contractually responsible receive no energy at all. They receive hot water reticulated in water pipes. The derived costs are based on reading of water meters, if site-specific reading takes place at all, since this was rejected as a mandated option because of inconvenience and expense to retailers.

It is not the prerogative of legislators; policy-makers; rule-makers regulators, however *"independently"* structured as corporate entities to re-write contractual law; common law provisions; or the terms of other regulatory schemes outside their jurisdiction. The current provisions appear to have the effect of making inaccessible to residential tenants their enshrined rights under multiple provisions. There are being held contractually responsible with implied *"unauthorized use of energy"* where in fact they are merely relying on those rights and expect their heated water to be provided as part of their mandated lease arrangements.

It seems that the BHW arrangements have effectively misinterpreted the deemed contractual status under s46 of the *GIA* that has been imposed on end users of heated water reticulated in water pipes, and in the absence of any energization, supply point/address point in their apartments. The term supply address is a technical one that is unrelated to the physical surroundings of premises. Instead it denotes supply of gas or electricity to a connection point, and if supplied through an *"embedded network"* still means the physical receipt of gas or electricity in transmission pipes of electrical lines.

Heated water does not reticulated in water service pipes does not fit that description. Therefore the term *"take supply"* in the *GIA* and elsewhere does not apply to the circumstances described.

These are all issues directly impacted by a contractual governance model that is unambiguous, consistent with other regulatory schemes and best practice parameters.

That is why the matters have been given in-depth treatment in more than one arena in the hope that collaborative dialogue will bring satisfactory outcomes for all concerned.

Embedded networks work from small scale generators providing energy. Some embedded networks are providing energy for the heating of communal hot water tanks, mainly in public housing. Their billing arrangements are different. Most privately rented apartment blocks have no embedded generators, but rather energy is supplied to a single energization point on common property infrastructure from the original distribution network. The landlord accepts this energy which is used to heat a single boiler tank which then reticulates heated water to various apartments. The tenants in those apartments do not receive energy at all but rather heated water, a composite product which is reticulated in water pipes to their premises. The property supply address therefore for the energy is the street address and the Landlord is the proper contractual party, despite existing arrangements

Contractual matters form the focus of two of the three components of Part 2, with 2A focused on proposed Victorian jurisdictional changes and 2B more forward looking to the NECF template law.

ADDITIONAL NOTES

Matters of interest to Essential Services Commission Victoria (VESC)

Please see all material and refer particularly principal contentions illustrating inconsistencies between definitions and interpretations between existing and proposed ERC BHW provisions and definitions and provisions of the *GIA* and *Gas Code;* especially deemed provisions reliant on effect supply through gas supply point/supply address (meaning gas connection dependant on flow of gas as described in *"meter"*; disconnection processes; (pp 58-63); analysis of s46 of the *Gas Industry Act 2001* (pp47-59) conclusions and recommendations (pp 273-299), Part 2 and 2B and other written material previously submitted.

Section 43A of the *GIA* is explicit concerning disconnection of gas rather than heated water products and emphasis the essential nature of gas, with mirrored reflections within the EIA

> ***43A (1A) (Gas Industry Act 2001 V34; No 31 of 2001 Part 3***
>
> *In deciding terms and conditions that specify the circumstances in which the supply of gas to premises may be disconnected,*[15] *the Commission must have regard to—*
>
> *(a) the essential nature of the gas supply; and*
>
> *(b) community expectations that ongoing access to gas supply will be available; and*
>
> *(c) the principle that the gas supply to premises should only be disconnected as a last resort.*

Matters of interest to the Department of Primary Industries (Victoria) (DPI)

The DPI has taken over from the VESC most policy issues associated with BHW arrangements, the target topic in sub-section 2A

Please refer to all policy considerations for BHW arrangements, notably as above principal contentions illustrating inconsistencies between BHW ERC definitions definitions in GIA and *Gas Code*; especially meter, supply point/supply address; disconnection processes all impacting on tariff maters. Please refer to derived cost considerations, trade measurement matters; regulatory overlap issues.

[15] Refers to disconnection of gas not heated water products. The term disconnection seems to have taken on a meaning neither intended nor permitted within current and proposed legislation and tacitly upheld in Codes and Guidelines instructing retailers to deem end-users of heated water products as contractually obligated.

Please see conclusions and recommendations; Parts 2A and 2B, and all previous supporting material sent during 2007 concerning policy matters and impacts, illustrated by case study example in a particular matter that remains unresolved after 20 months[16] and contested, with similar potential impacts on some 26,000 Victorian consumers of utilities.

Matters of relevance to VENCorp, Distributors and Energy Retailers

Since distributors are an integral part of the contractual equation within the NECF many matters raised are of significance to Distributors and to VENCorp on the basis of the rules made by VENCorp and monitoring undertaken.

Disconnection has a particular meaning within the Gas Code. It does not extend to disconnection of water whoever owns or maintains the hot water flow meters relied upon to calculated deemed gas usage by end-users receiving a composite water product reticulated in water service pipes to individual apartments

Supply means supply of gas through a physical connection at a supply point/supply address associated with a meter as defined as an instrument through which gas passes. There is no flow of gas through hot water flow meters that measure water volume but not gas or energy (heat).

Creative additional re-definition of meter inconsistent with GIA and the Case Code has given rise to unwarranted imposition of deemed contractual status on end-users of heated water where a single supply point exists for all such points serving to heat communal hot water tanks.

For Distributor-Retailer settlement purposes VENCorp regards these as single supply points, consistent with See all definitions and arguments, notably principal contentions and analysis of deemed provisions and disconnection processes.

In that case a particular inarticulate, vulnerable and disadvantaged end-consumer of heated water was threatened with disconnection of heated water services if he failed to provide identification and contact details and form an explicit contract with a supplier of energy unable to demonstrate that gas had been supplied using a meter as defined in the GIA, but instead had, under policy instructions used a water meter to measure water volume allegedly used from a communal water tank heated by a single energization point on common property infrastructure. No water dial readings were provided. No justification as to why supply as defined in the GIA was not demonstrable. No explanation as to calculations and how derived; redirection to complaints redress or hardship policies if required; no rationale basis upon which deemed status was imposed.
In a particular vulnerable state soon after hospitalization for incurable mental health conditions and a past history of suicide, the pressure of such demands were instrumental in triggering an explicit suicide plan, the execution of was narrowly averted. Now that the matter is closed the supplier claims the right to continue with issuing "vacant consumption letters warning of disconnection if conditions precedent or subsequent are not met. The supply is to the Landlord/Owner not Tenant. The Tenant receives a composite water product reticulated in water service pipes. That water is certainly heated – by arrangement with the Landlord, who takes supply at a single energization point on common property at the only supply address associated with that supply point with an MIRN number. Other tenants on the same block have received similar demands, many with language barriers or other impediments to understanding their rights and options. The residential tenancy provisions are explicit as to Landlord responsibilities if there is no meter (as defined in the GIA) through which energy consumption can be measured through legally traceable means. The Law needs to include re-clarification

Section 43A of the *GIA*. Terms and conditions of contracts for sale of gas to certain customers: refer to express expectations of disconnection of gas. No reference to heated water products. See comments under VESC above and extract from 43A *GIA.*

Matters of relevance to National Measurement Institute

Please refer to previous extensive written submissions to the Discussion Paper and directly to the NMI.

The NMI regulations and in particular Part V 18R are of particular note.

This submission extensively discusses anomalies and concerns about trade measurement practices and how this may be sitting uncomfortably with the existing philosophies of the NMI to seek commitment to legally traceable means of measuring goods and services and achieving accountability. The BHW provisions appear to contravene at least the spirit and intent of the legislation. There are equity issues and regulatory overlap with other schemes including the NMI provisions and residential tenancy provisions.

The derived formulae being used are based on reading water volume using hot water flow meters that are designed to withstand heat but not to measure any form of energy, or related factors such as ambience, heating value, pressure and the like.

Individual recipients of heated water as a composite product are being held contractually responsible for taking supply of energy, where in fact the energy is supplied to the Landlord through gas transmission pipes or electrical cables to a single communal water tank,. From there heated water reaches individual tenants in their apartments in water pipes.

No energization exists. No flow of gas or conduction of electricity occurs in transmitting the heated water to these apartments. The deemed consumption of energy cannot possibly be measured in a legally traceable say.

It is unclear what specific monitored accountabilities there are for maintenance of these devices that are used as if they were gas meters to derive costs based on water meter reading to guestimate deemed gas and electricity usage for energy supplied in transmission pipes to a communal water tank and thence in heated composite product form to individual apartments devoid of energization, supply points; supply addresses (which does not mean square footage but rather has the technical meaning of a supply point and is synonymous with that definition.

The National Energy Consumer Framework (NECF) has introduced the term energization. Those buildings with BHW systems have a new supply once and thereafter gas or electricity is supplied indefinitely. The energy used heats a communal water tank. The heated water is transmitted in water pipes not gas service or transmission pipes. The same applies to electric systems using single supply points to communal heat water.

Matters of interest to MCE Energy Reform Implementation Group

All matters impacting strategic planning during the reform process and subsequent reviews of efficacy; harmonization, clarification of certain matters within the Law; definitions; regulatory overlap considerations.

Matters interest to MCE Retail Policy Working Group

Since all of these matters are of direct relevance to jurisdictions participating in the NECF and since the RPWG is considering all submissions, the matters contained in this component submission and all related submissions are crucial before jurisdictional rules are adopted to achieve consistency but without eliminating existing perceived flaws in conceptual thinking.

Matters of interest to the MCE Network Policy Working Group

Since the contractual model for BHW arrangements relies on derived costs using water meters instead of gas or electricity meters as the instrument of measurement to calculate deemed energy usage, the matters are of crucial importance to the NPWG, not only in terms of consumer protection, but also harmony with other schemes, including national trade measurement provisions and the policy parameters embraced by the National Measurement Institute.

The methodologies used are inconsistent with current provisions under the GIA for distribution, supply and sale of energy and calculation through means of a meter as an instrument which measures the quantity of gas that passes through it to filter control and regulate and flow of gas.

Since the thrust of this submission and Part 2B is focused on proper contractual allocation, and since existing measurement and pricing methods appear to be in conflict with legislative provisions current and proposed, this matter needs addressing within the economic steam. This is discussed in more detail elsewhere.

The transfer of the majority of the existing Victorian BHW provisions to the *Energy Retail Code* appear to be an attempt in the one document to differentiate these provisions from all others by entirely re-defining meters as devices which measure hot water consumption rather than energy consumption.

The provisions imply that alternative definitions for disconnection and decommissioning may also apply, with failure to produce acceptable identification or alleged denial of access to meters triggering justification to threaten and then effect disconnection of hot water supplies (not energy which would affect all tenants in individual apartments residing at the same overall rented property address.

The derived formulae relying on finding a legitimate correlation between water volume consumption and gas consumption is based on flawed reasoning.

The reasoning behind the adoption of a deriving a cost in the first place is questionable.

In any case it is one thing deciding on a derived cost principle, and another adopting a derived cost for the express purpose of creating a contractual model deeming an end-consumer of heated water products to be responsible for energy supplied to a single energization point, which according to existing legislation is also a single billing point if the supply point was in existence prior to 1 July 1997, which is the case in the vast majority of privately-owned buildings that are multi-tenanted dwellings.

The process of arriving at a derived cost by using water meters does not make sense. If the landlord is responsible for the supply costs and supply of energy on the basis of there being a single energization point, all that is required is for the single bulk energy meter to be read to ascertain how much gas or electricity was used. This would save on all administrative costs associated with calculation and billing, and in theory bring costs down.

Matters of interest to Australian Competition and Consumer Commission (ACCC) and Australian Energy Regulation (AER)

Given imminent transfer of retail policy for gas to the AER in 2010 some relevant historical and current details and highlights are summarized for attention as they impact on the operation of the market, contractual considerations, trade measurement considerations and how jurisdictional provisions sit with the proposed NECF. There are many gaps in clarification which will be taken up with the MCE SCO NECF directly. They will also receive this submission to add to other material previously sent.

The ACCC has a responsibility to consumers and works with the CAV and AER under Memoranda of Understanding. These issues are being drawn to ACCC attention again

Matters of interest to Productivity Commission

These issues illustrate matters relating to regulatory reform and benchmarking – of topical interest to the PC. The thrust of these matters is not new and was brought to the attention of the PC during the Review of Australia's Consumer Policy Framework earlier this year with supporting material and open submissions.

Please refer to conclusions and recommendations at the end of this component submission Part 2A.

GENERAL COMMENTS ON POLICY PARAMETERS VESC, REGULATORY REVIEW (2008)

and

MCE SCO TABLE OF RECOMMENDATIONS AND POLICY PAPER

There is a good reason for making a combined response to aspects of the Essential Services Commission Victoria (VESC) current Regulatory Review, and to the Ministerial Council on Energy Standing Committee of Office Table of Recommendations and Policy Paper (MCE SCO TOR) and the National Measurement Institute (NMI); on the basis of overlapping policy parameters and proposed amendment to Laws and Rules in the move towards best practice nationalization.

With the lofty goal in mind of re-raising community awareness of the anomalies that exist that may be seriously hampering consumer protection and best business and trade measurement practices.

The compacted deadlines for the latter with responses expected by 12 September 2008, after online publication three weeks earlier on 27 August will make effective consultative feedback from interested stakeholders almost impossible to achieve.

The leeway offered by the MCE SCO is much appreciated with late submission, bearing in mind also that the MCE SCO will also be interested in the material to be included within the Rules and how consistency between jurisdictions may be effectively achievable. In any case various MCE arenas including the Retail Policy Working Group (RPWG); the Energy Reform Implementation Group (ERIG) and the Department of Resources Energy and Trade have already been alerted to some of the issues in previous submissions.

The National Measurement Institute is already aware of some issues raised in the context of their Discussion Paper on Trade Measurement. This material supplements all other communications with the view of refreshing awareness. It is my view that though much of the focus of the NMI is on patenting authorizations for trade measurement and regulations for metering maintenance, these issues need to be viewed in the broader context of consumer impacts and minimal standards of accountability in business practice generally.

Consumer Affairs Victoria is aware of some of the issues more narrowly focused on Bulk Hot Water Contractual and Calculation arrangements, now under DPI policy control. I had written to the CAV at length during 2007 and discuss some of these issues under Part 2A.

The Productivity Commission received multiple submissions from me during the review of Australia's Consumer Policy Framework, some of which were exclusive to energy matters and deal at some length with issues surrounding current arrangements for BHW provision, including deidentified case studies and discussions of existing complaints handling mechanisms under industry-specific schemes.

I had cut no corners in expressing reservations about the level and depth of assistance obtainable under current programs (see particularly subdrdr242Parts4-5). I discuss these now in a companion submission dedicated to energy arenas, including the MCE SCO Table of recommendations for the national Energy Consumer Framework, the Essential Services Commission Victoria (VESC), the Department of Primary Industries and others.

These parties, and others, including the MCE arenas, RPWG, ERIG, ACCC, AER, NMI and CHOICE had been also targeted at various times during 2007 and 2008 with particular submissions including detailed discussion of legal and technical matters that impact on aspects of the contractual governance model adopted by the NECF as contained within this component submission in several sections (Submission 2).

Time constraints prevent as thorough a treatment of certain issues as may have been possible with more time and fewer conflicting priorities.

Failure to comment on any aspect of the NECF TOR or the Victorian ESC Regulatory Review Stage 1 Draft Report and Stage 2 (when this is published) does not mean endorsement, but rather simply time constraints hampering ability to respond in detail, more especially since most discussions have taken place behind locked doors amongst parties forming part of the Consumer Consultative Committee and did not include other stakeholders. The Working Papers for Stage 1 and 2 discussions were not published transparently and are still not available online.

This section comments on selected components of the SCO Table of Recommendations (TOR) and components of the VESC Regulatory Review.

Time constraints prevent through examination of all issues on the table for public consultation. Concurrently run public consultation processes with short lead times require choices to be made regarding priorities. The regulatory burdens on well-resourced corporate energy providers has been much discussed.

I applaud moves to reduce regulatory burdens where appropriate and where best practice is adopted in either repeal or retention of instruments that hamper either productivity goals in an economic sense, or adversely impact on consumer protection.

As observed in Completing competition reforms and further reducing the regulatory burden Chapter 5: The national reform agenda: origins and objectives[17]

> *"In 2006, progress was made at the national level on reducing the regulatory burden. The COAG Communiqué of February 2006 notes that COAG has agreed 'to a range of measures to ensure best practice regulation making and review and to make 'down payment' on regulatory reduction by taking action now to reduce specific regulation 'hotspots' (COAG 2006). "*
>
> *Following the February 2006 decision, jurisdictions have been working together on a range of issues. This includes best practice regulation making within jurisdictions through improved gate keeping processes and across jurisdictions through developing principles for determining when uniform, harmonised or jurisdiction specific regulation is 'best'*

Of course it is commendable that moves are in place to achieve uniform, harmonized or best practice jurisdiction-specific regulation. However, the emphasis needs to be on best practice when regulations are jurisdiction-specific

In the case of the BHW guidelines, it is eminently questionable whether these provisions can be said to be best practice at all.

As published on Victorian Department of Treasury and Finance Website:

> *"The Victorian Government announced the Reducing the Regulatory Burden initiative in the 2006/07 Budget. Ensuring that regulation is appropriate and that there is no unnecessary burden on business and not-for-profit organisations is a key priority."*
>
> *Under the Reducing the Regulatory Burden initiative, the Government has committed to reduce the administrative burden of State regulation as at 1 July 2006 by 15 per cent over three years and 25 per cent over five years."*
>
> *"The Government recognises that high quality regulation depends upon a long-term program for reform. There is no quick fix solution to reducing the burden of regulation and so the commitment to regulatory reform must be sustained in future years." (Next Steps p9)*

[17] *http://epress.anu.edu.au/anzsog/minding_gap/mobile_devices/ch05s05.html*

The Laws and Rules the National Energy Consumer Framework (NECF) governing the role of distributors, retailers and customers in relation to the retail supply of energy to customers forming need to respect and uphold other regulatory schemes as well as the rights of consumers within those schemes.

Following discussion of some general governance considerations, consultative issues and general principles of regulatory burden initiatives, the submission is divided into small components as follows.

GENERAL COMMENTS ON POLICY PARAMETERS VESC, REGULATORY REVIEW 2008

and

MCE SCO TABLE OF RECOMMENDATIONS AND POLICY PAPER

There is a good reason for making a combined response to and to aspects of the Essential Services Commission Victoria (VESC) current Regulatory Review, the MCE SCO Table of Recommendations and the National Measurement Institute (NMI); on the basis of overlapping policy parameters and proposed amendment to Laws and Rules in the move towards best practice nationalization.

With the lofty goal in mind of re-raising community awareness of the anomalies that exist that may be seriously hampering consumer protection and best business and trade measurement practices.

The compacted deadlines for the latter with responses expected by 12 September 2008, after online publication three weeks earlier on 27 August will make effective consultative feedback from interested stakeholders almost impossible to achieve.

The leeway offered by the MCE SCO is much appreciated with late submission, bearing in mind also that the MCE SCO will also be interested in the material to be included within the Rules and how consistency between jurisdictions may be effectively achievable.

In any case various MCE arenas including the Retail Policy Working Group (RPWG); the Energy Reform Implementation Group (ERIG) and the Department of Resources Energy and Trade (MCE-RET) have already been alerted to some of the issues in previous submissions. The economic streams also need to consider the current pricing practices through conversion factor formulae relying on water meter readings. The practices used would make any legal metrologist blush with embarrassment. The intentions and provisions of the GIA and Gas Code seem to have become distorted beyond recognition.

GENERAL COMMENT ON VESC CONSULTATION PROCESSES

The VESC Guideline No 20: Bulk Hot Water Charging Guideline, since 1 January 2008, under the policy control of the DPI specifies the requirements for energy retailers charging for delivery of electric bulk hot water or gas bulk hot water to customers from gas or electrical distribution systems.

The VESC as part of its Regulatory Review published online on 25 August 2008 a Draft Decision, without it seems undertaking a robust and transparent consultation process in several stages as is normally expected, to repeal this Guideline, which has been the subject of protracted attack as being an unfair provision adversely impacting on the enshrined contractual and other rights of end-users of bulk energy without energization points expected to form contractual relationships on a deemed contract basis with energy providers licenced to sell gas or electricity but not composite products.

Since Victoria is aiming to *"lead to way"* to other States at different stages of competitive progression, it is crucial that robust consultation is effected and that all deliberative documents and consultative inputs are transparently reported online. This principle applies to all jurisdictional and national consultative initiatives.

Major changes have already been undertaken through transfer on 1 January 2008 from the ESC to the DPI of most policy matters related to the operation of the soon to be repealed BHW Charging Guideline, and adoption of a Draft Decision for the VESC Regulatory Review, without it seems, a robust and transparent consultation exercise being undertaken for the large range of instruments to be repealed or amended as part of the Review.

Most discussions concerning the ESC Regulatory Review have taken place behind locked doors including only an invited group belonging to a Consumer Consultative Committee (CCC).

The VESC Issues Paper for the current Regulatory Review summarizing initial responses from 14 stakeholders was tabled at closed meetings of the CCC in May and June 2008 respectively, following announcement of the Regulatory Review process in February. Stakeholders expressing an interest in openly participating in these arenas were disallowed from doing so. The Issues Paper itself produced in April 2008 and tabled for the participants for May meetings, which is not published online mentions 12 stakeholders

The Issues Paper reports that was a brief joint submission from CUAC, CALC and St Vincent de Paul in response to the February Open Letter of invitation.

There was a submission from EWOV the industry-specific complaints scheme funded and managed by industry participants. Utility Choice a price comparison service made a submission to the Open Stakeholder invitation. All other participants were industry based, including ERA, Origin Energy, Simply Energy, SPAusNet; TRUenergy, and United Energy Distribution, Alinta AE and Multinet Gas, who are now under Altina, taken over by the consortium Babcock and Brown and Singapore Power, the latter government-owned. AGL is part of that group. Though the highlights of those submissions are mentioned in the Issues Paper – not published online, the submissions to the Review are available. Scant information is made of discussions about the BHW arrangements, or proposal to repeal and transfer, though some industry stakeholders would prefer to see changes deferred till the NECF has a more settled position on final outcomes.

The single public meeting held on 5 August 2007 was not announced in the usual way for stakeholders on the ESC email mailing list, and it was unclear where this was intended to Detailed outcomes of discussions, that is outcomes of Working Papers and discussions undertaken by working groups that have taken place in this way have not been published online.

There are two visible consultative documents openly accessible online. These are the original Open Letter in February 2008 re Consultation that failed to specify the instruments or parameters to be considered; and a VESC Draft Decision dated 25 August 2007 which appeared online on 27 August.

It is of concern that all consultative documentation and discussion documents are not accessible online in connection with the entire Review of Regulatory Instruments – Stage 1 Draft Decision of 25 August, as published on 27 August 2008.

The May Issues Paper that was privately circulated or tabled to members of the Customer Consultative Committee (CCC) in time in May 2008 has not been published online for other interested stakeholders to study and respond.

No-one should have to specifically ask for a personal copy of an Issues Paper or any other consultative document. An attitude of transparency as espoused under the parameters of such bodies as the Victorian Competition and Efficiency, requires

- *a transparent regulatory decision making process through mandatory public consultation on regulatory proposals;*
- *the ongoing commitment to comprehensive public inquiries into regulatory matters conducted by the VCEC and the State Services Authority.*

A token poorly publicized public meeting at the end of the decision making process to *"inform the general public"* can hardly be taken as a consultative exercise involving the wider community.

The Retail Policy Working Group (RPWG) had undertaken several internal discussions with those belonging to the Group, but outcomes were transparently published and stakeholder input solicited. This is their stand policy though often timelines for response are less than optimal especially given competing demands, conflicting priorities, funding problems, especially in the community arena and individual stakeholders. All such consultative initiatives should embrace the principles of robust consultation with adequate lead time.

If well-resourced commercial companies are struggling to undertake meaningful dialogue because of time constraints, how must under-funded community organizations and individuals feel about the stresses and pressures of stakeholder involvement in public policy decisions?

The lead time proffered in the case of the VESC Regulatory Review Stage 1 of 3 weeks from date of publication of Draft Decision to response date three weeks hence was inadequate to secure widespread community awareness and response time.

This is to be immediately followed by a further Draft Decision on another clutch of instruments to be reviewed, repealed or changed in some way. The response burden on all stakeholders is considerable.

The energy area impacts of every member of every community. Policy impacts are widespread and far-reaching.

Many have expressed concerns about the manner in which far-reaching decisions have been taken across the board at both jurisdictional and federal levels that have not considered the correlation between decisions taken in isolation to others.

Maybe there is room for a broader sweep, enhanced governance at the early stages of planning and a truly joined-up Government approach that is well informed and has had the opportunity to gain wide inputs from many sources. A closed door policy that makes most decisions behind those doors is not a robust one.

Given that there are some 17 of 31 instruments being reviewed or repealed, it would have been most helpful for all consultative documentation and records of discussions to be readily accessible online.

In 2004 and 2005, at the time that of deliberations over the BHW Charging Guideline, deliberative documents were not readily accessible online. They were not made available till many months after the lodgment of a specific unresolved complaint that remained outstanding for 18 months, with the crux of the debate being over who the proper contractual party should be.

At the time of adoption of the VESC BHW Charging Guideline 20(1) and the preceding deliberative discussions, nothing at all was transparent in terms of online publishing of the deliberative processes.

Initially efforts were thwarted to seek policy clarification about the interpretation, application and effect of the BHW Guideline from both EWOV and ESC during the course of a complaint that remains unresolved after the 18 months that it was open before the existing Victorian industry-specific complaints scheme, and the VESC. Ultimately the Guideline and its associated deliberative documents from 2004 and 2005 discussions were made available online during mid-2007. Repeal of the Guideline may not make the historical matters and original rationale less accessible, if at all. This is regrettable.

Since the VESC has relinquished most responsibility for these provisions to the DPI save for what is included on bills, it is not certain whether the original documentation will continue to be readily available for scrutiny.

BRIEF COMMENT ON SCO MCE GOVERNANCE MODEL

The SCO Policy Paper has advised as follows:

> ***Extract MCE SCO Policy Paper Governance –***
>
> *There will be a single set of rules for gas and for electricity to allow stakeholders (particularly customers) ease of access to the new national customer framework – the National Energy Customer Rules. There is, however, no proposal to consolidate the National Electricity Law (NEL) and the National Gas Law (NGL) regimes other than the introduction of a common set of retail customer rules.*
>
> *The new national customer framework will also utilize a contractual model to regulate the arrangements between:*
>
> - *retailers and customers;*
> - *distributors and customers; and*
> - *distributors and retailers.*
>
> *Model terms and conditions for standard retail contracts and minimum terms for market retail contracts, for supply of energy to customers, are to be set out in the Rules.*
>
> *There will be a deemed customer distribution contract between a distributor and a retail customer taking supply via that distributor's network. The customer distribution contract will be set out as model terms in the Rules, and will be supported by direct obligations on distributors in the Rules.*
>
> *In addition, a Retail Support Contract (RSC) between retailers and distributors will be set out in the Rules to regulate the issues that arise upon the retailer supplying a customer connected to the distributor's network*

MK COMMENT

Some key issues being addressed relate to the broad governance model outlined in the MCE SCO Policy Paper. These issues are crucial to the development of jurisdictional Rules and the plan to harmonize these throughout the States and Territories who will participate in the NECF.

The SCO MCE Table of Recommendations acknowledges that the shift from six jurisdictional retail supply regimes for both electricity and gas to a single national regime is a major regulatory transition, especially since current arrangements, whilst sharing similarities, have developed in different contexts and have had different starting points for the transition.

Since so many of the specific recommendations under MCE SCO Parts 1-6 are impacted by the following considerations, I deal with some general principles relating to contractual matters, regulatory overlap with other schemes and some trade measurement considerations with particular emphasis on the compromised rights of residential tenants and under multiple provisions in the written and unwritten, including common and contractual law; and the rules of natural justices, and under specific enactments such as residential tenancy provisions. Once those principles are aired I will proceed to make additional comments to clarify selected issues under the headings provided.

The annotated contents page details the structure of this component submission and the particular sections of the MCE SCO TOR as well as the VESC Regulatory Review Stage 1 that are targeted in this somewhat narrowly focused submission.

Though time constraints have not permitted response to each component of either the VESC Review or the MCE SCO TOR, many of the issues are more generally addressed in updated submissions that were originally prepared for the Productivity Commission.

Parts 3- 5 deal more generally with consumer policies and regulatory reform issues, whilst Parts 6-9 are entirely energy focused with more technical emphasis on pertinent issues. Therefore all components, which are summarized in Part 1 as an overall Overview with several appendices should be viewed as a whole, though each component can stand alone. Parts 1-9 each contains an annotated table of contents and a dedicated executive summary.

COMMENT ON 1.1 BACKGROUND TO THE VESC REGULATORY REVIEW

The ESC explains that prior to the establishment of the Essential Services Commission set up in 2001 under the Essential Services Act 2001 (ESC Act), its predecessor the Office o the Regulator-General (the ORG) had put into place a suite of regulatory protections to ensure small customer protection in terms of continued access to essential energy supply on fair and reasonable terms, and also provisions for efficient and effective competition in the market.

The need to create service standards and address perceived market failure had heralded new guidelines.

Though the market has evolved significantly since 2001, the findings of the Australian Energy Market Commission (AEMC) regarding the effectiveness of competition in Victoria have not been supported by all stakeholders

I believe that there is a range of significant gaps in the assessment made. I had included a summary of some of these in submissions to the Productivity Commission and believe there is some merit in attaching at least the summary to each component submission to current jurisdictional and national initiatives as an ongoing reminder of at least some of the perceived gaps when decisions are being made to prune regulatory burdens based on *"effective competition"* markers, more so because of the pressure to reduce regulatory burdens across the board.

It makes good sense to rationalize and harmonize regulation in the move towards nationalization, but I reflect the concerns of others that the exercise does not erode consumer protection in the enthusiasm to reduce the costs of regulatory compliance.

Therefore it is encouraging that a National Energy Consumer Framework is being adopted which justifies a review of jurisdictional regulatory burdens where pruning of overlapping regulation can be achieved without compromise to consumer protections.

Edmund Chattoe has raised the issue of whether sociologists and economics can effectively dialogue[18]. This is discussed in a component submission elsewhere.

It is of concern that the social objectives previously included within the *Essential Services Act 2001* (Victoria) are to be removed, since most Australian citizens as consumers would consider that it is the responsibility of the community as a whole to address the needs of those most disadvantaged and for there to be a shared responsibility to ensure health safety and well-being parameters in developing a workable and effective consumer policy framework for energy.

It is not only the disadvantaged who may suffer from over-emphasis of commercial goals to achieve efficiency in the alleged *"long-term interests of consumers,"* often expressed as achievable by a predominant focus of economic efficiency and economically effective competition, expected to automatically benefit consumers, whether or not these means stripping them of important and enshrined rights.

---

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

Arrangements to deal with hardship issues through other means does not mean that other consumer objectives, social and moral obligations are dispensable

Even those without such disadvantage, which is not restricted to financial hardship, have rights that deserve to be upheld. For example unjust imposition of contractual status on private citizens as end-users of energy is unjust whether or not there are any considerations of disadvantage.

Many of the consumer protection instruments in place at jurisdictional level have so heavily focused on hardship matters that other issues impacting on the general population who cannot claim hardship may have been overlooked.

It may be a good time to re-evaluate whether access to energy is available to end-consumers, both small residential customers and small business customers on fair and reasonable terms or whether their needs and concerns are become the target for progressive erosion

Comment on 1.2 Legislative Framework for Draft Decision VESC Regulatory Review August 2008

The legislative framework for the VESC Draft decision in this review (p2) is described broadly as under (1) below taken directly from the revised *ESC Act 2001* with amendments up to 1 January 2008

> *(1) In performing its functions and exercising its powers, the primary objective of the Commission is to protect the long term interests of Victorian consumers with regard to the price, quality and reliability of essential services.*
>
> *(2) In seeking to achieve its primary objective, the Commission must have regard to the following facilitating objectives-*
>
> *(a) to facilitate efficiency in regulated industries and the incentive for efficient long-term investment;*
>
> *(b) to facilitate the financial viability of regulated industries;*
>
> *(c) to ensure that the misuse of monopoly or non-transitory market power is prevented;*
>
> *(d) to facilitate effective competition and promote competitive market conduct;*
>
> *(e) to ensure that regulatory decision making has regard to the relevant health, safety, environmental and social legislation applying to the regulated industry;*
>
> *(f) to ensure that users and consumers (including low-income or vulnerable customers) benefit from the gains from competition and efficiency;*
>
> *(g) to promote consistency in regulation between States and on a national basis.*

(3) Without derogating from subsections (1) and (2), the Commission must also perform its functions and exercise its powers in such a manner as the Commission considers best achieves any objectives specified in the relevant legislation under which a regulated industry operates.

The need for consistency in regulation between States and on a national basis has been recognized by the VESC and is a goal supported by many stakeholders as being appropriate and timely as nationalization initiatives are planned and consolidated.

The decision by the ESC to streamline the regulatory framework has triggered review of its codes and guidelines, of which 17 instruments are targeted for Stage 1 review, with Stage 2 following on its heels during September, placing enormous response3 burdens on interested stakeholders within very short timeframes.

Stage 1 includes 17 of 31 Codes and Guidelines for stakeholder response and review.

Of these this component submission targets in particular Guideline 20(1) Bulk Hot Water Pricing and Charging and related components of the Wrongful Disconnection Provisions.

1.4 It is commendable that the VESC's review is not intended to significantly change the fundamental customer protections in Victoria and that it expects that any substantive changes to the customer protection regulation for Victorian customers will be implemented in accordance with the MCE's decision on the national framework

1.5 Purpose of the Draft Decision (VESC Regulatory Review Stage 1)

I note that the VESC State I Review includes proposals for amendments to the Energy Retail Code (ERC), the Code of Conduct for Marketing Energy Retail in Victoria (the Marketing Code) and the Electricity Customer Metering Code (ECMC), as well as the real of certain energy retail guidelines.

The timescales provided for proper consideration of all Stage 1 proposals before publishing a final decision, coming at a time of demands also in other related arenas and the National Energy Consumer Framework Proposals.

No sooner would the effort been placed into responding to this batch, than the ESC proposes to publish another Draft Decision for Stage 2 proposals.

Though the VESC has mentioned robust stakeholder consultation, the Issues Paper for the Stage 1 proposals contained in this Draft Decision is nowhere to be found online.

The elitist Consultative Consumer Committee may well have had many opportunities to study these matters and ready access to tabled Issues Papers and Working Documents, but other interested opportunities were excluded from those process and access to documents, including summaries of Working Group recommendations

At the very least the Issues Paper should be a readily accessible document online. Very much at the last minute a matter of days before expiry of the deadline for response to the VESC Draft Decision, as a stakeholder who had expressed an interest in the regulatory review I was provided with a personal .pdf copy of the Issues Paper, too late to have time to study this and incorporate considered responses.

The Draft Decision fails to mention the input of those who submitted privileged or informal material that was pertinent to the Review especially in relation to BHW matters, even though it had been indicated that such material would be taken into account.

This goes towards issues of process relating to transparency accountability and procedural conduct of such Reviews. These are not new concepts since the question of robust and transparent meaningful stakeholder consultation has been raised on numerous occasions by many parties participating in various jurisdictional and national consultative initiatives.

The proposal to repeal the BHW Guideline has been rationalized, but there are concerns that the VESC and DPI may believe that merely transferring most of its provisions and moving from existing deliberative documents associated with the Guideline dating back to 2004 and 2005 certain provisions relating to perceptions of contractual status that can be imposed on end users of hot water services centrally heated on common property infrastructure will have the effect of re-writing contractual law, tenancy law, owners corporation provisions, trade measurement provisions and the provisions within the unwritten laws including natural and social justice rules.

Shown below is an excerpt from the ESC Review approach identified in the Draft Decision (p9) published on 25 August 2008 for stakeholder response by 12 September.

It is noted that there are different definitions within jurisdictions for small customer. However, these all appear to be based on threshold levels. In addition other terms such as *"relevant customer"* and *"prescribed customer"*[19] are important distinctions. I will discuss within this submission jointly to the MCE SCO and to the VESC Regulatory Review.

In Section 2 dedicated mostly to contractual, technical and trade measurement considerations relating to BHW arrangements and embedded customers I highlight some crucial considerations are fundamental to the proper definition of the contractual party, disconnection procedures and provisions; wrongful disconnection provisions, leaving aside the broader considerations of regulatory overlap with other schemes, notably the explicit and unambiguous provisions of the *Residential Tenancies Act 1997*.

[19] Prescribed customer in the Victorian provisions is described as

FURTHER SELECTED GENERAL DISCUSSION OF REGULATORY REFORM PHILOSOPHIES

As mentioned in a submission to the Productivity Commission's Review of Australia's Consumer Policy Framework, the Senate Select Committee had made these important findings in 2000, which advisers, politicians, policy-makers, and regulators would do well to heed and re-consider in the light of current regulatory reform programs:

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

> *"The Senate Select Committee had found that social services were not shown to improve during NCP.*[20] *The SSC took seriously the suggestions in many submissions that some aspects of NCP and its administration would appear to be in conflict with the principles of good health community and social welfare service provision. That Committee's findings in terms of competition policy and its impacts are further discussed elsewhere.*
>
> *Whilst the Senate Select Committee did not seek to duplicate the work done by the Productivity Commission and the Committee confirmed that there were overall benefits to the community of national competition policy it found that those benefits had not been distributed equitably across the country. Whilst larger business and many residents in metropolitan areas or larger provincial areas made gains residents from smaller towns did not benefit from NCP."*

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

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

The opening line of Chapter 5 of the SSC Report on the Socio-Economic Consequences of Competition Policy.[21]

> *"Market forces are global but the social fallout that policy makers have to manage are local"*[22]

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

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

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

[21] Ibid SCC (2000) *"Riding the Waves of Change"*

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

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

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

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

The Senate Select Committee's 2000 enquiry found that in terms of dealing effectively with hardship policies implemented or contracted out by the government it did not work to shift responsibility to

> *"bloody awful agencies which ought to be defunded"*

Why should the public have any confidence that the arrangements will be any more effective now in a climate of uncertainty, rising prices and cutbacks? Social security agencies are already taking up the option of bundling relief provisions but expecting vulnerable consumers to make a choice as to which service they wish to use subsidies for. Just how service guarantees will be made for essential services is yet to be outlined.

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

In Section 5 of his 2006 provocative paper about regulatory policy and reform[23], Peter Kell discusses the importance of effective regulators in a:

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

As pointed out by PILCH

> *Less than 10 per cent of corporations demonstrate a developed understanding of the relationship between corporate social responsibility and business.* [24].

[23] Kell, Peter (2006) *"Consumers, Risk and Regulation."* Published speech delivered by Peter Kell at the National Consumer Congress 17 March 2006

[24] PILCH (2005) Submission to the Parliamentary Joint Committee on Corporations and Financial Services Select Senate Committee Inquiry into Corporate Social Responsibility (July), Executive Summary Overview (cited in my Part 2 submission to the PC DR)
Found at
http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/submissions/sub04.pdf

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

> ***Conclusions***
>
> *The debate we need to have on consumer protection regulation in Australia is yet to come. A proper evaluation of the aims and structure of consumer protection is needed, so that regulation better serves consumers today and into the future. But this won't occur if we start from positions that suggest that consumers are already over-protection, and that regulatory developments in recent years are unreasonable attempts to further reduce the risks they face.*
>
> *We also won't see key consumer protection regulators given the right tools and objectives.*
>
> *As part of my review of consumer protection there is certainly scope to have a debate about the appropriate level of risk that consumers should carry in different circumstances. Indeed this should be one of the key questions that anyone with an interest in consumer policy needs to address. But this needs to be informed by a realistic assessment of the types of risks that consumers face today in an increasingly globalized financial system, as well as an assessment of the impacts of these risks – both positive and negative. It also needs to be informed by a more sober assessment f the way in which a range of major regulator developments in recent times actually shift risks to consumers away from government and firms. We've yet to see this work take place in the current round of regulatory review.*

In the previous year Peter Kell provided another provocative speech, also at the NCC[25]

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

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

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

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

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

I quote from Peter Kell's 2006 Speech at the NCC[26]

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

Jamison (2005) claims that

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

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

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

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

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

---

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

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

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

Reducing the Regulatory Burden[27]

Forward

Reducing the Regulatory Burden

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

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

Under the initiative the Government has committed to:

- *reducing the administrative burden of State regulation as at 1 July 2006 by 15 per cent over three years and 25 per cent over five years.*
- *reviewing key areas of compliance burden*
- *offsetting simplifications to any new or additional administrative or compliance burdens imposed by regulations made after 1 July 2006.*

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

The Department of Primary Industry is committed to the efficient development of regulation. The Department has prepared a detailed Three Year Administrative Burden Reduction Plan to address the administrative burden imposed on business by its stock of regulation. The Department is also undertaking a programme of reviews to identify the necessary actions to reduce compliance burdens.

The reviews and the initiatives outlined in the Three Year Administrative Burden Reduction Plan are focused on the identification of areas of regulation which impose significant cost to business as well as those that are scheduled for review through the normal operation of legislative process. Some of the reviews to date are:

I show below the Context of the Victorian Reduction of Regulatory Burden statement of in terms of Reducing the Regulatory Burden[28], with reference to National Competition Policy[29]

(1) Context p2

(2) "The Victorian Government recognises that good regulation will protect the community and the environment, while underpinning efficient and well functioning market economies.

(3) Conversely, ineffective regulation can both hinder economic activity and defeat the intended objectives of the regulation.

(4) The Victorian Government also recognises that the cumulative impact of regulation may affect business investment decisions.

(5) The Government is aware that the burden of much regulation falls disproportionately on small organisations. Reforms that reduce burdens, without compromising policy objectives, are good for all Victorians.

---

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

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

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

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

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

(9) Statement of Commitment, p 3

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

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

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

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

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

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

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

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

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

(19) *John Brumby MP Treasurer*[30]

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

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

P8

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

(21) Compliance burden is the additional cost incurred by organisations in order to adhere to legal requirements. For example this could include the purchase of additional equipment to comply with food safety regulation or to meet environmental standards for the disposal of industrial waste.

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

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

P9

> *(23) The Government is committed to identifying priority areas for review and establishing timelines for completion of these reviews.*
>
> *(24) The reviews will be undertaken and specific reforms developed to reduce the burden of regulation.*
>
> *(25) As with the National Competition Policy, some reviews will be done in-house while others may be undertaken through a public process.*
>
> *(26) This program of reviews will be combined with incentive payments to reward outcomes which reduce the regulatory burden.*
>
> *(27) In some cases, such as particularly complex areas or those which involve multiple departments, it may be more appropriate for the Victorian Competition and Efficiency Commission (VCEC) to undertake the review.*

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

The concepts are still applicable to countries like Australia that are not termed *"developing"*

Jamison et al (2005)[31] cite a selection of authors who have written in the relationship between the urban poor to private infrastructure.

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

> *"policymakers consider the market structure and potential for entry before entering into privatization contracts."*

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

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

Cowan and Tynan (1999)[32] as cited by *Jamison et al (2005)* that contracts need to achieve the following:

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

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

> ***1.*** *Macroeconomic and microeconomic linkages between infrastructure reform and the poor and discusses setting priorities*
>
> ***2.*** *Describes reforms' impacts on access and affordability for the poor;*
>
> ***3.*** *Discusses approaches for improving access for the poor, including operator obligations, connection targets, low cost technologies, subsidies and cross-subsidies, and open entry;*

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

> ***4.*** *Describes approaches for improving affordability, including lifeline subsidies, means-tested subsidies, vouchers, balancing connection and usage charges, billing options, and prepaid service.*
>
> *If these issues can be sensible targeted through such reviews we will all be better off. But in the current climate it is all too common to see less sensible arguments used to justify less regulation. Instead of a constructive evaluation of different regulatory options and their potential outcomes, we get undifferentiated attacks on regulation and regulators, often driven by barely concealed self-interest.*
>
> *We also see the inevitable return of the simplistic 'quantity theory of regulation." Where the desirability of regulation is simply related to the question of 'how much' rather than whether it is effective.*

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

However, the weaknesses are significant and caution needs to be exercised in deeming current provisions adequate, mostly meeting need, with gaps fixable by greater use of existing mechanisms and co-regulatory practices[33] Kell goes further, suggesting that

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

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

[33] Ibid Kell (2005) "*Keeping the Bastards Honest – Forty Years on…." NCC*

I refer again to the speech delivered by Peter Kell[34] as CEO of the Australian Consumer's Association at the National Consumer Congress in Melbourne in 2005[35]

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

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

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

---

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

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

In his 2005 speech Peter Kell examines the (then) proposed review and asks whether a review of consumer protection along the lines proposed was warranted[36] Peter Kell's words were[37]:

> *Now, at the outset, let me say that ACA supports a review of consumer protection policy and we support it, I hasten to add, despite the fact that we see some significant risks associated with such an exercise. Some of those risks are already apparent in the way that the Productivity Commission talks about this issue and I am sure some of you have seen their report.*
>
> *For example, there seems to be a notion that there is a wealth of self-regulatory initiatives that are not currently being given sufficient attention in this area. I am not so sure about that and I would like to put in a plea that we all be spared from more half-baked self-regulation. There are, of course, other players who would see such a review as a golden opportunity to wind back consumer protection. At times, this seems to be based on the idea that if we somehow develop more competitive markets, then consumer protection should be stripped back.*
>
> *That sort of notion, which is partly there in the Productivity Commission discussion, is problematic for several reasons. I will mention three. One is that there seems to be at times, in discussions around the outcomes of competition policy, a premature celebration of competition in some markets before it has actually really arrived or had an impact.*
>
> *The second reason why I think that that is an inappropriate approach comes from some of the work that Louise Sylvan has been doing. We should not be thinking of competition and consumer protection as somehow at odds with each other but, rather, we ought to be looking at the opportunity for integrating them and seeing them as complementary objectives in much of the regulatory arena.*
>
> *Finally, I think the notion that more competition means we can, in some simplistic sense, wind back consumer protection, is based on a one dimensional and unproductive understanding of consumer behaviour. That is what I will return to a little later in my talk.*

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

[37] Ibid Kell, Peter (2005) *Keeping the Bastards Honest – Forty years on…."* Speech at 2005 National Consumer Congress March, p2

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

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

I now refer to the topical published speech by Peter Kell[38] at the National Consumer Congress in March 2006[39], , referring to a number of important publications concerning regulation, including the 2005 published public lecture presented Gary Banks at the ANU on the topic of regulation-making in Australia.[40]

He refers to PC's Regulation and Review 2004-05 as part of its Annual Report series.[41].

In July 2008 Peter Kell relinquished his position as CEO of CHOICE (Australian Consumers' Association)[38] having joined on 11 March 2004. ACA is Australia's leading consumer organization, and the publisher of CHOICE magazine.
He took over from Louise Sylvan as Deputy Chair at the ACCC, whilst Louise Sylvan moved over as a full-time Commissioner at the Productivity Commission.
Prior to joining ACA, Peter Kell was Executive Director of Consumer Protection, and NSW Regional Commissioner, at the Australian Securities and Investments Commission (ASIC).
Peter joined ASIC in 1998 when it was given significantly expanded consumer protection jurisdiction, and was responsible for ASIC's approach to consumer protection regulation in the financial services sector. Peter's area developed and implemented successful regulatory campaigns in areas such as mortgage broking and financial planning, built ASIC's widely recognized consumer education and financial literacy programs, and developed policy and approval standards for consumer dispute resolution schemes. Peter was also responsible for establishing ASIC's Consumer Advisory Panel

[39] Kell, Peter, (206) Australian Consumers Association. *"Consumers, Risk and Regulation."* Speech delivered at National Consumer Congress 17 March 2006

[40] Banks, Gary, (2005) *Regulation-making in Australia: Is it broke? How do we fix it?* Presented by Chairman of Productivity Commission at a public lecture. This lecture was given as part of a Public lecture Series of the Australian Centre of Regulatory Economics (ACORE) at the Faculty of Economics and Commerce, ANU, Canberra, 7 July 2005
Found at http://www.pc.gov.au/__data/assets/pdf_file/0020/7661/cs20050707.pdf

[41] Productivity Commission (2005) Regulation and its Review 2004-05 Annual Report Series. Online http://www.pc.gov.au/research/annrpt/reglnrev0405/reglnrev0405.pdf c/f Published speech delivered by Peter Kell at the National Consumer Congress 2006, p 12 References.

That 2006 NCC talk by Peter Kell presents some provocative concerns about the philosophy of consumer protection and the extent to which it may be inappropriate for such philosophies to shift regulatory risk from government and/or corporations to individuals.

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

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

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

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

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

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

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

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

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

The findings of Senate Select Committee[42] in relation to NCP impacts on social services were not shown to improve during NCP. Ethical and sustainability, and socially responsible and financial considerations. Expressly, proper regard for local, social, community and environmental interests and financial considerations.

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

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

Andrew Nance's views and findings[43] (at the time with South Australia Council of Social Services (SACOSS) are also extensively cited and relied upon in the body of the text.

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

Extract (pages 1 and 2):

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

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

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

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 n 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 alter, 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 inquires 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"

Moving now from the general to the specific, and leaving discussion of BHW and related issues aside for a discrete section as 2A, I briefly discuss one or two of the submissions already made to the VESC Regulatory Review at the initial stage of circulating an open letter inviting interest generally without specifying which instruments were to be targeted for review.

I only learnt of these three weeks ago since neither the May Issues Paper nor the various Working Documents were published on line.

I accessed the Draft Decision on the date of publication online, 27 August, and also received upon request a personal copy of the May Issues Paper about a week ago, but have had no time to study this before completing this lengthy response to components of the Draft Decision Stage 1.

As expected industry associations and energy providers would like to see all regulation gone entirely and rely on generic provisions instead. There are many reasons for industry-specific regulation and why generic provisions alone are far from satisfactory, apart from being far less accessible and more expensive in terms of seeking redress. Many consumers of energy are entirely unable or unsuited to the formalities of accessing redress through generic provisions, even leaving aside the cost.

In principle I do not believe that major changes are warranted before the National Framework for Distribution and Retail Regulation is at a more settled stage and some consistency can be injected into the whole process of new regulation.

In terms of streamlining, I agree that obsolete instruments should not be confused with those that are current, but would like to see archived material retained for reference, quarantined rather than simply removed from the ESC website.

I support moves to streamline provisions, avoid duplication and generally simplify energy regulation and access to material. It is cumbersome to have to check through licencing documents, Orders in Council, and historical data.

I also agree with the opinions expressed that it can be confusing to the public to have to check through a variety of provisions and instruments, and that better access to documents relevant to regulations by all stakeholders is a worthy goal.

I now turn attention to the predications upon which massive regulatory review and new proposals are being undertaken at jurisdictional level in tandem with national considerations that are still in formulation

I share concerns by retailers and distributors about possible rail gauge problems that may arise if the national framework model turns out to be discrepant to jurisdictional proposals, especially with regard to smart metering roll outs, which are to be considered in more detail in the Stage 2 Draft Report.

No Issues Paper seems to have been presented online for general public consideration. Again the parameters of Stage 2 seem to have been largely considered behind locked doors with a Draft Decision appearing as the only publicly available item after the initial open letter to stakeholders in February.

Since many of the decisions that have been taken even at draft level have been predicated on the perceived success of competition within Victoria, whilst this submission does not pretend to examine those issues in detail, I would like to bring forward for stakeholder interest some of the considerations that may give some balance to rosy perceptions of such success as determined by the AEMC and by Victorian policy-makers and regulators.

To that end I comment again on the CRA Report upon which the AEMC had relied.

SELECTED RELECTIONS ON IMPACT OF PRICES AND PROFIT MARGINS ON ENERGY RETAIL COMPETITION IN VICTORIA[44]

The CRA International Price and Profit Report *"Impact of Prices and Profit Margins on Energy Retail Competition in Victoria Final Report"* (85 pages) commissioned as a quantitative analysis by the AEMC for the current Retail Competition Review (Victoria) is briefly discussed below, mostly in terms of its limitations.

In the First Draft Report (2.5, p19), the AEMC had expressed intent to

> *"consider the evidence in more detail once the final results were available and interested parties had had the opportunity to comment on the analysis undertaken." (p19 First Draft Report)*

Unfortunately since the report was not published online till 8 November, on the even of the deadline for responses to the First Draft, it was unreasonable to expect any stakeholder to have any chance to incorporate considered responses to this important component of commissioned findings.

Presumably a draft report had also been made available to the AEMC but this was not made publicly available to stakeholders who should have had the same opportunity to study preliminary material as the AEMC to allow more time to digest even preliminary results, given the tight deadlines.

On an issue of procedure, the CRA Report was positioned along with other commissioned Consultant Reports on the home page of the AEMC Retail Competition. However, my guess is that most people accessing the home page to look for submissions or relevant reports would instinctively click on the link at paragraph 2 to look at more information, without scrolling down. Therefore the positioning of the report and failure to supply a link on the next screen may have made it difficult for stakeholders to even be aware that such a report was available at all. For those already registered for e-mail alerts, it may have been helpful to flag the publication of this report or any others relevant and to provide links in more than one place on the site. I stumbled on the report by accident minutes before sending my submission electronically to meet the deadline. It may well be that the location of the report and its late publication has prevented stakeholder input on this topic.

This issue is raised here simply because effective consultation cannot occur under rushed deadlines, eleventh hour access to important protocols and commissioned reports. Participation is not a favour to stakeholders.

---

[44] Impact of Price and Profit Margins on Energy Retail Competition in Victoria. Project report Ref D 11383-00. Commissioned Consultant's Report to AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report*, October 2007, Sydney.

It is a crucial part of achieving valuable feedback from the public at large to Reviews and Commissions, so it needs to be placed in context and nurtured with an attitude of flexibility and spirit of cooperation, more especially when last minute reports are provided

The public had expected additional time to provide feedback on the CRA Report – indeed the AEMC had promised this, but again time has run out and the COAG deadlines are descending.

Because of the last-minute publication of this Report it would not have been feasible for any stakeholder to make a meaningful response to this report to meet the 9 November deadline for response if anyone noticed it at all online. It would have been helpful if at least an em-mail notification had been sent to all existing registered stakeholders who had provided email details.

Best practice requires that all evaluative material recognizes its own limitations and publicly highlights the limitations of any piece of study or research.

The Commission appears to have a set mind and has found suitable justification for what certainly appear to be pre-determined decisions based on a series of theoretical assumptions that may not stand up to closer scrutiny. On that basis there may be limited value in examining in detail the arguments put forward put this is my best shot within the time constraints. Others far better qualified may have had valued input to make in this technical area of financial forecasts and pas analyses, but the CRA Report was not made available in a timely way for stakeholder input. Not that more timely opportunity and robust counter-argument would necessarily have gone far in reversing the AEMC's assessments.

The Draft AEMC reports profit margins as follows[45]

2.5 Profit margins

One of the outcomes of effective competition is that there is pressure for prices to converge towards efficient costs over time. This implies that retail profit margins under market contract prices should be consistent with a competitive return for risk and financing costs.

The Commission engaged CRA International (CRA) to provide quantitative analysis on energy retail margins in Victoria as a basis of assessing whether the margins available under the market contract prices are consistent with the expectation of margins in a competitive market. While this work is ongoing, CRA's preliminary results suggest that competition has placed sufficient pressure on retailers' market offer prices to maintain margins at levels that would be expected in a competitive market. However, these results are preliminary at this stage of the Victorian Review.

[45] AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report,* October 2007, Sydney. p19

On p11 under the heading “Terms of Reference, The CRA Report of 8 November was careful to provide a caution about interpreting the effectiveness of competition on the basis of that report but suggested references to all other reports being prepared for and by the Commission. In particular the CRA Report noted that analysis of retail prices and margins represent only one aspect of a wide range of considerations that should be taken into account in a retail competition review, and it would not be appropriate to draw conclusions regarding the effectiveness of competition from this study in isolation from all those considerations.

In another section devoted to the stakeholder consultation process, I have commented on the importance of availability to all stakeholders in a timely way all data relied upon. This was intended to refer not only to reports commissioned for this Review, but all other ancillary data whether or not addressed to the Review or commissioned for the review. That is because of the enormous degree of overlap in various market reform initiatives that make it imperative for a considered, organized and structured approach to be applied in the interests of achieving robust stakeholder involvement.

In passing I note the strong reservations and disclaimers made in the CRA Report about the quality or completeness of the data available. This is further discussed under the section in passing Prices and Profit Margins.

Cursory observation is made here that the CRA Report was based on best estimates only in the absence of actual data from retailers and that much reliance was placed from publicly available information and on historical data dating back to 2003.

CRA International are to be congratulated for acknowledging the limitations of the data and estimates presented in this report on the basis of paucity of available actual data and other considerations. CRA has professionally and diplomatically handled the issue of the poor quality of data available.

How could this reputable firm have been expected to produce reliable and accurate results under the circumstances? Has much strategic planning went into the exercise of determining the criteria that would be needed for robust assessment of the market?

One burning question is, whether CRA sufficiently assisted with data that was or should have been carefully gathered not as a snapshot exercise but as a consistent best practice approach to collected pertinent data longitudinally after receiving best advice on evaluative design in assessing the impacts of competition? Can of proper assessment of such matters possibly be effected if undertaken a matter of months before regulatory change and price deregulation is undertaken.

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 calculated 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:

CRA's analysis begin with using retail cost estimates that had been used in providing advice to the Essential Services Commission in 2003 relating to current price paths for electricity and gas, commencing in 2004.[46]

The current analysis was updated on the basis of that earlier data and estimates. It had originally been comforting to know of the AEMC undertaking that given the paucity of the data available, not will take account of the precision of the estimates of margins when deciding how much weight to place on this source of evidence.

[46] 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

The AEMC has used these precise words under Section 8.1.1.

> *"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."*[47]

In addition the AEMC 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.*

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.

[47] AEMC, *Review of the Effectiveness of Competition in Gas and Electricity Retail Markets in Victoria: First Draft Report*, October 2007 Sydney., p246-247

The CRA Report details costs as follows:[48]

> ***Energy purchasing costs:*** *For electricity, these costs have been estimated using historical published contract prices for a fully contracted retailer. In the case of gas they estimated that energy purchase costs had increased by CPI+2 percentage points each year over the last four years.*
>
> ***Network charges:*** *For both electricity and gas, CRA estimated transmission and distribution charges on the basis of the published regulated network charges*
>
> ***Fees and levies:*** *These arise in both electricity and ahs and were estimated from public sources.*
>
> ***Retailer operating costs.*** *These were costs that an energy retailer incurs in the course of carrying out its business and include a wide range of items, including billing, call centre, credit management, trading and IT costs, as well as corporate overheads.*

Their **estimates of these costs** is the same for gas as for electricity, and based on an assessment of recent regulatory decisions and other information in the public domain.

Much emphasis is placed on comparisons between electricity margins for standing offers and market offers, and the market as a whole, under varying wholesale energy cost conditions.

It is not clear on cursory glance at the first few pages of the report what data had been relied upon in determining **wholesale energy cost conditions**, including load growth factors; infrastructure maintenance and the like.

The margins are not discussed in detail here except to comment on how wide they are and to refer again to the quality of the data made available for best estimate calculations.

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."*

[48] Ibid CRA Report to AEMC Retail Competition Review October 2007 p708

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 consisted 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 AER Publication State of the Energy Market (2007) now long out of date in many respects[49] makes the following observations about the outcomes from the development of the National Electricity Market:[50]

- Lower electricity prices overall
- More cost reflective prices, so that prices have **risen for households** and fallen for business
- Greater convergence of prices across the market

Based on comparative trends between 1990-91 and 2005-06 for Australia as a whole, households have experienced an average 4 per cent real increases, whilst business have had an average 23 per cent real reduction in price.

Since it is fully expected that in order to allow further headroom in what may be an already crowded market, prices will increase even more, those4 most likely to suffer are domestic users

The indicators relied upon that there is significant competitive activity in the retail market for electricity and gas for small-volume users in Victoria have been sited as follows:

> ***"The Victorian retail electricity and gas markets have experienced significant levels of new entry[51]"***

Comment

That is true. There has been competitive activity. There has also been significant evidence of market failure.

---

49 It is most encouraging to see a weekly snapshot of the market approach to show new developments, though snapshots in themselves can have drawbacks and fail to give the predictability that may be required for longer- range decision-maker. A volatile energy market cannot offer such predictability, especially not in a climate of regulatory uncertainty and major reform across the board.

50 State of the Energy Market 2007 AER, p 33. Published July 2007

51 CRA Final Report *"Impact of Prices and Profit Margins on Energy Retail Competition in Victoria. Competitive Trends in Victoria* 8 November 2007, p 4 *"Competitive Trends in Victoria."*

Jackgreen's Chairman John Smith has commented in this send-tier niche retailer's Annual Report[52]

> *"The group of second tier retailers which includes Jackgreen are themselves becoming targets for the larger players or business consolidation. Earlier this year Ergon Energy (Qld) paid $105M for Powerdirect the country's inaugural second tier retailer."*
>
> *"The disconnect between the National Energy Market Management Company (NEMMCO) and the national pricing saw the wholesale energy prices in June this year reach a staggering 8 times their monthly June average and 10 times the prices paid in early months of 2007. With high concern from the market regulators and energy user groups no-one including our Governments were willing to act!"*

This is an important consideration when assessing how quickly new entrants and more established second-tier retailers might fare when full price deregulation becomes a reality.

And further from the same Annual Report 2007:

> *"The ACCC the master of the new National Regulator confirmed that they would review the performance of individual companies in the market with a view to determine if any "gaming" of wholesale prices had occurred. It's clear to Blind Freddy that it had occurred; the question was who caused it and who benefited from it? Again the market activity is fairly transparent and somewhere north of the Murray and south of the Brisbane River will find those most active.*
>
> *The fallout was immediate NSW based independent Retailer Energy One handed back all its customers took a big $ hit and their share price dropped by 400% the same week.*
>
> *Momentum Energy sold off 15, 000 unhedged residential customers to get out of that market. In one fell swoop the contestable market lauded by successive Governments had come back to bite them."*

John Smith Chairman of Jackgreen, has made an honest assessment and appears to be only too well aware of the pitfalls of the decisions being made and premature decisions about market trends.

The recent is evidence also of market failure RoLR event where 11,000+ customers were transferred under those provisions; and again when another 15,000 unhedged residential customers were found to be unprofitable and sold off *(see comments of Jackgreen's Chairman above).*

[52] Jackgreen, a greenenergy specialist retailer currently selling electricity only though with licences in NSW and South Australia to sell gas

As observed by Gavin Dufty in his November 2007 Submission to the current Review, the AEMC Report appears to ail to discuss and analyze the multifaceted nature of the standing offer (such as RoLR provisions).

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

CRA figures and AEMC's findings (as commented on by Gavin Dufty) emphasize that

> *"….of the 60% have taken market offers 70% of domestic and 60% of commercial customers said contracts had met expectation.*

As pointed out by Mr. Dufty 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.

On page 2 the November 2007 Submission to the AEMC Review on behalf of St Vincent de Paul Society, Mr. Dufty has pointed out that:

> *"When this expectation failure rate (between 18% 24% of the total market) is considered in conjunction with those that have not actively participated in the market (40%), an overall market performance measure can be ascertained. Such a market performance measure indicates that over 50% (58-64%) of customers in the Victorian energy market believe is has either failed their expectations of there are not actively participating."*

Further Mr. Dufty commented as follows:

> *The AEMC draft review also failed to ascertain the nature of the issues that may be affecting this group. Such an analysis could reveal where potential or actual market failure exists. A key issue in ensuring that all households regardless of income or location have access to affordable and appropriate energy contracts. Mr. Dufty has specifically asked what evaluation was undertaken that customers were actually getting what they believed they were offered*

Other reservations expressed by Mr. Dufty for St Vincent de Paul include failure to:

> *"measure the level of sophistication of customer behaviour for example the quality of decision making as an indicator of market maturity.*

He points out that:

> *"when such an analysis was undertaken in the UK it was found that 20% of those who switched with the specific goal of seeking a lower price in fact had switched to a contact that resulted in high prices. A similar analysis should be undertaken here.*

The snapshot approach has also been targeted by Mr. Dufty as a flaw in evaluative design as a "point in time" approach to evaluate what is both a very dynamic energy market and the broader changes in the community such as ageing of the population.

Mr. Dufty specifically mentions the data gathering stage as:

> *"a snapshot of the market during this specific period in time (mid-2007) – a time where the full impact of volatility in the wholesale energy market was yet to be experienced, a period of time that has yet to see the impact of carbon trading regime, and a period of time prior to the introduction of smart meters."*

Mr. Dufty predicts that that all these factors

> *".....will significantly change the nature of the Victorian energy market and hence the nature of competition."*

One might ask what plans there are for proper longitudinal evaluation of post-decision dissonance by customers who made switching choices, based perhaps on incomplete understanding of the choices being made.

What seems to have been omitted from the AEMC Draft Report is factual data about the correlation between complaints received by EWOV and retail competition issues. It is clear that there have been numbers of problems identified in this process that deserve closer scrutiny.

I quote directly verbatim from the EWOV views on retail competition[53]

Extract from EWOV Annual Report 2005/06[54]

"Retail competition

All Victorian customers are able to choose their electricity, natural gas or dual fuel retailer. All electricity customers have had choice since January 2002. All natural gas customers have had choice since October 2002.

At 30 June 2006, there were 10 electricity retailers marketing to residential and small business customers in Victoria. Five of these retailers also sold natural gas.

During 2005/06, 812,865 Victorian customers switched energy retailer — there were 507,455 electricity transfers and 305,410 natural gas transfers. Compared with 2004/05, this was up 12%, from a total of 722,925.

We continue to see a loose correlation between switching activity and the number of cases EWOV receives about retail competition issues."

Most common retail competition issues

- *Transfer*
- *26% error, down from 43%*
- *20% contract terms & conditions, up from 10%*
- *16% information, up from 12%*

Marketing

37% door-to-door sales, down from 55%

37% phone sales, up from 28%

What were the most common transfer issues?

Error 557

Contract (terms & conditions) 419

[53] EWOV Annual Report 2005/2006 Retail Competition (correlated to complaints received and nature of complaint) See further figures in Complaints and Complaints pp34

[54] EWOV Annual Report 2005/2006 Retail Competition (correlated to complaints received and nature of complaint) See further figures in Complaints and Complaints pp34

Information 339

Delay 319

Billing 265

Cooling off rights 92

Offer 27

Objection 17

Total 2,143

Apparently despite recommendations by the Consumer Utilities Advocacy Centre[55] and others, that robust follow-up studies by undertaken to ascertain from those who were included in the Wallis Consumer Survey about their experiences after switching to assess whether they made a choice that was in their best interests, the AEMC chose not to do so. Therefore, as noted by CUAC, the survey represents little more than a tool to demonstrate how consumers were approached, not how they actually fared.

The CRA Report further observed in a brief analysis of Competitive Trends in Victoria on page 4 of their report:

"There is virtually universal access to market offers that provide discounts to the standing offers across all the electricity networks and the major gas networks"

In Chapter 6 of The Australian Energy Regulator's publication State of the Energy Market discusses retail price outcomes as follows"[56]

"Retail customers pay a single price for a bundled electricity product made up o electricity transport through the transmission and distribution networks and retail services. Data on the underlying composition of retail prices is not widely available

In Figure 6.13 the chart provides indicative data for residential customers in Victoria and South Australia based on historical information. These charges indicate that wholesale and network costs account for the bulk of retail prices. Retail operating costs (including margins) account for around 12 per cent of retail prices."

[55] AEMC Backs competition CUAC Quarterly Issue 9 October 2007, p2

[56] State of the Energy Market 2007 Australian Energy Regulator p189 6.3

Whilst retail price outcomes are of critical interest to consumers the interpretation of retail price movements is not straightforward. First trends in retail prices may reflect movements in the cost of any one or a combination of underlying components – wholesale electricity prices transmission and distribution charges or retail operating costs and margins. The costs of each component may change for a variety of reasons

Similarly differences in retail price outcomes between jurisdictions may reflect a range of factors differences in fuel costs and the proximity of generators to retail markets) industry scale the existence of historical cross-subsidies differences in regulatory arrangements and different stages of electricity reform implementation.

Second there are differences in jurisdictional regulatory arrangements that affect price outcomes. In New South Wales

Victoria South Australia and the Australian Capital Territory the electricity prices paid by residential customers are a mix of price set (or oversighted) by governments and regulators and prices offered under market contracts. In other jurisdictions all residential prices are regulated.

Regulated prices can reflect a mix of social economic and political considerations that are not always transparent. To better facilitate efficient signals for investment and consumption governments are considering removing price caps and more immediately aligning them more closely with underlying supply costs."

This report proffers particular warnings about interpretation of retail price trends in deregulated markets. Questions have been asked whether the AEMC studied this document and heeded this advice. Here it is verbatim taken from p 190:

"Particular care should be taken in interpreting retail price trends in deregulated markets. While competition tends to deliver efficient outcomes, it may sometimes give a counter-intuitive outcome of high prices as in the following examples."

- *Energy retail prices for some residential customers were traditionally subsidized by governments and other customers (usually business customers). A competitive market will unwind cross-subsidies, which may lead to price rises for some customer groups*

- *Some regulated energy prices were traditionally at levels that would be too low to attract competitive new entry. It may sometimes be necessary for retail prices to rise to create sufficient 'headroom' for new entry."*

Figure 6.13 wholesale the composition of a residential electricity bill in Victoria as follows:

Victoria:[57]

Wholesale electricity costs 41%

Network costs 44%

NEMMCO charges 3%

Retail operating costs 12%

South Australia[58]

Wholesale electricity costs 35%

Network costs 44%

Retail operating costs 8%

Retail margin 4%

GST 9%

Under Section 6.3.1 on p190 of the State of the Energy Market publication, there is an open acknowledgment of data paucity in the following words:

"There is little systematic publication of the actual prices paid by electricity retail customers. The ESSA previously published annual data on retail electricity prices by customer category and region but discontinued the series in 2004

At the state level:

- *All jurisdictions publish schedules of regulated prices. The schedules are a useful guide to retail prices, but their relevance as a price barometer is reduced as more customers transfer to market contracts*
- *Retailers are not required to publish the prices struck through market contracts with customers, although some states require the publication of market offers*

[57] State of the Energy Market AER p 190. These published figures for Victoria as at July 2007 were sourced from two CRA sources for Victoria, viz CRA 2003;, Electricity and gas standing offers and deemed contracts 2004-2007.

[58] State of the Energy Market AER p 190. These published figures for Victoria as at July 2007 were sourced from South Australia ECOSA, Inquiry into retail electricity price path, Discussion paper September 2004

- *The Victorian and South Australian regulators (ESC and ESOSA) publish annual data on regulated and market prices. The ESC and ESCOCA websites also provide an estimator service by which consumers can compare the price offerings of different retailers (section 6.2.1)"*

The Draft AEMC reports profit margins as follows:

2.5 Profit margins

One of the outcomes of effective competition is that there is pressure for prices to converge towards efficient costs over time. This implies that retail profit margins under market contract prices should be consistent with a competitive return for risk and financing costs.

The Commission engaged CRA International (CRA) to provide quantitative analysis on energy retail margins in Victoria as a basis of assessing whether the margins available under the market contract prices are consistent with the expectation of margins in a competitive market. While this work is ongoing, CRA's preliminary results suggest that competition has placed sufficient pressure on retailers' market offer prices to maintain margins at levels that would be expected in a competitive market. However, these results are preliminary at this stage of the Victorian Review.

The Commission will consider the evidence in more detail once the final results are available and interested parties have had the opportunity to comment on the analysis undertaken.

The Commission also asked CRA to examine the margins that are available under the current standing offer tariffs to assess the impact retail price regulation may have had on entry and competition. For example, a low margin under the standing offer tariffs may itself be a barrier to effective competition. CRA's preliminary results suggest that, for electricity, the level of the current standing offer tariffs have not prevented efficient new entry from being profitable, at least when considered on average across all customers in a distributor's service area. However, the results at this stage indicate that the scope to offer discounts off the standing offer contract price for gas for some customers may be limited.

Overall, retailers actively seeking new customers and growth in the proportion of the total customers they serve appear to be able to earn sufficient margins to offer attractive price and non-price incentives relative to the standing offer tariff.

However, the Commission is mindful that a reasonable margin for the average customer does not mean that all customers are necessarily profitable under the standing offer tariff. CRA's ongoing analysis of the retailer profit margins should provide further information on this issue and will be considered by the Commission when the results are available.

On the following few pages I proffer a compiled list of incompletely addressed factors and others not at all addressed in the assessment of effective retail competition in the gas and electricity markets in Victoria.

Though this material is the subject of more dedicated discussion in a separate component, it is pertinent to repeat here since many of the economic decisions being made and policy matters the subject of ongoing and rapid review are predicated on the perceptions of the success of the market.

This includes the advanced smart meter roll out and long range implications for the community and the economy.

It may be too late to bolt the door after the horse has bolted, but community duty to express concern weighs me down, so here it is for the record. It is a document that has been published in other arenas and to be expanded.

CHECKLIST OF INCOMPLETELY OR ALTOGETHER UNADDRESSED ISSUES IN ASSESSMENT OF EFFECTIVENESS OF COMPETITION IN THE GAS AND ELECTRICITY MARKETS IN VICTORIA[59]

Internal energy market

1. Examination of the whole market in context

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:[60]

- *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*

---

[59] 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 to AEMC First Draft Report Madeleine Kingston (November 2007). Found at
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

[60] 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

2. Tumultuous energy market conditions[61]

3. Very high electricity and gas prices (wholesale)[62]

4. Impact of future events on wholesale markets causing resulting in retail price increase:

> ***"Future events:*** *this is an evolving market. The impact of carbon pricing and interval meters on the effectiveness of competition in the wholesale market is as yet unclear although coupled with capacity and input constraints we can expect upward pressure on retail prices to increase."*[63]

5. Flaws in the assessment of effective retail competition in the gas market

Failure to address injection hedge dependency issues, notably at Longford, as a major barrier to entry and growth that has already resulted in at least one second-tier retailer taking steps that will have the effect of reducing ability to compete for Victorian energy customers.

Apparent omission of a wide range of assessment criteria, as for example identified by the Government of South Australia in their submission to the Second Draft Report (discussed in more detail shortly under the heading "Competition Issues – Barriers to Entry"

---

61 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

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

63 Ibid CUAC (2007) Response to AEMC's Issues Paper 10 July 2007

6. Vertical and Horizontal Integration Factors and advantages to incumbents[64] [65]

- *Transparency and predictability or lack thereof concerning rules applied to the approval or refusal of mergers and acquisitions in the energy field*[66] *(EAG)*

- *Development of new interconnectors normally of little interest to vertically integrated utilities*[67] *(CEER)*

- *Acquisition investment or trading decisions by one energy undertaking as impacting upon all*[68] *(CEER)*

7. Examination of load growth and management factors – [69]

Refer to recommendations by EAG as far back as 2002 in cautions to the ACCC (discussed in more detail under Load Growth Management

"In particular EAG recommended to the ACCC the '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.' Cautions were also expressed that Code Change proposals add to market complexity and increase consumer and retailer risk."

---

64 Ibid CUAC (2007) Response to Issues Report

65 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;

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

67 Council of European Energy Regulators (CEER) (2003) found at *http://www.ceer.eu/portal/page/portal/CEER_HOME/CEER_PUBLICATIONS/PRESS_RELEASES/CEER_PRESS_2003-10-06.PDF*

68 Paraphrased from ibid Council of European Energy Regulators found at

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

8. **Cost smearing** and its negative impact for the user/causer pay principle underpinning the market *(see also AIMRO rationale as presented by EAG, discussed in more detail elsewhere)*

Refer to the views of Energy Action Group (EAG) as expressed at the October 2007 International Metering Conference[70] concerning the

> *"Lack of concrete information on the table for consultation, given the resources put into the AIMRO exercise to date*
>
> *The lack of long term "real time" customer load and behavioural data, making modeling difficult and*
>
> *The fact that Cost smearing does absolutely nothing for the user/causer pay principle underpinning the market."*

I quote directly below from the Executive Summary of the Pareto Report prepared for the Energy Action Group concerning the proposal by the Essential Services Commission to roll out interval meters. More extensive citation on this issue and this particular report is provided under the section on Smart Metering

> ***Smearing of peak-load energy costs***[71]
>
> *Summer peak load growth also adds to energy costs and retailer risk costs in the NEM. The use of price caps (deemed standing offers and the like) by some jurisdictions further increased retailer risk.*

---

[70] Energy Action Group (John Dick) (2007) *"Allocating Risks in a Gross Pool Market"* Powerpoint Presentation at Metering International Conference 24 October 2007

[71] Pareto Associates (2003) *"Smart Meters for Smart Competition: Will Current Proposals Hand Back Power to Consumers?"* 2003 Update. Executive Summary. Full report available on *http://www.esc.vic.gov.au/apps/page/user/pdf/IMRO%20EAG%20-%20Pareto7%20April%2003.pdf*

[71] See also Sharam, Andrea (2003) Interval of Smart Meters. *"Smart Meters for Smart Competition: Will Current Proposals Hand Back Power to Consumers?"* 2003 Update produced for the energy Action group by Pareto Associates Executive Summary. This page last altered 30 April 2003
Found at *http://home.vicnet.net.au/~eag1/Intervalmeters.htm*
Full Report available at
http://www.esc.vic.gov.au/apps/page/user/pdf/IMRO%20EAG%20-%20Pareto7%20April%2003.pdfsts

9. Hampered modeling through lack of long-term real time customer load and behavioural data

(a) Refer to recommendations by Energy Action Group (EAG) as far back as 2002 in cautions to the ACCC (discussed in more detail under Load Growth Management)

> *"In particular EAG recommended to the ACCC the "issues 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"*
>
> *"Cautions were also expressed that Code Change proposals add to market complexity and increase consumer and retailer risk."*

10. Advanced Metering Infrastructure (AMRO) – straw-grasping based on estimated values in the analysis of AMRO without adequately thinking through the issue?[72]

Absence of concrete information on the table for consultation

(given the resources put into the AIMRO exercise)

11. Risk-innovation aversion

John Dick, President, EAG said:[73]

> *"It is clear and transparent to most that the Australian regulatory environment has not delivered an avalanche of innovative ideas to date in fact the regulators and the industry appears to be almost completely risk adverse to innovation and has to be dragged shouting and screaming to implement even small changes."*

[72] Ibid EAG (2007)
[73] Ibid EAG (2007) Submission to the ACCC direct quote
[73] Ibid EAG (2007) Submission to ACCC direct quote

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**[74]

    Instead of proffering as an explanation for recent RoLR events or distressed sales; or else suspension of active competitive activity in the Victorian market that regulated standing offer prices have stifled growth; perhaps the AEMC would have benefited from considering in considerable detail the impacts of the whole sale market; existing rules that have hampered procurement of physical gas; and the impacts on second-tier retailers of being unable to offer duel fuel products.

13. **The likelihood that the level of retail competition in Victoria will decrease with price rises in other states**[75]

Selected financial issues – supply side barriers

14. **Consideration of Return on Investment (ROI) impacts at distribution level and impacts on retail competition**[76]

15. **Consideration of available capital investment to the forecast load growth over the regulatory period**[77]

16. **Consideration of refurbishment of aging asset base**[78]

17. **Impact on retail competition by such external factors return 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"**[79]

---

74 CUAC (2007) Response to AEMC's Issues Report; 10 July 2007.
75 CUAC (2007) Response to AEMC's Issues Report; 10 July 2007.
76 Ibid EAG (2007) Submission to ACC October 2007 direct quote
77 Ibid EAG (2007) Sub to ACCC direct quote
78 Ibid EAG (2007) Sub to ACCC direct quote
79 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

PIAC and others have pointed out to:

> *"failure to take into account impacts on Australia's energy demand and sustainability taking into account possible compromise in commitment by private companies to address demand management in the face of clear incentive to generate income"* (PIAC)[80] *taking into account possible compromise in commitment by private companies to address demand management in the face of clear incentive to generate income."* (PIAC)[81]

(upheld by PIAC[82], Alan Pears; BCSE (ref 113); EAG; AC[83] CUAC;[84] CALC[85] numerous others)

19. Climate change policy

Alan Pears[86] has commented in a submission elsewhere that[87]

> *"Given the urgency, driven by climate change policy and the need to aggressively respond to growing peak electricity demand, it is critical that this process delivers real outcomes quickly. Good intentions are no longer sufficient. Fines and incentives should be applied to ensure action.*
>
> *The outcomes of this process are critical to overcoming the barriers to demand-side action and distributed generation that have marred the energy market since its inception.*
>
> *Indeed, the fact that it has taken this long to address these issues indicates a serious failure of public policy process."*

---

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

81 Ibid PIAC (2007)

82 CALV (2007) Response to AEMC Issues Paper, Consumer Action Law Centre. 28 June 2007

83 ACF (2007 Strong ALP renewable energy target good for jobs and the environment 30 October 2007 found at: *http://www.acfonline.org.au/articles/news.asp?news_id=1498*

84 CUAC (2007) Response to AEMC Issues Paper 10 July 2007, Key issues.

85 Ibid CALV (2007) Response to AEMC Issues Paper, Consumer Action Law Centre. 28 June 2007

86 Alan Pears is an engineer and educator who has worked in the energy efficiency field for twenty years. He is Senior Lecturer in Environment and Planning School / Work Unit, Global Studies, Social Science and Planning

87 Alan Pears (2007) Submission National Frameworks for Distribution Networks Network Planning and Connection Arrangements. Found at <*http://www.mce.gov.au/assets/documents/mceinternet/Alan_Pears20071019124200.pdf*>

20. Inefficient investment and consumption of electricity

TEC has raised the issue of

> *"Inefficient investment and inefficient consumption of electricity"*

In its submission to the AEMC Rule change proposal TEC discussed demand management[88] and transmission networks, making the following observations:[89]

> *"The focus of the proposals is on correcting the major bias against demand management (DM) in the National Electricity Market (NEM).*

On the other hand, John Dick President of Energy Action Group[90] believes that there is no evidence that demand side response will address the problem:

> *"…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.*[91]

---

88 TEC defines demand management (DM) as follows:
"Demand management in this proposal can be read to include 'demand response', 'demand side management', 'demand side response', 'energy efficiency' and 'non-network solutions'. In general, DM can include both the management of peak loads and energy efficiency as a way of meeting capacity requirements with the greatest cost-efficiency. It includes a diverse array of activities that meet energy needs, including cogeneration, standby generation; fuel switching, interruptible customer contracts, and other load-shifting mechanisms."

89 TEC (2007) Submission to AEMC Rule change proposal – demand management and transmission networks. 6 November 2007

90 EAG, is a membership based, not-for-profit incorporated association representing the interest of less than 160MHh consumers across the National Electricity Market, in its Submission on the AEMC Scoping Paper on Transmission and Pricing Rules Initial Consultation Scoping Paper (funded by an NEM Advocacy Panel Emergency Grant).

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

Political and regulatory factors

21. Possible impacts of political interference[92]

22. Consideration of possible reduction of commercial capacity to network users through special regimes for construction, operation and use of merchant lines

> *"Special regimes applied to the construction operation and use of merchant lines may reduce the commercial capacity available to network users in general and discourage the expansion of public networks"*[93]

23. Examination of Political Sustainability defined as:

> *"Approaches for increasing the political sustainability of policies and institutional mechanisms, including the application of pro- poor policies"*

24. Correlation of complex far reaching interrelated decisions[94]

As observed by the EAG in the same paper:[95]

> ***"Complex far reaching interrelated decisions.***[96]
>
> *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."*

---

92 Ibid CEER (2003) direct quote
93 Ibid CEER October 2003 direct quote
94 Ibid EAG (2007) Submission to ACCC?SP Powernet October 2007
95 Ibid EAG (2007) Submission to the ACCC
96 Ibid EAG (2007) Submission to the ACCC October 2007

"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 1[2] 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.

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."

In 2003, in discussing infrastructure projects, emerging economies and Government reneging, author Ravi Ramamurti, of the Department of Business Administration, Northeastern University, Boston, USA summarizes his paper as follows:[97]

"Despite deregulation and privatization, governments in emerging economies continue to play important roles in private infrastructure projects, thereby exposing private investors to the risk of government reneging. The government's role as deal maker—and deal breaker—in infrastructure investments stems from its role as financier, customer, supplier, competitor, and/or regulator. (The only role governments have shed as a result of recent economic reforms is that of producer.)

Based on the literature, I propose three explanations for government reneging: (1) economic uncertainty, which necessitates contract renegotiation; (2) the logic of the "obsolescing bargain," which makes deals less attractive to governments ex post than they were ex ante; and (3) political change, which puts new leaders in charge with incentives to renege on old promises.

[97] Ramamurti, R (2003) *"Can governments make credible promises?"* Journal of International Management 9(3) 2003, pp253-269. Insights from infrastructure projects in emerging economies institutions and international business.

I assert that these risks can be contained, respectively, through contract design, investment strategy, and institutional design. Using this framework, I conclude that Enron's strategy in the controversial Dabhol project in India was sensitive to first of the three factors and relatively less mindful of the other two.

The policy implication for MNCs is that they should be attentive to all three factors that cause government reneging rather than just one or two.

Jamison (2005) summarized the Internal Energy Market as follows:

"The Internal Energy Market provides new opportunities to energy consumers and to energy undertakings. It has the potential to increase economic and technical efficiency, as well as security of supply, thus improving European welfare and the competitiveness of European industry. It can also be an important tool to reinforce political and economic links with Eastern European and South Mediterranean countries, thus contributing for stability and development in these areas.

"If the Internal Energy Market is not properly organized, and if the increasing interaction between national political, economic and institutional decisions is not duly taken into account, it may engender inefficiencies, leading to high energy prices and poor quality of service and even endangering security of supply.

"Completion of the Internal Energy Market is a complex and relatively slow process. It is strongly influenced by the different speeds of national legal, institutional and industry developments. The present stage of the Internal Energy Market is a critical one.

It is the duty of energy regulators to point out the present difficulties and to suggest appropriate solutions leading to fair, efficient, secure and integrated energy markets in the European Union."

"Should consumer policy be administered separately from competition policy or should institutional arrangements reflect the synergies between the two?"

Some people believe that the Internal Energy Markets magnifies the risks and reduces opportunities. The CEER thinks the opposite is true. Therefore, we will endeavour to complete the Internal Energy Market as soon as possible, according to the mandate which was given to us by the Member States, by the European Parliament and by the Council. The CEER are working towards the completion of the Internal Energy Market to ensure that European consumers obtain the full benefits of liberalised markets as well as secure supplies of energy.

Rome, October 6, 2003"

Political, legislative or regulatory decisions concerning energy investment and trading frameworks in one Member State have a potential to impact upon all member states.

This paper provides a framework of some of the strategies governments can use to mitigate regulatory and political risk to private companies investing in infrastructure projects in developing countries.

One section of the paper focuses on strategies that can improve transparency, independence, competence, and credibility of the regulator, but other aspects of government, as they affect regulatory and political risk, are also discussed.

Jamison et al (2005) have drawn attention to the paper by *Kaufman et al (2004)*[98] examining six dimensions of government for 199 countries and territories in four time intervals between 1996 and 2002 using an unobserved components model, using 250 individuals measures taken from 25 different sources, including international organizations, political and business risk-taking organizations, think tanks and nongovernmental agencies. The governance indicators examined are:

1. *voice and accountability (political process, civil liberties, and political rights)*
2. *political stability and absence of violence*
3. *government effectiveness*
4. *regulatory quality*
5. *rule of the law, and*
6. *control of corruption*

The limitations of margins of error were acknowledged by the authors because of reliance on subjective perceptions and for certain dimensions given the context were unaccompanied by reliable objective data – those of corruption, confidence and property protection.

Despite the context, many of the issues examined may be relevant in examining current parameters.

Jamison's (2004) choice of *Kurtzman et al's 2004* paper[99] may be helpful were it examines five indictors:

1. *corruption*
2. *efficacy of the legal system*

[98] Kaufmann, Daniel, Aart Kraay, Massimo Mastruzzi. (Revised 2004). *"Governance Matters III: Governance Indicators for 1996-2002,"* World Bank c/f Jamison (2005)

[99] Kurtzman, Joel, Glenn Yago and Triphon Phumiwasana. (2004). *"The Global Costs of Opacity." MIT Sloan Management Review* 46(1): 3844. c/f Jamison (2005)

> ***3.*** *deleterious economic policy*
>
> ***4.*** *inadequate accounting and governance practices, and*
>
> ***5.*** *detrimental regulatory structures*

25. Consideration of random or otherwise unpredictable factors impacting on measured performances:

> *"Random or otherwise unpredictable factors that affect these measured performances including conflicts that may have different implications regarding firm's potential exercise of market power."* Kaufman[100]

26. Other external threats including those identified by Ravi Ramanurti,[101] who summarizes certain risks that can be contained, respectively through contract design and investment. These include:[102]

> 1. *economic uncertainty which necessitates contract renegotiation;*
> 2. *the logic of the "obsolescing bargain which makes deals less attractive to governments ex post than they were ex ante; and*
> 3. *political change which puts new leaders in charge with incentives to renege on old promises.*

27. "Political, legislative or regulatory decisions concerning energy investment and trading frameworks in one State having an impact on all States (and Territories)."[103]

28. "**Full examination of the existing and proposed Regulatory Framework**"

---

[100] Kauffman, Larry, (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.

[101] Ravi Ramanurti Department of Business Administration, Northeastern University, Boston, USA

[102] Management 9(3) 2003, pp253-269 Insights from infrastructure projects in emerging economies institutions and international business.

[103] 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

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."[104] *(Jamison et al 2005)*[105]

29. "Proper examination of Corruption"

Broadly defined as the relationship between corruption and risk, and methods for mitigating risk resulting from corruption[106]

30. Examination of Renegotiation and Bailout factors defined as [107]

> *"Approaches for dealing with unforeseen events or failures in institutional design corruption prevention measures or sustainability approaches that may trigger contract renegotiations or bailouts including strategies for avoiding such situations"*

---

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

105 Mark A Jamison, PhD, University of Florida 2001; MS Kansas State University 1980 BS Kansas State University 1978. Areas of expertise: Leadership and Strategy, Competition and Pricing, Cost Analysis, Universal Service

Dr. Mark Jamison is the director of the Public Utility Research Center (PURC) at the University of Florida and also serves as its director of Telecommunications Studies. He provides international training and research on business and government policy, focusing primarily on utilities and network industries. He co-directs the PURC/World Bank International Training Program on Utility Regulation and Strategy

Dr. Jamison's current research topics include leadership and institutional development in regulation, competition and subsidies in telecommunications, and regulation for next generation networks. He has conducted education programs in numerous countries in Asia, Africa, Europe, the Caribbean, and North, South, and Central America. Dr. Jamison is also a research associate with the UF Center for Public Policy Research and with Cambridge Leadership Associates, where he provides consulting and training on adaptive leadership. He is an affiliated scholar with the Communications Media Center at New York Law School. Dr. Jamison is the former associate director of Business and Economic Studies for the UF Center for International Business Education and Research and has served as special academic advisor to the chair of the Florida Governor's Internet task force and as president of the Transportation and Public Utilities Group.

Previously, Dr. Jamison was manager of regulatory policy at Sprint, head of research for the Iowa Utilities Board, and communications economist for the Kansas Corporation Commission. He has served as chairperson of the National Association of Regulatory Utility Commissioners (NARUC) Staff Subcommittee on Communications, chairperson of the State Staff for the Federal/State Joint Conference on Open Network Architecture, and member of the State Staff for the Federal/State Joint Board on Separations. Dr. Jamison was also on the faculty of the NARUC Annual Regulatory Studies Program and other education programs.

Dr. Jamison serves on the editorial board of *Utilities Policy*. He is also a referee/reviewer for the *International Journal of Industrial Organization, The Information Society, Telecommunications Policy,* and Utilities Policy.

106 Ibid Jamison et al (2005)

107 Ibid Jamison et al (2005)

31. Proper coordination of transmission network planning

> *"Some degree of coordination among those responsible for transmission network planning and construction is necessary if "patchwork" solutions are to be avoided"*[108]

32. Consideration of impact of inter-related decisions re structure of national transmission system

> *"Far reaching impact of complex interrelated decisions around the future structure of the national transmission system*[109]

33. Consideration of transmission asset issues

> *"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"*[110]

34. Consideration of risk of badly flawed ACCC Regulatory Test consultation process if review processes are unduly compressed[111]

> *".....if review processes of all descriptions continue to be unduly compressed the process runs the risk of following the "badly flawed ACCC Regulatory Test consultation process"*[112]

---

108 Ibid CEER October 2003 direct quote

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

110 Ibid EAG (2007) October 2007 Sub to ACCC direct quote

111 Ibid EAG (2007 Sub to ACCC direct quote

112 Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote

Selected Climate Change, Emissions Trading and Energy Efficiency issues

35. Interaction of competition between climate change, emissions-trading, energy efficiency [113]/[114]/[115]/[116]/[117]

36. Renewable energy and energy-efficiency targets[118]/[119]/[120]/[121]

(PIAC; Alan Pears[122] TEC[123]/[124]; ACF; [125]/[126], BCSE[127];CUAC[128]

> ***Energy inefficiency***
>
> *"As there is a strong relationship between energy efficiency and energy affordability we would argue that this is not so much a separate customer group as it is a way of addressing energy affordability and assisting customers in chronic financial hardship. Tenants in the private property market are a class of consumers particularly vulnerable in this regard. They do not constitute a homogenous group. However it is well documented that there are more low income consumers in rental properties than amongst home purchasers/owners and there is a positive relationship between tenants and utility stress."* [129]

---

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

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

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

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

117 CUAC (July 2007) Response to AEMC's Issues Paper 10 July 2007

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

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

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

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

122 Ibid Alan Pears (2007) Submission to NGDNNP&CA, Oct

123 c/f TEC online Environmental and Social Objectives for the NEM

124 c/f TEC online "Australia to Dump Environment and Social Goals in Power Shake Up available at *http://www.tec.org.au/index.php?option=com_content&task=view&id=561&Itemid=316*

125 ACF *"ACF's National agenda for sustainability"* Found at *http://www.acfonline.org.au/default.asp?section_id=215*

126 Ibid ACF

127 Ibid as BCSE (2007) Submission to Vic Energy Efficiency Target Scheme18 May 2007

128 CUAC (2007) Response to AEMC Issues Paper 10 July 2007. See page 13.

129 Ibid CUAC (207) Response to AEMC Issues Paper 10 July 2007. See page 13.

37. Consideration of other unpredictable external factors[130]

> *"The impact of carbon pricing and interval meters on the effectiveness of competition in the wholesale market is as yet unclear although coupled with capacity and input constraints we can expect upward pressure on retail prices to increase."*

38. **Absence of robust evidence of retailer rivalry** to support conclusions that rivalry between retailers was sufficiently strong,[131] along the following lines, as suggested by the South Australian Government in its response to the First Draft Report.

39. **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).[132]

40. **"Detailed examination of existing and proposed Financial Instruments."**[133]

Financial Instrument are defined as

> *"Instruments such as risk mitigation insurance guarantees and other risk reallocation products that decrease investor risk given the set of institutional instruments."*

Though the need for risk mitigation is discussed broadly in the AEMC First Draft Report, the specifics and assessment of whether the instruments in use are effective, sufficient risk protection in the current climate of uncertainty and volatile wholesale prices, and clear evidence of market failure from a retailer perspective in certain areas

130 CALV Submission to AEMC's First Draft Report, November 2007
131 Govt of South Australia (2007) Response to the AEMC First Draft Report, November 2007
132 EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote
133 Ibid Jamison, MA, Holt, L, Ber, SV, (2005)

41. Absence of single market objective and effective representation, review and appeal mechanisms allowing all end-users fair and equitable participation

> *"Absence of appropriate checks and balances in respect of AEMC's, AER's, NEMMCO's and ACCC's performance of their respective functions as outlined in the NEL and NER's in order to ensure that these bodies fulfill the single market objective and there is effective representation, review and appeal mechanism to allow end users fair and equitable participation?*[134]

42. "**Impacts on Australia's energy demand and sustainability,** taking into account possible compromise in commitment by private companies to address demand management in the face of clear incentive to generate income." (PIAC)[135]

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 perspective[136] (CALV).

Selected Retailer impacts

44. Consideration of market complexity factors promoting 'gaming' opportunities

Further market failure is likely to be the outcome of failure to consider market complexity factors that may promote '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:[137]

> *"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.* [138]

134 Ibid EAG (2007) Submission to ACCC October 2007
135 PIAC (2007) Submission to AEMC's First Draft Report 9 November 2007 Terms of Reference p 2
136 CALV (2007) Submission to AEMC's First Draft Report, November 2007 note especially p10 -11
137 Ibid EAG (2007) Submission to the ACCC SP/PowerNet Revenue Cap Association, October 2007 direct quote
138 Ibid EAG (2007) Submission to ACCC direct quote

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.

The Government of South Australia has already questioned the extent to which second-tier retailers may be endeavoruing to compete against themselves rather than within the market as a whole. Can they achieve this with the power imbalances as they stand? It is clear from Victoria Electricity's submissions to the First and Second Drafts that this company

> *"……(and possibly others) have already had to take steps that will have the effect of reducing their ability to compete for Victorian energy customers."*

Selected Demand side issues:

46. **Recognition of the essential nature of energy**[139] (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. [140] (CALV)

48. **Contemplation a competition framework that enables an effective and equitable spread of the inevitable cost burden** over time and across different sectors of society[141]

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)**[142]

50. **Examination of Political Sustainability** defined as:

> *"Approaches for increasing the political sustainability of policies and institutional mechanisms, including the application of pro- poor policies"*

139 Ibid CALV (2007)Submission p10 and 11
140 Ibid CALV (2007) Submission p10 and 11
141 PIAC (2007) Submission to AEMC's First Draft Report 9 November 2007 Terms of Reference p 2
142 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.

SELECTED ENERGY PROTECTION CONCERNS

I have previously cited and referred to the analysis by Gavin Dufty of the philosophies of the ESC apparently startlingly similar to those of the AEMC, the new Energy Rule Maker, in relation to Universal Service Obligations (USOs).

Dufty also deals with the hairy issue of shifting responsibility from corporations and government to consumers; or from corporations to government, a process that he refers to as *"gaming"* though that term is also used the context of this submission in referring to misuse of market power[143] Though Dufty's paper is focused on energy regulation, many of the principles can be applied to other arenas.

In his 2004 analysis of the Essential Services Commission's philosophies and approaches, Gavin Dufty, now Manager Social Policy and Research St Vincent de Paul Society said[144]

> *In all of these models the ESC[145] is proposing to withdraw from the traditional basic protections delivered via universal service. In lieu of a universal safety net offered via universal service obligations the ESC proposes to protect customers where the market is failing through the establishment of "residual markets[146]".*
>
> *This residual market would be subsidized by the Government supposedly using monies currently allocated to fund energy concessions designed to increase affordability of energy services for low income households.*

---

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

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

144 Tamblyn, John (2003) Powerpoint presentation World Forum on Energy Regulation, Rome September *"Are Universal Service Obligations Compatible with Effective Energy Retail Market Competition?"* John Tamblyn (then) Chairperson Essential Services Commission Victoria.
Refer also to John Tamblyn's similar paper Tambylyn, J (2004 *"The Right to Service in an Evolving Utility Market,"* Powerpoint presentation at National Consumer Congress 15-16 March 2004 Melbourne

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

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

As observed by Mr. Dufty, The model proposed

> *"…..creates the opportunity for private companies to 'game'[147] the subsidies created to address market failure. This could occur through company's retreating from providing services to all but the most profitable customers.*

The proposals made

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

In an ABC interview in November 2007, the Chairperson of VCOSS spoke of the effect of electricity price rises on families, especially those on low fixed incomes[148]

> *The peak social welfare body in Victoria says the rising cost of utilities will hit low income families hard. Electricity prices in the state will rise by up to 17 per cent from January, and gas prices will be up to 7 per cent higher. The Victorian Government says the drought has reduced hydro-electricity generation, pushing up energy production costs. Cath Smith from the Victorian Council of Social Service (VCOSS) says that could see household power bills increase by as much as $200. Water bills are also set to double over the next five years.*
>
> *Ms Smith says the higher prices will make life even harder for households that are already struggling. "$160 to $200 a year is going to be a really big push for a lot of families, particularly because the week when that bill arrives, potentially that's an extra $60 or $80 on your peak winter bill," she said. "That's a lot of money for people to find. "For people on pensions, together with the water price, that's pretty much a full week of pension, basic pension, just to cover the increases in your utility bills."*

---

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

148 VCOSS says power hike will hurt families found at *http://www.abc.net.au/news/stories/2007/11/30/2106621.htm*
It is yet to be spelled out how this will be compensated and whether those not receiving benefits but on similarly low incomes will far. Again the question of "blood awful services" that did not work will be the concern, as expressed in 2000 by the Senate Select Committee

In its submission to the Composite Paper MCE Retail Policy Working Group, VCOSS made the following observations and recommendations.

Whilst it is not the brief of the Productivity Commission to address such specifics, there are concerns that these are similar recommendations may not be taken into account in designing adequate energy protection for consumers.

Without the detail, and with little more than a recommendation to appoint a national *"energy ombudsman"* and make greater use of ADR services (which appears to include these schemes though none of them mediates, advocates or arbitrates, or holds face to face meetings between disputing parties), it is really difficult for the public to have any confidence that consumer protection, especially for energy will be adequately addressed.

Therefore this small selection of concerns is raised in this arena to raise public awareness of some of the gaps that need to be clarified.

Extracts from VCOSS submission to Composite Paper, Retail Policy Working Group July 2007[149]

With a view to further work towards the new regulatory framework, we note these additional matters of concern:

- *Any assessment of credit risk that relies on historical information about debt should be restricted to information about utility debts only.*
- *Hardship programs should be mandatory for all retailers to ensure that consumers who experience bill payment difficulty, irrespective of the nature of their contract, can retain supply and are offered appropriate flexible arrangements to pay bills with continuing regard to their capacity to pay*
    - *Late payment fees, currently banned in Victoria, should be prohibited under the new framework as they are regressive in nature and impact disproportionately on low income households. Late payment should be regarded an indicator of potential financial stress and a precursor to offering hardship options.*
- *All standing offer contracts for electricity and gas supply must include Centrepay as an accepted payment method.*

149 VCOSS (2007) Submission to MCE Retail Policy Working Group found at *http://www.vcoss.org.au/documents/VCOSS%20docs/Submissions/2007/SUB_070730_RPWG%20Composite%20Paper_VCOSS.pdf*

- *Prepayment meters are currently proscribed in Victoria. VCOSS remains fundamentally opposed to their introduction because they are hugely detrimental to low income and disadvantaged households, and the only benefit they do offer those consumers (ability to pay for energy use via small, frequent instalments) can be readily and more appropriately delivered by other methods (such as bill smoothing). However if prepayment meters are allowed for in the national market, the following must be guaranteed by the regulatory framework:*

- *they must be optional —consumers must never be compelled to prepay;*

- *explicit informed consent must be obtained before a customer is signed to this option; and*

- *all standing offer contract terms must be delivered, including consumer protections such as disconnection proscriptions, payment flexibility, and the principle that no-one should be disconnected simply due to incapacity to pay.*

As well as responding to the detail of issues under consideration, we make the following observations about the national energy markets:

- *The objective of economic efficiency in the long term interests of consumers must be aligned with social and environmental objectives.*

- *Contestable markets for energy are still immature. Reviews of the effectiveness of retail competition have offered highly qualified reports and indicate significant areas of failure.*

- *Consistency between jurisdictions and/or a national regime for regulation is desirable, but only so long as consumer protections are guaranteed.*

- *Retail market contracts should provide for robust consumer protections including provision for comprehensive hardship programs and proscriptions on disconnection.*

- *Retail marketing arrangements should have regard to plain language and consistent product disclosure, explicit informed consent and appropriate cooling-off periods.*

The ESC Retailer Compliance Report 2006/2007 advised as follows[150]

Extract 2005-06 COMPLIANCE REPORT FOR VICTORIAN ENERGY RETAIL BUSINESSES FEBRUARY 2007

4.3.1 Cases not involving the Commission

Wrongful disconnection cases can be identified by the retailer, the customer or EWOV. In 2005-06 a total of 143 wrongful disconnection cases resulted in compensation payments to customers. The payments ranged from $26 per customer to approximately $19,000 per customer.

Over 70% of the instances of wrongful disconnection detected by the retailer were due to incorrect account details or errors made by staff, resulting in the retailers requesting the distributors to disconnect the wrong address. Customers appeared mostly to complain of wrongful disconnection when accounts were paid but the disconnection order was not cancelled, disconnection at incorrect addresses and delays in reconnecting once a payment arrangement had been agreed.

The key reasons for the complaints to EWOV were retailer failure to use best endeavours to contact customers or to advise customers of the availability of financial counselling, concessions and the Utility Relief Grant Scheme and inadequate assessment of the customer's capacity to pay.

4.3.2 Cases involving the Commission

The Commission becomes involved in wrongful disconnection cases where a customer has made a complaint to EWOV, who is not able to reach resolution with the retailer. Clause 6.4 of the OP enables EWOV to seek guidance from the Commission on any questions of interpretation of the ERC or retailers' terms and conditions of supply relating to WDP. This guidance is provided by Commission staff.

[150] ESC Retailer Compliance Report, p26 4.3.2 found at *http://www.esc.vic.gov.au/NR/rdonlyres/949F62FF-B891-4543-939A-00435469E079/0/EnergyRetailBusinessesComplianceReport200606.pdf*

If EWOV is unable to resolve a claim for the wrongful disconnection compensation payment, to the satisfaction of both parties, the claim is referred to the Commission for a decision in accordance with clause 7 of the OP. This formal decision is made by a Commissioner who has been delegated this function.

In 2005-06 EWOV referred 12 cases for interpretative guidance. Commission staff would investigate the complaint and offer a view as to whether WDP had occurred. It was found that these cases were subsequently referred for a formal decision if either the customer or the retailer disagreed with the Commission staff's guidance. This process was recognised as being inefficient and from 1 January 2006, EWOV was advised that written opinions on a specific case would not be provided without a formal referral for a decision. Guidance under clause 6.4 therefore would be confined to broad interpretation of the regulatory obligations.

This reduced the duplication in EWOV referrals for the remainder of the financial year.

In the 2005-06 period, 17 cases were referred for a formal decision. For 6 cases the Commission ruled that the retailer had fulfilled the terms and conditions of the written contract, and for the remaining 12 it was decided that the contracts had been breached, particularly in regard to three basic requirements under clauses 11.1, 11.2 and 13.2 of the ERC. These clauses in general set out the obligations requiring:

- *Adequate assessment of a customer's capacity to pay.*
- *Providing the customer with advice on financial counselling, concessions including the Utility Relief Scheme and energy efficiency information.*
- *Using best endeavours to contact the customer.*

It was often the failure of the retailer to comply with specific steps in the disconnection process which resulted in a decision that wrongful disconnection had occurred. These steps included not providing energy efficiency advice or not making sufficient efforts to contact customers in financial hardship prior to disconnection, in accordance with the obligations set out in the ERC.

Contributing to this was failure by some retailers to record all actions and conversations with customers during the disconnection process. Some retailers asserted that the requirements are clearly set out in the call centre scripting. This was found not to be sufficient and that retailers need to ensure that evidentiary documentation of the actions is maintained. All retailers met the regulatory requirements to make the compensation payments promptly.

The ESC Retailer Compliance Report 2006/22077 advised as follows[151]

"4.3.2 Cases requiring Commission involvement

The Commission becomes involved in wrongful disconnection cases where a customer has made a complaint to EWOV, which despite EWOV's efforts, is not able to be resolved with the retailer. Clause 6.4 of the Procedure enables EWOV to seek guidance from the Commission on any questions of interpretation of the ERC or retailers' terms and conditions of supply relating to WDP."

"If EWOV is unable to resolve a claim for the wrongful disconnection compensation payment the claim is referred to the Commission for a decision in accordance with clause 7 of the Procedure. This formal decision is made by a Commissioner who has been delegated this function.

In 2006-07, 14 cases were referred to the Commission for a formal decision. In one case, the Commission was unable to decide whether the retailer had breached its contract with its customer because the Commission could not determine whether it was Origin Energy or the customer who was at fault regarding the electricity disconnection. However, it was noted that the retailer had already provided some compensation to the customer.

In the remaining 13 cases, it was decided that the contracts had been breached, particularly in regard to three basic requirements under clauses 11.1, 11.2 and 13.2 of the ERC. These clauses in general set out the obligations requiring:

- *Adequate assessment of a customer's capacity to pay.*
- *Providing the customer with advice on financial counselling, concessions including the Utility Relief Scheme and energy efficiency information.*
- *Using best endeavours to contact the customer.*

The Commission notes that it was often the failure of the retailer to comply with all of the specific steps in the disconnection process which resulted in a decision that wrongful disconnection had occurred. These steps included not providing energy efficiency advice or not making sufficient efforts to contact customers in financial hardship prior to disconnection, in accordance with the obligations set out in the ERC.

[151] ESC Retailer Compliance Report, p26 4.3.2

Some retailers have indicated that they are compliant with clause 11.2 of the ERC as they have placed information on assistance available on bills, reminders and on disconnection notices. The Commission considered that this was an insufficient means of advising the customer of the assistance available, as any assistance needs to be expressly communicated to the customer.

Other retailers did not comply with sections 46 of the Gas Industry Act 2001 and 39 of the Electricity Industry Act 2000. These sections provide that if a relevant customer commences to take supply of gas or electricity at premises from the relevant licensee without having entered into a supply and sale contract with a licensee, there is deemed, on the commencement of that supply, to be a contract between that licensee and that person.

*Section 5.1 of the **ESC 2007 Retailer Compliance Report** it was reported as follows:*

As outlined in Chapter 3, market conduct, billing and information provision issues were the primary causes of retailer non-compliance. The potential consumer detriment arising out of these issues can be significant as consumers may:

- *make purchasing decisions based on misleading or inaccurate information;*
- *not be able to readily access the information most applicable to their situation,*
- *enter long-term contracts that ultimately may not meet their energy needs,*
- *be placed in financial hardship due to a retailer seeking to recoup undercharging without offering payment arrangements or delaying repayment of overcharged amounts.*

The Commission is particularly concerned about ensuring that consumers are able to access, in a timely and easy fashion, all necessary information to enable them to make informed choices in the competitive retail energy market in Victoria.

*Under **Section 5.2 of the ESC 2007 Retailer Compliance Report***

5.2 Interactions with EWOV and CAV

The Commission received a number of referrals and requests for regulatory interpretation from EWOV during the 2006-07 financial year. In addition, the Commission and EWOV continued to meet monthly to discuss emerging industry issues. These meetings provide opportunities for analysis of EWOV complaint data and discussion of broad industry issues.

The Commission also consulted with CAV, in accordance with the existing MOU, on a number of occasions during the 2006-07 financial year to address market conduct and contractual issues.

*Under **Section 5.4** of the ESC 2007 Retailer Compliance Report it was reported as follows*

5.4 Issues for 2007-08

The Commission's compliance monitoring activities for the 2006-07 financial year highlighted a number of ongoing matters that it proposes to address with the relevant retailers over the next twelve months. These compliance matters include:

- *Ensuring that all retailers are complying with the provisions of Guideline 19, in particular the provision of Product Information Statements to customers;*
- *Ensuring that the retailers monitor their external sales channels compliance with all applicable provisions of the Marketing Code;*
- *Ensuring that all retailers comply with the Commission's Final Decision Early Termination Fees Compliance Review (December 2006) when calculating and applying early termination fees;*
- *Ensuring that the retailers' processes for obtaining a customer's explicit informed consent are in accordance with the obligations under the ERC;*
- *Continuing to work with CAV in relation to the fairness of energy contract terms.*

The commonest complaints for both electricity and gas received by EWOV during the year 2006/7, as reported in the 2007 Annual Report was identified as competition issues – the process of switching retailer.

The breakdown is shown below[152]

Cases by industry:

- *11,909 electricity cases (down 6%)*
- *3,888 gas cases (up 10%)*
- *429 dual fuel cases (up 45%)*
- *1,484 water cases (up 14%)*

EWOV received a total 18,280 cases in 2006/07 - 4,109 enquiries and 14,171 complaints. Overall, cases were up 3% from 17,763 in 2005/06.

Taking residential populations into account, the parts of Victoria with the highest rates of residential cases to EWOV were City of Melbourne, Loddon Shire, Pyrenees Shire, Moorabool Shire and Rural City of Swan Hill.

The most common issues were billing (39%), retail competition (21%) and credit (18%).

5,184 complaints were received for full investigation. 5,316 complaints were fully investigated and closed.

Redress to customers included 173 written apologies, 1,016 payment plans negotiated, and $1,740,406 in billing adjustments, fee waivers, debt reductions and other payments.

Electricity

EWOV's annual report 2006/07 reported 11,909 electricity cases overall, down 6% with 19% enquiries and 81% complaints.

The most common complaint was the process of switching retailer.

Amongst electricity retail cases alone, there were 10,240 electricity retail cases, up 24 cases, with 16% enquiries and 84% complaints – with the most common complaint being the process of switching retailers.

Complaints about distribution were most commonly about unplanned outage.

---

152 Found at *http://www.ewov.com.au/html/Annual%20Reports/Annual%20Report%202007.htm*

GAS

2006/07 gas cases

3,888 ***gas cases overall****, up 10%*

19% enquiries and 81% complaints

Most commonly — the process of switching retailer

3,456 ***natural gas retail cases****, up 12%*

16% enquiries and 84% complaints

Most commonly — the process of switching retailer

129 ***natural gas distribution cases****, down 37%*

14% enquiries and 86% complaints

Most commonly — new connections/installations

149 ***LPG (retailer specific) cases****, up 67%*

42% enquiries and 58% complaints

Most commonly — fees & charges

To illustrate:

In 2006/07, customers contacting us (EWOV) registered their dissatisfaction with the following practices:

- *door-to-door sales to non-account holders, to the elderly and to people with limited English*
- *marketing directed at people who — according to the person phoning us on their behalf — didn't have the capacity to provide explicit informed consent to a market contract*
- *people being asked to sign a document, unaware that it was a contract*
- *people being told, or coming to believe, 'things would stay the same' if they agreed to a new contract*

- *sales representatives saying, or implying, they were 'from the government' or had some government connection, or that the energy retailer they represented was 'taking over' in the area*

- *sales representatives saying 'nothing will change except your bill' or 'the supplier will stay the same' — statements which, while they had some truth, took advantage of the average*

- *customer's lack of understanding of the relationship and differences between energy retailers and distributors*

- *sales representatives wearing fluorescent work vests — for some customers this created the impression that they were linesmen, not salespeople, and inferred there may be a need to switch, not a choice*

- *people agreeing to receive further information, and then receiving a 'new customer' welcome letter*

- *delays in receiving important contract information, or in replying to customers' phone calls or letters.*

As appropriate, we (EWOV) provided reports on these issues to the energy retailers concerned, and to the ESC, Consumer Affairs Victoria (CAV), the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER), by way of a Market Conduct Reporting Protocol.

SELECTED METERING ISSUES

I turn now to reflect the views of United Energy Distribution and Alinta AE about rail gauge problems with the proposed national smart metering program as far as achievable.

I must say that I am very disappointed that Victoria has gone ahead with the roll out proposal without waiting for standardization, whilst at the same time recognizing that some jurisdictional differences will necessitate amendments to standardized provisions.

Beyond that since the time that the ESC decided on the smart meter roll out, technological developments suggest that an even smarter way of proceeding would be to adopt smart grids so that current technology does not become outdated and Australia can get closer to meeting world best practice standards.

I will go as far as suggesting that I believe there is a case to delay the roll-out till the national framework is in place.

The MCE may believe there is some value in having guinea pig data upon which to base future national agendas for smart metering, presumably without smart grid options in place as suggested by Robin Eckerman.

The MCE has just published the Consultants' response to stakeholder inputs regarding smart metering. There is divided opinion, and I am not convinced that the Consultants' responses will appease the growing concerns of many stakeholders, including numbers directly from the industry.

Victorian and New South Wales Ministers are determined to continue with their advanced meter roll-out despite all cautions.

On 13 June 2008 MCE had reviewed the national cost-benefit analysis and noted a wide range of potential net benefits but that benefits and costs are not certain in all jurisdictions.

On this basis, Ministers committed to continue smart meter deployments in Victoria and New South Wales. MCE also committed to: extensive pilots and business cases in most other jurisdictions to confirm benefits, costs and risks; and to establishing a consistent national framework for smart meters. Consistency between NEM and non-NEM jurisdictions will be sought where beneficial, given different market arrangements.

This indicates that the horse has already bolted and that despite all the many cautions expressed by numerous stakeholders from industry academics and community organizations that the business case, including for Victoria is not made out for this proposal, both Victoria and New South Wales are determined to proceed with the proposed advanced meter rollout Country Energy has formally expressed concerns that the costs provided by Victorian distribution businesses are above the upper bound of costs estimated by EMCa within the business case.

I include shortly the suggestions made by some industry stakeholders to the current VESC Regulatory Review in response to the Open Letter of Invitation published online in February 2008, the only online document preceding the Draft Decision on Stage 1 of the Review, though an Issues Paper had been available in May to selected stakeholders on the Consumer Consultative Committee (CCC).

Though repeated in a dedicated submission I include the analysis below taken from the inputs of various stakeholders regarding the smart meter roll-out.

The effectiveness of competition in the gas and electricity retail markers in Victoria had mostly been addressed by the AEMC, no doubt with a little help from the Victorian energy policy-makers and regulators.

Incomplete or inadequate assessment of competition effectiveness in any field can have a huge impact on regulatory issues and their appropriateness or effectiveness. One good example in the smart metering roll out.

I start by commenting on the suggestions made by some industry stakeholders to the current Review in response to the Open Letter of Invitation published online in February 2008.

Extract from Alinta's submission (on behalf of United Energy, Alinta AE, and Multinet Gas (the licencees to Open Letter VESC Regulatory Review 2008

We note that the ESC has sought comments on the incorporation of potential regulatory obligations to facilitate the orderly roll out of advanced metering infrastructure (AMI). The Victorian AMI project has held a number of workshops over the past few months to develop an AMI operating business model. This work is currently being finalised. The business model work in Victoria should be given a chance to be completed with sign off by the Industry Steering Committee.

UED and AAE wish to avoid the creation of rail gauge problems with the national smart metering program to the greatest extent possible. Accordingly, where regulatory obligations need to be clarified or amended, we strongly support this being done within the national context, via the appropriate regulatory instruments such as the National Electricity Rules, National Metrology Procedure, national licensing arrangements, codes and guidelines.

I note that full consideration of Victorian advanced metering proposals are to be considered in Stage 2 of the VESC Regulatory Review with the Draft Decision to be published during September 2008.

The MCE has advised as follows in Bulletin 129:

On 13 June 2008 MCE reviewed the national cost-benefit analysis and noted a wide range of potential net benefits but that benefits and costs are not certain in all jurisdictions.

On this basis, Ministers committed to continue smart meter deployments in Victoria and New South Wales. MCE also committed to: extensive pilots and business cases in most other jurisdictions to confirm benefits, costs and risks; and to establishing a consistent national framework for smart meters. Consistency between NEM and non-NEM jurisdictions will be sought where beneficial, given different market arrangements.

This indicates that the horse has already bolted and that despite all the many cautions expressed by numerous stakeholders from industry academics and community organizations that the business case, including for Victoria is not made out for this proposal, both Victoria and New South Wales are determined to proceed with the proposed advanced meter rollout

Country Energy has formally expressed concerns that the costs provided by Victorian distribution businesses are above the upper bound of costs estimated by EMCa within the business case

Energy Australia and Country Energy have both expressed numerous reservations as to whether a business case has been established for smart metering roll-out

Meanwhile I make some cursory comments below taken from the views expressed by other stakeholders in various arenas, including national consultative processes.

Cited below is an extract from presentation in October 2006 to the Metering International Conference in October 2007[153] by John Dick as President of the Energy Action Group (EAG)

Advanced Metering Infrastructure Roll Out

Philosophical Overview

We will not get all the decisions right in the move to Advanced Metering Infrastructure (AIMRO) and we are at the start of the learning curve as to what does and doesn't work.

It is clear and transparent to most that the Australian regulatory environment has not delivered an avalanche of innovative ideas to date, in fact the regulators and the industry appears to be almost completely risk adverse to innovation and has to be dragged shouting and screaming to implement even small changes.

The current industry arrangements makes it impossible for the industry participants to capture the full $ from value chain, but AIMRO can still easily meet the single market objective in the long term interests of consumers!

We appearing to be grasping at a number of straws based on estimated values in the analysis of Advanced Meter Roll Out without adequately thinking through the issues.

It is a risky strategy to compare the NEM with other countries given the disparate Australian climatic conditions, opportunistic generator bidding behavior, the various idiosyncrasies and massive asymmetric risks of our unique merit order dispatch gross pool energy market and Ancillary Service Payment markets, along with the very weakly interconnected transmission system and radially based distribution systems.

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

Risk in the NEM:

Most people understand that the NEM is a gross pool merit order dispatch market. The market allocated risk and cost to various parties and counter parties. One of the major objectives of a retailer is to manage the various market risks!

The current round of AIMRO consultation has failed to address "market risk" and the costs of risks as a significant issue.

"Standing offer" for less than 100 MWh residential consumers include the smeared costs of "risk as a premium" plus some head room to encourage retail competition.

User/Causer Pay an Underlying principle of the NEM

The under pinning of the NE Market arrangements is the user/causer pay principle! The participant who causes a problem compensated the rest of the market to ensure that the market comes back to an equilibrium. The energy only market floor is - $ 1000 and the cap is + $ 10,000. The average spot pool price is under $ 60/MWh.

The NEM places significant asymmetric risk on consumers. Consumers underwrite a high proportion of the risk without an understanding or an ability to act to minimize that risk.

Three examples of "Risk"

In the first month of the Ancillary Service Payment Market (ASPM), TransGrid pulled several northern NSW inter-connectors out of service to install a communications system. The overall costs of this action under causer/user pay principle was generators $ 80 m. consumers $ 80 m.

On the 16th January 2007, the ASPM cost $ 20 m for the day. The 6 sec raise ASP in South Australia reached prices of $ 35,000/ MWh for a short period of time.

We are currently seeing the fallout of the costs to retailers in NSW, who had pool exposure in June 2007, when the market almost breached the Cumulative Price Threshold of $ 150,000/MW/ week for the first time.

NEM Overview

Australia network businesses are in the process of moving to or have already moved to summer peaking systems. There is continuing deterioration of the Annual Load Duration Curves, (with the exception of Tasmania) across the market.

The industry structure and arrangements reward load growth and under user/causer pay principles, consumers pay significant risk premiums to cover rare events.

Energy costs (including the retail capped /standing offer prices) along with network prices are trending up quite rapidly across the NEM, in response to associated peak load growth and the asymmetric risk of the market!

Current government energy efficiency and greenhouse abatement issues along with the AEMC, AER and MCE processes will have minimal impact on current consumption patterns in part due to lead times to change those consumption patterns. The movement of the old energy inefficient household fridge to the shed beer fridge is an example of behavior that sustains high consumption levels.

The current drought has highlighted that generation capacity constraints in the NEM is water as well as gas. Spot gas prices reached over $ 300/ GJ in Victoria this winter, the contract price is $3.40/GJ.

Both transmission and distribution networks are aging as energy consumption and particularly peak load growth continues to increase

The NEMMCo SOO 2006 indicated that peak load (MW) is growing at 3.2% a doubling of peak consumption in 21 years.

NEM annual energy consumption GWh is growing at 1.7% or doubling every 41 years. However large energy intensive projects have the potential to change the energy growth projection quite rapidly, Desalination is a good example.

The 2004 to 2007 transmission regulatory determinations and ElectraNet revenue applications have allocated around $ 1878 m for asset replacement and $3694 m for load growth.

The 2004 to 2007 jurisdictional distribution determinations allocated $13b and the next regulatory round starting in NSW. The NSW businesses will be applying to the AER for something like $ 12 b, up from the $5 B awarded in the last IPART regulatory determination. Qld and South Australia seem to be following a similar pattern to NSW.

It appear that the NEM network capex "ask" is increasing by around 100% or 200% every 5 year round of regulatory determinations, depending on how you do the numbers, NSW and Qld are good examples.

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

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

What reliable data is available on heating and cooling one of the largest component of small business and residential consumption patterns!

How many a/c's and what size and star rating?

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

Load and Consumption Data

Billions of $ have been awarded by the regulators on inadequate load forecasts produced by the network businesses and in turn added to the Regulated Asset Base RAB.

Almost all of the consumption data used by the AGO, ESAA, ABS, ABARE etc and the various consultants in the energy efficiency and demand management debates for less than 100 MWh consumers across the NEM are estimates. How can you track behavioral changes and make decisions based on 1 or 3 month metering settlement data of the most volatile load!

What is the energy efficiency standards of new air conditioning being installed?

What sizes are the units being installed and what units are they replacing or are they new installations?

What happens to old energy inefficient units being replaced or is another unit being installed as well?

Enough Australians have a level of disposable income to rapidly change energy consumption patterns in very short period of time.

Appliance purchase information is not being effectively tracked. All Australian Governments seem to be doing is legislating without understanding what's actually happening in the market place!

The Incandescent light /Compact Fluorescent Light bulbs energy efficiency regulation provides a useful example, given that there are better technologies available like Light Emitting Diodes (and LED have no mercury content).

Fixing the power factor problem associated with CFL's is a further issue to be resolved!

AIMRO data will allow retailers to more effectively manage temperature sensitive load! Currently a retailer doesn't usually know about a residential customers change in behavior until up to at least 12 weeks after an event. (one, three month settlement period on a meter reading) or a one month billed customer up to four weeks after the change.

Reliability "Ancillary Services"

On top of the energy only market there are 8 different Ancillary Service Payment arrangements designed to ensure that the system operates with the minimum of disruption. There are 6 markets for frequency control 3 raise and 3 lower. One to cover network control NCAS and another to cover restart (Black Start).

NEMMCo has statutory responsibility to run a reliable and secure system. NEMMCo has the power to direct a market participant to operate. The market participant is paid operations and maintenance costs for the direction. The record to date for a direction is $ 20 m for the day.

The annual Inter-regional price differentials are running at $ 1.6 to 1.7 b. This figure has a relationship to generator market power and can be dependant / or is independent of peak load consumption. The flawed AER Regulatory Test has impeded the development of more robust state based transmission system along with inter-connectors. This adds to retailer risk and is paid for by consumers!.*

(Type 5) Interval Metering assist in the allocation of risk and costs under the user/causer pay principle. (Type 4) AIMRO has the potential to significantly reduce asymmetric risk

Price Caps /X Subsidies for less than 160 MWh Consumers

Price caps: work when the cap is higher than the retailer energy purchase price, however it is a recipe for disaster if the caps are lower than the energy purchase price.

X subsidies: flat load consumers subsidize volatile load customers. A flat load average on-peak consumer in Victoria with a bill slightly over $ 850/a is subsidizing a summer air conditioned consumer to the tune of $ 200/a in energy terms The impacts on distribution and transmission costs DUoS and TUoS are extra! While massive intra tariff cross subsidies continue to exist, there is a strong diminution of price signals and the continuation of inequitable outcomes.

Further issues with the current Settlement/Billing arrangements

The current settlements arrangements based on type 5 meters use Net System Load Profiling (one hat fits all in a region) as the basis for settlements. It takes up to 2 meter reads to settle the market. With 3 monthly meter reads the settlement arrangements take up to 30 weeks to complete.

(Algorithms are used to simplify the settlement processes and reduce financial exposure.)

However reconciliation between the settlements data and the distribution and retailer billing systems is an issue for some large retailers with multiple billing systems. Along with the fact that consumers are not impressed with billing errors! Utility industry ombudsman complaints are at record levels and in a number of jurisdictions the number of complaints is still rising!

Retailer "Risk"

The use of NSLP as a basis settlements increases trading risks and un-hedged exposure to the energy market. Over contracting costs the retailer revenue.

Needs to know their dynamic trading position/exposure in relation to both their customers' load and customer churn. Know their energy contract position in relation to their customers energy consumption.

Understand their exposure and make provision for their exposure to the Ancillary Service Payment Market.

There appear to be significant unstated cash flow benefits to retailers to move to AMI, these include:

Faster and more accurate settlements.

Accurate information to mange the retail hedge book. Rapid assessment of pool exposure or surplus energy/hedge contract that can be sold.

There are ongoing disputes between retailers about the transfer process and between the retailer and the distributor as to the amount relating to DUoS and other network charges.

The recent Retailer of Last Resort event raised questions as to what evidence was going to be used to accepted responsibility by the various parties involved in the resolution for the various financial obligations associated with this arrangement. The use of NSLP as a basis of allocating costs is not particularly helpful in allocating costs and obligations!

Distribution Business Behavior

Many distribution networks do not enforce their connection agreements so reactive power, power quality and network outage management are issues that are not well addressed across the NEM. The use by regulators of Guaranteed Service Levels doesn't inspire consumer confidence.

Under the Building Block Approach to Incentive Regulation a DB's can be rewarded with $ to pay consumers for complaints, so there's little incentive for a DB to fix problems!

There are potential savings in using AMI data to the minimize Distribution Loss Factors.

AMI offers a path to the "Smart Grid"

Replacing Type 5 and 6 Meters with Type 4 Meters offers a long term vision (more than 10 years) to transform the 1930's technology of a number of the distribution networks into the smart grid of the 21st Century.

There are clear customer benefits from better managing uncontrolled distribution outages. In a number of regulatory determination DB's are given revenue to pay for their failure to control customer outages!

Sceptics believe that we are adding "cruise control" to a T Model Ford!

Some brief comments on NERA/CRAI MCE Modeling

Modeling is extremely difficult when you don't have reliable consumption data at the small consumer level along with behavioral data.

There is little market based evidence that the CRAI modeling results will reduce the Critical Peaks and increase energy consumption. Some recent research presented to the conference by Sarea Coates raises some questions about the NERA led, CRAI modeling results where the increased energy consumption after the peak load interruption fails to occur.

"Trivia"

I understand that the practice of swapping used meters between various parties still occurs after a new meter is installed. Hopefully in most cases the amount of energy consumed by the customer is being recorded for settlements purposes.

It is unfortunate that the current MCE work on AIMRO is not unlike the Victorian Studies ignoring the provision of metering by independent third-party metering providers. Who have the potential to offer a range of competitive metering services.

The magnitude of the hurdles for DM, EE and renewable energy is so large that combined they will not make a significant contribution to changing load or consumption patterns in the next 5 years and it is unlikely that this position will change in the next 10 years. The 1 in 10 year temperature sensitive load compared to the 9 in 10 year load forecast varies by 1000 MW in both Victoria and NSW.

Changing the NEM Rules will not facilitate significant increases in DM, EE or renewable energy. A Photo Voltaic array has around a 15% Available Capacity Factor. The best Wind Farm has 42%. Fossil fuel power stations have ACF over 90%. The investment in renewable energy has to be significantly larger than the investment in fossil fuel plant. To get the same bang for the buck!"

Some Conclusions

It is disappointing to see the lack of concrete information on the table for consultation given the resources put in to the AIMRO exercise to date.

The lack of long term "real time" customer load and behavioural data makes modelling difficult.

Cost smearing does absolutely nothing for the user/causer pay principle underpinning the market."

Some metering issues are more fully discussed in part 6, but mentioned here because of overlap.

The Victorian charging Guideline for bulk hot water the subject of extended dedicated challenge within this component submission as a harmful regulation is actually called,

"Bulk Hot Water Charging Guideline and Bills Based on Interval Meters: ESC Guideline 20(1)"[154]

However, the Guideline for what it is worth as a legally enforceable policy provision that attempts to re-write contractual law and uses unacceptable trade measurement practices, falls short of living up to its own name without explaining how the interval meter charging should be effected. Indeed, the failure of authorities to date to do more than *"grasp at straws"* based on estimated values in the analysis of Advanced Meter Roll out without adequately thinking through the issues.[155]

As suggested by EAG the ESC has been determined from the outset to implement the interval meters without due regard to the technicalities and impediments, and refusing to accept such technical advice as was commissioned and prepared on behalf of Energy Action Group through Pareto Associates, and the advice by CRA and KPMG. This is further discussed in part 6.

There may be divided views about interval meter roll out, how this should be achieved and whether it would be more sensible to wait till consideration can be given to smart grids to replace ageing infrastructure before implementing a process that will be costly and need revision within the decade.

Will any conceivable savings be passed on to customers, particularly those who are captured by monolopy suppliers, such as those providing bulk energy for hot water services in multi-tenanted dwellings, and similar to those in inset or embedded net situations such as caravans and rooming houses and nursing homes?

Several community organizations including PIAC, St Vincent de Paul, CALV, TEC have expressed their concerns with regard to consumer impacts.

---

154 VESC Guideline 20(1) (2005) (December) Bulk Hot Water Charging Guideline 20(1). On the point of repeat under current regulatory review. Most provisions will be transferred to VERC. Appendices 1 and 2 to be repealed with simply a DPI reference retained, since the DPI now has direct control of tariff and formulae issues. Clause 1, Appendices with derived costs and conversion factor formulae and explanatory notes will no longer be accessible. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/C0E6AA35-3FE0-4EED-A086-0C41F72E5D25/0/GL20_BulkHotWaterGuideline.pdf*
See also ESC Final Decision 2005 FDD-Energy Retail Code – Technical Amendments – Bulk Hot Water and Bills based on Interval Meter Data (August)
http://www.esc.vic.gov.au/NR/rdonlyres/37078658-5212-4FA7-8A8E-AC42AB12BDDC/0/DDP_EnergyRetailCodeTechAmend20050810_CommissionPap_C_05_8007.pdf
See all other deliberative documents listed under appendices 2004-2005 till adoption of the Guideline and effective 1 March 2006

155 See EAG (207) *"Allocating Risks in a Gross Pool Market."* PowerPoint presentation by John Dick, President EAG at International Metering Conference October 2007

I draw attention again to PIAC (2004) Submission to ESC Joint Jurisdictional Metrology Draft Report. [156]

I also re-invite attention to St Vincent' de Paul's submission to the ESC as the Research Report prepared by Landlord, M and Dufty G (2004)

See St Vincent de Paul Society's submission to the Essential Services Commission (Langmore, M and Dufty, G (2004).

"Domestic electricity demand , issues for the Victorian Energy Market. Research Paper. Addresses Household responsiveness to price – Changing Demand (Part 1) and to market participation (Part 2) (with 33 citations including from UK studies)"

Finally I refer to Andrea Sharam's (2004) Research Paper prepared in 2004 by Andrea Sharam for the Energy Action Group on Smart Metering (Pareto and Associates commissioned report). This had been submitted directly to the VESC and apparently largely ignored.

The indications are, according to studies undertaken by CALV and their own submissions to the RPWG and other MCE arenas, that those in embedded network or generation situations fare worst and that social justice issues are not part of the equation in seeking to achieve competition goals deemed by economists to be *"for the overall good of society."*

Other concerns about premature and ill-considered decisions on interval meter roll out without the infrastructure in place and without smart grid arrangements to accompany these.

These concerns have been expressed by various experts, not all agreeing on strategy but united in believing that the decisions being made are not taking sufficient regard of technical matters.

For example, EAG[157] believes that an important side effect of *"light-handed regulation"* is poor information. I quote from the EAG PowerPoint 2007 International Metering Conference below

> ***One important side effect of "light handed regulation" is poor information***
>
> *How can you model AIMRO without the appropriate data, analysis and information! There are a number of important deficiencies in the current MCE papers out for consultation as a result.*
>
> *What reliable data is available on heating and cooling one of the largest component of small business and residential consumption patterns!*

[156] PIAC (2004) Submission to ESC Joint Jurisdictional Metrology Draft Report http://www.esc.vic.gov.au/NR/rdonlyres/BDF36633-B3A8-448B-8977-FFADDA3A3B1C/0/PIAC_re_MetDraftFeb04.pdf

[157] Energy Action Group (2007) International Metering Conference October 2007. PowerPoint Presentation (John Dick) (October)

EAG[158] and others have also raised the issue of the significant asymmetric risk placed on consumers, who underwrite a high proportion of the risk without an understanding or an ability to minimize that risk.

I quote below from PIAC's submission[159] to the Draft Report of the Joint Jurisdictional Metrology Review following an earlier submission to the Issues Paper.

> *The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to comment on the Draft Report of the Joint Jurisdictional Review. Having made a submission in response to the Review's Issues Paper we will make only brief comments at this point.*
>
> *PIAC supports the general thrust of much of the Draft Report. In particular, we support the recommendations that:*
>
> - *for 'small' customers type 5 meters should be able to be read as type as per the choice of the customer;*
> - *distributors should be responsible for metering services for meters of types 5-7 used by 'small' customers;*
> - *distributors should retain Ownership of type 5-6 meters; and*
> - *any roll-out of interval meters to 'small' customers should not proceed before an assessment of costs and benefits has been undertaken for each jurisdiction.*
>
> *In our view, however, the Draft Report falls short in one important respect. PIAC believes that a more explicit reference to social equity should be included in the metrology rules. This Review provides an appropriate opportunity to do so.*
>
> *We point out that social equity is very different from economic equity. One deals with what is fair in terms of sharing of costs between consumers. The other deals with what is fair in terms of which consumers most can afford to shoulder the added burdens associated with particular regulatory proposals.*

158 Ibid EAG (2007) PowerPoint presentation

159 PIAC (2004) Submission to ESC Joint Jurisdictional Metrology Draft Report. Found at *http://www.esc.vic.gov.au/NR/rdonlyres/BDF36633-B3A8-448B-8977-FFADDA3A3B1C/0/PIAC_re_MetDraftFeb04.pdf*

It is noted that the assessment framework proposed in the Issues Paper for measuring proposals for mass roll-outs included the criterion of 'equity. The proposed framework also makes explicit reference to:

- *the incidence of costs and benefits on individual consumers;*
- *protection of consumers; and*
- *the avoidance of unreasonable discrimination between Market Participants.*

Yet, the recommendation of the Draft Report is that in applying this framework each jurisdiction should be free to decide whether or not social equity is a valid issue for consideration. The strong suggestion which emerges, then, is that the jurisdictional regulators believe it is acceptable that consumers in different jurisdictions be entitled to different levels of protection.

Clearly this is not a tenable position. If social equity is to have any meaning at all then it must be taken into account equally by each of the jurisdictional regulators. Otherwise the apparent commitment to social equity can offer no comfort or certainty to consumers. What is more, allowing the jurisdictions to pick and choose the extent to which a requirement for social equity is to be observed provides to the distributors and retailers an opportunity to play the regulators off against one another in an attempt to drive down the levels of consumer protection.

The view of PIAC, then, is that it is appropriate for the final report of the review to clarify the importance of social equity and move to ensure that any changes to metrology rules do not result in negative impacts for poor and disadvantaged consumers.

The Issues Paper raised the question of whether constraints on tariffs present a barrier to the introduction of more economically efficient metering solutions. The response of the jurisdictional regulators in the Draft Report is that in order to promote efficient outcomes in metering the jurisdictions should reconsider the appropriate balance between the constraints on movements in tariffs and the need over time to introduce more cost-reflective tariffs. In response we point out that prices are a separate issue from the meters used to measure consumption. Meters are used to derive a cost for consumption incurred by individual customers and make it possible to construct bills for payment. Of themselves, meters cannot create competition.

Yet, the response of the Joint Review on this point reveals an attitude which approaches the fetishisation of competition. PIAC has seen arguments that a greater rate of churn in meter types is needed to facilitate retail competition. We also have seen arguments that final prices for electricity should be restructured so as to increase the rate of churn of meters. What we can distil from these differing perspectives is the thread of consistent arguments for end-users to face higher prices in order that the regulators can bring about the realisation of the dream of 'competition'.

What we are not clear about, however, is whether this review is focussed on facilitating better metering solutions for the market (since it is apparent that customers can expect benefits only from a market) or driving greater levels of competition between retailers.

The view of PIAC is that it is not appropriate for a review of metrology rules to be concerned with retail prices or distribution revenues or even with the structure of tariffs. This view is strengthened in the face of the recommendation that consideration by the jurisdictions of social equity should only be optional.

The Draft Report contains a further recommendation on tariffs to the effect that the jurisdictions should unbundle metering service charges from DUoS charges. Notwithstanding our general comments about whether tariffs are properly a subject of this review, PIAC believes there are strong reasons for the final report of the review not adopting this recommendation.

We welcome the view expressed by the Australian Consumers Association (ACA) that metering service charges are likely to be seen by consumers as no more than a cost of doing business for the electricity industry. In essence, the allocation of these costs is more properly a matter for discussion between the retailers and the distributors rather than a simple 'pass through' cost to be borne by consumers. More importantly, we agree with the ACA that the cost of achieving the unbundling of this tiny proportion of final prices likely will eclipse whatever savings could be expected from such an exercise.

As noted above, PIAC supports the recommendation of the Draft Report on 'reversion' and the reading of interval meters on an 'accumulation' basis. However, we are critical of the Draft Report in its proposal that the threshold at below which customers can choose between accumulation or interval reading of their type 5 meters should be a matter for the discretion of the jurisdictional regulators. PIAC accepts there are grounds for such discretion in some areas of national metrology rules. However, these can be exceptions only if the final report of this review attempts to introduce uniformity in other areas as appropriate.

> *An appropriate threshold for customer choice in this respect could be either 160MWh or 40MWh.*
>
> *In either case, it is difficult to understand why a threshold chosen in one jurisdiction cannot be appropriate in the others.*
>
> *Signed: PIAC Jim Wellsmore Senior Policy Officer"*

A good example of poorly considered energy reforms is the smart meter proposal without due regard to smart grid options or alternative advanced meter roll out options[160].

As discussed further shortly by reproducing in its entirety the views of Professor Robin Eckerman[161] and the views of Energy Action Group,[162] and of CALV[163] and St Vincent de Paul Society[164] about the broader implications of decisions being rushed through because they were conceptualized and planned for some years ago.

Robin Eckermann points out in his submission to the MCE In November 2007:

> *"This is not to deny that Smart Meters (as have been mandated in Victoria) will deliver some worthwhile benefits. Undoubtedly the introduction of time of use pricing will be a valuable catalyst in changing the behaviour of many energy consumers. However, some overseas modelling suggests that introducing Smart Meters alone would typically achieve less than half of the potential benefits of Smart Grids in terms of bringing Australia's electricity supply grids into line with "world's best practice".*

---

160 Refer to example to the PowerPoint presentation by EAG to the International Metering Conference October 2007 (John Dick) cited and reproduced in full in this component (6) and in Part 5.
Since 1993 the Energy Action Group has relied on membership, donations and small grants and consulting fees to fund its work in. It addresses the issues that arise out of the restructuring of the electricity and gas industries, and much effort as been concentrated on the regulatory regimes. It acts as a monitor for the public interest, and advocates the energy and water needs of domestic and small business users, with emphasis on low income households. It promotes a stronger, more meaningful, open and accountable regulatory system, real consumer participation in the regulatory system, and environmentally sustainable solutions to energy problems.

161 Robin Eckerman is Principal, Eckermann and Associates, and Adjunct Professor (Network/Communication Technologies) University of Canberra.

162 See for example the Research Paper prepared in 2004 by Andrea Sharam for the Energy Action Group NAME

163 See CALV's November 2007 submission to the MCE regarding cost-benefit analysis for a smart meter roll out

164 See St Vincent de Paul Society's submission to the Essential Services Commission (Langmore, M and Dufty, G (2004) *Domestic electricity demand elasticities, issues for the Victorian Energy Market.* Research Paper. Addresses Household responsiveness to price – Changing Demand (Part 1) and to market participation (Part 2) (with 33 citations including from UK studies)

Professor Eckermann has suggested

> *In the light of these developments, a complete assessment of the AMI business case in Australia needs to take account of the risk that moving prematurely will either:*
>
> - *deny Australia the benefits that Smart Grids can offer for the next 15 years or so; or*
> - *inflict the burden of another costly meter upgrade program in a 5-10 year timeframe if those benefits are to be harnessed.*

The decision to continue with the smart meter roll-out plan has not been halted, and yet the infrastructure is not in place yet to maximize benefits,, and nor have consumer protection issues, especially with regard to remote disconnections, been addressed at all. I would have thought that the consumer protection framework would need to accommodate this and make clear-cut decisions about how the framework would more specifically best serve the needs of individuals and small businesses as energy consumers since reliance on the general law will certainly not cover such issues.

I quote from the Executive Summary of the Pareto Associates 2003 Report[165] prepared for EAG and cite the remainder of that summary later:

> *Competition is meant to deliver benefits to consumers by allowing them to choose a supplier that best meets their individual needs. Through choice consumers encourage suppliers to develop products and services that meet needs defined by the consumers. This gives consumers economic power that not only determines the quality of products and services on offer but also the price. In truly competitive markets this process can deliver substantial and sustainable social benefits.*

[165] Ibid Pareto Associates (2003) for EAG Smart Meter Report, Executive Summary found at *http://home.vicnet.net.au/~eag1/Intervalmeters.htm*
Last updated April 2003
See also update EAG (2007) "Allocating Risks in the Gross Pool Market" Powerpoint Presentation at 2007 International Metering Conference (October)
Interval or "smart" meters

The rationale for specialized energy-specific regulation is strong and there is an urgent need for all protections to be in place before plans are firmed up and manufacturers given the go-ahead to plan with certainty for future needs. Those manufacturers have already been several times disappointed by past decisions going in one direction, making carefully structured strategic and business plans to accommodate those decisions, only to find decisions reversed. They need certainty as much as the general population does.

Consumers are entitled to know what the implications will be for them on these decisions before being able to effectively participate in the consultative processes. These issues have been raised by consumer organizations for years, yet meaningful consultation within reasonable timeframes remains an issue of grievance and poor strategic planning. It takes three times as long for these consultative goals to be met than envisaged so that all parties can fairly and actively participate.

The ESC Proposals, on the table for discussion as far back as 2003[166] for interval meter roll-out, now endorsed by the MCE are supply-side focused.[167]

EAG had pointed out as far back as 2003 the findings of the 2001 Pareto Report on interval metering issues emphasized that there is no example anywhere in the world where advanced metering has been rolled-out without at least some form of remote reading capability. No new evidence has emerged to suggest this has changed.

The ESC appeared then (and now) to retain an unfounded belief that 'the market' will develop products and capabilities that will ensure delivery of benefit to consumers. This belief appears misplaced because there is no evidence from anywhere in the world that this is happening in competitive retail markets.

EAG But the ESC appears not to accept that consumer response could be facilitated by extending regulatory intervention to facilitate roll-out of *low-cost* two-way communications and load-control technology similar in functionality to that adopted by the Italians, but the ESC refused to accept that reasoning and the supporting data following both the Pareto Report (2001) and the CRA and KPMG Reports prepared at the time of ESC consultative processes.

These are amongst the several issued discussed here and in Part 6 in more detail

In terms of marginalized groups, though residential tenants do not all neatly fit into this category, those of low income and/or other vulnerability or disadvantage are particular classes of customers who need enhanced protection.

---

166 Pareto Associates (2003) for EAG *"Smart Meters for Smart Competition: Will Current Proposals Hand Back Power to Consumers?"* 2003 Update produced for the Energy Action Group by Pareto Associates. full report found at *http://www.esc.vic.gov.au/apps/page/user/pdf/IMRO%20EAG%20-%20Pareto7%20April%2003.pdf*

167 Ibid (2003) EAG Paper prepared by Pareto Associates (2003)

In relation consumer impacts of smart meters, I quote briefly from the Executive Summary of the Pareto Report commissioned by EAG as far back as 2001, cited in more detail later, and to the recommendation by Energy Action group in its submission to the Energy Reform Implementation Group (2007) that the 25% (approx) of the population who will be unable to participate and/or benefit from these reforms need to be safeguarded, not merely by cursory input by poor-managed "*bloody awful agencies that ought to be defunded"*[168]

> *The clearest potential benefit to consumers is the 'hope' that time of use tariffs would be developed by retailers that could lower the bills of those consumers using low cost energy. But if that were the case, consumers using high cost energy should expect higher (possibly very much higher) bills if they do not change consumption behaviour.*
>
> *There is no guarantee that low cost consumers would receive benefits. Even if that did happen, delivery of these benefits could be delayed for many years under a policy that provided for roll- out of "new and replacement" interval meters to low volume consumers.*

In 2002 PIAC NSW had made the following suggestions regarding future large scale introduction of automated interval meters:[169]

> *"Another proposal in the Interim Report was for a large scale pilot of interval or time-of-use meters which are argued to enable households to better manage their consumption during periods of peak demand and high prices. The view of PIAC is that while demand management reduces costs for consumers the largest beneficiaries of changed consumer behaviour for interval meters are the retailers.*
>
> *Accordingly pilot programs and future large scale introduction of these new meters must be funded by the industry and not residential users of electricity."*

The issue of prepaid services has become one causing tension and concern within the community with many submissions focusing on this and on the proposal to roll out interval meters. There is a general consensus that community concerns have been ignored. As to pre-paid meters, this should only be by fully informed consent.

---

[168] Senate Select Committee (2000) "Riding the Waves of Change". A Report by the SCC on the socio-economic consequences of competition, Ch 4, 5, 6 and preliminary discussions 1999 (refer Graeme Samuel, Chair, ACCC) found at *http://www.aph.gov.au/Senate/Committee/ncp_ctte/report/c05.doc*

[169] Well Connected No 14 June 2002 p2

In 2002 PIAC NSW had studied and published[170] a number of concerns associated with these services as listed below and undertook local lobbying of Ministers. If these meters are introduced PIAC believe they should be regulated.

> *"This trial in South Australia and the introduction of these meters in Tasmania has occurred without a regulatory framework that PIAC believes is not satisfactory. There are a number of areas where households could be disadvantaged through the use of these meters that include:*
>
> - *paying higher tariffs, than would otherwise be the case;*
> - *the energy company not providing enough emergency credit;*
> - *coercive behaviour to take up these meters by energy businesses;*
> - *disconnections could occur at times of the day that are disallowed by NSW regulations;*
> - *the energy businesses do not provide accessible points to top-up the cards.*

The FEAMG[171] has made some succinct observations about complex metering arrangements and transparency as quoted below. This an issue close to my heart and one that I have repeatedly raised. I cite below first the FEAMG's comments about transparency.

> ***3.1. Abolition of price caps***
>
> *The Commission favours market solutions, but it avoids making any recommendations on metering for utilities. Complex mechanical water and electricity meters are all but illegible to consumers, and much better metering technology has been available for many years.*
>
> *But Victoria seems to be the only state where this is a concern. (Vol 2 p. 421). Utility pricing without transparency in pricing is a basic violation of economic principles. We insist on price tagging in supermarkets; why should utilities be exempt?*

---

170 Ibid, p3
Found at http://www.piac.asn.au/publications/pubs/wellconnected14.pdf

171 Foundation for Effective Markets and Governance (FEAMG) (2008) Response to Productivity Commission's Draft Report (Jan),ssubdr121p11

I make a brief comment on smart meters which have been mandated in Victoria (vol 2 p 241 PC Draft Report). However as the PC had pointed out.

> *"out of state providers may not be able to read and apply tariffs for meters properly and therefore make it difficult for them to attract customers."*

Unless the technology is advanced enough to cope with this drawback there seems little point in them.

That is the background to the thinking behind the specific issues raised within this the absence of transparency and proper trade measurement practice as illustrated by the current bizarre practices in Victoria and other States in calculating and apportioning costs for the heating component (energy) supplying bulk hot water tanks on body corporate infrastructure.

The detail and resolution 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 are the Landlord or Owners' Corporation and the energy supplier.

Under Section 6.3.1 on p190 of the State of the Energy Market publication,[172] there is an open acknowledgment of data paucity in the following words:

> *"There is little systematic publication of the actual prices paid by electricity retail customers. The ESSA previously published annual data on retail electricity prices by customer category and region but discontinued the series in 2004*
>
> *At the state level:*
>
> - *All jurisdictions publish schedules of regulated prices. The schedules are a useful guide to retail prices, but their relevance as a price barometer is reduced as more customers transfer to market contracts*

[172] Australian Energy Regulator (AER) (2007) The State of the Energy Market (July) released August, p190 sec 6.3.1

- *Retailers are not required to publish the prices struck through market contracts with customers, although some states require the publication of market offers*[173]

- *The Victorian and South Australian regulators (ESC and ESOSA) publish annual data on regulated and market prices. The ESC and ESCOCA websites also provide an estimator service by which consumers can compare the price offerings of different retailers (section 6.2.1)"*

For the record despite the tedium of reinforcement through repetition, I will provide selected excerpts from Part 6 since there is much overlap between general concerns about certain provisions and the related consumer protection issues. For example, the Bulk Hot Water Guidelines soon to be repealed are actually called: *"ESC Guideline 20(1) Bulk Hot Water Charging Guidelines and Bills Based on Interval Meters"*[174]

Despite this there is no mention as to how the charging of the interval meters should be applied, but if the contractual situation is not clarified, end-users who have no obligation to form a market contract will suffer unnecessary disconnection and detriment. They are not the proper contractual parties, despite the perceptions of policy-makers and regulators, and of the energy-suppliers, licenced or otherwise.

---

173 As part of the dialogue over the AEMC's proposals (see Second Draft Report, 12 December 2007) and responses to that Report, there is a current debate about whether and where prices should be made accessible and how much the public really needs to know before making switching decisions. This is likely to be resolved by a unilateral decision to go with minimalist requirements and disregard for proper disclosure. At the very least, all prices should be published online to enable maximum coverage and the chance to make considered decisions before switching. This will no doubt hurt mostly the smaller retailers remembering the "homogenous" nature of energy, the levels of identified "inertia" for whatever combination of reasons; and other factors that identify significant groups of consumers who because of their personal circumstances simply cannot actively participate in the market

174 *ESC Guideline 20(1) (2005) Bulk Hot Water Charging Guidelines and Bills Based on Interval Meters*. Effective 1 March 2006
Found at
See also
See also all deliberative documents 2004-2205 as listed in List of Appendices leading to decision to adopt these bizarre guidelines that infringe the fundamental contractual rights of consumers and contravene and spirit and intent of trade measurement practice, endorsed by public policy, and seen to be driving unacceptable market conduct.

1.4 Meter data (p3 PIAC)[175]

PIAC does not support the recommendation that in a market contract, a retailer may calculate a customer's bill without reference to actual metering data (see page 54 of the Consumer Response).

Excluding consumption as the tool for calculating the cost of energy would undermine other important policy initiatives, particularly regarding demand side response and environmental policies. Without consumers having information regarding their consumption levels, there is less chance of consumers appreciating their carbon footprint. For example, a capped monthly price for unlimited energy consumption would be a disastrous development for the integrity of the energy market.

175 Public Interest Advocacy Centre (2007) Submission to MCE Retail Policy Work Group Composite Paper on the National Framework for Distribution and Retail Regulation. July 2007 Found at *http://www.mce.gov.au/assets/documents/mceinternet/Public%5FInterest%5FAdvocacy%5FCentre20070806132432%2Epdf*

Pertinent extracts from **Detailed Summary of Submissions in Response to the Phase 2 Reports on the Cost Benefit Analysis of Smart Metering**[176]

Consultant's summarized responses from Country Energy to Phase 2 Smart Metering MCE SCO Phase 2 CBA Roll-out time frame

We recommend that the roll-out timeframe needs to be further reviewed in conjunction with industry pilots and technology trials. Timelines and targets should be set as part of the legal and regulatory framework, taking into account jurisdictional differences. Achievement of any timeframe will be dependent on the available technology to meet the minimum functionality requirements as well as the existence of sufficient and appropriately skilled resources to complete the change out program.

Minimum functionality

Minimum functionality needs to be further reviewed by the technical working group in conjunction with industry trials, to conclusively prove the viability of relevant technology and validate the ability to achieve the anticipated benefits.

Costs

Many costs remain uncertain, as no meter is currently available to meet the minimum functionality. Country Energy is also concerned to better understand certain assumptions used to estimate installation and communications costs.

Urban/rural/remote split

There is uncertainty regarding the breakdown of costs and benefits between the customer classifications of urban, rural and remote. Country Energy recommends validation of any assumptions through trials.

The SCO MCE is apparently undertaking further trials is part of the ongoing work programme for the introduction of smart metering.

Meter stock assumption Country Energy

The business case has not taken into account the costs associated with writing off existing meter stock, where the asset life is not yet realised.

Country Energy believes that this cost should be accounted for within the business case as a relevant cost of the smart meter roll-out. Disposal of these assets is also an area of consideration.

---

[176] Consultant's Response to Submissions Phase 2 Report MCE SCO Energy Market Reform Bulletin 129 15 September 2008
http://www.mce.gov.au/assets/documents/mceinternet/Consultants%5FResponse%5Fto%5FSubmissions%5FRecived%5Fon%5Fthe%5FPhase2Report20080915085648%2Epdf

Meter useful lives

While Country Energy supports a 40 year life for electromechanical meters, there is some doubt over the estimated useful life of electronic meters.

Country Energy has received advice from some meter manufacturers that they will only guarantee the electronic meters for 10 years.

MCE: *"Noted. 40 year life for accumulation meters was used for the final analysis. A 15 year life for smart meters was assumed based on EMCa's view of the useful life of an electronic meter."*

The business case has not taken into account the costs associated with writing off existing meter stock, where the asset life is not yet realised.

Country Energy believes that this cost should be accounted for within the business case as a relevant cost of the smart meter roll-out. Disposal of these assets is also an area of consideration.

Smart meter installation time

Country Energy believes the average installation time is understated; as such the number of installers required is likely to be higher.

The MCE *"Noted. There are a number of different views on installation times. Installation times were based on the experience the relevant consultants."*

Consultant's summarized responses from Energy Australia to Phase 2 Smart Metering MCE SCO Phase 2 CBA

Smart metering technology

Key elements of the smart metering technology solution discussed in the CBA are immature and the technologies are evolving rapidly.

The MCE has conceded this, in these words "Agreed. The analysis of technology was based on the best information available at the time of the study."

Costs

EnergyAustralia considers the lower end of the estimated range of the total cost of implementing smart metering is likely to be lower than actual implementation costs. This conclusion is based on a view that some costs may be omitted, while others may be under-estimated.

Consultant's (selected) summarized responses from Energy Australia to Phase 2 Smart Metering MCE SCO Phase 2 CBA

Regulatory framework

Ergon Energy observed that

It is essential that the governance framework for a smart meter roll-out is established up-front to provide the necessary certainty for investment. In

QLD, changes would be required to safety legislation to obtain the benefits associated with remote disconnection and reconnection. Regulated tariffs will need to be significantly restructured to enable price signals to be sent to customers.

The MCE confirms that Governance frameworks are a matter for the MCE and each jurisdiction.

PIAC (selected(Response to Phase 2 Smart Metering

More broadly, PIAC echoes other consumer advocate concerns that existing regulatory frameworks will not equitably redistribute benefits to consumers to offset the costs they incurred for the installation of the meter.

Pre-payment Meters

On the issue of Pre-Payment Meters, I refer to the paper prepared by Andrea Sharam for the Energy Action Group in 2003.[177] The arguments are just as pertinent. I quote from the Executive Summary and Recommendations contained in that paper.

> ***Executive Summary***
>
> *Utilities have a profound impact on the welfare of households not just because they deliver essential services, but because the delivery itself can be highly regressive.*
>
> *Pre-payment Meters (PPM) are primarily a credit management tool promoted by utilities to recover debt on the one hand and prevent the future accumulation of debt on the other. The termination of the credit relationship in favor of pre-payment effectively removes the role of the utility from the disconnection process. The act of disconnection is for all intents and purposes privatised. This enables utilities to avoid public reporting of disconnection rates (as they relate to inability to pay) and allows them to abrogate social responsibilities. PPMs do not address inability to pay, and are often the most expensive payment option.*
>
> *This reduction in affordability exacerbates rather than limits the impact of fuel poverty. Fuel poverty itself remains largely un-addressed in Australia for reasons that are perplexing, as many opportunities exist to eradicate it with benefits to customers, utilities and governments. Sadly, in an era in which the market is supposed to empower the customer, poorer vulnerable users of gas and electricity are being relegated to expensive and discriminatory residual markets such as that created by PPMs.*

> ***Recommendations***
>
> *1. That legislation be passed to prohibit the introduction of PPM into Victoria*
>
> *2. That comprehensive 'hardship' policies set out as a formal guideline of the Essential Services Commission become a license condition of all energy retailers in Victoria.*

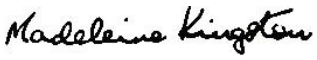
In its submission to the Retail Policy Working Group Working Paper 1, PIAC[178] made this comments

[177] Sharam, Andrea (EAG) (2003 *"Second Class Customers: Pre-Payment Meters, the Fuel Poor and Discrimination."* Research Paper

Extract from PIAC's submission to Retail Policy Working Group Paper 1

Pre-payment meters

We assume the RPWG's consultants are proposing that no small customer should be required by a retailer to use a prepayment meter. It is appropriate that this be made explicit in the Rules. PIAC understands that currently three jurisdictions have codes of practice for the use of pre-payment meters and that these are enforceable through licence conditions on the supply businesses. The NSW arrangements provide for the Minister to make a Regulation allowing the use of pre- payment meters and imposing conditions. This is an appropriate model for the proposed new national arrangement although PIAC believes a single national code or set of rules would be desirable.



Collated by Madeleine Kingston

[178] PIAC (2006) Response to MCE Retail Policy Working Group (RPWG) Paper 1, p10 found at *http://www.mce.gov.au/assets/documents/mceinternet/PIAC20061214092809.pdf*